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W. H. Sanford

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CAT. NO. 23 012

PRINTED
IN
U.S.A.

CITE THIS VOLUME 15 A.L.R.

AMERICAN LAW REPORTS ANNOTATED

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ORGANIZATIONS OF THE PUBLISHERS

VOL. XV.

THE LAWYERS CO-OPERATIVE PUBLISHING COMPANY	-	ROCHESTER, N. Y.
EDWARD THOMPSON COMPANY	- - - - -	NORTHPORT, L. I., N. Y.
BANCROFT-WHITNEY COMPANY	- - - - -	SAN FRANCISCO, CALIF.

1921

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AMERICAN LAW REPORTS ANNOTATED VOL. 15

SAMUEL H. GABBARD et al., Appts.,
v.
JAMES S. SHEFFIELD et al.

Kentucky Court of Appeals — February 22, 1918.

(179 Ky. 442, 200 S. W. 940.)

Timber — reservation of — successive grants of right to remove.

1. One who in a conveyance of real estate reserves to himself, his heirs and assigns, the timber upon the property, without limitation as to time for removal, may, in case his first grantee of the timber does not remove it within the time limited in his grant, extend the time for removal, and the failure to remove within the first limitation does not vest the title in the owner of the soil.

[See note on this question beginning on page 41.]

Evidence — parol — to contradict writing.

2. Parol evidence is not, in the absence of fraud or mistake, admissible to show that one reserving title to the timber when conveying real estate agreed to remove it within a year or two.

[See 10 R. C. L. 1016.]

Receiver — right to — absence of interest.

3. The owner of the soil has no right to a receiver to take possession of the timber, the right to cut which is claimed by a stranger, if such owner has no right or title to, lien upon, or interest in, such timber.

[See 23 R. C. L. 15.]

APPEAL by defendants from an order of the Circuit Court for Breathitt County appointing a receiver to take possession of certain timber, in a suit to enjoin the cutting and removal of such timber. *Reversed.*

The facts are stated in the opinion of the court.

15 A.L.R.—1.

Messrs. Samuel H. Hurst and E. C. Hyden for appellants.

Mr. W. L. Kash for appellees.

Hurt, J., delivered the opinion of the court:

On March 21, 1917, the appellees Caroline Sheffield and her husband, James S. Sheffield, Clay Sheffield, Ben Sheffield, Morton Sheffield, Lulu Pence, and Delia Rose, children of Caroline and James S. Sheffield, and with the two last named of whom their husbands, Logan Pence and Robert Rose, joined, brought this action in equity in the Breathitt circuit court against the appellants, Samuel H. Gabbard, G. D. Heironymous, and James F. West. The causes of action were set out in the petition in three paragraphs. In the first the appellees alleged that they were the owners and in the actual possession of two certain tracts of land, and all of the timber trees growing and being thereon, and all of the logs, railroad ties, and lumber thereon, and that without right and against their will and consent the appellants had entered upon the lands and cut down many trees, and were engaged in removing from the lands logs, railroad ties, and lumber which had been made from the trees, and converting same to their own use, and depriving the appellees of their ownership of same, and were threatening to cut and remove all of the trees from the lands, and to convert them to their own use. The appellees alleged certain grounds for an injunction, and prayed that the appellants be enjoined from further cutting and removing the trees, ties, or timber made from them from the land. By a second paragraph it was averred that the appellants had removed from the lands and converted to their own use certain logs, ties, and lumber since the 18th day of February, 1917, and asked a recovery of their value. A third paragraph averred that appellants, previous to February 18, 1917, while engaged in hauling logs from the lands, and in the manufacture of same into lumber upon the grounds, had unreasonably

misused the lands, and thereby reduced their vendible value in the sum of \$500, and prayed for a recovery of that sum upon that account.

All of the averments of the petition were denied by answer, except the ownership of the surface of the lands by the appellees, and, in turn, the appellants averred that they were the owners of the timber, the railroad ties, and the lumber made from the timber trees, and were the owners of the right of ingress and egress to and from the lands and over the same, and the right to make tramroads and to enter upon the lands with machinery for the purpose of cutting, removing, and manufacturing the timber trees into such products as they desired, as well as to build houses, stables, and roads over the land which were reasonably necessary to the cutting, manufacturing, and removal of the timber from the land, and were the owners of the privilege so to do, until the 18th day of February, 1918. The affirmative averments of the answer were denied by a reply. On the 11th day of April, 1917, upon the motion of the appellees and over the objection of the appellants, the court appointed a receiver in the action, and directed him to forthwith take into his possession all of the timber trees upon the land, both standing and down, the railroad ties, tie cuts, and all the timber made from the trees, and to make an appraisal and to report to the court all of the trees which were down, saw logs, railroad ties, and timber. The appellants excepted to the judgment of the court, and prayed an appeal to this court from the order appointing the receiver.

The only question for determination here is the soundness of the judgment of the court in appointing a receiver, and putting the timber trees, logs, and manufactured products in controversy into his charge, but the decision of this question makes necessary a consideration of the facts, in order to ascertain whether the appellees, upon whose

motion the receiver was appointed, have shown that they have, or probably have, "a right to, a lien upon, or an interest in," the property in controversy, which would justify the court in taking the property from the possession and control of the appellants, and withholding it from their use and control during the pendency of the action. If appellees failed to show, in the language of § 298, Civil Code of Practice, that they had, or probably had, "a right to, a lien upon, or an interest in, any property" in controversy, the court was in error in putting it into the possession of its receiver, and taking the use and control of it from the owners.

The undisputed facts, as developed by the evidence upon the motion for the appointment of a receiver, are as follows:

James S. Sheffield was the owner in fee of the lands, and transferred them to one Nathan Day by what appeared to be a deed conveying the title to Day. Thereafter Sheffield sold and conveyed the lands to one C. J. Little. Day sought possession of the lands under his deed, but after considerable litigation the deed which Day held was adjudged to be a mortgage. In this litigation the deed from Sheffield to Little was, for some reason which the record does not show, set aside, but he had, previous to that time, paid all or a portion of the consideration for the conveyance of the lands to him. Sheffield also became indebted to Little on account of funds furnished by Little for the benefit of Sheffield during the litigation with Day. Thereafter, on the 11th day of April, 1906, Sheffield and Little entered into a transaction by which, in consideration of the sum of \$3,600, as expressed in the deed, Sheffield and wife conveyed the lands to Little. The \$3,600 which Little was to pay Sheffield for the lands was made up, in part, of the amount of the Day mortgage lien upon the lands and the sums which Sheffield owed Little in the way of the amounts he had formerly paid for

the land, and the sums expended by Little for the benefit of Sheffield in the litigation with Day. The debt to Day and the sums Sheffield owed Little amounted together to the sum of \$2,800, which left Little owing Sheffield the sum of \$800 upon the purchase price of the lands. The \$800 was paid by Little at the same time the land was conveyed to him, by executing a deed of conveyance to Caroline Sheffield, the wife of James S. Sheffield, and her children, Clay, Ben, Morton, Lulu, and Delia Sheffield, by which he conveyed to them the lands, with a title of general warranty, but excepted from the effect of the conveyance, and reserved to himself and his heirs forever, all the timber, coal, oil, gases, and all other mineral substances, clays, etc., and subterraneous products of any and all kinds in, upon, and under the lands, together with the customary rights of ingress and egress for the purpose of obtaining, manufacturing, and removing the excepted things. At the same time Little and Caroline Sheffield entered into a written contract by which they agreed that in order to more clearly state the rights which Little retained in the timber upon the land, it was agreed that the grantees in the deed were to have the privilege of using such of the coal as they desired for domestic purposes, and the right to cut and use any of the timber trees under 10 inches in diameter, necessary for rails for fencing purposes, and any of the timber not merchantable for fuel. On the 18th day of February, 1907, Little sold, and by a deed of that date conveyed, to the Parkersburg Tie & Timber Company all of the timber of every kind and description standing, lying, or being upon the lands, together with the right of ingress and egress to and from and over the lands to remove the timber, and further provided in the deed that the vendee should have a period of ten years from that date in which to cut and remove the timber. Thereafter the Parkersburg Tie & Timber Company sold and conveyed its property

and rights under the deed to another, and thereafter it passed through the hands of several purchasers until it became the property of the appellants. Each of the conveyances, as well as the one to the appellants, limited the time for the removal of the timber to not later than the 18th day of February, 1917, the time within which it was to be removed under the deed from Little to the Parkersburg Tie & Timber Company. The appellants began operations upon the lands in 1916, but finding that they would not be able to finish the removal of the timber before February 18, 1917, the time limit fixed in the deed to them, they entered into a contract with Little, who, for a consideration of \$100, sold to them the right to continue and remove the timber at any time before the 18th day of February, 1918, and provided in the deed executed to them that they could exercise the right to enter and remove the timber to the extent of the terms of the exception in the deed from him to Caroline Sheffield and children, of date April 11, 1906.

It seems from the petition that appellees concede the right of appellants to enter upon the land and exercise the rights in regard to the cutting, manufacture, and removal of the timber, as expressed in the exception contained in the deed from Little to them, of date April 11, 1906, up and until February 18, 1917, the time fixed by Little in his deed to his original vendee for the removal of the timber, but deny his authority to sell or convey an extension of time to appellants beyond that date for the removal of the timber, and insist that, Little having sold his entire interest in the timber and limited the time for its removal, when that time expired, if any timber had not been removed, it became the property of the appellees as the owners of the soil, and would not be the property of Little, who was the appellants' remote vendor of the timber.

This makes it necessary to determine what estate Little had in the

land by virtue of the deed executed to him by Sheffield and wife on April 11, 1907, and the deed which he executed to appellees on the same date. The deed from Sheffield and wife to Little, considered alone, vested him with the fee-simple title to all of the lands embraced by it and to every constituent part of it. Holding title to all of the lands in fee, he could sell and convey such an estate in them as he chose, and except such an estate out of them as he chose, and retain the title to the excepted portion in himself. This much is conceded, but it is insisted that the deeds and the written contract between Little and Caroline Sheffield and children were all made at the same time, and were all emanations of one contract, and only express different phases and conditions of the same contract, and should be construed together as making one contract, and when so construed it was a sale by Sheffield to Little of the timber, coal, oil, gases, clays, and other subterraneous products in the land, and that in the sale of the timber it was contemplated that it should be severed from the surface immediately, and for that reason that the timber was converted into personalty, and, there being no time fixed in the deed when it would have to be removed from the land, it would have to be removed within a reasonable time, or else it would become again real property and the ownership fixed in the owners of the soil, and Little, by the sale of it to his vendee, had fixed ten years from the date of his sale as the reasonable time contemplated for its removal, and, the timber not having been removed within that time, the right of Little or any vendee of his to remove it had been lost, and for that reason he was without authority to sell to appellants an extension of time for the removal of the timber beyond the time fixed by him. Upon the other hand, it is contended for appellants that Little was the owner of the timber, and that, as such, it was an estate in real estate, and when he

made a sale of it, and fixed the limit of ten years in which the vendee should remove it, that it was a sale of only so much of the timber as was removed within that period, and any timber remaining after that period had expired was the property of Little, and, being such owner, he had the right to give the appellants an extension of time in which to cut and remove it.

Whether the two deeds were the expression of one contract only, or whether the evidence of two distinct contracts, it seems to be, under the peculiar facts of this case, immaterial. If one separate transaction, the deed from Little to the appellees was that of an owner of the land selling and conveying to a vendee a certain estate in the lands, and excepting and retaining for himself another and distinct estate in the lands, and of this there can be no doubt. If both deeds are to be considered as one transaction and the outgrowth of one contract, it is very clear that the parties by the contract intended to vest the title to all of the lands, and everything which went to make up the lands, in Little, and to place him in the position of an owner, with power to sell and convey the surface of the land, and except from the sale, and not convey, the timber upon the surface, nor the coal, oil, gases, clays, etc., beneath the surface, and thus retain the title thereto.

The essential thing in construing a contract is to determine from it, if the writing is unambiguous, the intention of the parties, and, when the intention is ascertained, to enforce its provisions according to such intention. If the intention of the parties was not, as above stated, to vest the entire estate in the lands in Little, as one of the elements of the contract, there was no reason for the conveyance of the lands in their entirety to Little, as the Sheffields could have conveyed to him the things excepted by him in the conveyance by him to them, and put such limitations as to time upon his right to cut and remove the timber

as they should agree upon, as well as any other conditions agreed to, it being the intention of the parties that Little should occupy the status of a title holder to the lands in their entirety, and in the deed, which he executed to appellees for the surface of the lands, should be in the position of title holder, and not in the position of a purchaser. The deed executed by him to appellants can only be considered as the act of the owner of the entire estate, which Sheffield had made him, and a conveyance by him to the appellees of a certain estate in the lands, and an excepting by him of the interests in the lands which were excepted from the operation of the deed.

That an estate in lands may be divided by the owner, and separate estates carved out of different elements which go to make up the lands, there is no doubt. One may be the owner of the surface of the land, another the trees standing upon it, and another the minerals under the surface, and all of them be the owners of lands. In *Kincaid v. McGowan*, 88 Ky. 91, 13 L.R.A. 289, 4 S. W. 802, it was said: "Minerals in place are land. They are subject to conveyance. The surface right may be in one man, and the mineral right in another. Both in such a case are landowners. They own separate and distinct corporeal hereditaments. . . . The owner of land may convey a surface estate in fee in it, and reserve to himself an estate in fee in the minerals, or any particular species of them, in which case the vendee holds a distinct and separate estate in the surface, or soil, and the vendor holds a distinct and separate estate in the minerals. By this severance each estate is subject to the laws of descent, of devise, of conveyance."

This doctrine has been approved by this court, and in *Hays v. Wicker*, 161 Ky. 706, 171 S. W. 447, and in *Webb v. Webb*, 178 Ky. 152, 198 S. W. 736, was applied to an estate in lands consisting of the standing timber trees thereon as a distinct and separate estate from the surface of

the lands. In 13 Cyc. 651, the text is: "But an estate in inheritance is created by a grant to one, his heirs and assigns, of all timber standing and growing in a close, forever, with the right at any time to enter and remove the same."

If an estate of inheritance, distinct and separate from the surface of the land, can be created in the ownership of trees standing upon the land by a grant, there is no logical reason why an owner of land may not sell and convey the land, excepting the timber trees from the conveyance, and thus retain the ownership of them, and an inheritable estate be created out of them, distinct and separate from the other constituent elements of the land, and so doing remain the owner of an estate in land, as standing trees are real estate, unless they have been sold with the intention of an immediate severance from the soil. *Dils v. Hatcher*, 24 Ky. L. Rep. 826, 69 S. W. 1092; *Asher Lumber Co. v. Cornett*, 23 Ky. L. Rep. 602, 63 S. W. 974; *Bell County Land & Coal Co. v. Moss*, 30 Ky. L. Rep. 6, 97 S. W. 354; *Byassee v. Reese*, 4 Met. 372, 83 Am. Dec. 481; *Tilford v. Dotson*, 106 Ky. 755, 51 S. W. 583; *Cain v. McGuire*, 13 B. Mon. 341; *Oates v. Yeargin*, — Ky. —, 115 S. W. 794; *Moss v. Meshew*, 8 Bush, 187; *Cardwell v. Atwater*, 15 Ky. L. Rep. 570. The rule by which standing trees, which are sold in contemplation of immediate severance from the soil, are converted from realty into personalty, is founded upon the equitable doctrine that that which was intended to be done will be considered as having been done. Hence, where standing trees have been sold by the owner of the land, but not in contemplation of immediate severance from the soil, their character is not changed from realty to personalty, and if sold in contemplation of immediate severance from the soil, and they are not removed within a reasonable time, or within the time fixed in the contract for their removal, they cease to be chattels, and are restored

to their position as real estate. *Bell County Land & Coal Co. v. Moss*, 30 Ky. L. Rep. 6, 97 S. W. 354. The appellees have invoked, as applying to the facts of this case, the doctrine that where an owner of lands makes a sale of the standing trees thereon in contemplation of their immediate severance from the soil, but no time is fixed in the contract within which the trees are to be removed, that the purchaser has only a reasonable time within which to cut and remove the trees, and that it is a sale to him of only such of the timber as he may cut and remove within a reasonable time. It has been continuously held that when an owner of land sells certain trees upon it, and a time is fixed in the contract for their removal, or the trees are sold in contemplation of their severance from the soil, but no time is fixed in the contract within which it is to be done, it is a sale of only so much of the timber cut and removed within the time fixed, or so much of it as is cut and removed within a reasonable time, when a time has not been fixed for its removal by the contract. *Chestnut v. Green*, 120 Ky. 385, 86 S. W. 1122; *Jackson v. Hardin*, 27 Ky. L. Rep. 1110, 87 S. W. 1119; *Taylor-Brown Timber Co. v. Wolf Creek Coal Co.* 32 Ky. L. Rep. 1015, 107 S. W. 733; *Vincent v. Haycraft*, 158 Ky. 845, L.R.A.1915E, 307, 166 S. W. 613; *Oates v. Yeargin*, — Ky. —, 115 S. W. 794; *Morris v. Sanders*, 19 Ky. L. Rep. 1433, 43 S. W. 733.

This rule does not, however, have application under the peculiar facts of the instant case, as we have heretofore held that it was not a sale of the timber by the owner of the land for severance from the soil, or within a time fixed by the contract, but the timber is an estate excepted and retained by the owner of the soil when he sold and conveyed the other interests in the land. In the deed from Little to appellees, after making the necessary statements to convey the lands to them, an exception is made to the estate conveyed by the deed, and which, as

far as is necessary to be stated, is as follows: "Excepting and reserving, however, to the parties of the first part, their heirs and assigns forever, all the timber, coal, oil, gases and other mineral substances, clays and subterraneous products of any and all kinds, in, upon and under the above-described tracts and parcels of land. . . ."

Then follow the provisions of the deed as to the grantor's right of ingress and egress deemed necessary to remove the things excepted, which rights it is said he may exercise at any time the "grantor, his heirs and assigns," may elect. There is no time fixed or mentioned within the deed within which the grantor, his heirs and assigns, are required to cut and remove the timber, or to dig the coal, or bore for gas, or mine for the clays, except the provision that they may do so at any time. The same language is used as applying to the right to cut and remove the timber, as applies to the coal, oil, gases, and clays excepted from the conveyance. These articles, including the timber, are all excepted from the conveyance, and are not sold or conveyed, and the title and ownership are expressly reserved to the "grantor, his heirs and assigns, forever." While there is a technical distinction between an exception and a reservation in a deed, in this one they have the same signification, and the word "reserving," as used in the deed in connection with its context, can have no other meaning than that the things mentioned in the exception or reservation are excepted and not sold, but the title to same is retained in the "grantor, his heirs and assigns, forever."

It is true that where a contract for the sale of standing timber by the owner of the soil fixes no time within which the timber sold or reserved is to be cut and removed, the intention of the parties as to whether the timber is sold in contemplation of its being removed from the soil within a reasonable time may be ascertained from facts not appear-

ing in the written agreement, as the situation of the parties and the circumstances surrounding them at the time of the contract may be looked to for that purpose. *Hicks v. Phillips*, 146 Ky. 305, 47 L.R.A. (N.S.) 878, 142 S. W. 394; *Baustic v. Phillips*, 134 Ky. 711, 121 S. W. 629; *Hounshell v. Miller*, 153 Ky. 530, 155 S. W. 1148; *Kentucky Coal & Timber Development Co. v. Carroll Hardwood Lumber Co.* 154 Ky. 531, 157 S. W. 1109. There is nothing in the evidence as to the situation of the parties or the circumstances surrounding them, at the time the deed was executed to and accepted by the appellees, which would indicate that the parties to the deed contemplated that the timber would be cut or removed immediately, or within any reasonable time thereafter, and the written agreement executed at the same time, by which it was agreed that appellees were to have "all the coal from the lands needed for their domestic purposes, and all timber under 10 inches in diameter necessary for fence rails, and any timber not merchantable for fuel," rather strengthens the view, above expressed, that the written contract and deeds fully set forth the entire understanding between the parties.

Two of the appellees testified that at the time of the transaction Little said that he would remove the timber from the land within a year or two, but this is denied by Little, and the writing evidencing the contract between the parties is contradictory of any such understanding, and parol evidence cannot be held to contradict the terms of a written contract,

Evidence—
parol—to
contradict
writing.

in the absence of any plea of fraud or mistake. There is no pretense that the deeds failed to contain the contracts by reason of any fraud or mistake. Hence this case seems to fall within that line of cases of which *Baustic v. Phillips*, 134 Ky. 711, 121 S. W. 629, and *Hicks v. Phillips*, *supra*, are two. In the latter case it was held that where a

grantor in a deed conveying land reserves the timber on a part of the land, and the deed fixes no time for the removal, and there is nothing in the stipulations of the deed, nor in the situation or circumstances surrounding the parties at the time the contract was executed, to show that a severance of the timber from the soil was contemplated, the title to the timber then standing upon the land remains in the grantor, and is not lost by his failure to cut and remove the timber within a reasonable time. The one who accepts a deed with such a reservation knowingly assumes the burden, and cannot complain. In *Baustic v. Phillips*, supra, it was said: "Where the vendor of land reserves the trees growing thereon, or any portion thereof, they remain his property, and as against the purchaser of the land he has a right to enter on the land, and without doing any unnecessary damage cut and remove the timber, or he may sell such right or give license to another to exercise it."

In such states of case the use of the word "reserves" has the same meaning as "except," and the reservation is in reality an exception. Hence it must necessarily follow from the foregoing that Little was the owner of an estate in these lands, consisting, among other things, of the timber thereon, at the time he executed the deed to appellees; that such an estate was one in realty; and that it was such a one as he might sell, or devise by will, or pass by inheritance to his heirs in the event of his death intestate. When he made the conveyance of the timber to the Parkersburg Tie & Timber Company, and fixed a limitation of ten years within which it could cut and remove the timber, by analogy to the cases which hold that a sale of standing timber by the owner of the soil, with a time fixed in the contract within which it is to be cut and removed, is a sale of so much of the timber only as may be cut and removed within that time, and such of the timber as remains uncut at

the expiration of that period is the property of the owner of the soil, it would seem that the sale by Little to the Parkersburg Tie & Timber Company was only a sale of so much of the timber as it would cut and remove within the time fixed, and at the expiration of that time the remaining timber would be the property of Little, and as such owner he would be authorized to sell a further extension of time to

a vendee, within
 Timber—
 reservation of
 successive
 grants of right
 to remove.

which to cut and remove it. This is evident when it is considered that previous to the making of the sale by Little to the tie company, that he had an unlimited time within which to cut and remove the timber, and the limitation of time fixed in the sale of it was only a sale of a portion of his estate in the land, and not of his entire interest. The estate in the timber being separate and distinct from that owned by appellees in the surface of the land, and a right only having been parted with by Little to his vendee to cut and remove timber thereon for the period of ten years, if Little is not the owner of the estate in the timber remaining, who is the owner thereof? The appellees never have, at any time, owned any interest in the timber, because the estate in the timber had been carved out of the estate in the lands before the appellees became the owners of the surface of the land, and there is no way suggested by which, since that time, they have acquired any title or interest in the timber, except the interest acquired by them by the written contract between them and Little at the time the land was conveyed to them. The cases of *Ford Lumber & Mfg. Co. v. Asher*, 131 Ky. 796, 115 S. W. 790, and *Begley v. Consolidated Timber Co.* 152 Ky. 455, 153 S. W. 734, are differentiated from the instant case, as not being based upon a similar state of facts as exists here. Hence there does not appear any way in which appellees have ever obtained any title, or right, or prob-

able right, to any of the timber, or any interest therein, except such as was necessary to make rails and for fuel purposes, as set forth in the written contract between them and Little, dated April 11, 1907. This contract, however, does not seem to have ever been recorded until after appellants bought the timber, and no notice of it is shown to have been brought to them, but it was recorded before they secured the extension of time; but it does not appear that any of the timber cut by them was such as appellees were entitled to, under the writing.

Having failed to show that they have, or probably have, any right or title to, lien upon, or interest in, the timber which appellants were cutting and proposing to cut and remove, the court was in error in placing it in the hands of a receiver.

The judgment is therefore reversed, and cause remanded for proceedings consistent with this opinion.

NOTE.

When a conveyance of standing timber, or an exception or reservation of standing timber from a conveyance of real estate, will be regarded as vesting in the purchaser, or grantor who thus reserves the timber, an estate in perpetuity, or when it will be regarded as vesting in the purchaser a mere right which must be exercised within a reasonable time, or be lost to him, is a question of very great difficulty. In the ultimate analysis, it depends upon the intention of the parties. The decision in the reported case (*GABBARD v. SHEFFIELD*, ante, 1) that an estate in perpetuity was reserved to the grantor finds support in many cases dealing with this question. On the other hand, there are other cases in which the variance between the contract involved, and that involved in *GABBARD v. SHEFFIELD*, is very slight, in which a contrary result was reached. This entire question is discussed in the annotation following *ZIRKLE v. ALLISON*, post, 41.

E. H. WILLIAMS, Trustee, etc., Appt.,
v.
J. H. McCARTY et al.

West Virginia Supreme Court of Appeals — March 26, 1918.

(82 W. Va. 158, 95 S. E. 638, 100 S. E. 565.)

Timber — time for removal.

1. Where the owner of land conveys the timber thereon to a trustee to secure a debt which he owes to another, and there is no limit as to the time within which such timber shall be removed, it is competent for the owner of such land and the party secured by such deed of trust to fix such time by subsequent agreement, and when they have by such subsequent agreement fixed the time within which such timber is to be removed, and a sale is made under such deed of trust with reference to the time agreed upon by the parties for the removal of said timber, and the deed to the purchaser under such deed of trust provides for the removal of said timber within such time, such provision is valid and binding, and the purchaser's right to remove said timber will cease and determine at the expiration of such time.

[See note on this question beginning on page 41.]

Headnotes by RRTZ, J.

Trust — following converted property.

2. A party whose property has been appropriated by another may in equity follow and secure such property, either in its original or in any changed or different form, and this right to so follow and secure it extends to the property, either in its original or any altered form, in the hands of a third party, where it appears that such third party took it with notice of the fact that it had been improperly appropriated.

[See 26 R. C. L. 1348.]

— jurisdiction of equity.

3. The jurisdiction of equity to follow property, or the proceeds thereof, when the same has been converted into some other form, at the suit of the owner thereof, will not be denied because the title of the plaintiff in such suit is contested by another, when the determination of the rights of the parties to the property simply depends upon the construction of their title papers, and not upon the determination of any question of fact.

APPEAL by plaintiff from a decree of the Circuit Court for Pocahontas County sustaining a demurrer to a bill filed to recover the purchase price of timber on deposit in a certain bank. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Price & McNeel, for appellant:

The right to the timber was not forfeited after the three-year period mentioned in the deed made by a third party.

Keystone Lumber & Min. Co. v. Brooks, 65 W. Va. 512, 64 S. E. 614; Magnetic Ore Co. v. Marbury Lumber Co. 104 Ala. 465, 27 L.R.A. 434, 53 Am. St. Rep. 73, 16 So. 632; Evans v. Spurgin, 6 Gratt. 107, 52 Am. Dec. 105; White v. Ward, 35 W. Va. 418, 14 S. E. 22; Rowlett v. Daniel, 4 Munf. 473; Hess v. Rankin, 78 Va. 175; Bryan v. Hyre, 1 Rob. (Va.) 101, 39 Am. Dec. 246; Suttle v. Richmond, T. & P. R. Co. 76 Va. 284.

If the trustee to sell attempted to diminish or change the fee-simple estate held under the deed of trust, he exceeded his powers, and anything that he might have attempted in this particular is without force or effect.

Fidelity Ins. Trust & S. D. Co. v. Shenandoah Valley R. Co. 32 W. Va. 244, 9 S. E. 180.

Mr. L. M. McClintic, for appellees:

The deed did not grant an absolute and unconditional title to the timber, and all timber that was not severed and removed at the expiration of the three years was the property of the owner of the land, J. H. McCarty.

Adkins v. Huff, 58 W. Va. 645, 3 L.R.A.(N.S.) 649, 52 S. E. 773, 6 Ann. Cas. 246; Null v. Elliott, 52 W. Va. 229, 43 S. E. 173; Deer Creek Lumber Co. v. Sheets, 75 W. Va. 21, 83 S. E. 81.

The agreement as to the removal of the timber was valid and binding, but, in the event it was not, the only party that could complain would be J. E.

Peck & Company, and they, having accepted the proceeds arising from the sale of said timber, thereby ratified said agreement.

Lowance v. Johnson, 75 W. Va. 784, 84 S. E. 937.

Ritz, J., delivered the opinion of the court:

S. E. McCarty, being the owner of a tract of land in Pocahontas county, on the 31st day of October, 1906, conveyed the timber upon the same to T. A. Bruffey, trustee, to secure to J. E. Peck & Company the payment of certain debts mentioned in said deed of trust. Subsequently, on the 27th day of May, 1907, said McCarty conveyed the land, except the timber thereon, to the defendant J. H. McCarty. The deed of trust conveying the timber contained no limitations as to the time in which said timber should be removed from the land. The debt secured by said deed of trust remaining unpaid, J. E. Peck, the cestui que trust therein, the trustee, and J. H. McCarty, the owner of the land, on the 24th day of April, 1909, entered into an agreement by which it was provided, among other things, that in case of a sale under said deed of trust the purchaser at such sale should have three years from the date thereof within which to remove the timber. On the 1st day of June, 1909, the trustee made sale of the timber under said deed of trust, and on that day conveyed

the same to the purchaser, the predecessor in title of the plaintiff, reciting in said deed the agreement made between McCarty, Peck, and the trustee, to the effect that the purchaser should be allowed three years within which to remove said timber. The timber was not removed within three years from the date of said purchase, and in the year 1916 the defendant J. H. McCarty sold the said timber to the defendant Spice Run Lumber Company, for the sum of \$1,000. The defendant lumber company, however, ascertaining that the plaintiff was making a claim to said timber, did not pay the purchase money to McCarty, but deposited same in the First National Bank of Marlinton, to be retained by that bank until it was determined who was entitled thereto. Plaintiff thereupon brought this suit for the purpose of recovering the purchase price of the timber on deposit in the bank.

The jurisdiction of a court of equity to entertain the bill is challenged. The bill is filed upon the theory that the plaintiff, as successor to the purchaser at the sale made by the trustee, was the owner of the timber; that this fact appears from a proper construction of the title papers filed with the bill; that the defendant McCarty, when he sold this timber to the defendant Spice Run Lumber Company, was a trespasser and wrongdoer; and that the plaintiff may waive his right to sue for damages for the trespass, and follow the proceeds derived from the sale of the timber so long as the same can be identified, and so long as the rights of no innocent third party intervene. If the property involved in this case was the property of the plaintiff, then his equitable right to follow the proceeds of a sale of it by a wrongdoer, so long as he can identify such proceeds,

Trust—
following
converted
property.

can hardly be questioned. In equity such proceeds belong to the owner of

the property and they will be impressed with a trust in his favor so

long as the same can be traced and definitely identified. 39 Cyc. 25. The fact that the plaintiff may have relief at law by a suit against McCarty, or against the Spice Run Lumber Company, for damages, does not deny him the right to go into equity to secure the proceeds arising from a sale of his property. In this connection Mr. Justice Story, in his work on Equity Jurisprudence, 13th ed. at § 1256, says: "It is true that courts of law now entertain jurisdiction in many cases of this sort, where formerly the remedy was solely in equity; as, for example, in an action of assumpsit for money had and received, where the money cannot conscientiously be withheld by the party, following out the rule of the civil law, 'quod conductio indebiti non datur ultra quam locupletior factus est qui accepit.' But this does not oust the general jurisdiction of courts of equity over the subject-matter, which had for many ages before been in full exercise, although it renders a resort to them for relief less common, —jurisdiction of equity. as well as less necessary, than it formerly was."

The theory upon which the courts proceed is that a party dealing with the property of another will, in a court of equity, be treated as the agent of the real owner of the property, should the real owner desire to avow his acts; that, while there may have been no relation of trust or privity between them, if the real owner of the property desires to affirm a contract made by another for the sale or disposal of his property, he may do so in a court of equity, and such court will treat the wrongdoer as an agent ex maleficio. Story, Eq. Jur. § 1255; Pom. Eq. Jur. § 1053. Cases are numerous in which this has been done, and it will suffice to cite but a few representative ones. In the case of National Mahaiwe Bank v. Barry, 125 Mass. 20, the bank filed a bill to impress a trust in its favor in certain property which had been acquired with its money. One of its employees had

embezzled a large sum of money, part of which had been intrusted to another, and had been invested in real estate in the name of such other. The supreme judicial court of Massachusetts held, in accordance with well-established authority, that while the bank could sue the embezzling officer for the money, or could maintain a suit against the party to whom the money was turned over with knowledge that it was embezzled, and recover a judgment against either or both of those parties, it was not bound to do so. When it found property which had been purchased with its funds, it had the right in a court of equity to impress that property with a trust in its favor, and to compel the relinquishment to the defendant of the specific property. So, in case of *Humphreys v. Butler*, 51 Ark. 351, 11 S. W. 479, it was held that where a party wrongfully collected money due another, and with that money purchased property, the true owner of the fund thus collected could in equity impress the property purchased with a trust in his favor, and it mattered not that he might, in an action at law, recover the fund. The holding is that the fund was always his, and that in equity the party who used it for the purchase of something else would be held to be acting as the agent of the real owner; and, while the title to the property thus acquired was in the name of the wrongdoer, in equity it belonged to the actual owner of the fund which purchased it, and the wrongdoer would be compelled to surrender the title. In *Newton v. Porter*, 69 N. Y. 133, 25 Am. Rep. 152, it was held that where one stole negotiable securities and exchanged them for other securities, a court of equity would hold that the other securities belong to the owner of the stolen property. A court of law would not so treat them, but in equity the owner of the property may elect to treat the wrongdoer as his agent, and compel the surrender of the property thus acquired. See also *Robinson v. Pierce*,

118 Ala. 273, 45 L.R.A. 66, 72 Am. St. Rep. 160, 24 So. 984. Many authorities are cited in the opinions in the above cases, which clearly establish the jurisdiction of courts of equity in cases like this. As was said by Lord Ellenborough in *Taylor v. Plumer*, 3 Maule & S. 562, 105 Eng. Reprint, 721, in speaking of the right of the owner of property to follow the proceeds thereof in equity: "It makes no difference, in reason or law, into what other form different from the original the change may have been made, whether it be into that of promissory notes for the security of the money which was produced by the sale of the goods of the principal, as in *Scott v. Surman*, Willes, Rep. 400, 125 Eng. Reprint, 1235, or into other merchandise, as in *Whitecomb v. Jacob*, 1 Salk. 160, 91 Eng. Reprint, 149, for the product of or substitute for the original thing still follows the nature of the thing itself as long as it can be ascertained to be such, and the right only ceases when the means of ascertainment fail."

But we need not go beyond our own borders for authority clearly upholding the jurisdiction of equity in such cases. In the cases of *Ballard v. Ballard*, 25 W. Va. 470, and *Barrett v. McAllister*, 33 W. Va. 738, 11 S. E. 220, this court sustained the jurisdiction of equity under very similar circumstances. It is attempted to distinguish those cases from the case here, upon the facts. In those cases the owner of real estate, after making a sale of it by executory contract, sold it to a third party. The court held that in such case the purchaser under the executory contract held the full equitable title to the property, and that the former owner, the holder of the legal title, was in equity a trustee for such purchaser under the executory contract, and when he sold the property to a third party, such purchaser under the executory contract would, in a court of equity, be given the benefit of the contract thus made. It is

stated that those are specific performance cases, and that therefore equity has jurisdiction upon that ground. The court did not put it upon that ground in either of those cases, but put it squarely upon the ground that there was a constructive trust—that the wrongdoer was a trustee for the rightful owner of the property whether he would be such trustee or not. The case of Hogg v. McGuffin, 67 W. Va. 456, 31 L.R.A. (N.S.) 491, 68 S. E. 41, is on all fours with the present case. In that case McGuffin had executed to Hogg an option contract for the sale of certain stocks. Hogg elected to accept the stocks under the contract. McGuffin had, however, sold them to a third party, the proceeds of the sale, consisting of certain negotiable notes, being deposited in a bank by McGuffin. Hogg then filed a bill, not for the purpose at all of having specific performance of the contract, but for the purpose of impressing a trust upon the proceeds of the sale of the stocks in the hands of the bank, and this court held that he might do so. Judge Brannon, in speaking for the court in that case, expressly says that the fact that there might be an adequate remedy at law does not deprive equity of the familiar jurisdiction to enforce a constructive trust in such a case. It is held in that case that, because the stock was Hogg's, the proceeds of the sale, which were then in the bank, in equity belonged to Hogg. In this case, if the timber which has been cut and removed belonged to the plaintiff, in equity the proceeds of the sale of that timber belong to the plaintiff, so long as such proceeds can be identified. See also Wolf v. McGugin, 37 W. Va. 552, 16 S. E. 797, and County Ct. v. Cottle, 81 W. Va. 469, 94 S. E. 948.

But it is contended that there is a controversy here as to the title to the timber, and that this controversy is one cognizable only in a court of law; that, before the plaintiff could go into equity to follow the

fund, he would have to first settle in a court of law his title to the timber. This contention might be correct if the plaintiff's claim of title depended upon anything more than a construction of the title papers exhibited with the pleading. The title which he sets up and relies upon stands or falls with the construction given to the deeds and papers filed with his bill. It does not involve the trial of any question of fact, and where this is the case a court of equity is as competent to construe the papers, and determine whether or not the plaintiff places the proper construction upon them, as is a court of law. In the case of Bradley v. Swope, 77 W. Va. 113, 87 S. E. 86, the plaintiff sought to enjoin trespasses upon land claimed by him. As to whether he or the defendant was the owner of the land depended upon the construction of the title papers, and the court held that where such was the case, a court of equity would construe them, and, if he was found to be the owner of the land, administer him relief. Judge Williams, in speaking for the court in that case, says: "If, by a proper construction of his deed, plaintiff is entitled to the land bounded by the Long lines, then he has a right to maintain his bill, for, although it appears the land in controversy is uninclosed timberland, plaintiff's admitted possession of other portions of his tract extends his possession to its exterior bounds, no adverse possession being shown. Curtis v. Meadows, 77 W. Va. 22, 86 S. E. 886. There is no necessity for referring the question here involved to a court of law to be determined by a jury. Ephraim Creek Coal & Coke Co. v. Bragg, 75 W. Va. 70, 83 S. E. 190. And contra, if a proper construction of plaintiff's deed does not entitle him to the land in question, he could not recover in an action at law. His case, in either court, depends solely on the terms of his deed, which a court of equity has as much right to construe as a court of law, in a case properly before it."

So here we say that a court of equity is as competent to construe the title papers under which the plaintiff claims as is a court of law, and, there being no other question involved, equity has jurisdiction to construe the title papers and administer the relief to which the parties are found to be entitled.

It remains then for us to determine the effect of the deed made by the trustee, conveying this timber to the plaintiff's predecessor in title. It is earnestly contended by the plaintiff that this deed conveyed the timber on the land without any conditions, reservations, or limitations, while on behalf of the defendant it is contended that the conveyance was upon the condition that the timber was to be removed within three years from the day of the sale by the trustee. It will be observed that the deed of trust made by McCarty to T. A. Buffrey, trustee, to secure Peck, conveyed "all of the timber on that certain tract or parcel of land lying and being in the county of Pocahontas, state of West Virginia." Then follows the description of the land. There is no limitation as to the time within which the timber is to be removed, nor is there any provision for forfeiture of the right upon the happening of any contingency, so that, under the decision of this court in the case of *Keystone Lumber & Min. Co. v. Brooks*, 65 W. Va. 512, 64 S. E. 614, an absolute estate in the timber vested in the trustee. Was the grantee in the deed under any obligation to remove the timber within any particular time? As to the character of the estate created by a deed such as this, and as to the obligation upon the grantee to remove the timber, the authorities in this country are irreconcilably in conflict. As to the character of the estate which passed, some of the courts hold that such a deed grants a mere license to remove timber from the land for a reasonable time. Others hold that it is a lease of the land for the purpose of timber operations thereon, and that the limit of time is such rea-

sonable time as it would take to remove all of said timber, if the operations were carried on in the ordinary way. Others hold that the deed is a conveyance of the timber, and vests in the grantee the absolute title to the trees as part of the real estate. Still others hold that, while the deed grants the timber, it is a defeasible fee, and, unless the grantee removes the timber from the land within a reasonable time after the title vests in him, his title is defeated by the implied condition that the timber will be removed within such reasonable time. See *McRae v. Stillwell*, 111 Ga. 65, 55 L.R.A. 513, 36 S. E. 604; *Eastern Kentucky Mineral & Timber Co. v. Swann-Day Lumber Co.* 148 Ky. 82, 46 L.R.A.(N.S.) 672, 146 S. W. 438; *United States Coal & Oil Co. v. Harrison*, 71 W. Va. 217, 47 L.R.A.(N.S.) 870, 76 S. E. 346; *Peirce v. Finerty*, 76 N. H. 38, 29 L.R.A.(N.S.) 547, 76 Atl. 194, 79 Atl. 23; *Beatty v. Mathewson*, 40 Can. S. C. 557, 3 B. R. C. 859, 12 Ann. Cas. 913; *Wilson Lumber Co. v. D. W. Alderman & Sons Co.* 80 S. C. 106, 128 Am. St. Rep. 865, 61 S. E. 217; *C. W. Zimmerman Mfg. Co. v. Daffin*, 149 Ala. 380, 9 L.R.A.(N.S.) 663, 123 Am. St. Rep. 58, 42 So. 858; *Bond v. Ungerecht*, 129 Tenn. 631, L.R.A.1915A, 571, 167 S. W. 1116.

The extensive monographic notes appended to the reports of these cases fully cite and discuss the authorities on the various phases of the question, but it is impossible to reconcile them. A great many of the authorities hold that a deed such as this vests the timber absolutely, and that the title thereto is not divested by failure to remove it within a reasonable time, and this is the holding of our case of *Keystone Lumber & Min. Co. v. Brooks*, but that case does not decide what would be the result in case of a failure to remove the timber within a reasonable time. It is very uniformly held that there is an obligation to remove the timber within a reasonable time after the making

of the contract. In many states where it is held that such a deed as this vests the title to the timber, it is also held that, if the grantee therein fails to remove the timber within a reasonable time after it is granted to him, his title is not defeated. He still owns the timber, but he cannot remove it. In other words, he would be guilty of a trespass if he goes upon the land to remove the timber after the expiration of that time. Neither can the owner of the land remove it. In these jurisdictions it is held that, should the owner of the land attempt to cut the timber, the owner of the timber may enjoin him from doing so; and likewise, if the owner of the timber attempts to go upon the land and remove it, his repeated trespasses in so doing may be enjoined by the owner of the land, so that the result of these decisions is that a condition is created which deprives both of the parties of any use whatever of their estates. The parties when they made the contract certainly never contemplated any such result. The purpose of the courts in giving effect to contracts is to carry out the intention of the parties, and it is a long stretch of the imagination to say that the parties ever intended that a state of affairs would be created by their contract which would deprive both of them of their property.

There are others of these cases which hold that the estate of the grantee is a defeasible fee; that is, the title to the timber, upon the delivery of the deed, vests in the grantee, subject to be defeated by his failure to remove it within such time as is reasonably necessary therefor, by operations in the ordinary way. This uncertain condition confronted these parties when the contract was entered into between J. H. McCarty, of the one part, and T. A. Buffrey, trustee, and J. E. Peck, of the other part, by which a period of three years was fixed for the removal of this timber. At that time nearly three years had passed since the execution of the deed of trust, and no

operation had been carried on with a view to the removal of the timber. A person proposing to purchase under the deed of trust might well hesitate when he was advised of these facts. The tract of land was a small one, and it might very reasonably be said that the grantee had had ample time within which to remove this timber, and any purchaser would get an estate of at least doubtful value. On the other hand, J. H. McCarty, who was the owner of the land encumbered with this deed of trust, might well be doubtful as to his right to forbid the removal of the timber, and with this uncertain situation confronting the parties, why could they not make a contract by which their rights were rendered certain and definite? J. E. Peck, the cestui que trust, the trustee in the deed of trust, and the owner of the land, were all parties to this contract. They were the only people who had any interest in the subject-matter, and no reason is perceived why they could not make a valid and binding contract by which the security of Peck for his debt was made worth something, and the extent of the encumbrance upon McCarty's estate in the land was defined. It is true Peck did not sign the agreement, but a sale was made under the deed of trust, and under the agreement, and he took the benefit of it, so that while he did not sign it, he became a party to it, not only because he was named therein, but because he accepted the benefits thereof, and then, too, the bill in this case alleges that he was a party to that agreement. It may well be said that it would be impossible to secure anything like an adequate price for the timber, were the rights of the purchaser clouded as they would have been but for this supplemental contract, and it was very much to the advantage of Peck to secure such an arrangement in order that his debt might be paid upon a sale under the deed of trust. The purchaser under the deed of trust cannot complain, for the reason that he purchased with the un-

derstanding and with the full knowledge that the parties had made this contract giving three years from the date of sale within which to remove the timber. Had the parties not made this contract, what rights would he have required at a sale under the deed of trust? Judge Brannon, in the case of *Keystone Co. v. Brooks*, says that there is, perhaps, obligation to remove the timber in a reasonable time. The great weight of authority is that there is such an obligation. As before stated, nearly three years of that time had already expired without any operations. How much longer would it take to remove this timber by operations in the ordinary way? We are of the opinion that Peck and McCarty had the right, and it was entirely proper for them, to enter into the contract of April 24, 1909, definitely fixing the rights of each of them in the subject-matter referred to in that contract. Peck had security which, under the circumstances, was, if not entirely worthless, at least of very doubtful value. McCarty had an encumbrance upon his land, the extent of which was uncertain. By this contract Peck's uncertain security was turned into a valuable one, and the encumbrance upon McCarty's land was made definite and certain, so that he would have something by which to be guided in the future in regard to handling his estate, and when the purchaser purchased under this deed of trust and under this contract,—and the deed to him shows that it was made in accordance with the deed of trust and in accordance with the contract, and that the timber was to be removed within three years,—if he would get the advantage of his purchase he must remove the timber within the time specified in the contract. Null

Timber—
time for
removal.

v. Elliott, 52 W. Va. 229, 43 S. E. 173; *Adkins v. Huff*, 58 W. Va. 645, 3 L.R.A. (N.S.) 649, 52 S. E. 773, 6 Ann. Cas. 246. This he did not do. He allowed the time to go by, and has therefore lost all of the rights that he had under

his purchase. Having no interest in the timber at the time it was actually cut from the land, he had no interest in the purchase money arising from the sale thereof.

The Circuit Court, therefore, committed no error in sustaining the demurrer to the bill, and its action is affirmed.

Williams, J., concurring (March 26, 1918):

I concur in affirming the decree dismissing plaintiff's bill, but not for the reason given in the opinion. I do not think the bill presents a case for equity jurisdiction. It shows that the right to the fund in bank depends on the title to the timber from which it was derived, and that the title was claimed adversely by J. H. McCarty and by Williams, trustee. Both were bona fide claimants, and McCarty sold the timber in good faith. How, then, can he be a trustee in invitum or ex maleficio? It is not unconscientious for him to retain the proceeds; in fact, he has a right to do so, unless the other claimant establishes a superior title. The mala fides is the governing principle in all such cases, says Story in his work on Equity Jurisprudence, § 1255. There is a wide and fundamental difference between this case and those cited in the opinion to support the decision, which the opinion fails to notice, and that is McCarty's conscientious or bona fide claim of title. The cases cited from other jurisdictions are all cases where the defendant wrongfully misapplied property or funds which he recognized as the property of another, and to which, at the time of misappropriation, he made no claim of title. There was no necessity in any of those cases, as there is here, for the court to determine a disputed question of title before deciding whether defendant was a trustee ex maleficio. In other words, the chancellor is called upon here to settle a disputed title, which should be decided by a court of law, in order to determine whether equity has jurisdiction to impress the fund with a trust.

The title to the timber was purely legal, the ownership depending on the proper construction of the trust deed from S. E. McCarty to Bruffey, trustee, and of his deed to A. D. Williams, a question which a court of law was as competent to determine as a court of equity. *Poage v. Bell*, 3 Rand. (Va.) 586. No equities are involved. The insolvency of neither J. H. McCarty nor the Spice Run Lumber Company is alleged, and by an action at law against either or both of them plaintiff had a full, complete, and adequate remedy. Hence there is no ground for equity jurisdiction. 1 Pom. Eq. Jur. § 130. No privity of contract existed between plaintiff and any of defendants, and no relation of trust, express or constructive. The bill does not disclose whether plaintiff was a party to the arrangement with the bank or not. Presumably it was made between J. H. McCarty and the Spice Run Lumber Company only for the latter's protection. But, even if plaintiff had been a party to it, that would not change the situation so as to give equity jurisdiction of a suit by plaintiff to determine the title to the timber, or the fund derived from it, even though equity might have entertained a bill of interpleader by the bank. The timber was severed and converted into personalty before the suit was brought, and full compensation therefor was obtainable by means of a judgment at law. Plaintiff claims the fund on the sole ground that legally he was the owner of the timber, and McCarty, who sold it, was not, thus presenting a state of facts which furnishes a basis for one of the most familiar actions cognizable in a court of law. He cannot, by electing to treat the sale as having been made for his benefit, confer jurisdiction on a court of equity. The property from which the fund was derived must necessarily have been impressed with some equity to entitle him to equitable relief.

"Where personal property is conveyed by deed of trust, and a claim

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is set up by a third person, a court of equity ought not to enjoin a sale under the deed, but should leave the party to his legal remedy." 3 Rand. (Va.) 586.

In *Sheppard v. Turpin*, 3 Gratt. 373, property held under a deed of trust was sold under execution at the instance of a party not claiming under the trust deed, and the court held that equity would not entertain a suit by either the trustee or cestui que trust against the purchaser for the recovery of the property, on the ground that there was no obstacle to their proceeding at law. If he could not pursue the property itself in equity, I do not see how he could have any better right to follow the fund. See also *Kuhn v. Mack*, 4 W. Va. 186, and *Bowyer v. Creigh*, 3 Rand. (Va) 25, both cases in point.

In *Franks v. Cravens*, 6 W. Va. 185, a deed of trust to secure a debt had been given upon a tract of land on which was located a boiler, engine, and other machinery, used in connection with a sawmill. These articles were removed to another tract of land, another deed of trust given on them to secure a debt of another party, and they were subsequently sold under the second trust deed, whereupon the cestui que trust under the first deed of trust filed his bill in equity against the purchaser to compel restoration of the property to himself or his trustee, on the ground that it was trust property and was bought with notice of the facts. The court held that, although the property may have been real estate at the time the first trust deed was given, it was converted into personalty, as between the creditor and third parties by its removal, and, because plaintiff had a complete remedy at law for its recovery, equity could give no relief.

Other authorities supporting the proposition that equity is without jurisdiction in the present case are the following: 1 Pom. Eq. Jur. § 176; 2 Pom. Eq. Jur. § 424; *Fussell v. Gregg*, 113 U. S. 550, 28 L. ed. 993, 5 Sup. Ct. Rep. 631; *Young v.*

Porter, 3 Woods, 342, Fed. Cas. No. 18,171; *Cole v. Mette*, 65 Ark. 503, 67 Am. St. Rep. 945, 47 S. W. 407; *Galt v. Galloway*, 4 Pet. 332, 7 L. ed. 876; *Bassett v. Brown*, 100 Mass. 355; *Claussen v. Lafrenz*, 4 G. Greene, 224; *Morgan v. Palmer*, 48 N. H. 336; *Kimball v. Grafton Bank*, 20 N. H. 347; *Curtis v. Blair*, 26 Miss. 309, 59 Am. Dec. 257; *Vick v. Percy*, 7 Smedes & M. 256, 45 Am. Dec. 303; *Hipp v. Babin*, 19 How. 271, 15 L. ed. 633.

Ballard v. Ballard, 25 W. Va. 470; *Barrett v. McAllister*, 33 W. Va. 738, 11 S. E. 220, and *Hogg v. McGuffin*, 67 W. Va. 456, 31 L.R.A.(N.S.) 491, 68 S. E. 41, are cited to support equity jurisdiction in the present case. But each of them was a suit to compel specific performance, a remedy peculiarly equitable. Two of them involved contracts for the sale of land, and the third, and last named, an option to purchase stock in a corporation, of peculiar value to plaintiff. Plaintiff had complied with the conditions, but defendant had sold the stock to an innocent purchaser for value, thereby putting it out of his power to comply with his contract. Compliance being impossible, the court there properly gave plaintiff a decree for the proceeds of the sale of the stock as an alternative, on his prayer for general relief, on the ground that Hogg's option to acquire the stock imposed on McGuffin the duty to retain it, so as to be able to comply with his contract in case Hogg should elect to take it within the life of his option. It was impressed with a trust by virtue of the contract. Moreover, McGuffin's insolvency was alleged and proven; therefore, his legal remedy was not adequate. In all three of those cases the subject-matter of suit was an equitable claim or title, pure and simple, and the relief sought could be obtained only in a court of equity.

Wolf v. McGugin, 37 W. Va. 552, 16 S. E. 797, was a suit to avoid a preference which an insolvent debtor sought, by a sale of his property, to give to one of his creditors, who, together with another, had become

the purchaser thereof, in violation of § 2, chap. 74 (§ 3830) Code. Jurisdiction in equity was sustained in *County Ct. v. Cottle*, 81 W. Va. 469, 94 S. E. 948, on the ground of discovery and accounting for public funds, involving settlements between Cottle and said court, in which different sets of sureties on his official bonds were liable for funds coming into his hands at different periods of time during his administration as sheriff.

I find no authority in the books anywhere, in those jurisdictions where the distinction has been preserved between courts of law and courts of chancery, as it was originally established by a long course of practice in England, for the proposition that where one of two adverse claimants of the legal title to property, whether it be real or personal, sells it, the other claimant can invoke the aid of a court of equity to recover the proceeds. It is a principle too firmly established to require any citation of authorities, that jurisdiction of a cause cannot be conferred by consent.

There is no better argument to show the lack of equity jurisdiction than the conclusion reached by the opinion itself. After holding that equity has jurisdiction, at the suit of the owner of property, to pursue the fund derived from a sale thereof, wrongfully made, it reaches the conclusion that plaintiff had no title to the property when it was sold. I do not deny the correctness of the conclusion as a legal proposition, but I do deny our jurisdiction to decide it in this case, and would simply affirm the decree, for the same reason the lower court sustained the demurrer to plaintiff's bill and dismissed his suit; that is, for want of jurisdiction in equity.

NOTE.

The effect of a time limit in timber contracts, upon the right of the purchaser who has failed to remove within the time fixed, is discussed in the annotation following *ZIRKLE v. ALLISON*, post, 41.

J. H. MALLETT, Appt.,
v.
W. J. DOHERTY, Respnt.

California Supreme Court (Dept. No. 1) — April 15, 1919.

(180 Cal. 225, 180 Pac. 531.)

Timber — sale — when title passes.

1. A grant of standing timber with the understanding that a grantee should have six years to remove it, and an extension of four years thereafter if the vendor shall not sooner have disposed of the property, conveys only so much of the timber as may be removed within the stipulated time.

[See note on this question beginning on page 41.]

Record — notice — sale of standing timber.

2. A purchaser of real estate is chargeable with notice of the terms of a recorded contract for sale of standing timber thereon with respect to the limit of the time allowed for the removal of the timber.

[See 23 R. C. L. 194.]

Timber — computation of time for removal — period of exclusion from land.

3. The time during which a vendee of standing timber is excluded from the land by the vendor must be deducted in computing the time during which the right of removal continued under the deed.

[See 17 R. C. L. 1090.]

APPEAL by plaintiff from a judgment of the Superior Court for Kern County (Farmer, J.) in favor of defendant, and from an order denying a motion for new trial, in an action brought to quiet title to an undivided one-half interest in certain standing timber. *Reversed.*

The facts are stated in the opinion of the court.

Mr. W. W. Kaye, for appellant:

The deed conveyed the absolute title to the timber, so that plaintiff could remove it at any time, even after the expiration of ten years, and the stipulation for its removal was merely a covenant, and it remained the property of the plaintiff even though it was not removed within the time specified.

Peterson v. Gibbs, 147 Cal. 1, 109 Am. St. Rep. 107, 81 Pac. 121; Gibbs v. Peterson, 163 Cal. 758, 127 Pac. 62; Hawley v. Kaftz, 148 Cal. 393, 3 L.R.A. (N.S.) 741, 113 Am. St. Rep. 282, 83 Pac. 248.

The land was not disposed of in 1911, and plaintiff should have at least the balance of four years to remove the timber.

United States v. Hacker, 73 Fed. 292; Woodbridge v. Jones, 183 Mass. 549, 67 N. E. 878; King v. Ackerman, 2 Black, 408, 17 L. ed. 292.

Plaintiff should be given a reasonable time after final determination of this action in which to remove the timber.

Gibbs v. Peterson, 163 Cal. 758, 127 Pac. 62.

Mr. Alfred Siemon, also for appellant:

Whether the land was "disposed of" during the six-year period by the taking effect of the deed at the time of the escrow is entirely immaterial.

McDonald v. Huff, 77 Cal. 279, 19 Pac. 499.

Messrs. Borton & Theile, for respondent:

A contract for the sale of standing timber with a limited time for the removal of the timber may be either a present sale with the time for removal merely a personal covenant, or it may be a personal contract for a sale, with the removal of the timber a condition precedent to the ripening of title.

Peterson v. Gibbs, 147 Cal. 1, 109 Am. St. Rep. 107, 81 Pac. 121; Gibbs v. Peterson, 163 Cal. 767, 127 Pac. 62.

A deed in escrow, it is true, under the terms of the statute, takes effect on delivery by the depository, but upon such delivery it takes effect as of the date of the escrow.

Marr v. Rhodes, 181 Cal. 267, 63 Pac. 864; McDonald v. Huff, 77 Cal. 279, 19 Pac. 499.

Messrs. Anderson & Borton also for respondent.

Lawlor, J., delivered the opinion of the court:

This action was brought by the plaintiff against the defendant to quiet the title of the former to an undivided one-half interest in certain standing timber.

On October 5, 1905, the Kern County Lumber Company, a corporation, being the owner of a tract of land on Mount Breckenridge, in Kern county, executed and delivered an instrument in writing which purported to convey the standing timber on the said land to the plaintiff. This instrument was duly acknowledged and recorded.

The plaintiff, on October 27, 1905, assigned to the Madera Sugar Pine Company, a corporation, the Fresno Flume & Irrigation Company, a corporation, the Sanger Lumber Company, and the West Side Lumber Company, a corporation, an undivided one-half interest in the said timber.

On November 12, 1908, the Kern County Lumber Company conveyed to the defendant the land upon which the said timber stands. This deed was placed in escrow with the Producers' Savings Bank in Bakersfield on June 19, 1909, with escrow instructions to the effect that the deed be not delivered until the balance of the purchase price, which included a subsisting mortgage of \$5,000 on the land, was paid by the defendant. The final payment was made and the deed delivered on May 22, 1912.

In his complaint, filed on December 6, 1912, the plaintiff alleged that he was the absolute owner of an undivided one-half interest in the timber, with the right to the free use of the land, without charge, for the purpose of removing the timber, until the 5th day of October, 1915. It was further alleged that the defendant claims the ownership of the land and the timber; that on

November 1, 1912, the defendant evicted the plaintiff from the real property, and ever since then has held possession thereof against the plaintiff. The plaintiff prayed that the defendant be required to set forth his right to the timber and the real property; that a decree be entered quieting the title of the plaintiff to an undivided one-half interest in the timber; that the defendant be enjoined from claiming any right, title, and ownership therein; and that he be enjoined from hindering and preventing or in any way obstructing the plaintiff in the free use and occupation of the land for logging purposes, and for the purpose of cutting and removing the timber.

The defendant answered and denied that the plaintiff is the absolute owner of, or had any interest in, the timber, or any right to the use of the land for the removal thereof. He further denied that the plaintiff had ever been in possession of the land, or that he had been evicted therefrom, alleging that he himself was the absolute owner of both the land and the timber.

The defendant pleaded separately § 318, § 319, subd. 1 of § 337, subd. 2 of § 338, and subd. 3 of § 338 of the Code of Civil Procedure, as a bar to the complaint "and the cause of action attempted to be set forth therein."

The case was tried by the court without a jury. Judgment was entered in favor of the defendant, from which the plaintiff appeals. The plaintiff also appeals from an order denying his motion for a new trial, and the case comes here upon a bill of exceptions used on the hearing of the said motion.

The instrument referred to reads as follows:

"That for and in consideration of the sum of \$3,000 the said party of the first part does hereby grant, bargain, sell, and convey to the party of the second part, all timber suitable for sawmill purposes, and standing and being upon the following described real estate, . . . to-

gether with the free use and occupation of said premises and appurtenances, without charge, for the purpose of cutting, hauling, and sawing said timber.

"And it is further understood and agreed that the party of the second part shall have six (6) years from the date of this agreement to remove said timber and an extension of four years thereafter, if the party of the first part shall not have sooner disposed of said land, and, in the event of said land being sold, it shall be upon the express condition that no part of the timber hereinbefore mentioned shall be cut or used in the manufacture of timber, during said term of four years."

The timber had not been removed by the plaintiff or his co-owners within the six-year period, which expired on October 5, 1911, nor at the commencement of this action, on December 6, 1912.

It is the position of the appellant that the instrument conveyed to him absolute title to the timber, so that he could remove it at any time, even after the expiration of ten years, and that the stipulation for the removal of the timber was merely a covenant, and the timber remained his property even though it was not removed within the time specified.

As we understand the position of the respondent, it is that the intention of the parties was fully expressed in the contract, and that they intended "that the right to remove the timber, and the title of the plaintiff to the timber, should terminate and be at an end together."

On the question of the plaintiff's title to the timber and the right to use the land for the removal of the timber, the court found: "That the plaintiff was not . . . at the time of filing complaint herein, and never at any time since has been, the owner, either absolute or otherwise, of an undivided one-half interest . . . in the timber. . . . That the plaintiff did not have . . . at the time of filing his complaint herein, and has not had at any time subse-

quent thereto, the free use and occupation of all or any of the above-described lands, without charge or otherwise, . . . until the 5th day of October, 1915, . . . for the purpose of cutting, sawing, hauling, and removing said timber. . . ."

No other findings were made by the court.

In support of his contention that the instrument conveyed to him absolute title to the timber, the appellant relies on the companion cases of *Peterson v. Gibbs*, 147 Cal. 1, 109 Am. St. Rep. 107, 81 Pac. 121, and *Gibbs v. Peterson*, 163 Cal. 759, 127 Pac. 62. We are of the opinion that these cases are not determinative of this case. In the *Peterson-Gibbs Cases* the instrument involved provided not merely that the vendees of the timber should have a period of ten years within which to remove it, but also that if it was not removed within ten years the vendees should thereafter pay a yearly rental of \$200 for the privilege of removing such timber, and it was agreed "that all the privileges granted herein are to continue until such timber is removed." In view of the provision for the payment of rent after the ten-year period, this court construed the instrument as an absolute conveyance without condition. This obviously is correct, for the provision for the payment of rent for an indefinite period after the expiration of the ten years, in case the timber should not be removed, indicates clearly that it was the intention of the parties that the vendees should have the right to remove the timber after the specified term. The court said: "The question in each case is as to what is the contract between the parties." The doctrine of the *Peterson-Gibbs Cases* was followed in *Ciapusci v. Clark*, 12 Cal. App. 44, 106 Pac. 436, and in *Anderson v. Palladine*, 39 Cal. App. 256, 178 Pac. 553; the court in each of those cases construing the instrument as giving the purchaser of the timber the right to remove it after the expiration of the time specified.

The instrument herein contains no language indicating that the appellant was to have more than ten years within which to remove the timber. While the language is somewhat involved, the instrument is, in effect, equivalent to one conveying the timber, "the same to be removed within ten years." This finds support in the provision that, "in the event of said land being sold, it shall be upon the express condition that no part of the timber hereinbefore mentioned shall be cut or used in the manufacture of timber, during said term of four years."

It is conceded that this restriction was intended to apply to the purchaser of the land. Since it is plain that the appellant was entitled to an aggregate term of ten years, and this action was brought before such term had expired, it will not be necessary to consider the arguments of respective counsel as to the meaning of the phrase, "shall not have sooner disposed of said land," including the question whether it was "disposed of" on the date of the execution of the deed, or when it came out of escrow. It may be mentioned that the lumber company failed to put the "express condition" in the deed when the land was sold to the defendant, but this in no way affects the rights of the plaintiff as to the time for the removal of the timber, since the instrument conveying

Record—notice— it to the plaintiff
sale of standing was recorded, and
timber. the defendant was
therefore put upon constructive notice of the provision.

The rule of construction as to contracts for the sale of standing trees, to be removed within a specified time, is thus stated in 28 Am. & Eng. Enc. Law, p. 541: "Contracts for the sale of standing trees to be removed within a specified time have generally been construed by the courts as sales of only so many trees as the vendee might cut and remove within the time designated, the balance remaining the property of the vendor."

See also 25 Cyc. 1549, 17 R. C. L. 1084, and 55 L.R.A. 526.

The weight of authority is in accord with this rule. *McRae v. Stillwell*, 111 Ga. 65, 55 L.R.A. 513, 36 S. E. 604; *Baxter & Co. v. Mattox*, 106 Ga. 344, 32 S. E. 94; *Howard v. Lincoln*, 13 Me. 122; *Webber v. Proctor*, 89 Me. 404, 36 Atl. 631; *McIntyre v. Barnard*, 1 Sandf. Ch. 52; *Patterson v. Graham*, 164 Pa. 234, 30 Atl. 247; *Golden v. Glock*, 57 Wis. 118, 46 Am. Rep. 32, 15 N. W. 12; *Saltonstall v. Little*, 90 Pa. 422, 35 Am. Rep. 683; *Williams v. Flood*, 63 Mich. 487, 30 N. W. 93.

It is to be noted that the instruments in the above cases, like the one at bar, employ words of present grant.

The question of a forfeiture arising from a condition subsequent has been argued at great length by counsel. But the question is not involved in this case, for the reason that it was the intention of the parties that the right to take the timber should be limited to ten years.

The legal result follows that the vendee would be entitled to only so much of the timber as he might remove within the time, the balance remaining the property of the vendor. As stated, however, the ten-year period had not expired when the complaint was filed. There is no finding on the issue that the plaintiff was ejected from the property. If the plaintiff was prevented by the defendant from going on the land and cutting the timber, the period of interruption should be taken into account, and the term extended by operation of law for the time during which the plaintiff was so prevented from exercising his right.

The judgment is reversed, and a new trial ordered for the purpose of determining whether the appellant has any time remaining within which he may remove the timber, and decree accordingly.

We concur: Olney, J.; Shaw, J.

Timber—sale—
when title
passes.

—computation
of time for
removal—period
of exclusion
from land.

Petition for rehearing denied
May 15, 1919,

parties to a timber contract upon the failure of the purchaser to remove the timber within the time fixed, or within a reasonable time, is treated in the annotation following *ZIRKLE v. ALLISON*, post, 41.

NOTE.

The general subject of the rights of

KATE T. SHEPARD, Appt.,
v.
MT. VERNON LUMBER COMPANY.

Alabama Supreme Court — May 13, 1915.

(192 Ala. 322, 68 So. 880.)

Partition — interest in land and standing timber — sale for partition.

A purchaser of standing timber to be removed within a specified time cannot, after the expiration of such time, have the land sold for partition under a statute permitting such sale of land held by joint owners or tenants in common, when the land cannot be equitably partitioned, since the owners of land and timber are not joint tenants or tenants in common.

[See note on this question beginning on page 41.]

APPEAL by defendant from a decree of the Law and Equity Court for Mobile County (Berney, J.) overruling demurrers to a bill filed to secure the sale of certain land and the timber thereon, for purposes of partition.
Reversed.

The facts are stated in the opinion of the court.

Messrs. W. G. Caffey, Gregory L. Smith, and H. T. Smith for appellant.
Messrs. Ervin & McAleer for appellee.

McClellan, J., delivered the opinion of the court:

The appellee has persistently sought the right it conceives to be its due under a contract whereby it purchased and took the title to certain standing timber on certain lands. A full statement of the conveyance and the cause may be found in the report of this appellee's appeal, in 180 Ala. 148, 60 So. 825. The appellee took conveyance and title to described standing timber, and engaged to remove it from the land within five years from the 19th day of April, 1901. On the appeal of the cause just mentioned, wherein the lumber company sought to have its title to the standing timber made available and the appropriation of

its timber facilitated, notwithstanding the five-year period in which the company had engaged to remove the timber had expired, it was ruled (180 Ala. 148) that the bill was without equity, for that it sought to invoke the court's jurisdiction to the end that a trespass upon the land of the grantors in the conveyance to the company might be sanctioned, authorized, and enforced. The lumber company then brought an action of ejectment to recover the standing timber described in its conveyance. It was held on appeal (190 Ala. 574, 67 So. 286) that the company could not prevail; and so for the reason on which the previous appeal (180 Ala. 148) was rested, viz., that, though holding the title to the timber the possession of which was sought to be recovered in the ejectment suit, to issue judicial process to consummate that possession would be to aid

in and to effectuate a trespass by the company. The judgment against the company in the ejectment suit was hence affirmed.

Now the lumber company has filed a bill to have the land sold (including, of course, the timber), on the ground that the property cannot be equitably divided without a sale, and invoking the court to ascertain, appraise, and apportion the respective values of the timber to which the company has titles, and the land.

Article 1 of chapter 121 of the Code (§§ 5203 et seq.) affords the positive law governing partition and sales for division of lands held by "joint owners or tenants in common." Code, § 5231, provides: "The chancery court shall have jurisdiction to divide or partition, or sell for partition, any property, real or personal, held by joint owners or tenants in common, whether the defendant denies the title of the complainant or sets up adverse possession or not."

The statutory process whereby lands may be sold by the courts of chancery for division of the proceeds among the joint owners or tenants in common is a substitute for partition in kind, the proceeds of the sale taking the place of the land, and the respective rights of the joint owners or tenants in common to the money being apportioned in proportion to the undivided interest of each in the land. *Kelly v. Deegan*, 111 Ala. 152, 156, 157, 20 So. 379. In this case it was said: "While a court of equity had jurisdiction, concurrent with courts of law, to decree the partition of lands held by coparceners, joint tenants, and tenants in common, it was without jurisdiction to decree a sale of the lands, if the tenants, or either of them, were adults, and not consenting. *Deloney v. Walker*, 9 Port. (Ala.) 497. The statute (Code 1886, § 3262) now confers the jurisdiction, concurrent with that of the court of probate, 'to divide or partition, or to sell for partition,' whether the tenants are adults or infants. The essential, controlling element of the jurisdiction is that the lands

'cannot be equitably divided or partitioned' among the tenants. Code 1886, § 3253. When this fact exists, a sale at the instance of either tenant is matter of right, as actual partition at common law was matter of right, without inquiring whether it is of benefit or injury to the other tenants. *Freeman, Cotenancy & Partition*, § 539. The decree of sale is obtained only by an adversary judicial proceeding, and the sale is compulsory. It works a conversion of the lands into money, but it is not destructive of, and works no change in, the relations and rights of the parties; the money stands in the place of the lands, and is divided as the lands would have been divided if of them there had been actual partition."

According to the statutes, a sale of land for division cannot be had unless the land cannot be equitably partitioned among the joint owners or tenants in common thereof. And in further exposition of the subject it was said in *Kelly v. Deegan*, supra: "The indispensable element of every compulsory partition is a cotenancy. Whatever other relation may exist, if this relation does not exist, there is no right to partition."

It will hardly amount to addition to this statement to say that a cotenancy is an indispensable element of every compulsory sale for division under our statutes, and that, if there is no cotenancy, there is no right to a sale for division. Expressive of the same fundamental principle, it was pronounced in *Brown v. Feagin*, 174 Ala. 438, 443, 444, 57 So. 22: "The right of partition, or sale for distribution, is a right which from its very nature exists only in favor of and against tenants in common, and the equity of the bill filed for either purpose is founded on the community of title or interest in the several parties complainant and defendant."

In treatment of a bill wherein partition was sought, this court pertinently said, in *Berry v. Tennessee & C. R. Co.* 134 Ala. 622, 33 So. 9: "Indeed, it is required of complainant that it should show a clear title

to an undivided interest in the lands sought to be partitioned."
(Italics supplied.)

The proposition, under like circumstances, was thus emphatically stated in *Russell v. Beasley*, 72 Ala. 190: "It is required of the complainants, however, that they should show a clear title to an undivided interest in the lands sought to be partitioned."

The cause in that instance was disposed of upon the ground that the evidence did not "show any estate in common between the complainants and the defendant in the suit, either by way of a joint tenancy, or a tenancy in common." And it was also therein pronounced that "it avails nothing to prove title to a distinct portion of the land proposed to be partitioned, for the essence of the estate in common, necessary to be here shown, is that the tenants should own undivided parts, and occupy promiscuously, because neither knows his own severalty."

Other of our decisions, concluding to the same effect, might be noted.

In *Thompson v. Mawhinney*, 17 Ala. 362, 368, 52 Am. Dec. 176, it was said: "Tenants in common are such as hold by several distinct titles, but by unity of possession, because none knoweth his own severalty, therefore they all occupy promiscuously. . . . Unity of possession, therefore, is the very essence of a tenancy in common, and without it this tenancy cannot exist." *Pruitt v. Ellington*, 59 Ala. 454, 458; *Austin v. Bean*, 101 Ala. 141, 16 So. 41.

Where the owner of land conveys to another the title to mineral in situ or to standing timber (both realty in the view of the law), the result is to create two closes adjoining, but separate (the one the land proper, and the other the mineral or standing timber, conveyed, as the case may be). *Birmingham Fuel Co. v. Boshell*, 190 Ala. 597, 67 So. 403; *Hooperv. Bankhead*, 171 Ala. 626, 54 So. 549.

The application of the established principles we have but restated, to

the status shown by this bill, leads unescapably to the conclusion and to the result that the bill is without equity; that the demurrer was erroneously overruled. The only title or right, in respect of the land described in the bill, claimed for the lumber company, is the standing timber to which, under our decisions that have long since established a rule of property in this state, the company has the title. The conveyance to it of the standing timber made a close distinct from that of the soil, the title to which was not conveyed to the lumber company. The severance thus wrought was so effectual in its separation of the estates into which this real estate was susceptible of division that the soil owner was and is without title or right to the timber conveyed, and the grantee of the timber, the lumber company, was and is without title or right in or to the estate in the land not conveyed to it. In such circumstances, there could be no cotenancy, joint ownership, or tenancy in common within the purview of our partition statutes. Under very similar circumstances, the supreme court of Mississippi, Chief Justice Smith delivering the opinion, ruled to the like effect in *Forest Product & Mfg. Co. v. Buckley*, 107 Miss. 897, 66 So. 279. It was therein aptly said: "It seems clear that the parties hereto do not hold the property in question either as joint tenants, tenants in common, or coparceners, and therefore they do not come within the terms of the statute. Appellee has parted with all of his title to the trees, and has no further interest therein. Appellant owns no part of the land as such, but simply owns the trees standing thereon, with the incidental right of having them remain on and receive sustenance from the soil until they shall be cut and removed. The situation of the parties hereto is substantially the same as that of persons who own different rooms in the same building, or as that created when the owner

Partition—
interest in land
and standing
timber—sale for
partition.

of the soil sells the coal or other mineral lying beneath the surface; and it has never been held, so far as we are aware, that parties thus situated are joint tenants or tenants in common."

The supreme court of Pennsylvania, in *Dexter v. Lathrop*, 136 Pa. 565, 20 Atl. 545, 548, made a like pronouncement on the question here under consideration, that there was no cotenancy.

There is no unity of possession or of right to possession between a party holding the title to standing timber and a party owning the land, as such, on which the timber rests. In the absence of such unity of possession or right to possession, there can be no cotenancy of land. There is nothing to the contrary in the decision delivered in *Christopher v. Curtis-Attalla Lumber Co.* 175 Ala. 484, 57 So. 837. It does not deal with the relation of cotenancy, upon the existence of which the result in this cause depends, but with the matter of notice predicated of possession. To affirm that a grantor is the "quasi bailee" of the grantee, in a conveyance of timber standing on the land owned by the grantor, where nothing has been done to render actual the grantee's possession of his purchase, is certainly not the affirmation of a legal status which has in it any element of a relation of cotenancy.

The case of *Harrell v. Mason*, 170 Ala. 282, 54 So. 105, Ann. Cas. 1912D, 585, is said to be opposed to the conclusion at which we have arrived. Our view is that, while there are expressions in that opinion, by way of dicta, which might afford a premise for a conclusion opposed to that prevailing on this appeal, the doctrine of the decision in *Harrell v. Mason* admits a complete reconciliation with established principles of equity jurisprudence as it is administered in this state. The inapplication of the *Harrell-Mason* decision to the cause under review lies in the fundamentally differentiating fact that in the cause at bar there was effected in 1901 a full severance in

estate of the timber interest from the interest (not conveyed) of the owner in the land as such. In the *Harrell-Mason* Case, one only of the cotenants of the land (the timber interest being then unsevered in estate) conveyed to Harrell only his undivided interest in the timber standing thereon. The conveyance to Harrell was binding and effectual between and upon the parties to that conveyance, but ineffectual to prejudice any of the rights of the grantor's cotenants. *O'Neal v. Cooper*, 191 Ala. 182, 67 So. 690. Where such a conveyance, by one of the cotenants, is made, a court of equity will treat the grantee as so far subrogated to rights of his grantor (a cotenant in fact when he conveys to the grantee) as that, in virtue of the rights of his grantor, he may file a bill in his own name, reciting the facts, to have partition or a sale for division when partition in kind cannot be equitably effected; and on such a bill a court of equity may ascertain and adjust and vindicate the rights of the grantee, complainant, if consistent with, and not prejudicial to, the rights of the cotenants. *Ibid.* See also *Charleston, C. & C. R. Co. v. Leech*, 33 S. C. 175, 26 Am. St. Rep. 667, 11 S. E. 631. But this equity is not predicated of any relation of cotenancy enjoyed by the grantee, for none he has; on the contrary, it is the recognition and enforcement, without prejudice to the rights or interest of the grantor's cotenant, of a right growing out of the cotenant's conveyance, and clothing him with the conveying cotenant's right to have partition or a sale for division, subject to the limitation that the rights of the cotenants be not prejudiced thereby. When the *Harrell-Mason* decision is referred to that right in the conveying cotenant's grantee (*Harrell*), it is sound; otherwise, it would be in conflict with the long-established rule that cotenancy cannot exist without unity of possession, or of right to possession. The conveyance to Harrell did not purport to invest him with any interest in the land as such. He was

not a cotenant, in any sense. We need hardly add that appeal to the rule that "equity will not suffer a wrong without a remedy" cannot avail or apply here, to constitute the essential relation of cotenancy where that relation does not exist.

The decree is laid in error. It is reversed, and a decree will be here entered, sustaining the demurrer and dismissing the bill.

All the Justices concur in the conclusion and in the opinion, except as stated in addenda opinion of Justice Mayfield.

Mayfield, J., concurring:

I fully concur in the conclusion and in the decree rendered in this case. I also concur in most all that is said in the opinion of Mr. Justice McClellan; but as there seems to be some difference of opinion among the justices as to the effect of the decision and opinion in this case, as well as touching the effect of our former decisions on similar questions, I deem it proper to state the reasons, and to limit it to what I concede to be necessary to a decision of this cause.

The question as to what right or title the appellant owner of the land has to the timber sold, but not removed within the time limit fixed by the contract, deed, or grant by which the title to the timber passed, is not, as I understand the case, raised on this appeal, and is not decided. Whether the owner of the land is bound to let the timber sold remain standing on her land indefinitely, or whether she can remove it for the purpose of cultivating and improving her land, and, if she did remove it after the time limit had expired, to what extent, if any, she would be liable to the owner of the timber, appellee here, as I read the record, are questions likewise not raised or decided.

Whatever might be the relative rights of the parties to the land and the timber, they are not tenants in common, as the opinion points out, and the complainant could not maintain the bill in this case.

While this court has, in previous decisions cited in the opinion of Mr. Justice McClellan, decided that conveyances of timber like the one in question did convey the fee simple title thereto, and that this did constitute an interest in land, and in the land on which the timber was standing, this court has never decided, and, I apprehend, will never decide, that such a contract, deed, or grant as the one in question passes such an interest in the land as that the grantor, the owner of the land, can never use or cultivate the land so long as the grantee allows the timber to remain standing thereon. If this be the law, then the grantee of the timber, by failing to remove it as he contracted and covenants to do, can wholly deprive the owner of the land, for all time to come, of the proper use and enjoyment of his land. He cannot clear nor cultivate it, because to do so would be to remove or destroy the timber. The very consideration—or a part thereof, at least—of this grant, was to have the timber cut and removed within the time limit fixed by the contract, deed, or grant, so that she could the more easily clear and cultivate her land. If, however, she cannot clear her land or remove the timber, should the grantee fail to remove it within the time contracted, or even should the grantee absolutely fail and refuse to remove it at all, then the value of both the land and the timber is absolutely destroyed by the sole fault of the grantee of the timber in breaching his contract to remove. Can or will any court ever say that such would be the legal and practical effect of a contract, deed, or grant like the one in question? I think not. Is there any logic or reason in holding that the parties to a contract like this, whether they be learned lawyer or ignorant laymen, intended to make such a contract, or that the language used was susceptible of such a construction? I think not. Such a construction of the contract, deed, or grant allows the fault, breach, or

wrong of one party to the contract to render the contract wholly useless and of no value to both.

It has been uniformly held by this and all other courts that, after the expiration of the time limit in which the timber shall be removed, the owner of the timber cannot lawfully cut or remove the timber, though it may belong to him, because he contracted or covenanted to remove it within the time specified; but it has never been held, so far as I know, that the owner of the land, after such a breach by the vendee of the timber, could not use, cultivate, or clear his land because to so do would destroy the timber or trees of the grantee, who was solely at fault. To so construe such contracts would render them void as against public policy. Would it not be against public policy to allow lands to be thus tied up forever, so that the owner of the land cannot lawfully use his own land, and so that the owner of the timber could not lawfully cut and remove it? We have no case holding that the owner of land, after the expiration of the time in which the grantee has covenanted to remove it, may not remove the timber from his land and cultivate it if he desires. It is expressly intimated in *Zimmerman's Case*, 149 Ala. 380, 9 L.R.A.(N.S.) 663, 123 Am. St. Rep. 58, 42 So. 858, that he can remove it, but not use it. It is there said: "It may be that the vendor would be entitled to remove the timber after the time limit himself, but not to appropriate it to his own use."

I submit that it would be unreasonable, if not intolerable, to hold that the owner of the land could not remove the timber and use the land, after the vendee of the timber had failed and refused to perform his contract to remove. While, of course, if the contract, deed, or grant does not fix a time limit for the removal of the timber, the law will read into it a reasonable time limit, yet there is a difference, and a material difference, between contracts for the sale of timber and the

right to remove, where no time is fixed, and those in which a time limit is fixed. The cases of *Magnetic Ore Co. v. Marbury Lumber Co.* 104 Ala. 465, 27 L.R.A. 434, 53 Am. St. Rep. 73, 16 So. 632; *Butterfield Lumber Co. v. Guy*, 92 Miss. 361, 15 L.R.A.(N.S.) 1123, 131 Am. St. Rep. 540, 46 So. 78; *Forest Product & Mfg. Co. v. Buckley*, 107 Miss. 897, 66 So. 279, illustrate the difference. In those the grant of the right to use the land for the growing of the timber, and the right to remove it, were without limitations, and the contracts provided, some by implication and some by express provision, that the right to remove should be at the pleasure of the grantee, with a perpetual right of way for railroad purposes. Those cases, of course, are different from cases like the one under consideration, and the one in *Zimmerman's Case*, where it was expressly covenanted that the right should be renewed within a given time. This difference is well pointed out by the supreme court of Massachusetts, in the case of *Perkins v. Stockwell*, 131 Mass. 529, 532. It is there said: "Where there is a reservation of wood and timber with the right to remove the same, it is implied that the removal shall be made within a reasonable time. *Hill v. Hill*, 113 Mass. 103, 18 Am. Rep. 455. If the reservation had been of wood and timber which was to be permitted to stand and grow indefinitely, it might be argued that it should be allowed to stand and grow, so long, at least, as to make it merchantable; but when a definite time is fixed within which its growth is permitted without payment, and longer only by payment of rent, the plaintiffs could not expect to hold the defendant bound by the reservation, if they delayed their election beyond the year after the expiration of the original term."

The distinction is well pointed out by the supreme court of South Carolina, in *Wilson Lumber Co. v. D. W. Alderman & Sons Co.* 80 S. C. 106, 109, 128 Am. St. Rep. 867, 61 S.

E. 218. It is there said: "The deed was an absolute conveyance in fee simple of the trees and timber suitable at that time for milling purposes, and under the authorities of this state, particularly *Knotts v. Hydrick*, 46 S. C. L. (12 Rich.) 314, the estate in the trees and timber was a fee-simple estate; the only limitation being that plaintiff's right was restricted to trees suitable for milling purposes in 1893. Plaintiff was not required to remove said timber within a reasonable time, but could at any time enter upon the land and remove all timber suitable for milling purposes at date of deed."

A copious note to the above case, as reported in 128 Am. St. Rep., appearing on pages 868 et seq., cites scores of cases pointing out this difference. A few of them are as follows: "If conveyance of timber requires it to be cut and removed within specified time, it must be cut and removed within that time. *Bryant Lumber Co. v. Crist*, 87 Ark. 434, 112 S. W. 965. A grant to cut trees within a certain time is not executed if the trees are not cut within the time stipulated. *Noyes v. Goding*, 104 Me. 453, 72 Atl. 181. A deed to cut and remove timber within a certain time is binding on the vendee or his assignee. *Walker v. Johnson*, 116 Ill. App. 145. If a deed requires timber to be removed within a specified time, it must be removed within that time. *Hollensteiner v. Missoula Lumber Co.* 37 Mont. 278, 96 Pac. 420. If a time is set within which timber must be removed, it must be cut and removed within that time. *Hurst v. Taylor*, 32 Ky. L. Rep. 1051, 107 S. W. 743; *St. Louis Cypress Co. v. Thibodaux*, 120 La. 834, 45 So. 742. Or, if there is a deed of trees to be cut and removed within ten years, they must be removed within that time. *Webber v. Proctor*, 89 Me. 404, 36 Atl. 631. If the grantee agrees to remove trees from the land within two years from the date of the grant, and fails to remove them within a reasonable time after the

expiration of that period, his right to the timber is forfeited. *Bell County Land & Coal Co. v. Moss*, 30 Ky. L. Rep. 6, 97 S. W. 354."

The case of *Adkins v. Huff*, reported in 3 L.R.A.(N.S.) 649, reviews the authorities on the subject, and the report contains a valuable note collecting many cases. The annotator there has to say: "The conclusion reached in *Adkins v. Huff* that the right of a grantor of land who reserves timber standing thereon, to be removed within a specified time, terminates at the expiration of such time, is supported almost unanimously by the cases which pass upon the question."

It is true that there are cases, among them cases of our own court, holding that the trees or timber left standing on the land after the expiration of the time limit for removal are yet the property of the vendee, and do not revert to the vendor; but there are, so far as I know, none holding that the grantee still owns an interest in the land upon which the trees are growing, which will prevent the vendor from removing them in order to use or cultivate his land if he desires so to do. If A should sell B a home, with a covenant on the part of the latter to remove it from the land within a year, and B fail and refuse to remove it, surely A would not thereby be forever prevented from using the land on which the house was situated. After the failure of a vendee to remove timber, trees, or a house from the land on which they are located, within the time agreed upon,—and certainly upon a refusal so to do,—the timber, trees, or house cease to be a part of the land, and become personalty, as to the respective rights of the owner of the land and the personalty, and such personalty becomes an obstruction to the use of the land, and of course the owner of the land then has the right to remove it from his land, as he would a horse, cattle, or even the person of the owner of such personalty, if it was occupying the land in violation of law, and even, as in the case at

bar, in violation of express covenants.

I do not think this or any other court has heretofore held, or will ever hold, to the contrary. I concede, as I have before stated, that there is a difference among the courts as to the construction of contracts like the one in question. This difference was pointed out in our *Zimmerman Case*, 149 Ala. 380, 9 L.R.A.(N.S.) 663, 123 Am. St. Rep. 58, 42 So. 858, but the difference only goes to the title to the timber, and not to the title or rights to the land after the expiration of the time limit for removal. It is true, as above stated, that this court, in *Zimmerman's Case*, followed the line of decisions holding that the trees or timber remain the property of the vendee after the expiration of the time limit, and do not revert to the vendor, and that the contract is more than the mere right to take timber during the time; that it is a sale of the trees, with a covenant to remove; but it has never been held that the interest in the land shall extend beyond the time limit fixed in the contract or grant. Both parties are held to the contract, and were so held, even in *Zimmerman's Case* and the line of cases which it follows.

The true rule, and the correct interpretation of such contracts, were stated by the supreme court of Wisconsin, which has been followed by most of the leading courts. The logic and reasoning of this court is unanswerable, as is pointed out by the supreme court of Michigan in the case of *Macomber v. Detroit, L. & N. R. Co.* 108 Mich. 491, 32 L.R.A. 102, 62 Am. St. Rep. 713, 66 N. W. 376. In these cases the question was made acute, by reason of the fact that, at the expiration of the time limit, some of the trees sold were still standing, and others had been cut but not removed from the land. So the question was presented: Was there any difference as to the rights of the vendor between the trees cut, and those not cut; that is, was there a difference as to

the rights and title of the contracting parties, as to the timber and the land, after the expiration of the time limit? And the Michigan court says:

"In *Golden v. Glock*, 57 Wis. 118, 46 Am. Rep. 32, 15 N. W. 12, a contract similar to that in question was held to convey title to only such timber as was removed within the time limited, but considered all such timber as was manufactured into stave bolts as removed. In *Hicks v. Smith*, 77 Wis. 146, 46 N. W. 133, the same doctrine was reaffirmed by the same court. A contract not distinguishable from the one herein involved was considered, and it was held that, as to trees cut into logs, the severance from the realty had become complete. The property had become personalty, and its character so essentially changed by such manufacture that it was, in effect, removed from the premises, within the meaning of the deed.

"In *Williams v. Flood*, 63 Mich. 493, 30 N. W. 93, Mr. Justice Campbell, speaking of such a contract as the present, said: 'It is not very important to discuss the exact nature of plaintiff's rights under the written contract. Whatever they were, they included an absolute sale of all the timber described, subject only to such qualifications of the right of removal as the contract mentions. At most, this condition would only operate by way of forfeiture. The timber had all been paid for, and all belonged to the plaintiff, unless lost by forfeiture for nonremoval.' The same can be said of the present case, and, if we apply the rule that forfeitures are not favored (*Miller v. Havens*, 51 Mich. 485, 16 N. W. 865), the rule of the Wisconsin court seems consistent with reason and justice. It is no stretch to treat the severance of the timber from the soil, and its manufacture into logs, as a removal, within the terms of the provision for forfeiture."

I concede, of course, that this court has not gone to the full extent of the above holding, as to the title

to the standing trees, but has as to the rights or title of the grantee as to the land.

Our earliest case on the subject under discussion is *Heflin v. Bingham*, 56 Ala. 566, 28 Am. Rep. 776, and that case expressly followed the New Hampshire court, and chiefly based the holding on the case of *Hoit v. Stratton Mills*, 54 N. H. 109, 20 Am. Rep. 119. Both of these cases are fully in accord with what I conceive to be the law, as to the rights of the owner of the land, after the expiration of the time limit for removal. In the New Hampshire case it was said: "When the time for the defendant's keeping his trees or other chattels on the plaintiff's land has expired, the defendant cannot keep them there as long as he pleases. He cannot rightfully keep them there after that time. He can wrongfully leave them there after that time, as he can wrongfully do, or wrongfully neglect to do, a great variety of other things. He is liable, as for any tort or breach of contract, to the extent of the legal rule of damages for injuries caused by his wrongful omission to remove them within the time expressly or impliedly fixed. Not only has the plaintiff a remedy by legal process for the injuries which he suffers from the defendant's property being on his land after the time of removal; he also has the 'natural, essential and inherent' right of 'protecting property.' He can, without legal process, protect his property against the wrongful presence and injurious action and effect of the defendant's property. And this right is the right to do whatever, under the circumstances of each case, apparently is reasonably necessary to be done in defense. *Aldrich v. Wright*, 53 N. H. 398, 16 Am. Rep. 339. In that case, some authorities are cited showing that it may be reasonably necessary, in the defense of one's own property, to destroy the property of another. If in defense it is reasonably necessary for A to remove B's property from A's land, he may remove it. If it is reason-

ably necessary for him to destroy it, he may destroy it. If it is reasonably necessary for him to sell it, he may sell it. If it is reasonably necessary for him, in defense to do anything after reasonable notice. . . . If it is reasonably necessary for him to have a lien on the offending property or its proceeds for the expenses of the exercise of his natural right of defense, he has a lien. When B is liable for the damage caused to A by his property wrongfully remaining on A's land, he must also be liable for the reasonable expense to which his fault puts A in ridding his land of the encumbrance. And, if indemnity by lien is a part of the reasonable necessity of A's defense, it is a part of his natural right of defense. His remedy by the exercise of his natural right of defense is as broad as the reasonable necessity of the case. That right is a plenary one, whether the thing against which it may be exercised is wrongfully allowed to remain, or is wrongfully put on his land, by B. He may resist a wrongful occupation of his land, as well as a wrongful invasion of it. A wrongful occupation is a wrongful invasion of his right of property."

I submit that there are no decisions contrary to the above; that it is fully in accord with natural and moral law, as well as with municipal; and to hold otherwise would be contrary to all precedents. While there is a conflict among the authorities as to whether timber belongs to the vendor or to the vendee after the expiration of the time limit for removing, there is no conflict or dissent to the proposition that the vendee has no title, interest, claim, or demand as to the land on which the trees are standing. While growing trees and timber are considered realty, and not personalty, yet when they are severed from the land they become chattels, and a conveyance of them, by a legal fiction, operates as a severance, so far as the rights of the parties to the conveyance are concerned. In legal effect, it is just as if the timber had been severed by

the ax. As has been said, the severance in law may be made with the pen as well as with the ax.

NOTE.

According to the general rule, a purchaser of standing timber to be removed within a specified time, who fails to remove it within the time limited, loses whatever right he had, not only in the timber, but the right of entry upon the land for purposes of removal. This rule does not pre-

vail in Alabama and a few other states, but in these states the title to the timber remains in the purchaser, even though he has failed to remove it within the time limited; but his right of entry is gone. The decision in the reported case (*SHEPARD v. MT. VERNON LUMBER CO.* ante, 23,) is an interesting example of the application of the Alabama rule. The entire question of effect of failure to remove timber within the time limited in timber contracts is discussed in the annotation following *ZIRKLE v. ALLISON*, post, 41.

D. C. SMITH et al., Plffs. in Err.,

v.

JOHN N. RAMSEY.

Virginia Supreme Court of Appeals—June 11, 1914.

(116 Va. 530, 82 S. E. 189.)

Timber — sale for removal — effect of manufacture.

That timber sold under a contract giving a specified time in which to cut and remove it is cut and manufactured into lumber, ties, and other articles prior to the expiration of the time named does not defeat the operation of the rule that failure to remove the timber within the time specified will leave the title in the grantor.

[See note on this question beginning on page 41.]

ERROR to the Circuit Court for Caroline County to review a judgment in plaintiff's favor in an action brought to recover the value of certain railroad ties, lumber, etc., alleged to have been converted by defendants to their own use. *Reversed.*

Statement by Buchanan, J.:

The defendant in error brought this action of trover and conversion to recover the value of certain railroad ties, lumber, pulp wood, etc., which the defendants had, as averred, converted to their own use. There was a verdict and judgment in favor of the plaintiff. To that judgment this writ of error was awarded upon the petition of the defendants.

All questions of law and fact were submitted to the court for its decision, without a jury, upon an agreed statement of facts, which is as follows:

"It is agreed that the letter of date February 10, 1913, addressed to the plaintiff, John N. Ramsey, is the first notice sent or received forbidding the further removal of the ties, wood, lumber, etc., and that the said notice shall be taken to have been signed and is to be as binding upon the other defendants as though signed by the other defendants.

"It is further agreed that the timber which is the subject-matter of this action was cut and manufactured before the 9th day of February, 1913, and the only question at issue is over the right of the plain-

tiff to property in and to remove the same after the expiration of his contract.

"It is further agreed that in August, 1912, at least six months before the expiration of said contract, John N. Ramsey visited the defendant, and in conversation with D. C. Smith offered to buy certain pine trees not included in the contract of February 9, 1911, and that the defendant signified his willingness to sell; that thereupon the plaintiff offered the defendant \$50 for the pine trees, on condition, however, that the defendants would extend the time limited in the contract of February 9, 1911, for a period of eight months; that the defendant agreed to sell the pine trees at \$50, but informed the plaintiff that the time of the February contract would not be extended a single day; that thereupon the plaintiff refused to buy the pine trees, and told the defendant D. C. Smith that he (plaintiff) intended to cut all of the trees included in his contract, and would remove the same when he got good and ready, in spite of the contract.

"It is further agreed that the following is a correct count and measurement of the ties, wood, lumber, etc., cut under the said contract, and not removed from the premises prior to February 9, 1913, and that the total value set out is to be considered the correct value of the same, to wit:

128 finished oak railroad ties,
34 unfinished oak railroad ties,
4,659 feet of sawed lumber,
558 feet of sawed lumber,
464 cords of pulp wood,
16 pieces of wagon poles,
2,500 feet oak and gum culls,
valued in the aggregate at \$550.

"Subscribed and agreed to.

"G. B. Wallace,

"For the plaintiff.

"Chandler & Beale,

"Attys. for defendants.

"It is agreed that the defendants have taken possession under a claim of ownership of the ties, lumber, pulp wood, etc., set out above, and remaining on the premises February 15 A.L.R.—3.

ruary 10, 1913, and deny the right of the plaintiff to the same.

"G. B. Wallace,

"Attys. for the plaintiff.

"Chandler & Beale,

"Attys. for defendants.

"Contract of date February 9, 1911, referred to in agreement, which is in the following words and figures, to wit:

"This contract, made and entered into this 9th day of February, 1911, between M. D. Parr and Ada E. Smith and D. C. Smith, her husband, parties of the first part, and John N. Ramsey, party of the second part, witnesseth, that for and in consideration of the sum of \$500, \$100 of which is paid in cash and the balance to be paid in thirty days from the date of this contract, the said parties of the first part have sold unto the said party of the second part all the growing timber (except the pine and cedar) on what is known as the river land of the North Point farm, and more particularly described as follows: Commencing at Hawes bridge over the Mattaponi river and running as the old main road used to run to the foot of the long hill at corner of fence, thence around the foot of the hill to the edge of the field, thence with the edge of the field to Mrs. Buchanan's line, thence with Mrs. Buchanan's line to the said Mattaponi river, and thence down said river to the point of beginning.

"The said parties of the first part agree to give the said party of the second part two years from the date of this contract in which to cut and remove said timber. And the said party of the second part is to have a right of way out to the main county road at the foot of the long hill first mentioned in this contract.

"Witness the following signatures and seals:

"Mrs. M. D. Parr. [Seal.]

"Mrs. Ada E. Smith. [Seal.]

"D. C. Smith. [Seal.]

"John N. Ramsey. [Seal.]

"If fences are broken down by trees or pulled down in any way for

outlets, the fence must be repaired or put in good order at once.

"Letter referred to in agreed statement of facts, which is in the following words and figures, to wit:

"Paige, Va., Feb. 10, 1913.

"Mr. John N. Ramsey,

"Fredericksburg, Va.

"Dear Sir:—

"I write to notify you that the contract between us to cut and remove timber sold to you by me expired on the 9th day of February, 1913. I hereby forbid moving any more of the said timber.

"Respectfully, D. C. Smith."

Messrs. Chandler & Beale and W. S. McNeill, for plaintiffs in error:

Under the contract, all trees or timber standing at the expiration of the limited time belong to the vendor, not as a forfeiture nor as a reversion, but on the theory that the instrument is a conditional grant, and the vendee has failed, within the specified time, to comply with the conditions of the sale necessary to vest title in himself.

Wright v. Camp Mfg. Co. 110 Va. 678, 66 S. E. 843; 25 Cyc. 1551, 1552, note 56; Alexander v. Bauer, 94 Minn. 174, 102 N. W. 387; Howard v. Lincoln, 13 Me. 122; Perkins v. Stockwell, 131 Mass. 529; Prentiss v. Ross, 96 Mich. 83, 55 N. W. 613; Null v. Elliott, 52 W. Va. 229, 43 S. E. 173; Haskell v. Ayres, 32 Mich. 93.

The timber contract is a conditional sale, and the words "cut and remove" are the two conditions which must be complied with before title can pass to the vendee.

Boisaubin v. Reed, 1 Abb. App. Dec. 161; Strong v. Eddy, 40 Vt. 547; Irons v. Webb, 41 N. J. L. 203, 32 Am. Rep. 193; King v. Merriman, 38 Minn. 47, 35 N. W. 570; Chestnut v. Green, 27 Ky. L. Rep. 838, 86 S. W. 1122; McRae v. Stillwell, 111 Ga. 65, 55 L.R.A. 513, 36 S. E. 604; Morgan v. Perkins, 94 Ga. 353, 21 S. E. 574; Allison v. Wall, 121 Ga. 822, 49 S. E. 831; Mengal Box Co. v. Moore, 114 Tenn. 596, 87 S. W. 415, 4 Ann. Cas. 1047; Green v. Bennett, 23 Mich. 464; Webber v. Proctor, 89 Me. 404, 36 Atl. 631; Clark v. Ingram-Day Lumber Co. 90 Miss. 479, 43 So. 813; McNeil v. Hall, 187 N. Y. 549, 80 N. E. 1113; McClary v. Atlantic Coast Lumber Corp. 90 S. C. 153, 72 S. E. 145; Lufburrow v. Everett, 113 Ga. 1054, 39 S. E. 436; Chest-

nut v. Green, 120 Ky. 385, 86 S. W. 1122; Taylor Brown Timber Co. v. Wolf Creek Coal Co. 32 Ky. L. Rep. 1015, 107 S. W. 733; Clark v. Guest, 54 Ohio St. 298, 43 N. E. 862; Frank Hitch Lumber Co. v. Brown, 160 N. C. 281, 75 S. E. 714; Hawkins v. Goldsboro Lumber Co. 139 N. C. 160, 51 S. E. 852; Rowan v. Carleton, 100 Miss. 177, 56 So. 329.

The mere cutting of timber within the time specified for its removal does not prevent the title thereto from reverting back to the owner of the land.

McRae v. Stillwell, 55 L.R.A. 530, note 5; Taylor Brown Timber Co. v. Wolf Creek Coal Co. 32 Ky. L. Rep. 1015, 107 S. W. 735; St. Louis Cypress Co. v. Thibodaux, 120 La. 844, 45 So. 742; 28 Am. & Eng. Enc. Law, 2d ed. 541; Peirce v. Finerty, 76 N. H. 38, 29 L.R.A. (N.S.) 547, 76 Atl. 194, 79 Atl. 23.

Messrs. G. B. Wallace, F. M. Chichester, and C. M. Chichester, for defendant in error:

Under a contract giving the vendee of timber a limited time in which to cut and remove the same, if the timber is cut and severed within the stipulated time, it becomes the property of the vendee, and his failure to haul it off the premises does not entail a forfeiture, in the absence of an expressed forfeiture clause in the contract or deed.

Ersine v. Savage, 96 Me. 57, 51 Atl. 243; Irons v. Webb, 41 N. J. L. 203, 32 Am. Rep. 193; Macomber v. Detroit, L. & N. R. Co. 108 Mich. 491, 32 L.R.A. 102, 62 Am. St. Rep. 713, 66 N. W. 376; Golden v. Glock, 57 Wis. 118, 46 Am. Rep. 32, 15 N. W. 12; Hicks v. Smith, 77 Wis. 146, 46 N. W. 133; Halstead v. Jessup, 150 Ind. 85, 49 N. E. 821; Walcutt v. Treisch, 82 Ohio St. 263, 29 L.R.A. (N.S.) 554, 92 N. E. 423; Plumer v. Prescott, 43 N. H. 277; Alexander v. Bauer, 94 Minn. 174, 102 N. W. 387; Wimbrow v. Morris, 118 Md. 91, 47 L.R.A. (N.S.) 882, 84 Atl. 238; Williams v. Flood, 63 Mich. 491, 30 N. W. 93; Walker v. Johnson, 116 Ill. App. 145; Plummer v. Reeves, 83 Ark. 10, 102 S. W. 376; Keystone Lumber & Min. Co. v. Brooks, 65 W. Va. 512, 64 S. E. 614; C. W. Zimmerman Mfg. Co. v. Daffin, 149 Ala. 380, 9 L.R.A. (N.S.) 663, 123 Am. St. Rep. 58, 42 So. 858; Hoit v. Stratton Mills, 54 N. H. 109, 20 Am. Rep. 119; McRae v. Stillwell, 55 L.R.A. 529, note

4; Hubbard v. Burton, 75 Mo. 67; Butler v. McPherson, 95 Miss. 635, 49 So. 257; Johnson v. Truitt, 122 Ga. 327, 50 S. E. 135; Mahan v. Clark, 219 Pa. 229, 68 Atl. 667, 12 Ann. Cas. 729; Taylor Brown Timber Co. v. Wolf Creek Coal Co. 32 Ky. L. Rep. 1015, 107 S. W. 733; Watson v. Gross, 112 Mo. App. 615, 87 S. W. 104.

Buchanan, J., delivered the opinion of the court:

The controversy in this case grows out of the agreement attached to the agreed statement of facts. By that instrument the defendants sold to the plaintiff all the growing timber (except pine and cedar) on a designated parcel of land, and gave him two years from that date in which "to cut and remove said timber," and a right of way, describing its course, from that land to a public highway. The controversy here depends upon the meaning of the words "to cut and remove," as used in the agreement.

There is scarcely any other subject upon which there is so great a diversity of judicial decision as in the construction of what are known as "timber contracts." Not only have the courts of different jurisdictions construed them differently, but the decisions of the same court have not always been uniform. Some courts hold that the rights of the vendee or grantee in such contracts are a license, others a lease, others an absolute sale, and others a conditional sale. In some cases it is held that the sale or conveyance is absolute, and the requirement to cut and remove the timber within a specified time a mere covenant, the breach of which does not affect the title, but only entitles the vendor to damages when broken, unless by the terms of the deed or contract, expressly or impliedly, the vendee's title is forfeited for failure to cut and remove the timber within the designated time. In other cases it is held that the sale or conveyance is not absolute, but conditional, and that title to such timber as is not cut and removed within the time limit remains in the vendor or grantor.

Whether the sale or conveyance be regarded as absolute or conditional, where the transaction is considered a sale, accounts largely for the different conclusions reached by the courts as to the rights of the parties.

The difference in the rights of the parties under such contracts or conveyances, when held to be absolute and when held to be conditional, is clearly stated in *Green v. Bennett*, 23 Mich. 464, 470, by Judge Christiancy, in the opinion of the court of which Judge Cooley was then a member. In that case it was said, in substance, that under a contract for the sale of all the wood and timber on specified land, to be removed within a designated time, the wood and timber remain the property of the purchaser, though not removed within the time fixed, if the contract is construed as making an absolute sale of the same; and if the sale is conditional, and the provision for removal within the specified time is in the nature of a condition, the purchaser would, if the vendor should insist on the condition, lose all right to the wood and timber not removed within the time specified, and the vendor would have the right to insist on the breach of the condition, and hold the wood not thus removed.

In the case of *Irons v. Webb*, 41 N. J. L. 203, 32 Am. Rep. 193, Chief Justice Beasley, in delivering the opinion of the court, in which such a sale was held not to be conditional, said, in concluding that opinion: "In forming the foregoing opinion, I have laid no stress on the fact that the timber in the present instance was actually cut down before the end of the time limited in the deed for its removal. This has been designedly done, as it is not perceived how such fact can add anything to the force of the exception in the conveyance, in the way of fixing the title in the grantor. I have endeavored to show that the exception is unconditional; and if this be so, by its own efficiency it kept the title to the timber in the plaintiff [the grantor who had reserved the tim-

ber]; but if, to the contrary, the property in the timber was not to remain in the plaintiff unless the trees were removed within such period, then very clearly the mere felling of the trees would not satisfy the requirement of such condition."

The general subject of the construction of instruments such as is in question in this case was carefully examined and considered in *Young v. Camp Mfg. Co.* and *Wright v. Camp Mfg. Co.* reported in 110 Va. 678, 66 S. E. 843, and the conclusion reached that a deed to standing timber, with the right, for a fixed period, to cut and remove the same, does not convey an absolute and unconditional title to the timber, but only conveys title to such as may be cut and removed within the fixed period.

In the subsequent cases of *Brown v. Surry Lumber Co.* 113 Va. 503, 507, 75 S. E. 84; *Quigley Furniture Co. v. Rhea*, 114 Va. 271, 280, 281, 76 S. E. 330, and others, the conclusion reached in that case as to the character of such contracts was approved and followed.

While the facts in those cases and in this as to what had been done under the contracts or deeds were different, the character of the contract in each was substantially the same. Those decisions would seem, therefore, to settle, if decisions can settle a question, that the provisions in such contracts for the cutting and removal of the timber within a fixed period are not covenants, but conditions.

It is insisted, however, by counsel for the plaintiff, that even if the sale in this case be held to be conditional under our decisions, the conditions for cutting and removing only applied to the timber left standing upon the premises at the expiration of the time limit, and not to that which was cut during that period, but not removed from the premises, and especially where it had been manufactured.

It is clear from the language used, taking the words in their ordinary and popular sense, as they must be,

since there is nothing in the case to show that they were understood in a different sense, that it was the intention of the parties that the timber should be cut and removed from the defendants' land within two years. The suggestion that the court in *Wright v. Camp Mfg. Co.* supra, and the cases which follow it, used the words "cut" and "remove" as synonymous, both meaning to sever the trees from the soil, and not necessarily removing them from the land, has no foundation. In *Quigley Furniture Co. v. Rhea*, supra, the words "cut" and "remove" are treated as synonymous with the words "cut and take off." The well-settled rule of construction is that no word in a contract is to be treated as meaningless (as would be the case if "remove" were held to be synonymous with "cut"), if "any meaning reasonable and consistent with other parts of the contract can be given to it." *Stephen Putney Shoe Co. v. Richmond, F. & P. R. Co.* 116 Va. 211, 81 S. E. 93, and authorities cited. There is nothing in the contract to indicate that the word "remove" was not used in its ordinary and popular sense. There is only one time limit fixed by the contract, and that is as applicable to the removal as it is to the cutting of the timber. *Strong v. Eddy*, 40 Vt. 551. Upon what principle of construction can it be said that the time limit applies to the one, and not to the other? The manifest object of the time limit was to fix a period within which the plaintiff was to exercise all the rights acquired under the contract. It cannot be supposed that the owners of the land intended to limit the purchaser's right "to cut" the timber to two years, and give him an indefinite or unlimited time in which to remove it after it was cut, and in the meantime deprive themselves of the use of the land upon which the timber grew, and subject their other lands to a right of way for an indefinite or unlimited time.

To hold that by such a contract it was intended by the parties that

the plaintiff should have two years within which to cut the timber, and after that period had expired he should have a reasonable time within which to remove it, would be to disregard the agreement which they had made for themselves, and make a new one for them. It is clear, not only from the language of the agreement, that the parties intended that the timber must be cut and removed within the time limit, but their subsequent conduct shows that they so understood it. By the agreed statement of facts it appears that at least six months before the end of that period the plaintiff made an effort to purchase from the defendants certain pine trees excepted from the contract in question; that the defendants were willing to sell the same; that the plaintiff made an offer of \$50 for the pine trees, on condition, however, that the defendants would extend the time limit of the said contract for a period of eight months; that the defendants were willing to take the price offered, but informed the plaintiff that the time limit of the said contract would not be extended a single day; that the plaintiff thereupon refused to buy the pine timber, and told one of the defendants "that he intended to cut all the trees included in his contract, and that he would remove the same when he got good and ready, in spite of the contract."

Where, as in this jurisdiction, such sales or conveyances do not give an absolute and unconditional title to the timber, but only give title to such timber as is cut and removed during the time limit, how can the cutting of the timber satisfy the condition

**Timber—sale
for removal—
effect of
manufacture.**

that it was to be removed from the land within the time agreed upon?

How can the performance of one of two conditions satisfy the requirement of the other? "If," as said by Chief Justice Beasley in *Irons v. Webb*, supra, "the property in the timber was not to remain in the plaintiff unless the trees were removed within such period, then very

clearly the mere felling of the trees would not satisfy the requirement of such condition."

It has been held, says Mitchell, J., in delivering the opinion of the court in *King v. Merriman*, 38 Minn. 47, 35 N. W. 570, "in a very few cases, . . . that, if the timber be cut within the time" limited in the contract for its sale, "the property is in the vendee, although not removed within the limitation of the contract;" but such a "doctrine would seem to be based upon the supposed hardships of such a case, rather than upon strict logic."

The contract, when made, was a contract in reference to real estate (*Stuart v. Pennis*, 91 Va. 688, 691, 22 S. E. 509), and the fact that, by cutting or felling the timber it was converted into personalty, did not change the character of the contract and make it one for the sale of personal property, to be governed by the law applicable to such sales. It was impossible to perform the conditions of the contract without severing the trees from the soil and thus converting them into personalty, so that they could be removed from the land. Neither would the expenditure of money or labor in preparing the timber for removal from the land, without actually removing it, satisfy the condition to remove, unless done with consent, express or implied, of the vendor or grantor.

The requirement to remove being a condition, the defendants could have waived it; but there is nothing in this case to show that there was any waiver, or that the timber was manufactured into ties, sawed lumber, pulp wood, and wagon poles with the knowledge of the defendants, much less with their approval or consent, or by reason of any waiver of the condition that the timber, in whatever shape it was, was to be removed within the time limit. On the contrary, it clearly appears that there was no consent or waiver of any kind on the part of the defendants, and that the plaintiff, with full knowledge that perform-

ance of the condition to remove would be insisted on, proceeded deliberately and in defiance of the terms of the contract, not only as written, but as understood by both parties, not to keep and perform the conditions imposed by it.

The court is therefore of opinion that, under the facts of this case, the plaintiff was not entitled to recover, and that the Circuit Court erred in so holding. Its judgment must therefore be reversed, and this court will enter such judgment for the defendant as it ought to have entered.

NOTE.

There is some difference of opinion upon the question involved in the re-

ported case (*SMITH v. RAMSEY*, ante, 32), upon the effect, upon the rule that failure to remove timber within the time specified in a contract causes a loss of whatever right the timber owner possessed, and a reversion to the landowner, of the fact that the timber is cut and manufactured into lumber, ties, or other articles. The decision in *SMITH v. RAMSEY*, that it does not change the rule, is an extreme application, and it is interesting to note that in the subsequent case of *ZIRKLE v. ALLISON*, infra, the court refused to extend the doctrine to the facts of that case. The entire question of effect of failure to remove timber within the time limited in the contract is discussed in the annotation following *ZIRKLE v. ALLISON*, post, 41.

D. T. ZIRKLE, Plff. in Err.,

v.

T. L. ALLISON.

Virginia Supreme Court of Appeals — January 22, 1920.

(126 Va. 701, 101 S. E. 869.)

Timber — removal to other land of vendor — effect.

1. Upon sale of timber standing within certain specified limits, it is removed so as to pass title to the vendee when, under license from the vendor, it is taken out of the limits specified to other land of the vendor to be sawed, although it is not removed entirely from the vendor's land until the time limit has expired.

[See note on this question beginning on page 41.]

— contract for sale — when title changes.

2. Under a contract for sale of timber which requires the timber to be cut and removed by a specified date, the title to the timber never passes out of the grantor until the timber is cut and removed within the time specified.

[See 17 R. C. L. 1085.]

Trial — demurrer to evidence — inferences to be drawn.

3. Upon demurrer to the evidence every inference must be drawn in favor of the person offering it which the jury might have drawn.

[See 26 R. C. L. 1063.]

ERROR to the Circuit Court for Culpeper County (Rutherford, J.) to review a judgment in favor of defendant in an action brought to recover certain lumber alleged to belong to plaintiff, in possession of and detained by defendant. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. William Horgan, Timberlake & Nelson, and Grimsley & Miller, for plaintiff in error:

Defendant never had any right to Zirkle's lumber, under a proper construction of the word "remove," as put upon it by the parties to the contract.

Butler Bros.-Hoff Co. v. Virginian R. Co. 113 Va. 28, 73 S. E. 441; Citizens Bank v. Taylor & Co. 104 Va. 164, 51 S. E. 159; William R. Trigg Co. v. Bucyrus Co. 104 Va. 79, 51 S. E. 174; Virginia & K. R. Co. v. Heninger, 110 Va. 301, 67 S. E. 185; Northrop v. Richmond, 105 Va. 335, 53 S. E. 962; McGuire v. Brown, 114 Va. 235, 76 S. E. 295; 1 Beach, Contr. § 721; Holland v. Vaughan, 120 Va. 324, 91 S. E. 122.

If the language or the words used in a contract are involved in doubt, the practical interpretation put upon such contract, or words, by the parties themselves, as shown by their actions and conduct, is entitled to great, if not controlling, influence.

Bank of Old Dominion v. McVeigh, 32 Gratt. 531; Knick v. Knick, 75 Va. 12; King v. Norfolk & W. R. Co. 99 Va. 625, 39 S. E. 701.

Mr. Edwin H. Gibson for defendant in error.

Prentis, J., delivered the opinion of the court:

D. T. Zirkle instituted his action of detinue against the defendant, to recover about 100,000 feet of sawed lumber then piled and stacked upon the land of the defendant. Issue was joined, and at the conclusion of the plaintiff's evidence the defendant demurred thereto, in which demurrer the plaintiff joined, and the jury returned a verdict assessing the plaintiff's damages, subject to the judgment of the court upon the demurrer. The trial judge sustained the demurrer, and entered judgment for the defendant, and the plaintiff assigns error.

The facts out of which the controversy arises are these:

The parties entered into a contract in these words:

"Contract made and entered into this 4th day of January, 1916, by and between D. T. Zirkle, party of the first part, and T. L. Allison and K. M. Allison, his wife, parties of the second part:

"Witnesseth: That for and in consideration of the sum of \$425 (four hundred and twenty-five dollars), cash in hand paid at and before the signing of this contract, receipt of which is hereby acknowledged, the parties of the second part have this day sold to the party of the first part all the second growth pine and poplar on two tracts, one supposed to contain 25 acres, adjoining the lands of B. B. Green on the one side and the oak woods on the other, tract No. 2 containing about 3 or 4 acres on the east side of the farm of the parties of the second part. The parties of the second part do hereby agree to give eighteen months from January 1, 1916, in which to cut and remove the aforesaid timber.

"As witness the following signatures and seals this the day and date first above written."

Zirkle employed one Houghton to cut and saw the timber covered by the contract, and before Houghton placed his mill for that purpose, Allison showed him the timberland, and then showed him a place for his sawmill. The boundaries of such timberland were clearly pointed out, and the place at which the mill was located was entirely outside of these boundaries, and within the fences inclosing the cultivated land of Allison, which fences entirely separated the timber tracts from such cultivated land. It will be observed that the written contract allows "eighteen months from January 1, 1916, in which to cut and remove the aforesaid timber." It was cut and taken from the location at which it grew, and sawed into lumber at the mill-site location above referred to. It had been sawed into lumber six months before the time when the contract required it to be cut and removed. After the expiration of the said period, Allison, the defendant, refused to allow its removal from such mill site, claiming that under the contract it had not been removed within the time specified, therefore that the plaintiff had lost his right

to remove it, or to claim it as his property.

In support of this contention of the defendant a number of Virginia cases are relied upon. They are: *Young & Wright v. Camp Mfg. Co.* 110 Va. 678, 66 S. E. 843; *Brown v. Surry Lumber Co.* 113 Va. 503, 75 S. E. 84; *Quigley Furniture Co. v. Rhea*, 114 Va. 271, 76 S. E. 330; *Smith v. Ramsey*, 116 Va. 530, ante, 32, 82 S. E. 189; *Hartley v. Neaves*, 117 Va. 219, 84 S. E. 97; *Blackstone Mfg. Co. v. Allen*, 117 Va. 452, 85 S. E. 568; *J. R. Wheeler Co. v. Hite*, 119 Va. 345, 89 S. E. 101.

These cases undoubtedly settle the proposition in Virginia that, under timber contracts which require the timber to be cut and removed by a specified date, the title to the timber never passes out of the grantor until the grantee cuts and removes it within the period of time specified in the contract for so doing; not that there is a forfeiture by the grantee of the timber remaining uncut or unremoved after the time limit, but because it has never become his property, for there is an express condition precedent in the contract itself which precludes the passing of the title from the grantor to him.

The question here, then, is whether, under the contract under which this timber was sold, it has been cut and removed within the prescribed time limit. In determining this question it must be noted that the case was presented to the trial judge upon a demurrer to the evidence, and therefore it was his duty, and is now our duty, to draw every inference in favor of the plaintiff, from the evidence, which the jury might have drawn. Scanning the contract, then,

**Trial—demurrer to evidence—
inferences to be drawn.**

which is to be construed, it is apparent that the parties contracted with reference to the timber lying within certain boundaries, and the parol evidence shows that these boundaries were clearly and definitely

designated and understood by the parties. It was from these premises that the timber was to be cut and removed, and there is nothing in the contract from which it can be inferred that the purchaser had any right to locate a sawmill on any of the adjacent land of the grantor. It does not appear clearly upon what conditions the sawmill was located on the other land of the defendant. It might just as well have been located on the adjacent land of some other person. The jury could not have inferred that it was located there by virtue of any provision in the written contract, for there is nothing therein upon which such an inference can be based, and therefore they could have concluded that it was there located under a parol license from the owner of the land. If so located, then the removal of the timber to this place

under such a parol license was just as clearly a removal of the timber from the premises—that is, the premises to which the contract referred, upon which the timber grew—the boundaries of which were clearly pointed out, as if it had been removed to the land of some other person than the defendant. This being true, we are clear in our view that the demurrer of the defendant should have been overruled.

The doctrine of the cases relied upon will not be extended—certainly not in this case, in which the contract does not so require, and in which such a construction would promote injustice rather than justice.

The language of Burks, J., in *Bank of Old Dominion v. McVeigh*, 32 Gratt. 542, is worthy of repetition in this connection: "When an instrument is susceptible of two constructions, the one working injustice and the other consistent with the right of the case, that one should be favored which standeth with the right."

A case which in its circumstances is quite like this one is *Watson v.*

**Timber—
removal to
other land of
vendor—effect.**

Gross, 112 Mo. App. 615, 87 S. W. 104, and that case supports the view which we have expressed.

The timber has been bought and paid for, the lumber into which it has been manufactured has been removed from the premises referred to in the written contract, and, for

the reasons indicated, we are of opinion that the court erred in sustaining the defendant's demurrer to the evidence. We will therefore enter the judgment upon the verdict of the jury, which the trial court should have entered.

Reversed.

ANNOTATION.

Rights of parties to a timber contract upon failure of purchaser to remove the timber within the time fixed or within a reasonable time.

I. Introduction, 41.

II. Contracts specifying no time for removal:

- a. In general, 42.
- b. Contracts construed as grants in perpetuity, 43.
- c. Contracts construed as requiring removal within a reasonable time:
 1. In general, 51.
 2. Contracts containing a time limit after beginning, but none for beginning, 60.
 3. What is a reasonable time, 61.
 4. Effect of failure to remove:
 - (a) Majority rule, 65.
 - (b) Minority rule, 66.

III. Effect of failure to remove under contracts specifying time for removal:

a. Majority rule:

1. Sale contracts:
 - (a) In general, 70.
 - (b) Doctrine that title passes subject to be divested by failure to remove, 75.
- (c) Doctrine that sale passes to purchaser only so much as he removes within the time limited, 76.

I. Introduction.

The question under annotation arises under two general forms of contracts. There is (1) the ordinary case of a sale and conveyance of standing timber, and (2) a reservation or exception of the timber in a deed of the land. In either event the timber is, for a time at least, except in case of a mere license, owned by one person, and the land by another.

III. a, 1—continued.

(d) Doctrine that sale is only a license, 78.

2. Exceptions and reservations in deed of land, 79.

3. Theory, 80.

b. Minority rule:

1. In general, 82.
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IV. Extension of time:

- a. In general, 85.
- b. By operation of law, 93.

V. Effect of fact that trees have been cut or manufactured:

a. Doctrine that title does not revert:

1. In general, 95.
2. Theory, 99.

3. Rights and remedies of parties, 101.

b. Doctrine that title does revert, 102.

c. Special contracts, 104.

VI. Rights upon subsequent sale of land:

a. Doctrine that title passes to grantees of land, 106.

b. Doctrine that title reverts to original owner of land, 108.

VII. Actions:

- a. Under majority view, 110.
- b. Under minority view, 114.

While the term "purchaser" is not accurately applied to the timber owner in the second case, to avoid a troublesome repetition, that term has been used in some parts of this annotation to cover not only the person who buys the timber and receives a conveyance thereof, but also a grantor who has sold the land reserving or excepting the timber from his conveyance. In a great many of the timber

contracts that have been before the courts the purchaser has been given a specified time in which to cut and remove the timber; in other contracts, in which no time is specified, he is held to have a reasonable time in which to cut and remove. This annotation is concerned primarily with the rights of the parties upon the failure of the purchaser to cut and remove the timber within the time stated, or within a reasonable time where no time is stated in the contract. In order adequately to present the cases dealing with contracts specifying no time for removal, it has been deemed advisable to consider the question which precedes the one above outlined, viz., whether, when no time is specified for cutting and removal in a contract of sale of timber, or in a deed of the land reserving or excepting the timber, the purchaser or grantor, as the case may be, will be held obligated to remove it within a reasonable time, or whether he will be held to have a right to have the timber remain on the land in perpetuity.

The rights as between the purchaser of the timber and a subsequent purchaser of land without exception of timber, as illustrated by *Christopher v. Curtis Attalla Lumber Co.* (1912) 175 Ala. 484, 57 So. 837, are not considered herein. Nor is the right to partition before expiration of the time limited, or a reasonable time, — a question involved in *Harrell v. Mason* (1911) 170 Ala. 282, 54 So. 105, Ann. Cas. 1912D, 585, — considered. The rights upon a conveyance of mineral rights with the right to use timber have also been excluded. See *Kennedy Stave & Cooperage Co. v. Sloss Sheffield Steel & I. Co.* (1902) 137 Ala. 401, 34 So. 372, a case upon this point. And oral licenses, such as was involved in *Putney v. Day* (1833) 6 N. H. 430, 25 Am. Dec. 470, have been excluded.

The validity of a reservation or exception of timber in a deed of the land is assumed in this discussion. For a reservation held invalid because made to others than the grantor, see *Young's Petition* (1877) 11 R. I. 636.

II. *Contracts specifying no time for removal.*

a. *In general.*

The effect to be given a sale and conveyance of standing timber depends upon the intention of the parties. The owner may convey an estate in fee simple in the trees, or he may sell an estate determinable upon the failure to remove the trees within a time stated, or within a reasonable time, or he may give a mere license to cut timber for the period stated.

Considerable conflict of opinion has developed in case of contracts of sale in which no time for removal is stated, as to whether an estate in fee simple is conveyed in the trees, or an estate determinable by failure to remove within a reasonable time. Primarily, this is a question of intention. *Hicks v. Phillips* (1912) 146 Ky. 305, 47 L.R.A.(N.S.) 878, 142 S. W. 394; *Eastern Kentucky Mineral & Timber Co. v. Swann-Day Lumber Co.* (1912) 148 Ky. 82, 46 L.R.A.(N.S.) 672, 146 S. W. 438. It is settled that a sale of timber may be made so as to pass to the purchaser a perpetual right to have the timber remain on the land, or a perpetual right to enter and remove it.

Florida.—*McNair & W. Land Co. v. Adams* (1907) 54 Fla. 550, 45 So. 492; *Cummer Co. v. Yager* (1918) 75 Fla. 729, 79 So. 272.

Georgia.—*Baxter v. Mattox* (1898) 106 Ga. 344, 32 S. E. 94; *North Georgia Co. v. Bebee* (1907) 128 Ga. 563, 57 S. E. 873.

Iowa.—*Baker v. Kenney* (1910) 145 Iowa, 638, 189 Am. St. Rep. 456, 124 N. W. 901.

Mississippi.—*Butterfield Lumber Co. v. Guy* (1908) 92 Miss. 361, 15 L.R.A.(N.S.) 1123, 131 Am. St. Rep. 540, 46 So. 78; *Forest Product & Mfg. Co. v. Buckley* (1914) 107 Miss. 897, 66 So. 279.

Montana.—*R. M. Cobban Realty Co. v. Donlan* (1915) 51 Mont. 58, 149 Pac. 484.

Texas.—*Lodwick Lumber Co. v. Taylor* (1906) 100 Tex. 270, 123 Am. St. Rep. 803, 98 S. W. 238; *Houston Oil Co. v. Hamilton* (1918) 109 Tex.

270, 206 S. W. 817, reversing (1913)—Tex. Civ. App. —, 153 S. W. 1194.

Virginia.—Johnson v. Powhatan Min. Co. (1920) 127 Va. 352, 103 S. E. 703.

Such a right is not lost by failure to remove the timber within a reasonable time. Wilson Lumber Co. v. D. W. Alderman & Sons Co. (1908) 80 S. C. 106, 128 Am. St. Rep. 865, 61 S. E. 217; Chapman v. Dearman (1915) — Tex. Civ. App. —, 181 S. W. 808, affirmed in (1921) — Tex. —, 229 S. W. 1112. A purchaser of timber was held not to have forfeited his right to the same, where there was nothing in the agreement requiring him promptly to remove the timber, and his vendor had not demanded that he do so, in Davidson v. Moore (1896) 18 Ky. L. Rep. 563, 37 S. W. 260.

It is stated in some cases that an agreement giving the purchaser a right to have the trees remain on the land in perpetuity is so unreasonable in its nature that no contract will be held to have this effect unless it is plainly manifest that such was the intention of the parties. McNair & W. Land Co. v. Adams (1907) 54 Fla. 550, 45 So. 492; Cummer Co. v. Yager (1918) 75 Fla. 729, 79 So. 272; McRae v. Stillwell (1900) 111 Ga. 65, 55 L.R.A. 513, 36 S. E. 604; Johnson v. Powhatan Min. Co. (1920) 127 Va. 352, 103 S. E. 703.

A few cases disapprove of contracts for an indefinite time. A contract for the purchase and sale of timber, in which the purchaser was to have "the full term of five years within which to cut and remove the timber hereby conveyed, such term to commence from the time said party of the second part begins to manufacture said lumber into wood or lumber," was held void in Gay Mfg. Co. v. Hobbs (1901) 128 N. C. 46, 83 Am. St. Rep. 661, 38 S. E. 26. Referring to the provision of the contract as to the time of commencement, the court said: "We think that that feature of the contract renders the whole void. The contract may be treated as a lease, or a term for years; for a lease can be made

of the right to cut trees and dig minerals. An indispensable legal requirement to the creation of a lease for a term of years is that it shall have a certain beginning and a certain end. . . . But there is an attempt to fix the beginning of the lease in the contract before us. It is when the plaintiff shall begin to manufacture the timber into lumber. That act on the part of the plaintiff may never take place; it is entirely uncertain. The plaintiff cannot be made to commence to manufacture the timber into wood or lumber, and no rule can be thought of by which the commencement of the term can be fixed. It is evident from the reading of the contract that the fee in the land was not to pass, and yet no one can tell how long the land, and the other timber upon it, may remain useless to the defendants and to the commonwealth under the indefinite and uncertain time at which the lease is to begin." Similar decisions appear in Rumbo v. Gay Mfg. Co. (1901) 129 N. C. 9, 39 S. E. 581, and Monds v. Elizabeth City Lumber Co. (1902) 131 N. C. 20, 42 S. E. 334, affirmed on rehearing in (1903) 134 N. C. 116, 46 S. E. 24. But these cases are expressly overruled in Hawkins v. Goldsboro Lumber Co. (1905) 139 N. C. 160, 51 S. E. 852. It is stated in Warren v. Short (1896) 119 N. C. 39, 25 S. E. 704, that a deed of timber might be drawn so as to pass all trees of a certain size for an indefinite period.

b. Contracts construed as grants in perpetuity.

When a sale of standing timber conveys a right to have it remain on the land in perpetuity, being, as above stated, a question of intention, it is difficult, if not impossible, to lay down any general test to determine the character of the grant or sale. In the following cases a grant in perpetuity was held to have been intended:

A deed which conveys all "of the timber, wood, logs, and growing trees, suitable for saw-log purposes or being manufactured into lumber, now upon, or that may hereafter grow upon, all or any of the said lots of land," and also

conveys to the grantee, his heirs, and assigns, the right and privilege, "now and at any and all times hereafter," to enter upon the land for the purpose of cutting such timber, is held in *Baxter v. Mattox* (1898) 106 Ga. 344, 32 S. E. 94, clearly to show an intention to convey a license in perpetuity to cut the timber, but it is added that, if under any peculiar circumstances the doctrine of reasonable time could be applied to the rights of the grantee under such a conveyance, there was nothing in the record in the case at bar to indicate that a reasonable time had expired.

A perpetual right of entry to cut and remove trees was held to have been created in *North Georgia Co. v. Bebee* (1907) 128 Ga. 563, 57 S. E. 873, by a conveyance granting "unto the party of the second part, his heirs and assigns forever," the described trees, "together with the full and unre-served right of way over and through any and all the above-described lands, or any other lands that are now or may be hereafter owned or controlled by said party of the first part, for the manufacture or removal, at any time, of any and all timber of the party of the second part on said lands, . . . also the right to cut and use at any time all timber necessary for the manufacture or removal of said timber," and containing a provision, also, for the payment of damage to growing crops or lands in the manufacture and removing of such timbers, and a general warranty to the parties of the second part, their heirs and assigns. The court in that case says, in reliance upon *Baxter v. Mattox* (Ga.) *supra*, that "where the owner of land grants the trees growing thereon to another and his heirs, with liberty to cut and carry them away at his pleasure forever, the grantee acquires an estate in fee in the trees with an interest in the soil sufficient for their growth, while the fee in the soil itself remains in the grantor."

A conveyance reciting that the grantor had "bargained and sold and by these presents do grant and convey unto the said party of the second part,

his executors, administrators, and assigns, all timber and growth of timber, . . . with privilege at all times to enter upon the above-described lands for the purpose of cutting and hauling timber therefrom, . . . to have and to hold the same under the said party of the second part, his executors, administrators, and assigns forever," is a grant in perpetuity of the right to take timber. *Baker v. Kenney* (1910) 145 Iowa, 638, 139 Am. St. Rep. 456, 124 N. W. 901. The writing in question was headed "Bill of Sale," and a part of the description in the warranty was of "goods and chattels," and it was recorded in the chattel mortgage record. To these facts the court says no consideration need be given. In holding that the instrument conveyed a right in perpetuity, the court says: "The language of the instrument before us indicates that the parties contemplated the right on the part of defendant and his administrator or assigns, to take timber and growth of timber from the described land. There is not only a failure to fix a time limit, but the habendum clause expressly describes the right as one which is to exist forever. It is true in neither the granting clause nor the habendum are the heirs of the grantee mentioned, and at common law the grant would be construed to be for life only. But in this case 'the term "heirs" or other technical words of inheritance are not necessary to create and convey an estate in fee simple.' Code, § 2913. . . . If a grantor, desiring to prepare an instrument which should convey to the grantee a fee-simple title to the incorporeal hereditament described in the instrument as the right to take timber and growth of timber from designated land, should attempt to frame a deed for that purpose, he could not, having regard to the laws of this state, do so in apter words than those used in the instrument before us, and we reach the conclusion that such was his purpose."

In holding that a grant of timber conveyed an interest to the grantee

which was not lost by failure to remove within a reasonable time, the court in *Butterfield Lumber Co. v. Guy* (1908) 92 Miss. 361, 15 L.R.A.(N.S.) 1123, 131 Am. St. Rep. 540, 46 So. 78, relies largely upon the fact that, according to the law of that state, a sale and conveyance of timber is a sale of an interest in realty. It is held that such conveyance vests an absolute title in the trees, independent of the land itself, and such title is not lost or forfeited by failure to remove within a reasonable time. The *Butterfield Case* was approved and followed in *Forest Product & Mfg. Co. v. Buckley* (1914) 107 Miss. 897, 66 So. 279, in case of a contract conveying and warranting to the purchaser all timber and timber-like trees being, growing, and standing upon the land, with the right to enter, cut, and remove the same "at pleasure."

A grantee of land in whose deed timber has been excepted cannot claim title to the timber on the theory that it was to have been removed within a reasonable time, and has not been so removed. *R. M. Cobban Realty Co. v. Donlan* (1915) 51 Mont. 58, 149 Pac. 484. The deed involved in this case was in the ordinary form of a deed conveying real estate; it expressed a present consideration fully paid, its subject-matter was timber and growing trees, which were realty under the laws of the state, and it purported by appropriate language to convey this realty to the grantee, his heirs and assigns, forever.

The conveyance in *Lodwick Lumber Co. v. Taylor* (1906) 100 Tex. 270, 123 Am. St. Rep. 803, 98 S. W. 238, after reciting a consideration, continued: "I have bargained, sold, and released, unto the Hope Lumber Company, heirs and assigns, forever, in fee simple, the following described tract or parcel of land, to wit: All the timber on . . . and I do hereby bind myself, heirs, and legal representatives to warrant and forever defend, all and singular, the title to the above-mentioned premises unto the said Hope Lumber Company, heirs and assigns," etc. The court says: "The deed unmistakably

expresses the intention to convey the timber as an interest in the land on which it stood, and to convey it in fee simple and forever. It is a well-settled proposition that trees may be so conveyed or reserved in a deed as to leave in one person a title in fee in the soil generally, and in another a like title in the timber. Where this is the case there goes with the title to the timber the right to the use of the soil for its sustenance and of entry upon the land for its enjoyment. Consequently no such limitation as that the timber must be removed within a reasonable time can be imported by construction into such a grant or reservation. The very terms of the deed, when it says the title is conveyed in fee simple forever, answer any question that might otherwise arise as to the nature and duration of the right granted." This case is followed in *Jones v. Lodwick Lumber Co.* (1907) — Tex. Civ. App. —, 99 S. W. 736, a case involving a similar contract.

The deed involved in *Chapman v. Dearman* (1916) — Tex. Civ. App. —, 181 S. W. 808, affirmed in (1921) — Tex. —, 229 S. W. 1112, recited that in consideration of a stated sum the grantors have granted, sold, and conveyed unto the purchasers all the timber situated on certain described lands, and the grantors further authorize and empower the purchasers, their heirs, assigns, and legal representatives, to enter upon the land, cut and remove the timber. The habendum clause was, To have and to hold the above-described premises, together with all and singular the rights and appurtenances unto the said purchasers, "their heirs and assigns, forever." As may be seen, by comparison with some of the deeds involved in the Texas cases *infra*, this deed was very similar to some which were held to convey only a chattel interest, requiring the timber to be removed within a reasonable time.

A conveyance by the owner of land to the purchaser of "the right of entering upon said land and removing

said timber and trees from the same at the pleasure of said grantee, his heirs, personal representatives, and assigns . . . to have and to hold the said granted property and privileges to the said G. H. Mooers, his heirs, personal representatives, and assigns forever," was interpreted in *France v. Deep River Logging Co.* (1914) 79 Wash. 336, 140 Pac. 361, Ann. Cas. 1916A, 238, to convey to the grantor a continuing, perpetual right, for all time, to enter upon the land and remove the timber.

The deed involved in *Houston Oil Co. v. Hamilton* (1918) 109 Tex. 270, 206 S. W. 817, recited that in consideration of a stated sum the grantor bargained, sold, transferred, and delivered unto the grantee all the pine timber on the described tract of land, to have and to hold the timber, together with the right of way for the purpose of removing the timber, unto the said purchaser, "its successors and assigns, forever." The court says that this language admits of no other construction than as investing the purchaser with the right to have the described timber remain on the land until the purchaser or its assigns may elect to remove and appropriate the same. The language is, in substance, that the purchaser, "its successors and assigns, shall forever be entitled to have and to hold both the timber and the right of way to, upon, through, and across the land for the purpose of removing the timber, and the grantor binds himself, his heirs, executors, and administrators to forever warrant and defend unto the lumber company and its assigns the title to the timber and the license to enter at will on the land for the removal of the timber. As if to avoid any possibility of this habendum and warranty being so construed as to require a removal at any time other than at the free and unrestrained will of the purchaser, the clause is inserted that the grantee shall have 'all the time it demands in which to remove said timber off said lands.'"

Compare with *Brown v. Surry*

Lumber Co. (1912) 113 Va. 503, 75 S. E. 84, and *Hawkins v. Goldsboro Lumber Co.* (1905) 139 N. C. 160, 51 S. E. 852, *infra*, II. c. 2, as to a clause giving the purchaser all the time he desires.

An absolute conveyance in fee simple, without conditions or limitations, of trees and timber suitable at the time for milling purposes, conveys an estate in the timber which is not lost by failure to remove it within a reasonable time. *Wilson Lumber Co. v. D. W. Alderman & Sons Co.* (1908) 80 S. C. 106, 128 Am. St. Rep. 865, 61 S. E. 217. The fact that the grantee has entered and cut part of the timber and then abandoned his operation, does not deprive him of the right to enter thereafter and cut other timber. The deed involved in this case not only granted the timber, but granted the right of ingress, egress, and regress for the purpose of "cutting and removing" the timber, and also the right to do any and all things whatsoever that may be necessary or convenient for "cutting and removing" the timber.

The fact that has led some courts to hold that the timber must be removed within a reasonable time is that it appeared from the contract that a removal was intended. This argument was made to the court in *R. M. Cobban Realty Co. v. Donlan* (1915) 51 Mont. 58, 149 Pac. 484. In answer the court says: "This argument makes a grant of timber in perpetuity well-nigh impossible, since removal is contemplated at some time during the life of the timber in almost every case. It requires us to imply that, though given as a mere incident to the grant of the timber,—which grant, if language has any value, is in perpetuity,—the right of entry is limited in time, and, with that implication as to the incident, to condition a grant of the principal thing, otherwise unconditioned. . . . A grant does not follow its incidents, but these follow, and, when expressed in general terms, take their character from the interest to which they are attached. . . . In its essentials, deed A [the deed

conveying the timber] conveying the timber, with the right of entry to cut and remove the same, differs not from a grant or reservation of coal or minerals, with a similar right of entry to mine and remove." The fact that it was intended that the timber should be removed was held not conclusive that it must be removed within a reasonable time, in *Butterfield Lumber Co. v. Guy* (1908) 92 Miss. 361, 15 L.R.A. (N.S.) 1123, 131 Am. St. Rep. 540, 46 So. 78. In that case the contract which conveyed and warranted the timber also contained the further provision: "We further convey the right to enter upon said land with log carts and log wagons to remove said timber off said land." The deed involved in *Houston Oil Co. v. Hamilton* (1918) 109 Tex. 270, 206 S. W. 817, included a grant of the right of way upon the land for the purpose of removing the timber. The court says: "The owner of growing-timber land certainly can, by contract, invest a purchaser or his assigns with title to the timber as an interest in the land, or with the right to cut and remove the timber, or any part thereof, at such time or times throughout the future as the purchaser or his assigns may elect, and to appropriate the timber after it has become a chattel by severance. . . . Where the terms of a writing plainly evidence the intent of the owner to grant to a purchaser or his assigns a perpetual estate in growing trees, as part of the land, or a right, to be exercised at any time, at the will of the purchaser or his assigns, to enter the land and sever and appropriate the trees, then such writing cannot be construed as implying that the trees must be removed within only a reasonable time, for an obligation cannot be implied in contradiction of the precise agreement by which the parties have bound themselves." The contract indicated that the timber was to be removed, in *Wilson Lumber Co. v. D. W. Alderman & Sons Co.* (S. C.) supra.

That a reservation of the wood and trees to the grantor and "his heirs, forever," reserves a title of inherit-

ance to the wood and trees then on the tract indicated, is held in *Putnam v. Tuttle* (1857) 10 Gray (Mass.) 48.

In *Cawthon v. Stearns Culver Lumber Co.* (1910) 60 Fla. 313, 53 So. 738, in the case of a conveyance of all the pine timber suitable for saw logs that there "is now, or may be hereafter," on the land, with the privilege of free ingress and egress at any and all times to remove the timber, the court says: "While in a conveyance of growing timber intended to be removed from the land, where no time is specified for the removal, a reasonable time may be implied to be determined from all the facts and circumstances of the particular case, yet where the conveyance contemplates future growth of at least some of the trees before their removal, and an indefinite right to remove is given, even though an intention to remove the timber appears by the conveyance, the mere passage of time without removal may not of itself, in the absence of injury or undue advantage, terminate the vendee's right to take the timber from the land. In this case the conveyance of the land was made in 1890, and the proceeding to prevent the removal of the timber was begun in 1906. As the conveyance is of 'all the pine timber suitable for saw logs that there is now or may be hereafter on the "land," with privilege of free ingress and egress at any and all times . . . for the purpose of removing said timber,' the mere lapse of the time stated does not terminate the grantee's right to take the timber, no other circumstance of injury or undue advantage being shown."

Some doubt is expressed in *Gregg v. Birdsall* (1866) 53 Barb. (N. Y.) 402, as to whether the owner of land, who sold the same, reserving the timber without fixing any time for removal, could be limited as to time for removal. The court says: "This exception and reservation were absolute in terms, and unlimited as to the period when the act of removal and manufacture should be exercised." And the court adds; "If any time could be fixed by the act of the

adverse party, or of a judicial tribunal, within which the power of removal and manufacture was to be exercised (which I think doubtful), it should be in the future. Notice should be given to the defendant to exercise his power of removal within some time to be named, so as to enable him to obtain the benefit of his reservation; and he should not be deprived of his property or reserve rights by an allegation that a reasonable time for removal and manufacture had already elapsed, and therefore his rights were extinguished, and this without notice that the plaintiffs wished him to remove his property from their premises." The court says further that the right of the grantor to enter and remove the timber is not extinguished by delay in its exercise; that the parties to the agreement have not seen fit to impose any limitations of time in the conveyance in regard to the exercise or enjoyment of these privileges; and that, if any limitation can now be interposed, it cannot in equity be done without allowing a reasonable time in the future for the exercise of the rights. That the rights under such a contract must be terminated by notice, and the expiration of a time after such notice, is directly contradicted by the decision in *Decker v. Hunt* (1906) 111 App. Div. 821, 98 N. Y. Supp. 174, where the right of one who had reserved a right to the removal of timber in selling land was held to expire by the expiration of a reasonable time. The court states that the grantor who thus reserved the timber, together with those to whom he transferred the right, acquired the right to cut and take away so much of the timber as they should cut and take away within a reasonable time after the reservation, and that, at the expiration of such time, so much thereof as remained became the property of the owner of the land on which the timber was situated. It appeared in the *Decker* Case, however, that the owner of the timber right and the owner of the land had agreed, at a time long previous to the suit, that

the timber should be taken off within four years, and this seems to be treated by the court as some evidence of what the parties regarded as a reasonable time. The question of notice receives a further discussion in subd. VII. a, *infra*.

It seems to have been the opinion of the court in *Warren v. Leland* (1847) 2 Barb. (N. Y.) 613, that a written, unsealed contract, whereby the owner of land bargained and agreed to sell to another for a stated consideration the pine timber on certain described lots, conveyed to the purchaser a right to take the time necessary in removing the timber, although in one place it is stated that he had the right to cut and take off the same "within a reasonable or indefinite time." This seems to be a contradiction in terms.

A similar rule has been applied where timber is excepted or reserved from a conveyance of land, and there is nothing to show that a severance of the timber was contemplated; a title is held to remain in the grantor, which is not defeated by failure to remove the timber. *Walters v. Sheffield* (1918) 75 Fla. 505, 78 So. 539; *Baustic v. Phillips* (1909) 134 Ky. 711, 121 S. W. 629; *Hicks v. Phillips* (1912) 146 Ky. 305, 47 L.R.A. (N.S.) 878, 142 S. W. 394; *Ford Lumber Co. v. Cornett* (1912) 146 Ky. 457, 142 S. W. 713, rehearing denied in (1912) 148 Ky. 25, 145 S. W. 1105; *GABBARD v. SHEFFIELD* (reported herewith) ante, 1; *Howard v. Lincoln* (1836) 13 Me. 122; *Goodwin v. Hubbard* (1860) 47 Me. 596; *Wait v. Baldwin* (1886) 60 Mich. 622, 1 Am. St. Rep. 551, 27 N. W. 697, but see *infra*, this subdivision; *Skamania Boom Co. v. Youmans* (1911) 64 Wash. 94, 116 Pac. 645; *Healy v. Everett & C. V. Traction Co.* (1914) 78 Wash. 628, 139 Pac. 609.

This has been held true in case of a reservation of timber "in order to procure it for the purpose of supplying a sawmill." The owner of land which had been granted to him in a deed in which the grantor reserved title to timber, no time being mentioned therein, cannot terminate the right of his grantor in the timber

by notice, and failure of the grantor to remove within a reasonable time. *Knotts v. Hybrick* (1859) 46 S. C. L. (12 Rich.) 314. The court says: "The reservation of growing timber, and of permanent roads through uncultivated lands in order to procure it for the purpose of supplying a sawmill, indicates a continuing interest, the endurance whereof is not limited by any term used in the deed."

Where it is the manifest understanding of the parties that the timber was not merely reserved, with the right to remove the same from the land, but that it was actually excepted, and intended to be excepted, from the operation of the original deed, the title in fee simple, with the right to have it remain on the land in perpetuity, remains in the grantor. *Sears v. Ackerman* (1903) 138 Cal. 583, 72 Pac. 171. The grantor who has thus excepted the timber from the operation of his deed may maintain an action in damages against a grantee of the land, who has destroyed some of the timber, and is entitled to an injunction restraining the owner of the land from destroying any more.

A conveyance of land in fee, and a reconveyance by the grantee to the grantor, his heirs and assigns, of all the trees and timber standing and growing on the land, forever, with free liberty to cut and carry away the trees and timber at all times, were construed together, and as thus construed were held to be, in effect, a grant with a reservation of the trees, and it was held in *Clap v. Draper* (1808) 4 Mass. 266, 3 Am. Dec. 215, that this was an estate of inheritance that continued in perpetuity.

It is held that such a right, however, may be lost by long negligence and disuse; for instance, in *Ten Broeck v. Livingston* (1815) 1 Johns. Ch. (N. Y.) 357, where a deed in fee contained the reservation of the right of "cutting and hewing timber and grazing in the wood not appropriated or fenced in," it was held that the right reserved ceased as soon as the premises were fenced in by the grantee, especially where it appeared

that the premises had been inclosed for about thirty years, and the right during that period had not been claimed or exercised.

Examples of exceptions and reservations which reserved the timber in perpetuity follow: A title to the timber with right to have the same remain on the land was held to have been excepted from a conveyance in *Hicks v. Phillips* (1912) 146 Ky. 305, 47 L.R.A. (N.S.) 878, 142 S. W. 394, by a reservation in a deed reading as follows: "Said Phillips reserved the timber on the left-hand side of the road, . . . also all the rails made, and cut timber for rails, or other purposes, lying on said land." It was urged in this case that because the word "reserved" was used in the deed, the grantor retained merely the privilege or right to cut the timber, but this contention was denied. Petition for rehearing overruled in (1912) 148 Ky. 670, 47 L.R.A. (N.S.) 882, 147 S. W. 42. That the fact that a removal of the timber was intended is not conclusive against a grant in perpetuity is held in *Baustic v. Phillips* (1909) 134 Ky. 711, 121 S. W. 629. The exception there was of the timber "and all rights to remove same off of said land." The court said: "In the case under consideration, however, the grantors did not reserve to themselves the mere right to cut and remove the timber. They excepted from the provisions of the deed the timber in question. Therefore, the title never passed to the grantees, but remained in them." A deed conveying land in which the grantor reserved unto himself, his heirs and assigns, "all the timber on the above-described premises, and the right to enter into and upon the same for the purpose of removing said timber, and the construction and maintenance of the logging road thereon forever," was treated as a reservation of a right in perpetuity to remove the timber in *Skamania Boom Co. v. Youmans* (1911) 64 Wash. 94, 116 Pac. 645. The only contention, however, seems to have been that because the word "forever" was used in connection with the clause relating

to the construction and maintenance of the logging road, and was separated from the remainder of the reservation by a comma, that it related only to the construction of the road. This contention, however, was denied by the court. A reservation in a sale of land of all the merchantable timber, together with the right and privilege of going upon the land for cutting and removing same, and containing the provision, "the acceptance of this deed and having the same recorded being an agreement to said reservations, and a confirmation of said privilege and right of way, irrevocable until the removal of said timber, reserved to the grantor a right to remove the timber at any time in the future he sees fit." The word "irrevocable" in the deed was held to be equivalent to the word "forever," in the *Skamania Boom Co. Case*, (Wash.) supra. *Healy v. Everett & C. V. Traction Co.* (1914) 78 Wash. 628, 139 Pac. 609.

That a reservation of timber in deed of the land reserves title in perpetuity in the grantors seems to be the opinion of the court in *Shenandoah Land & Anthracite Coal Co. v. Clarke* (1906) 106 Va. 100, 55 S. E. 561, where an injunction against his cutting and removing the timber was denied. The chief dispute in this case arose over an addendum written on the deed, giving the grantee the right to cut and use whatever timber he may want from time to time.

An exception in a deed conveying real estate of "a certain lot of timber" growing on a portion of the land granted, for the benefit of a stranger to the instrument, is held in *Stone v. Stone* (1909) 141 Iowa, 438, 20 L.R.A. (N.S.) 221, 119 N. W. 712, 18 Ann. Cas. 797, to be an exception of the timber rather than of the land itself, for the benefit of the person named personally, and terminates with his death, the fee then being in the grantee in the deed.

Some cases have made the distinction to rest upon whether the timber is excepted from the conveyance, or only the right to cut and remove; if

the former, the right to the timber is not lost by failure to remove it within a reasonable time. *Bardon v. O'Brien* (1909) 140 Wis. 191, 133 Am. St. Rep. 1066, 120 N. W. 827. The term used is not important, that is, whether the term is "reserved" or "excepted." In fact, in this case, the word "reserving" is used, but the court holds that where the timber is reserved it is an exception, since the timber is part of the realty and would have passed to the grantee but for the exception, and that the property in the timber continues in the grantor with the right in so much of the soil as is necessary to sustain it, while if the right to cut and remove is reserved, it is not an exception.

The title to the timber being in the purchaser, or in the grantor of the land who has excepted or reserved the timber from his deed, the rights incident to that title follow. Ejectment lies in favor of the grantor, who has reserved the timber, to recover the same. *Walters v. Sheffield* (1918) 75 Fla. 505, 78 So. 539. He may maintain replevin to recover the trees, where the timber has been severed without his permission or authority. *Wait v. Baldwin* (1886) 60 Mich. 622, 1 Am. St. Rep. 551, 27 N. W. 697. The owner of the trees may maintain an action in trespass, for breaking the close, against the owner of the land who has cut and carried away the trees. *Clap v. Draper* (1808) 4 Mass. 266, 3 Am. Dec. 215. He may recover the value of the trees cut and removed by the landowner. *Skamania Boom Co. v. Youmans* (1911) 64 Wash. 94, 116 Pac. 645. The grantee of the land cannot recover the value of the timber of one to whom the grantor conveyed the same, and who removed it after what was claimed to be a reasonable time. *Baustic v. Phillips* (1909) 134 Ky. 711, 121 S. W. 629. The owner of the land is not entitled to come into equity to have the deed canceled, on the theory that so long as the timber stands on the land the land is useless to him. *Butterfield Lumber Co. v. Guy* (1908) 92 Miss. 361, 15 L.R.A. (N.S.) 1123, 131 Am. St. Rep. 540, 46

So. 78. Nor can the owner of the land have the land, together with the trees growing thereon, sold, and the proceeds divided between the landowner and the purchaser of the timber. It is said that the owner of the land and the owner of the timber do not hold the property in question either as joint tenants, tenants in common, or copartners, therefore they do not come within the terms of the statute as to partition. *Forest Product & Mfg. Co. v. Buckley* (1914) 107 Miss. 897, 66 So. 279.

In *Wilson v. Marsee* (1915) 166 Ky. 487, 179 S. W. 410, a grantor of land conveyed by a deed which contained an habendum clause as follows: "To have and to hold the same forever with the condition and promise Marsee and Amanda Marsee [the grantors] have free concurrence to timber." Thereafter the grantor exercised the right of going on the land and hauling timber therefrom, and frequently cut timber and made it into boards, staves, and slats, and on a number of occasions employed the grantee to assist him in the work. Upon an action by the grantee to quiet title to the land in question, the court divided the timber equally between grantor and grantee.

c. Contracts construed as requiring removal within a reasonable time.

1. In general.

It is announced generally in some cases that in case of a contract of sale of standing timber, in which no time for removal is specified, the purchaser has only a reasonable time in which to effect the removal.

Alabama.—*Goodson v. Stewart* (1908) 154 Ala. 660, 46 So. 239.

Kentucky.—*Oates v. Yeargin* (1909) — Ky. —, 115 S. W. 794.

Michigan.—*Ferguson v. Arthur* (1901) 128 Mich. 297, 87 N. W. 259.

Oklahoma.—*Mitchell-Crittenden Tie Co. v. Crawford* (1916) — Okla. —, 160 Pac. 917.

New Hampshire.—*Hoit v. Stratton Mills* (1873) 54 N. H. 109, 20 Am. Rep. 119; *Kidder v. Flanders* (1905) 73 N. H. 345, 61 Atl. 675.

South Carolina.—*Berry v. Marion County Lumber Co.* (1917) 108 S. C. 108, 93 S. E. 328, Ann. Cas. 1918E, 877.

Tennessee.—*Carson v. Three States Lumber Co.* (1902) 108 Tenn. 681, 69 S. W. 320.

Texas.—*Houston Oil Co. v. Boykin* (1918) 109 Tex. 276, 206 S. W. 815.

Vermont.—*Deerfield Lumber Co. v. Lyman* (1915) 89 Vt. 201, 94 Atl. 837.

Virginia.—*Adams v. Hazen* (1918) 123 Va. 304, 96 S. E. 741; *Johnson v. Powhatan Min. Co.* (1920) 127 Va. 352, 103 S. E. 703.

Canada.—*Dempster v. Russell* (1912) 3 Ont. Week. N. 719, 21 Ont. Week. Rep. 449, 2 D. L. R. 14.

It is announced generally in other cases that, under a deed conveying all the "merchantable" standing timber of a certain description which specifies no time for removal, the grantee has a reasonable time for such removal. *Liston v. Chapman & D. Land Co.* (1905) 77 Ark. 116, 91 S. W. 27; *Hall v. Wellman Lumber Co.* (1906) 78 Ark. 408, 94 S. W. 43; *Garden City Stave & Heading Co. v. Sims* (1907) 84 Ark. 603, 106 S. W. 959; *Fletcher v. Lyon* (1909) 93 Ark. 5, 123 S. W. 801; *Smith v. Dierks Lumber & Coal Co.* (1917) 130 Ark. 9, 196 S. W. 481; *Young v. Cowan* (1918) 134 Ark. 539, 204 S. W. 304.

The failure of a purchaser to cut timber, owing to his inability to operate a mill, was held to result in a forfeiture of his rights under a contract providing that, if at any time it became impossible for the purchaser to cut the timber, it should revert to the vendor, in *Adams v. Young* (1921) 125 Miss. 748, 88 So. 324.

The court in *Penley v. Emmons* (1918) 117 Me. 108, 102 Atl. 972, says: "The principle is too elementary to need the support of authority, but when a time is not specified for the performance of a contract it should be performed within a reasonable time." The conveyance of timber in this case, however, was under circumstances which supported the conclusion that it must be removed within a reasonable time.

That removal must be effected within a reasonable time is the theory of *Lufburrow v. Everett* (1901) 113 Ga. 1054, 39 S. E. 436.

That an estate in perpetuity is not conveyed is especially true where the grant itself is upon condition that it be exercised "at any time within reason." *Goette v. Lane* (1900) 111 Ga. 400, 36 S. E. 758.

Under a lease of timber for ninety-nine years, such timber as the lessee may think merchantable being paid for at so much per 1,000 feet, it was held in *Bluestone Coal Co. v. Bell* (1893) 38 W. Va. 297, 18 S. E. 493, that the lessee must begin operations within a reasonable time.

It has been held generally that an exception or reservation of timber from a conveyance of the land, with the right to remove same, requires a removal within a reasonable time. *Heflin v. Bingham* (1876) 56 Ala. 566, 28 Am. Rep. 776; *Ward v. Moore* (1913) 180 Ala. 403, 61 So. 303; *Hampton Stave Co. v. Elliott* (1916) 124 Ark. 574, 187 S. W. 647; *Beene v. Green* (1917) 127 Ark. 119, 191 S. W. 915; *Huron Land Co. v. Davison* (1902) 131 Mich. 86, 90 N. W. 1034. This was held in *Hampton Stave Co. v. Elliott* (1916) 124 Ark. 574, 187 S. W. 647, although the president of the grantor, a lumber company, testified that the company had a policy of preserving its timber on its own lands as long as possible, and supplying it for the operation of its plant only when other timber could not be purchased therefor, and that he declined to fix a limit for its removal in the making of the deed of conveyance, upon the suggestion of the grantee that it should be done.

It has been held that a license to cut wood or timber must be acted upon within a reasonable time. *Gilmore v. Wilbur* (1831) 12 Pick. (Mass.) 120, 22 Am. Dec. 410; *Hill v. Hill* (1873) 113 Mass. 105, 18 Am. Rep. 455; *Hill v. Cutting* (1873) 113 Mass. 107; *Snyder v. East Bay Lumber Co.* (1903) 135 Mich. 31, 97 N. W. 49.

A contract which was construed as a mere executory contract as to trees

still unsevered from the soil, and which conferred upon the grantee but a license to remove the trees, was held to require a removal within a reasonable time, in *Potter v. Everett* (1890) 40 Mo. App. 152.

It seems clear that the foregoing cases cannot be regarded as announcing an absolute rule that in all circumstances a contract for the sale of standing timber will be held to have the implied condition that the timber must be removed within a reasonable time. Whether it will be so construed depends upon the intention of the parties. Some cases go no further than to say that, where it is the intention of the parties that the timber shall be removed within a reasonable time, the contract will be given effect in accordance with the intention. *Evans v. Dobbs* (1908) 33 Ky. L. Rep. 1053, 112 S. W. 667. The effect that the intention of the parties may have is well stated in *Patterson v. Graham* (1894) 164 Pa. 234, 30 Atl. 247, as follows: "No time was expressly fixed in the agreement within which the timber was to be cut and removed. But the intention of the parties may be ascertained from other stipulations in the agreements and facts dehors the agreement, such as the situation of the parties and the circumstances surrounding them at the time they entered into it. Patterson was a farmer; Graham was a lumber manufacturer and dealer in lumber. No provision is made as to the payment of taxes by the purchaser on any interest in the land; provision is made for increased price should a railroad station be built within 8 miles of the land, either before Graham commenced sawing or before he had finished. Patterson grants privileges on his land to Graham, necessary to carry on the lumber manufacturing business. It is very clear that Patterson sold and Graham bought, with the intention on the part of both that the timber was to be manufactured into lumber. That is, it was not bought as land to be held indefinitely, or to be sold as land when it suited the purchaser. A purchaser may buy

growing timber with no intention of manufacturing it into lumber, and hold it, just as he might buy and hold the land if he so frame his contract. In such a case he could remove it when he chose, and the vendor would have no right to quicken him by notice. But here the parties intended, not a sale and purchase of the timber to be held as land, but a sale for purpose of manufacture within a reasonable time; not an immediate severance, but not one indefinitely remote; and this is evidenced by the agreement and their surroundings." The supreme court of Pennsylvania had held in *Boults v. Mitchell* (1850) 15 Pa. 371, that, in case of a sale of timber rights in which no time was fixed for removal, the landowner might, by notice to the timber owner, require removal within a reasonable time, and that, upon failure of the timber owner to remove within a reasonable time, the right of entry failed, and if thereafter the timber owner enters upon the land, the landowner may sue for breach of his close, though he may not recover in damages the value of the trees taken, the property of which is not in him. In holding that a grant in perpetuity was not intended, the court in *Faulkner v. Allen* (1918) — Okla. —, 173 Pac. 1133, says: "The very language of the contract of sale of timber contemplated that this was not to be a perpetual grant, because it was specifically provided in the contract that the second party should have a reasonable time after said trees and timber shall have been cut and removed, or after the contract shall be terminated in another manner, within which to remove any and all improvements of every nature and description placed by him upon said lands." The court in *Brown v. Surry Lumber Co.* (1912) 118 Va. 503, 75 S. E. 84, lays down the general proposition that, unless the conveyance of the timber clearly manifests an intention of the grantor to convey to the purchaser a perpetual right to enter on the land and cut trees, the purchaser is allowed only a reasonable

time for the cutting and removing of the timber. Applying this general criterion to the facts of the case, the court says: "Looking to the deed in this case and all of its terms, we are of opinion that it does not clearly manifest an intention in the grantors to convey to the grantee a perpetual right to enter on the land and cut trees. The grant to the lumber company was for the purpose of enabling it to enter upon the land of Brown and cut and carry away his trees, and, while its language is very broad, we think that, construed in the light of the purpose and intent of the parties to the instrument, the right to cut and remove the timber must be exercised within a reasonable time." This theory is approved in *Johnson v. Powhatan Min. Co.* (1920) 127 Va. 352, 103 S. E. 703.

A deed conveying a certain parcel of timber being on the land described, but which does not convey all the timber that may thereafter grow upon the land, requires the cutting and removal of the timber within a reasonable time. *McNair & W. Land Co. v. Adams* (1907) 54 Fla. 550, 45 So. 492. The court, in reaching this conclusion, says that the timber is conveyed for definite, not all, purposes and uses; that these purposes not only imply, but require, the cutting down and removal of the timber from the land; and that this shows clearly that the estate conveyed should at some time come to an end—that it should not be perpetual. The deed involved in this case conveyed to the purchaser, his heirs and assigns forever, but nothing is said of the use of the term "heirs and assigns forever." Similar decisions appear in *McNair & W. Land Co. v. Parker* (1912) 64 Fla. 371, 59 So. 959, and *Cummer Co. v. Yager* (1918) 75 Fla. 729, 79 So. 272.

An instrument in the form of a deed which conveys to the grantees named therein, their heirs and assigns, at a specified price per acre, "all the pine timber suitable for sawmill purposes" on the land, which acknowledges receipt of a specified sum, and recites that the grantor agreed "that the

amounts left unpaid this day shall be paid as follows: when each lot is entered to cut said timber, the balance due on each lot is \$100, which will be due as above stated," and which also purported to convey to the grantees, their heirs and assigns, "the full right of way for railroads, tramroads, and wagon roads, in and through the said lands for the purposes above stated, said right of way to continue as long as said mill operations may require," does not convey a right in perpetuity to the timber. *McRae v. Stillwell* (1900) 111 Ga. 65, 55 L.R.A. 513, 36 S. E. 604.

A conveyance of a shingle mill located on certain land, and the timber on that and other lots of land, with certain privileges in aid of a contemplated manufacture of the timber, was held to reflect an intention of the parties that the trees were to be cut and removed from the land within a reasonable time from the date of the conveyance, in *Warren v. Ash* (1907) 129 Ga. 329, 58 S. E. 858.

A deed granting, bargaining, selling, and conveying unto the purchaser all the trees of a certain variety and of a certain diameter, to have and to hold to the purchaser, his heirs and assigns forever, in fee simple, was held not to be a grant in perpetuity, but to require removal of the timber within a reasonable time, in *Shippen Bros. Lumber Co. v. Gates* (1910) 136 Ga. 37, 70 S. E. 672. A part only of the consideration called for by the contract was paid in cash; the balance was to be paid on removal of the timber. In addition to a conveyance of the timber, there was also conveyed to the purchaser a right of way to build a tram railroad over the land, and certain timber desired for fuel and fencing was reserved to the grantor.

Under a conveyance of certain varieties of timber for sawmill purposes to the purchaser, his heirs and assigns, with the right to run tramroads and wagon roads on and across the land, and an agreement "to forever warrant and defend" the privileges granted, it was held in *Mills v.*

Ivey (1907) 3 Ga. App. 557, 60 S. E. 299, that the purchaser was required to remove the same within a reasonable time.

A conveyance of seven eighths of the timber and minerals on a tract of land as consideration of delivery of the other eighth to the owner is held in *Eastern Kentucky Mineral & Timber Co. v. Swann-Day Lumber Co.* (1912) 148 Ky. 82, 46 L.R.A.(N.S.) 672, 146 S. W. 438, to contain the implied condition that operations for their removal shall be begun within a reasonable time, although the property is located in a mountainous region without access to a market, if, at the time the deed is made, a railroad is projected in the vicinity of the property, although it was not built until many years afterward.

The omission from a conveyance of the timber on a tract of land of a stipulation as to when possession and operation shall begin, or of a condition reserving the right of re-entry for inaction, does not prevent the enforcement of the implied condition that such operations shall be begun within a reasonable time. *Eastern Kentucky Mineral & Timber Co. v. Swann-Day Lumber Co.* (Ky.) *supra*. See also *Polley v. Ford* (1921) 190 Ky. 579, 227 S. W. 1007.

The court in *Florence, P. & Co. v. Newsome* (1921) — Ga. App. —, 106 S. E. 619, says, in reliance upon *North Georgia Co. v. Bebee* (Ga.) *supra*, II. b, that when the contract provides for removal "at any time," the rights are not lost by failure to remove within a reasonable time, and continues: "But, where such a conveyance or contract is silent as to the time within which the timber shall be removed, an implication arises that such right is to be exercised within a reasonable time from the date of the sale. In *Hawkins v. Duvall* (1919) 108 Misc. 333, 177 N. Y. Supp. 584, under a deed reserving the right in the grantor to remove the timber "at any time," it was held that the words "at any time" did not vest ownership and right of removal in the vendor forever, but only was intended to enable

him to exercise his right whenever convenient to him, within what is, under all the circumstances, a reasonable time. The contract involved in *Hayes v. Gregory* (1918) 184 App. Div. 802, 172 N. Y. Supp. 784, gave the timber owner the right to enter upon the property to get the timber "at any time," but it was not contended that he had an unlimited time. The timber deed involved in *Fletcher v. Lyon* (1909) 93 Ark. 5, 123 S. W. 801, conveyed the timber to the grantor, and gave him the right "to cut and remove the same at any time." This deed was held, however, to give the grantee only a reasonable time within which to effect the removal. The court says: "If the words 'at any time' be given their literal meaning, the defendant may await all time to remove the timber, and, if not, the words must be held to mean a reasonable time without unnecessary delay, the same as if no time at all were specified. We conclude that the latter is the proper interpretation of the language of the deed." Under a contract that the purchaser may cut and remove the timber at his convenience, it was held in *Smith v. Dierks Lumber & Coal Co.* (1917) 130 Ark. 9, 196 S. W. 481, that the timber must be removed within a reasonable time. The purchasers of timber were held to have only a reasonable time in which to remove it, in *Penley v. Emmons* (1918) 117 Me. 108, 102 Atl. 972, although the conveyance gave them the right to enter and remove the same "at their convenience."

Under a reservation of timber in a conveyance of land, in which it is provided that the grantor is to have sufficient time to remove the same, "unavoidable circumstances considered, be what they may," the grantor has a reasonable time in which to remove the timber. The addition of the words "unavoidable circumstances considered, be what they may," does not operate to extend indefinitely the time for the removal of the timber. *Siler v. Louisville Property Co.* (1908) 32 Ky. L. Rep. 911, 107 S. W. 266.

A contract for the sale of timber, "together with the right to enter upon

said lands from the date of this instrument until said timber may be removed, to cut and remove said timber," was held not to convey a perpetual right, but to require removal within a reasonable time, in *Morgan v. Veness Lumber Co.* (1919) 108 Wash. 674, 185 Pac. 607. It appeared in this case that the land was valuable for agricultural and pasturage purposes after the timber was removed, and that it could have been removed in from three to six months, and the court says that, from the circumstances surrounding the parties at the time the contract was made, it appears that the deed falls far short of granting the right of removing the timber at the pleasure of the grantee.

A grant of timber growing upon certain described lands, together with the right of ingress and egress in and upon the land for the purpose of cutting and removing the timber, to have and to hold the timber, rights, privileges, and right of way, together with all and singular the rights and appurtenances thereto and anywise belonging unto the purchaser, his successors and assigns forever, was held not to convey the perpetual right to maintain the timber on the premises, in *Houston Oil Co. v. Bunn* (1919) — Tex. Civ. App. —, 209 S. W. 830. The court refers to the decision of the supreme court of Texas in *Houston Oil Co. v. Hamilton* (Tex.) supra, II. b, and says that the decision in that case is not conclusive of the decision in the case at bar, although it recognizes that the distinction between the deeds is very slight. Emphasis is placed by the supreme court in the *Hamilton Case* upon the use of the word "forever," the court saying that "to say that one may have 'forever' to enter land and remove timber therefrom is to deny that one is limited to a reasonable time for such entry and removal." The court of civil appeals in the *Bunn Case* says: "We think the learned judge who wrote that opinion was so impressed with the soundness of his construction of the deed as a whole that he gave a meaning and effect to the use of the word 'forever'

in the habendum clause of that deed which, while it may have accorded with the manifest intention of the parties to that instrument, cannot be given it in all cases. The use of the word 'forever' in the granting or habendum clause of the deed does not generally have the effect of enlarging the estate granted; and if the instrument as a whole shows that a fee-simple title was not intended to be granted, the title will not be enlarged into a fee simple by the grantor's declaration that it is to be held by the grantee 'forever.'"

The fact that the grant was not of the timber for all time grown upon the land, but of that "now standing, growing, or being in or upon" the land, was regarded as an important feature by the court in *Beatty v. Mathewson* (1908) 40 Can. S. C. 557, 3 B. R. C. 859, 12 Ann. Cas. 913. The court says: "We know that timber such as named does not live and remain obtainable for any useful purpose for such length of time as an estate in fee simple *prima facie* implies, or as the expression 'forever,' used in this habendum, implies, apart altogether from what the words immediately preceding the word 'forever' imply." The grant involved in this case professed to "grant, bargain, sell and assign unto [the purchaser], his heirs and assigns," and the habendum was as follows: "To have and to hold the same under the said party of the second part, his heirs and assigns forever, together with full power, liberty, right, and authority for the said party of the second part . . . from time to time and at all reasonable times hereafter during the term of — years, to fell, cut down," etc. The deed in question was given after a former deed which fixed the time for removal at ten years, but, upon it being found impracticable to remove it within that time, the deed before the court was executed.

Under a contract for the conveyance of timber granting to the purchaser, in one part thereof, full right and privilege for and during the term of four years from date of conveyance to enter upon the land and cut and

remove the timber, and stating in another part of the conveyance that "it is understood and agreed . . . that the said party of the second part . . . shall have four years from the date of this conveyance to commence the cutting and removing of said timber," the purchaser was held to have four years from the date of the contract in which to enter on the land and commence cutting, and having commenced within the four years, and having given notice of his election to take an additional 100,000 feet as provided in the contract, and tendered the money within the time, must be allowed, after the four years, the reasonable time required to continue and complete the cutting of the amount stipulated for in the conveyance. *Byrd v. Sexton* (1913) 161 N. C. 569, 77 S. E. 697.

Some cases make the test whether the timber was sold as real estate or personal property; if the latter, an implied obligation to remove it within a reasonable time will arise. *Lodwick Lumber Co. v. Taylor* (1906) 100 Tex. 270, 123 Am. St. Rep. 803, 98 S. W. 238 (obiter); *Beauchamp v. Williams* (1909) — Tex. Civ. App., 115 S. W. 130; *Montgomery County Development Co. v. Miller-Vidor Lumber Co.* (1911) — Tex. Civ. App., 139 S. W. 1015; *Houston Oil Co. v. Boykin* (1913) — Tex. Civ. App., 153 S. W. 1176, affirmed without reference to the personal property test in (1918) 109 Tex. 276, 206 S. W. 815. The theory of these cases is very clearly and completely summed up by *Levy, J.*, in *Davis v. Conn* (1913) — Tex. Civ. App., 161 S. W. 39, as follows: "Where in the particular case (1) it is contemplated by the conveyance that the vendee is to have some beneficial use of the land in connection with the trees, and that the trees shall remain thereon, so as to receive profit and growth from the growing surface of the land, the sale operates as a sale of an interest in land; and (2) where it is contemplated and intended by the conveyance that there shall be a severance and taking away of the growing trees from the land, such sale must be regarded and operates to be

a sale as of chattels only. It is quite well settled by the cases that growing trees may, by the agreement of the parties, be severed in contemplation of law from the land, and be dealt with in the contract as personalty, removable immediately or timely, without an actual severance at the time." The deed which was construed to pass the timber as personalty in *Montgomery County Development Co. v. Miller-Vidor Lumber Co.* (1911) — *Tex. Civ. App.* —, 139 S. W. 1015, recited that the grantor had "granted, bargained, sold, and conveyed, and by these presents do grant, bargain, sell, and convey unto the said" purchaser, all of the grantor's rights in and to the timber on the land.

A distinction has been made in North Carolina between the rights of a purchaser of timber and those of a grantor who excepts or reserves the timber. Although, in North Carolina, the courts adhere generally to the theory that, when in a contract for the sale of standing timber no time is specified within which it shall be cut and removed, the law presumes this shall be done within a reasonable time, it was held in *Ormand Min. Co. v. Bessemer City Cotton Mills* (1906) 143 N. C. 307, 55 S. E. 700, a case in which the grantor of land had excepted or reserved the timber, that the above rule did not apply. The court refers to the rule that, when no time is specified, a purchaser takes upon the implied agreement to cut and remove within a reasonable time, and continues: "He has bought the timber for that purpose, whereas, when a grantor of the fee reserves or excepts the timber, he is not providing for timber cutting, but reserving a right, and should be entitled to hold till this is put an end to by the grantee giving notice for a reasonable time, so that the grantor may elect to cut, or sell this right to another." This case was approved and followed in *Kelly v. Enterprise Lumber Co.* (1911) 157 N. C. 175, 72 S. E. 957.

In *Huron Land Co. v. Davison* (1902) 131 Mich. 86, 90 N. W. 1034, a case involving a reservation in the sale of land, considerable emphasis is

placed upon the fact that the reservation was of the timber. According to the court: "This clause did not give him [the grantor] the right to deprive his grantee of the use of the land so long as he saw fit to let the reserved timber stand. The timber reserved was the timber then having a market value and suitable for use, i. e., large enough for use as timber. It did not reserve trees then growing and not large enough for timber, but which would be large enough in the course of fifteen or twenty years. To hold otherwise would give the grantor the exclusive control of the land except as to the timber not reserved. It seems unreasonable that such language should be construed into a permanent right to enter at any time in the future, and cut and remove the timber." The court then referred to cases involving sales of timber, and the holding of the court that timber must be removed within a reasonable time, and continued: "Where one sells land reserving the timber for no other purpose than for removal, we see no good reason why the same rule should not apply. Where is the difference between selling timber to be removed, and selling the land reserving the timber to be removed, so far as the question of time for removal is concerned?" *Wait v. Baldwin* (Mich.) *supra*, II. b, involving a similar exception, is disapproved.

A deed by the owner of adjoining farms, of one of the farms, in which there was contained an exception in the words, "excepting and reserving the standing timber on the south end of farm adjoining . . ." and the right of way to and therefrom," was interpreted in *Decker v. Hunt* (1906) 111 App. Div. 821, 98 N. Y. Supp. 174, as requiring a removal of the timber reserved within a reasonable time. The court states that if the grantor, and those who succeeded him to the right, might for all time neglect to remove such timber, and still hold and own the same, it would practically prevent the owner of the land from clearing up and using that part of the farm upon which the timber was

standing, and would, in effect, be an exception of all that part of the farm itself—a purpose which clearly is in direct contradiction of the whole conveyance.

A clause in a deed which conveyed land from parents to a child as an advancement, reserving to the father and mother "the privilege of selling and removing the timber from said land as they may desire to sell or to use, and also the right of way through said lands to remove the same," was held not to reserve title to the timber, but to create only an unassignable license, in *United States Coal & Oil Co. v. Harrison* (1912) 71 W. Va. 217, 47 L.R.A.(N.S.) 870, 76 S. E. 346.

The Pennsylvania decisions are not altogether clear whether the mere expiration of a reasonable time results in a loss of his timber to the purchaser who has failed to remove, or whether such a loss results from the neglect by the timber owner for an unreasonable time after notice to remove. In *Patterson v. Graham* (1894) 164 Pa. 234, 30 Atl. 247, the court says: "Undoubtedly, in a contract for the sale of timber, where the parties intend a severance and no time is fixed within which it is to be removed, the law implies that the grantee will remove it within a reasonable time. And the grantor can quicken action by notice. If, after such notice, the grantee neglects for an unreasonable time to exercise his right, he loses it." The court, however, says further that "the question, then, of what is a reasonable time, is not determined by the will of the grantor, or alone by the fact of notice, but by all the circumstances." In this case the timber was held lost to the purchaser by reason of an abandonment of operations once begun. In *Andrews v. Wade* (1886) 3 Sadler (Pa.) 133, 6 Atl. 48, it is stated that a person having a right to cut and remove timber growing on the land of another may be compelled to take it off after a reasonable time under all the circumstances, or he will be presumed to have relinquished all rights thereto. This rule was applied to a sale of

bark in *Union Tanning Co. v. Shug* (1899) 22 Pa. Co. Ct. 647.

In Louisiana, it is necessary to have a time fixed. Where no time is specified in the contract, the mere lapse of time does not work a forfeiture. *Simmons v. Tremont Lumber Co.* (1919) 144 La. 719, 81 So. 263; *Big Pine Lumber Co. v. Hunt* (1919) 145 La. 342, 82 So. 363. In *Simmons v. Tremont Lumber Co. (La.) supra*, the court states: "Until a time limit has been fixed, and has expired, the plaintiff [landowner] shows no cause of action to have the timber declared forfeited to him, or that defendant's title to the timber and rights under the contract are prescribed." That the timber must be removed within a reasonable time seems to have been the opinion of the court in *Shepherd v. Davis Bros. Lumber Co.* (1908) 121 La. 1011, 46 So. 999, where it is stated that the failure to fix the time within which the trees should be cut was insignificant, in view of the fact that, in case the purchaser delayed unreasonably in the matter, the vendor could call upon the court to supply the defect of the contract in that respect, by fixing a time. It is accordingly held in this state that unless the time has been fixed an owner, who in selling land has reserved the timber thereon, may sell the timber, conferring a limited time in which to remove it, and at the expiration of that time may extend the period. *Big Pine Lumber Co. v. Hunt (La.) supra*. It is suggested in *Wood v. Elliott* (1883) 51 Mich. 320, 16 N. W. 666, that one who acquired the rights of a purchaser of timber, who was, according to the contract, "to have his own time to remove" the same, might have his rights terminated upon notice from the landowner. No notice, however, was given to the owner of the timber in this case, and it is held that, without notice, his rights in the timber did not expire. Accordingly, the owner of the timber was held entitled to recover against the owner of the land, who had cut down the same, but had left the wood on the land.

One who has purchased timber under a contract giving him the right

to enter upon and cut and remove said timber, "at any time thereafter," is entitled to a reasonable time, after notice, to remove the timber, although prior thereto he had had a reasonable time in which to remove. *St. James v. Erskine* (1909) 155 Mich. 606, 119 N. W. 897.

The necessity of notice to terminate the purchaser's right receives further attention in subd. VII. a, *infra*.

As shown in II. b, *supra*, the fact that a removal of the timber was intended is not, according to the cases there cited, conclusive against a grant in perpetuity, or a reservation or exception in perpetuity. The cases now under discussion, while perhaps not expressly denying the above position, give the fact that a removal was intended very much weight in reaching the conclusion that there must be a removal of the timber within a reasonable time. It is stated as a general proposition that, if the situation of the parties and the circumstances surrounding them at the time the contract is executed are such as to show that the severance of the timber from the soil was contemplated, the title thereto may be defeated by a failure to cut and remove the timber within a reasonable time. *Kentucky Coal & Timber Development Co. v. Carroll Hardwood Lumber Co.* (1913) 154 Ky. 523, 157 S. W. 1109.

In *Hall v. Eastman, G. & Co.* (1906) 89 Miss. 588, 119 Am. St. Rep. 709, 43 So. 2, the court, in dealing with an instrument which granted, sold, and conveyed to the purchaser all the timber then or thereafter growing, standing, lying, or being on the land, together with the right of ingress and egress, and which contained a provision that the deed should continue and remain in force until the purchasers, their successors and assigns, commence to cut and lumber the same, and for one year thereafter, and then to become void and of no effect, says: "The plain purpose of the instrument is to give to the grantee the right to cut and remove the timber. There was not the remotest thought on the part of

either that the grantee should have the right to the timber, the timber to be kept standing on the land forever or indefinitely. It is made the duty of the grantee to cut and remove the timber from the land." Compare with *GABBARD v. SHEFFIELD* (reported herewith) ante, 1.

A deed to the land, which contained a provision for a reconveyance after the timber was removed, was construed as in effect merely a grant of the beneficial interests until the timber should be removed; as thus construed, it was held that the timber must be removed within a reasonable time, in *Fletcher v. Lyon* (1909) 93 Ark. 5, 123 S. W. 801.

Where the purchaser of timber, between five and six years after his purchase, moved his mill upon the land and commenced manufacturing and removing the timber, and continued his operations for three years, then discontinued, took away his mill, and made no further effort to cut timber for eleven years, when, trees which were valueless when he made his contract having in the meantime grown into merchantable lumber, he cuts and removes these, with others that he neglected to fell in his first operation, claiming the right to do so under his contract made twenty years before, the second entry is clearly a trespass, since, upon the discontinuance of the first operation, he, as the purchaser, will be held to have relinquished to the owner of the land the full possession thereof. *Patterson v. Graham* (1894) 164 Pa. 234, 30 Atl. 247.

A contract by which the owner of land sold a part thereof for the purposes of a levee, and for a separate stated consideration sold the timber on the levee track, and granted the right to haul through adjacent property, for the period of one year, does not evidence the purpose to fix a time limit within which the timber should be removed from the right of way, but to fix a time limit within which the purchaser shall have a right to haul the timber over the adjacent land. *Bittick v. Crittenden* (1916) 126 Ark. 627, 189 S. W. 1061.

2. Contracts containing a time limit after beginning, but none for beginning.

The cutting under a contract of sale specifying no time for the commencement of the cutting, although requiring it to be finished within a stated time after such commencement, must be commenced within a reasonable time; failure to begin the cutting and removal within such time results in a loss of the purchaser's rights and a reversion to the landowner. *Norfolk Bank v. Whipple* (1918) 254 Fed. 195, affirmed on opinion below in (1919) 169 C. C. A. 647, 258 Fed. 990; *Hall v. Eastman G. & Co.* (1906) 89 Miss. 588, 119 Am. St. Rep. 709, 43 So. 2; *Gay Mfg. Co. v. Hobbs* (1901) 128 N. C. 46, 83 Am. St. Rep. 661, 38 S. E. 26; *Bunch v. Elizabeth City Lumber Co.* (1903) 134 N. C. 116, 46 S. E. 24; *Hawkins v. Goldsboro Lumber Co.* (1905) 139 N. C. 160, 51 S. E. 852; *Flagler v. Atlantic Coast Lumber Corp.* (1911) 89 S. C. 328, 71 S. E. 849; *McClary v. Atlantic Coast Lumber Corp.* (1911) 90 S. C. 153, 72 S. E. 145; *Gray v. Marion County Lumber Co.* (1915) 102 S. C. 289, 86 S. E. 640; *Minshe v. Atlantic Coast Lumber Corp.* (1914) 98 S. C. 8, 81 S. E. 1027, writ of error dismissed for want of jurisdiction in (1914) 235 U. S. 685, 59 L. ed. 424, 35 Sup. Ct. Rep. 202. See *Rogers v. Marion County Lumber Co.* (1917) 108 S. C. 238, 93 S. E. 1055; *Brown v. Surry Lumber Co.* (1912) 113 Va. 503, 75 S. E. 84.

The court in *Hall v. Eastman, G. & Co.* (1906) 89 Miss. 588, 119 Am. St. Rep. 709, 43 So. 2, after referring to the covenant as to cutting involved in that case, which was as follows: "It is especially covenanted and agreed that, as to each 40-acre tract herein described and conveyed, this deed shall continue and remain in force until the said Eastman, Gardiner & Company, their successors and assigns, commence to cut and lumber the same, and for one year thereafter, and then to become void and of no effect," declared this to be the controlling clause in the instrument, and continued: "It plainly means, what it

expressly declares, that all the timber, whether growing, standing, lying, or being on the lands described, and whether growing thereon when the instrument is made, March 21, 1900, or thereafter growing thereon, which the grantee could take in one year from that date,—that is to say, could 'cut and remove,'—was such timber as the grantee could cut and remove in one year from the time it commenced to cut." In answer to the further contention that the cutting might be commenced whenever the grantee pleased, the court said: "The plain purpose of the instrument is to give to the grantee the right to cut and remove the timber. There was not the remotest thought on the part of either that the grantee should have the right to the timber, the timber to be kept standing on the land forever or indefinitely. It is made the duty of the grantee to cut and remove the timber from the land. The provisions of this instrument abound as to the right and the duty to enter, and cut and remove the timber from these lands. Plainly the purpose of the instrument was, as to each 40-acre tract, that the grantee should commence to cut and remove the timber within what would be a reasonable time, to be determined by the evidence."

This has been held true although the contract expressly provides that the purchasers "shall not be limited as to the time in which they shall commence to cut or remove the same." *Brown v. Surry Lumber Co.* (1912) 113 Va. 503, 75 S. E. 84. That the cutting must be commenced within a reasonable time was held in *Hawkins v. Goldsboro Lumber Co.* (1905) 139 N. C. 160, 51 S. E. 852, although it was expressly stipulated in the contract of conveyance that "the time in which to begin to cut and remove said timber shall be and is not limited."

Compare with *Houston Oil Co. v. Hamilton* (1918) 109 Tex. 270, 206 S. W. 817, supra, II. b.

In *Hall v. Eastman, G. & Co.* (Miss.) supra, the purchasers of the timber were held to have a reasonable time within which to commence opera-

tion, under an instrument which granted them the timber at the time, or thereafter, growing, standing, lying, or being on the land, and gave them the right to ingress, and provided that the deed should continue and remain in force until the purchasers, their successors and assigns, commenced to cut and lumber the same, and for one year thereafter, and then to become void and of no effect. A like construction was put upon a deed containing a similar provision in *Flagler v. Atlantic Coast Lumber Corp.* (1911) 89 S. C. 328, 71 S. E. 848, the provision in the deed being: "It is agreed that the time limit of this conveyance, as above set forth, shall be ten years from the time the second party begins cutting and removing the said timber from the land above described." The court disapproves of the theory that, although the purchaser of the timber must remove it within ten years after commencing operations, he had an unlimited time in which to commence operations. This was held, also, in the previous cases of *Knotts v. Hybrick and Wilson Lumber Co. v. D. W. Alderman & Sons Co.* (S. C.) *supra*, II. b. The court had held that the grant involved in those cases was for an unlimited time. This case is approved and followed in *McClary v. Atlantic Coast Lumber Corp.* (1911) 90 S. C. 153, 72 S. E. 145, in which a similar contract was involved.

Where several lots of timber are sold at the same time, with a stipulation that the right shall cease within a stated number of years after "timber is commenced to be cut," the period of limitation is computed as to all the lands embraced in the contract, from the time the purchaser begins cutting the timber upon any one of the lots. *Perkins v. Peterson* (1899) 110 Ga. 24, 35 S. E. 319; *Baxter v. Mattox* (1898) 106 Ga. 344, 32 S. E. 94.

Under a sale contract by which the purchaser is to remove the timber within a period of five years from the time when it shall commence operations to cut the same, but in no event later than the 1st day of July, 1915, where the purchaser began

operations in August, 1907, and discontinued in October, 1907, and thereafter carried on no operation until, in 1914, an assignee of the purchaser attempted operations, it was held not necessary to the right of forfeiture that the owner of the land assert his right of forfeiture, especially where he took possession of the land after the withdrawal of the original purchaser. *Call v. Jenner Lumber Co.* (1917) 33 Cal. App. 310, 165 Pac. 23.

Where the time limited in a sale of timber is to begin running from the date of beginning to cut the timber, the cutting of a few trees on the tract, by one who afterwards became the owner of the contract of sale, does not start the running of the limitation period. *Gray Lumber Co. v. Harris* (1910) 8 Ga. App. 70, 68 S. E. 749.

3. What is a reasonable time.

What is a reasonable time is generally a mixed question of law and fact; no fixed rules can be established for ascertaining this; all the facts and circumstances must be taken into consideration.

Arkansas.—*Liston v. Chapman & D. Land Co.* (1905) 77 Ark. 116, 91 S. W. 27; *Garden City Stave & Heading Co. v. Sims* (1907) 84 Ark. 603, 106 S. W. 959; *Fletcher v. Lyon* (1909) 93 Ark. 5, 123 S. W. 801; *Beattie v. Smith* (1920) 146 Ark. 532, 226 S. W. 168.

Florida.—*McNair & W. Land Co. v. Adams* (1907) 54 Fla. 550, 45 So. 492; *McNair & W. Land Co. v. Parker* (1912) 64 Fla. 371, 59 So. 959.

Georgia.—*Goette v. Lane* (1900) 111 Ga. 400, 36 S. E. 758; *Allison v. Wall* (1904) 121 Ga. 822, 49 S. E. 831; *Brinson v. Kirkland* (1905) 122 Ga. 486, 50 S. E. 369; *Shippen Bros. Lumber Co. v. Gates* (1911) 136 Ga. 37, 70 S. E. 672; *Mills v. Ivey* (1907) 3 Ga. App. 557, 60 S. E. 299; *Flurence, P. & Co. v. Newsome* (1921) — Ga. App. —, 106 S. E. 619.

Kentucky.—*Eastern Kentucky Mineral & Timber Co. v. Swann-Day Lumber Co.* (1912) 148 Ky. 82, 46 L.R.A.(N.S.) 672, 146 S. W. 438.

New York.—*Hayes v. Gregory*,

(1918) 184 App. Div. 802, 172 N. Y. Supp. 784.

Oklahoma. — *Mitchell-Crittenden Tie Co. v. Crawford* (1916) — Okla. —, 160 Pac. 917; *Faulkner v. Allen* (1918) — Okla. —, 173 Pac. 1133.

Pennsylvania. — *Patterson v. Graham* (1894) 164 Pa. 234, 30 Atl. 247.

South Carolina. — *Minshe v. Atlantic Coast Lumber Corp.* (1914) 98 S. C. 8, 81 S. E. 1027, writ of error dismissed for want of jurisdiction in (1914) 235 U. S. 685, 59 L. ed. 424, 35 Sup. Ct. Rep. 202.

Tennessee. — *Carson v. Three States Lumber Co.* (1902) 108 Tenn. 681, 69 S. W. 320.

Texas. — *Montgomery County Development Co. v. Miller-Vidor Lumber Co.* (1911) — Tex. Civ. App. —, 139 S. W. 1015.

Vermont. — *Deerfield Lumber Co. v. Lyman* (1915) 89 Vt. 201, 94 Atl. 837.

Wisconsin. — *Western Lime & Cement Co. v. Copper River Land Co.* (1909) 138 Wis. 404, 120 N. W. 277.

See *Donworth v. Sawyer* (1900) 94 Me. 242, 47 Atl. 521; *Snyder v. East Bay Lumber Co.* (1903) 135 Mich. 31, 97 N. W. 49; *Hall v. Eastman, G. & Co.* (1906) 89 Miss. 588, 119 Am. St. Rep. 709, 43 So. 2, and *United Timber Corp. v. Bivens* (1918) 248 Fed. 554.

In *Polzin v. Beene* (1916) 126 Ark. 46, 189 S. W. 654, a case involving a contract such as is discussed in subd. V. a, *infra*, time was reckoned from the conveyance of the land by the owner, by a deed in which he recognized that the purchaser of timber from him had not, at the time of the deed, forfeited his right to cut and remove the same.

Some general rules of construction have been laid down by the courts. It is stated in *Goette v. Lane* (1900) 111 Ga. 400, 36 S. E. 758: "In cases where there may be a doubt as to whether one or the other of two periods of time would be reasonable, generally the jury should resolve the doubt in favor of the grantee, giving him the longer period of time, for the simple reason that the grantor's right rests upon a forfeiture, which a court of law will enforce, but always in such a manner that the injury to him

whose rights are the subject of the forfeiture will be the least that the nature of the case will reasonably admit of."

The court in *Brinson v. Kirkland* (1905) 122 Ga. 486, 50 S. E. 369, says: "What might be a reasonable time to remove one class of timber might not be so as to another. It might, therefore, be important to show whether the trees were pine, oak, or cypress. The question might be affected by a consideration of the size of the tract of land, the purposes for which the purchase was made, and also the purpose with which the timber was sold. It might be that the timber was bought for the purpose of keeping it from being cut; or it might be near a railroad, so as to be easily transported; or it might be so remote and inaccessible as to show that the parties understood that the purchaser was buying on the chance that timber then out of the market would thereafter come into demand and be salable. It might be bought in the light of a custom so general as to form, by implication, a part of the contract. And, if so, proof of that custom could be offered to affect the construction of the conveyance. Again, it might be that the sale was made in order to have the ground cleared preparatory to being used for agricultural purposes. Or it might be that the land would be practically valueless, and that there was no need for diligence in removing the timber."

In *Heflin v. Bingham* (1876) 56 Ala. 566, 28 Am. Rep. 776, the court says: "What is a reasonable time is necessarily dependent on the nature of the service and is generally a question of fact. It is so in the present case. Still there are certain rules not to be lost sight of. The use for which the timber is known to be wanted, the custom and rule, if such there be, of felling and removing the timber as the capacity of the mill may require it, if kept reasonably employed, are among the inquiries which should be made in determining the question of reasonable time. The accident of a failing market, or undue delay in rebuilding the mill after its destruction

—these and similar disturbances should exert no influence with the jury. But when the mill was destroyed by fire a reasonable time was allowed for its reconstruction."

In *Mayes v. Watkins* (1914) 112 Ark. 607, 165 S. W. 633, the owner of land contracted to sell the same, but specified that the title to the cottonwood timber on the land "does not pass, and the makers of this bond reserve a reasonable time of no less duration than to and including the 1st day of January, 1911, to cut and remove the same." The trial court's instruction to the jury, which was approved by the supreme court, was to the effect that "appellants [the grantors] had a reasonable time within which to remove the timber from and after the 14th day of August, 1909 [the date of the bond], and that the least period of time that could have been considered reasonable was, as stipulated in the contract, until the 1st day of January, 1911; that if due diligence and care had been used by the owners of the timber for the removal, up to and including the 1st day of January, 1911, and same was not removed by that time, that the owners of the timber would still have a reasonable time from that date within which to remove the timber; and that, in considering what would be a reasonable time, the jury should take into consideration the quantity of timber to be removed, the distance it was necessary to haul it, the kind of roads over which it would have to be hauled, the condition of the land as to being wet or dry, and all other facts and circumstances affecting the removal of the timber from the land."

The fact that there was a decline in the timber market, or that no sawmill was near to the timber, is held to constitute no excuse for a failure to remove the timber within a reasonable time. *Newton v. Warren Vehicle Stock Co.* (1915) 116 Ark. 393, 173 S. W. 819; *Young v. Cowan* (1918) 134 Ark. 539, 204 S. W. 304.

The facilities which the purchaser has for removing the timber are not the standard which must be taken into consideration in determining whether

or not there is a reasonable time; but it is those facilities which, in the exercise of ordinary care, the purchaser could and should have, to enable him to cut and remove the timber within a reasonable time. *Beattie v. Smith* (1920) 146 Ark. 532, 226 S. W. 168.

The purchaser in *Wright v. Camp Mfg. Co.* (1910) 110 Va. 678, 66 S. E. 843, was a lumbering company doing a very extensive business. On this point the court says: "In determining what is a reasonable time between the parties to this controversy, we cannot think that the rights of the appellants should be controlled by the magnitude of the business in which the Camp Manufacturing Company is engaged. In determining what is a reasonable time within which the trees upon the lands of Young and Wright should be removed, we should consider the circumstances and conditions affecting the parties to the contract; and the rights of appellants are not to be measured by the convenience or inconvenience, the ability or the inability, of the Camp Manufacturing Company, caused by and resulting from the magnitude and extent of its business and its numerous other contracts, to which these appellants are strangers." What is a reasonable time must be determined by the facts as they existed at the time of entering into the contract. *Allison v. Wall* (1904) 121 Ga. 822, 49 S. E. 831.

It is stated in *Goette v. Lane* (1900) 111 Ga. 400, 36 S. E. 758, that a local custom or usage is not ordinarily relevant or material evidence in determining what is a reasonable time to be allowed in such cases, and the court continues: "Certainly such a custom would have no bearing upon the case, unless its observance was shown to be so general and universal that there could be no escape from the implication that the parties intended to contract in the light of the same. Especially would a local custom or usage not be applicable when the time fixed thereby might be such a short period of time as not to be at all reasonable, when applied to the facts and circumstances of the particular case."

The fact that the purchaser was

prevented from taking the timber by the act of the owner of the land enters into a determination of what is a reasonable time. *Hurst v. Taylor* (1908) 32 Ky. L. Rep. 1051, 107 S. W. 743.

The verbal statement of the purchasers of a mill and timber, at the time of removing the mill, that they had abandoned and surrendered their interest under the lease, is not effectual to reinvest title to the timber in the vendor, since the purchasers had acquired an interest in the land which could only reinvest in the vendor by a writing, or by failure to remove the timber within a reasonable time. *Warren v. Ash* (1907) 129 Ga. 329, 58 S. E. 858.

An owner of land who has sold the timber thereon under a contract which does not specify the time for removal, and which therefore requires removal within a reasonable time, cannot, upon a subsequent sale of the land, affect the rights of the purchaser of the timber by stipulating in the deed that the timber is reserved to the purchaser thereof, with right to remove until a stated time short of a reasonable time. *Kidder v. Flanders* (1905) 73 N. H. 345, 61 Atl. 675.

The facts disclosed in the cases vary so greatly that any classification is difficult. For convenience, the cases have been grouped according to the length of time involved.

The failure of a purchaser of timber in 1855, to remove it until 1906, is not the exercise of the right of removal within a reasonable time. *Goodson v. Stewart* (1908) 154 Ala. 660, 46 So. 239.

Failure for thirty years to begin operations under a conveyance of timber and minerals on a tract of land was held to be an unreasonable delay, as a matter of law, in *Eastern Kentucky Mineral & Timber Co. v. Swann-Day Lumber Co.* (1912) 148 Ky. 82, 46 L.R.A. (N.S.) 672, 146 S. W. 438.

Twenty-two years was held more than a reasonable time in *Polley v. Ford* (1921) 190 Ky. 579, 227 S. W. 1007.

The failure of the grantor, who had

reserved timber, for twenty years to exercise his right to remove the timber, was held to result in the loss of such right, in *Ward v. Moore* (1913) 180 Ala. 403, 61 So. 303. The court says: "Taking the prescriptive period of twenty years as a maximum measure in such cases, but not affirming at this time that a less period of entire inaction will not likewise result, we hold that twenty years is an unreasonable time, beyond which the stated right of entry and removal cannot exist—cannot be recognized."

A delay of twenty years was held unreasonable in *Penley v. Emmons* (1918) 117 Me. 108, 102 Atl. 972.

Nineteen years was held not unreasonable in *Hawkins v. Duvall* (1919) 108 Misc. 333, 177 N. Y. Supp. 584, where the grantee from whose deed the timber was reserved received full value for his purchase money in land other than that upon which the reserved timber stood; where the land on which the timber stood was practically worthless except to mature the trees then growing; and where none of the parties was engaged in lumbering, and it cannot fairly be said that immediate removal was within their contemplation.

A delay of sixteen years was held to be an unreasonable time in *Siler v. Louisville Property Co.* (1908) 32 Ky. L. Rep. 911, 107 S. W. 266, although for six years the grantor who had reserved the timber was unable to obtain a right of way across an adjoining tract, which was necessary to enable him to remove the timber, but thereafter a right of way might have been obtained.

The expiration of fifteen years after the delivery of a deed in which timber rights were reserved was held, as a matter of law, to be more than a reasonable time for cutting and removing the timber, where it appeared that the grantor who thus reserved the timber had a sawmill within hauling distance of the timber, for a number of years. *Beene v. Green* (1917) 127 Ark. 119, 191 S. W. 915. But in *Shippen Bros. Lumber Co. v. Gates* (1910) 136 Ga. 37, 70 S. E. 672, it was held that the court could not

say as a matter of law that fifteen years was more than a reasonable time. A delay of fifteen years was held an unreasonable delay in *Gilmore v. Wilbur* (1831) 12 Pick. (Mass.) 120, 22 Am. Dec. 410, in cutting wood under a license.

A delay of over fourteen years was held to result in a forfeiture, in *Fore v. Marion County Lumber Co.* (1920) 114 S. C. 501, 104 S. E. 179. The fact that the vendor of the timber did not have a fee-simple title to the land was held immaterial upon this question, where the delay was not due to the defect. The defect was the result of a mistake in a deed to the vendor of the timber, which was subsequently corrected. Failure to cut and remove timber within fourteen years after conveyance was held, as a matter of law, to be a failure to cut and remove within a reasonable time, in *Kentucky Coal & Timber Development Co. v. Carroll Hardwood Lumber Co.* (1913) 154 Ky. 523, 157 S. W. 1109. A lapse of fourteen years was held an unreasonable time in *Gray v. Marion County Lumber Co.* (1915) 102 S. C. 289, 86 S. E. 640.

4. Effect of failure to remove.

(a) Majority rule.

Where a contract in which no time for removal is specified is held to be a contract requiring the removal of the timber within a reasonable time, there are two theories as to the effect of failure to remove it within such time. According to the great majority of courts, the purchaser loses not only his right to enter for purposes of removal, but also whatever rights in the timber itself he may have had; and the owner of the land acquires such rights. Subject to two qualifications, viz., the effect of cutting without removal, which is discussed *infra*, subd. VI., and the effect of a transfer of the land, which is discussed *infra*, subd. VII., this rule is, as stated, supported by the great weight of authority.

Arkansas.—*Liston v. Chapman & D. Land Co.* (1905) 77 Ark. 116, 91 S. W. 27; *Hall v. Wellman Lumber Co.* (1906) 78 Ark. 408, 94 S. W. 43; 15 A.L.R.—5.

Garden City Stave & Heading Co. v. Sims (1907) 84 Ark. 603, 106 S. W. 959.

Georgia.—*McRae v. Stillwell* (1900) 111 Ga. 65, 55 L.R.A. 513, 36 S. E. 604; *Goette v. Lane* (1900) 111 Ga. 400, 36 S. E. 758; *Warren v. Ash* (1907) 129 Ga. 329, 58 S. E. 858; *Shippen Bros. Lumber Co. v. Gates* (1910) 136 Ga. 37, 70 S. E. 672.

Kentucky.—*Eastern Kentucky Mineral & Timber Co. v. Swann-Day Lumber Co.* (1912) 148 Ky. 82, 46 L.R.A.(N.S.) 672, 146 S. W. 438; *Kentucky Coal & Timber Development Co. v. Carroll Hardwood Lumber Co.* (1913) 154 Ky. 523, 157 S. W. 1109.

Maine.—*Penley v. Emmons* (1918) 117 Me. 108, 102 Atl. 972.

Massachusetts.—*Gilmore v. Wilbur* (1831) 12 Pick. 120, 22 Am. Dec. 410 (license); *Hill v. Hill* (1873) 113 Mass. 103, 18 Am. Rep. 455 (same); *Hill v. Cutting* (1873) 113 Mass. 107 (same).

Pennsylvania.—*Patterson v. Graham* (1894) 164 Pa. 234, 30 Atl. 247.

Texas.—*Houston Oil Co. v. Boykin* (1918) 109 Tex. 276, 206 S. W. 815; *Beauchamp v. Williams* (1907) — Tex. Civ. App. —, 115 S. W. 130; *Montgomery County Development Co. v. Miller-Vidor Lumber Co.* (1911) — Tex. Civ. App. —, 139 S. W. 1015; *Houston Oil Co. v. Bunn* (1919) — Tex. Civ. App. —, 209 S. W. 830.

The Florida cases are not altogether clear as to what, if any, estate remains in the purchaser after the expiration of a reasonable time. In *McNair & W. Land Co. v. Parker* (1912) 64 Fla. 371, 59 So. 959, the court says: "As to the interest conveyed by the deed, it is plain that it carries no permanent fee-simple interest in the land itself. It conveys only the timber growing on the land, which is a kind of servitude which may be lost by nonuse or abandonment." This case is approved in *Cummer Co. v. Yager* (1918) 75 Fla. 729, 79 So. 272, where the court says further: "The conveyance to the grantee, 'her heirs and assigns forever,' is of a fee-simple estate in 'the cypress timber now growing and standing' on the land, and is

coupled 'with the right of entry on the aforesaid land for the purpose of working up and removing said cypress timber.' From these terms the law implies an obligation to remove the timber within a reasonable time."

An injunction by the owner of land against the removal by the purchaser of trees sold was dissolved in *Woody v. Interment Iron & Timber Co.* (1906) 141 N. C. 471, 53 S. E. 953, where the time for removal was unlimited, and a reasonable time had not expired, the court stating that it is possible the deed in this case may be so construed as to require the grantee, or those claiming under him, to remove the trees within some reasonable time, but as it was claimed that the time within which the defendant might enter and remove had not expired, the injunction should be dissolved.

(b) Minority rule.

According to the courts of a few states, where there is a sale of timber, or an exception or reservation of timber in a deed of the land, and the purchaser of the timber or grantor of the land, as the case may be, is held bound to remove within a reasonable time, his failure to remove within the time results merely in the loss of the right of entry on the land; the title to the timber remains in him. *Heflin v. Bingham* (1876) 56 Ala. 566, 28 Am. Rep. 776; *Magnetic Ore Co. v. Marbury Lumber Co.* (1894) 104 Ala. 465, 27 L.R.A. 434, 53 Am. St. Rep. 73, 16 So. 632; *Goodson v. Stewart* (1908) 154 Ala. 660, 46 So. 239; *Ward v. Moore* (1913) 180 Ala. 403, 61 So. 303; *Hoit v. Stratton Mills* (1873) 54 N. H. 109, 20 Am. Rep. 119; *Kidder v. Flanders* (1905) 73 N. H. 345, 61 Atl. 675; *Dyer v. Hartshorn* (1906) 73 N. H. 509, 63 Atl. 231; *Deerfield Lumber Co. v. Lyman* (1915) 89 Vt. 201, 94 Atl. 837.

That the purchaser loses only his right of entry, but not his title to the timber, is held also in *Boults v. Mitchell* (1850) 15 Pa. 371. But where the time for removal is fixed, it is held in *Saltonstall v. Little*

(1879) 90 Pa. 422, 35 Am. Rep. 683, that not only is the right of entry terminated, but also title to the timber. And see *Patterson v. Graham* (1894) 164 Pa. 234, 30 Atl. 247, II. c. 1, *supra*.

This theory seems to be favored by the court in *Keystone Lumber & Min. Co. v. Brooks* (1909) 65 W. Va. 512, 64 S. E. 614, where there was an absolute grant of the timber, although this court admits the other rule as applied to conveyances to be removed in a definite time. See comment upon this case in *WILLIAMS v. MCCARTY* (reported herewith) *ante*, 9.

But see *Wilson v. Buffalo Collieries Co.* (1917) 79 W. Va. 279, 91 S. E. 449, *infra*.

Grantors who reserved to themselves all the chestnut bark growing on the land at the date of the deed were held required to remove the same within a reasonable time, in *Morris v. Sanders* (1897) 19 Ky. L. Rep. 1433, 43 S. W. 733.

A contract may be drawn so as to take it out of the general rule, and make the title to the timber revert, as the parties desire, upon failure to remove within a reasonable time. A conveyance of timber upon condition that the same be cut by the specified date passes a defeasible title to the timber. *H. H. Hitt Lumber Co. v. Cullman Coal & Coke Co.* (1917) 200 Ala. 415, 76 So. 347. A conveyance to have and to hold for a specified period conveys a defeasible title. *Slaughter v. Hall* (1918) 201 Ala. 212, 77 So. 738. It is clear that the timber not removed within the time fixed reverts to the owner of the land, where that is the express provision of the contract of sale, and it has so been held. *Harris v. Free* (1912) 6 Ala. App. 113, 60 So. 423. The contract involved in *Bach v. Little* (1910) 140 Ky. 396, 131 S. W. 172, contained an express provision for reversion in case the timber was not removed within the time limited. The question in that case was as to the assignability of the contract of sale. See *Taylor Brown Lumber Co. v. Wolf Creek Coal Co.* (1908) 32 Ky. L. Rep. 1015, 107 S. W. 733, *infra*, V. b. The deed to the timber in *H. H. Hitt Lumber Co. v. Cullman Coal & Coke*

Co. (1917) 200 Ala. 415, 76 So. 347, conveyed in the ordinary form to the grantee all the standing timber upon the land described therein, and contained the following habendum clause, namely, "to have and to hold unto the said grantee, its successors and assigns forever, upon the condition and providing the same is cut and removed from the said above-described lands on or before the 1st day of May, 1915, the said time being the essence of this conveyance." The court admits the rule that a deed will not be construed to create an estate on condition unless language is used which, according to the rule of law *ex proprio vigore*, imports a condition, or the intent of the grantor to make a conditional estate is otherwise clearly and unequivocally indicated, but holds that the language used in this deed does indicate such an intent. A deed of conveyance which grants in the usual way to the grantee all the trees of a certain size on the land, and which contains the following habendum clause, to wit: "To have and to hold to the said Tenshaw Logging Company, its successors and assigns, for the period hereinafter shown," the period hereinafter shown being as follows, to wit: "The said Tenshaw Logging Company is hereby given five years from this date within which to cut and remove the trees herein and hereby sold and conveyed and for that period we do hereby grant and convey to the said Tenshaw Logging Company"—conveys a title only for the term of five years, and not a title absolute or in fee. *Slaughter v. Hall* (1918) 201 Ala. 212, 77 So. 738. The court admits that if the granting clause had expressly recited the estate conveyed, it would control, as to the estate granted, over a contrary provision in other clauses or parts of the deed, but where, as here, the conveyance merely grants without naming or defining the estate, then there is no conflict between such granting clause and other subsequent clauses which fix or limit the estate conveyed.

And a bill of sale may be so drawn as to pass title to such trees only as

are removed within the time fixed. This was held to be the effect of the deed involved in *Nutting v. Stratton* (1913) 77 N. H. 79, 87 Atl. 251, in which "all the standing wood and timber which shall have been cut and removed on or before March 1, 1911, from" the described tract, was conveyed.

The purchaser of timber was held to acquire only such as was cut and removed prior to the date fixed, under a deed providing that he had the right to enter and cut the timber "at any time before January 1, 1913; all timber not removed before that date should become the property of said grantors." *Paul v. Wiggin* (1916) 78 N. H. 235, 99 Atl. 88.

In *Gay Mfg. Co. v. Hobbs* (1901) 128 N. C. 46, 83 Am. St. Rep. 661, 38 S. E. 26, where a sale of timber, to be removed within five years from the time the purchaser began to manufacture said lumber into wood or lumber, was held invalid for the reason that there was no certain beginning or certain ending of the lease. The court says: "If the doctrine of reasonable time could be invoked in this case, the plaintiff [the purchaser] would be in no better condition than he now occupies. The price was \$200 for the timber, 14 inches on the stump when cut, and the defendants to pay all taxes, and the contract made thirteen years ago and not a stick of timber yet cut by the plaintiff. Under these circumstances it would certainly be held, as matter of law, that the plaintiff had allowed a reasonable time to cut the timber to elapse, and, not having done so, its rights under the contract had been lost." A similar opinion was expressed in *Bunch v. Elizabeth City Lumber Co.* (1903) 134 N. C. 116, 46 S. E. 24.

Twelve years was held by the court to be a reasonable time in which to begin operations, in *Minshaw v. Atlantic Coast Lumber Corp.* (1914) 98 S. C. 8, 81 S. E. 1027, writ of error dismissed for want of jurisdiction in (1914) 235 U. S. 685, 59 L. ed. 424, 35 Sup. Ct. Rep. 202. The failure to begin operations within this time was held to result in a forfeiture, although

the grantee of the timber did begin operations, and the suit was brought, about thirteen years after the sale. For this reason Fraser, J., dissents, saying that the difference of conditions between a time that is reasonable and a time that is not reasonable ought to be material, and to his mind the reasonableness of twelve years and the want of reasonableness of thirteen years are not apparent.

Where eleven years had expired after the sale and before the purchaser had undertaken to remove any timber, a finding that a reasonable time had expired and that the right to the timber had been forfeited, was sustained in *Houston Oil Co. v. Boykin* (1913) — Tex. Civ. App. —, 153 S. W. 1176, affirmed in (1918) 109 Tex. 276, 206 S. W. 815, where it appeared that the land on which the timber was situated lay within 3½ miles of a railroad, and the same distance from a town in which a sawmill was located for nearly three years, and that the local demand for lumber would have consumed the timber on the land if it had been manufactured by a mill built for that purpose, or it could have been hauled from a mill on the land to the railroad in ships. It further appeared that a sawmill was constructed within 3½ miles from the land, seven years after the sale, and the owners thereof offered to buy from the timber owners the timber on the land, and remove it at once.

Ten years were held to be a reasonable time, in *Carson v. Three States Lumber Co.* (1902) 108 Tenn. 681, 69 S. W. 320, where the sale involved from 16,000,000 to 18,000,000 feet of timber, and the land, or the greater part of it, was low and swampy and subject to overflow from a river, and at the time of entering into the contract the only method of getting out the timber was by operating the floating logs in an overflow. It appeared that in the first year the purchasers had cut a large amount of lumber in anticipation of having another overflow, but were not able to get it out on account of its failure. Witnesses having long experience in timber work testified that a reasonable time for

removing timber under the contract would be from six to thirteen years.

The lapse of a period of nine years before the purchaser commenced to cut the timber from land, there being only 40 acres of land to be cut, and this being situated within 3 miles of a sawmill owned by the purchaser, was held, as a matter of law, to be more than a reasonable time, in *Young v. Cowan* (1918) 134 Ark. 539, 204 S. W. 304.

On the contrary, a delay of nine years was held not to be an unreasonable delay by the grantor, who had reserved the timber on a sale of 257 acres, the chief value of which consisted of the timber, as evidenced by the fact that the land was sold for \$550, which the grantee was given eleven years to pay, and the further fact that the grantor retained legal title to the land. *Hayes v. Gregory* (1918) 184 App. Div. 802, 172 N. Y. Supp. 784.

The lapse of eight years before a company which purchased timber, and whose mill had been destroyed about two months after the purchase, began the rebuilding of its mill, was held to be an unreasonable time, in *Smith v. Dierks Lumber & Coal Co.* (1917) 130 Ark. 9, 196 S. W. 481.

The delay of a purchaser of timber in 1890, to cut the same until 1897, was held a delay beyond a reasonable time, in *Lufburrow v. Everett* (1901) 113 Ga. 1054, 39 S. E. 436, where the evidence was overwhelming that he had ample opportunity to finish cutting the timber before that time, and he said in his own testimony that he believed he could have cut it easily, but did not do so because there was no demand for the lumber. In *Hampton Stave Co. v. Elliott* (1916) 124 Ark. 574, 187 S. W. 647, a reasonable time was held to have expired where seven years had expired, within which time the timber company had cut over the ground twice, and there was no reason shown why the timber could not have been sooner cut and removed.

Upon a sale of a mill and timber on certain lands, in which it was provided that the purchasers should have a lease to the mill site for five

years, and longer if necessary, but were to pay a reasonable rental after five years, the stipulation as to time was held to afford a clear inference that the parties estimated a reasonable time within which to cut and remove the timber would not be less than five years. *Warren v. Ash* (1907) 129 Ga. 329, 58 S. E. 858. An oral extension by the owner of land, mentioning no definite period, will be treated as an extension for a reasonable time. In determining what is a reasonable time, the duration of the original lease must be considered. *Branch v. Johnson* (1911) 9 Ga. App. 699, 71 S. E. 1123. In this case, the original lease being for a period of two years, it was held unreasonable to construe a parol agreement as extending it for five years more.

It cannot be said by the reviewing court that a finding that a reasonable time had not expired for the removal of the timber is against the weight of evidence, where it appears that the timber deed was dated in 1898, and subsequently, in 1900, the owner of the land sold it, and in the conveyance expressly recognized that the land was subject to the timber deed, and the suit to restrain the removal was instituted in 1903. *Liston v. Chapman & D. Land Co.* (1905) 77 Ark. 116, 91 S. W. 27. The court says that in determining what is a reasonable time no account should be taken of the time that elapsed between 1898 and 1900, since the grantors at that time expressly recognized the rights of the purchasers of the timber.

The failure of a purchaser of timber, under a deed dated in August, 1899, to remove the timber until August of 1901, was held not to be a failure to remove within reasonable time in *Garden City Stave & Heading Co. v. Sims* (1907) 84 Ark. 603, 106 S. W. 959, where the purchaser showed that it was impossible to cut timber for a considerable part of the intervening time, owing to bad weather and other adverse conditions, and where it was shown that the seller of the timber was an employee of the purchaser, and knew the conditions, and that the timber could only be

removed with profit during certain seasons of the year, and made no objection that the time was not reasonable. The seller of the timber had sold the land to the plaintiff in the action at bar.

The purchaser of timber under a contract giving him a stated time in which to cut and remove the timber from the date of commencing sawing, and requiring him to begin sawing "within a reasonable time," and providing that the purchaser should begin "the same within a reasonable time, and move his mill to said land as soon as he finishes present location," cannot maintain an action in damages against the landowner who has refused to allow him to cut, where he made no attempt to move his mill as required in the contract, but moved it from the then location to other lands, and failed to take any steps to cut timber on the land in question until eighteen months after the contract was executed. *Hearne v. Perry* (1919) 178 N. C. 102, 100 S. E. 185.

In *Weaver v. King* (1906) — Tex. Civ. App. —, 98 S. W. 902, where the landowner from whose land timber had been sold, with a stipulated time for its removal, granted an extension to the purchaser of all the time he needed to cut the timber. It was held that the purchaser had reasonable time after the expiration of the time limited. In this case it appeared that a year had expired after the expiration of the time limited, and an injunction against the cutting was issued on the theory that the purchaser had the burden of showing that a reasonable time had not elapsed, and, not having shown this, the court would presume that such a time had elapsed, and therefore that the title had been forfeited by failure to cut within the reasonable time. The question as to who has the burden of establishing what is a reasonable time is not within the scope of this annotation. It is interesting to note, however, that a conclusion contrary to that reached in the *King Case* was reached in *Montgomery County Development Co. v. Miller-Vidor Lumber*

Co. (1911) — Tex. Civ. App. —, 139 S. W. 1015, where it is stated that, no time being fixed in the deed in which the severance of the timber must be made, the law implies that a reasonable time was intended, and the landowner could only claim a forfeiture of the timber owner's right to cut and remove the timber by alleging and proving that such reasonable time had elapsed. The action in the Montgomery County Case was trespass to try title, with an application for a temporary injunction. The action in the King Case was an application for injunction to restrain the cutting and removing.

In *Patterson v. Graham* (1894) 164 Pa. 234, 30 Atl. 247, a purchaser who five years after his purchase entered upon the land to cut the timber, and continued his operations for three years, and then, after apparently having cut all that was worth cutting, took away his mill, was held to have no right to re-enter eleven years thereafter and cut what had grown into merchantable timber in the meantime.

III. Effect of failure to remove under contracts specifying time for removal.

a. Majority rule.

1. Sale contracts.

(a) In general.

Where the contract specifies a time for the removal of the timber, the great majority of courts hold that the rights of the purchaser terminate upon his failure to remove within the time stated, and reinvest in the owner of the land. This statement is subject to the effect of cutting before the expiration of the time limited, which is discussed in subd. V. *infra*, and also subject to the effect of sale of the land, which is discussed in subd. VI. *infra*.

The result in these cases is not dependent upon the character of the instrument evidencing the sale. It has been well stated that "no distinction seems to be made in this respect between rights conferred by deed and those conferred by contracts which have not the form nor all the requi-

sites of a deed." *Adkins v. Huff* (1905) 58 W. Va. 645, 3 L.R.A.(N.S.) 649, 52 S. E. 773, 6 Ann. Cas. 246. This language is approved in *Clark v. Ingram-Day Lumber Co.* (1907) 90 Miss. 479, 43 So. 813.

It must be remembered that the intention of the parties is an important element in construing grants of timber containing a time limit for removal. The test generally applied, where an estate in the timber has been conveyed, is whether a forfeiture of such estate was intended by the limitation as to time. *Anderson v. Palladine* (1919) 39 Cal. App. 256, 178 Pac. 553. A grant of "all the timber now growing and standing on [certain described property], . . . together with the right and privilege of free and undisturbed ingress and egress in, upon, and from said real property at any and all times within ten years from the date of this grant," was held not to show an intention of the grantor to create an estate in the timber upon condition subsequent; upon failure to remove the timber within the ten years, only the right of free and undisturbed access would be lost. In addition, the above construction was aided in this case, according to the court, by the closing language of the deed. After apt words of grant of the timber, and language conferring the right to remove it within ten years, there was the additional provision, "together with all other rights and privileges necessary for the full enjoyment by said grantees of this grant." Here, according to the court, is emphasized the intent of the grantor to confer everything necessary for the full enjoyment of the grant of the timber, and a reasonable construction of this provision would give to the grantee of the timber additional time, within reason, for its removal, if found necessary.

Various theories have been advanced as to the status of the title to the trees before the expiration of the time limited. Too much importance should not be attached to the theory adopted in the particular case, however. The same court has not always been consistent in the statement of

theory. Although the North Carolina court makes it clear that the doctrine of that jurisdiction is that a defeasible title passes by a conveyance of standing timber, it is frequently stated in that jurisdiction that the conveyance is only of so many of the trees as the purchaser shall remove within the time stated. *Hornthal v. Howcott* (1911) 154 N. C. 228, 70 S. E. 171; *Jenkins v. Montgomery Lumber Co.* (1911) 154 N. C. 355, 70 S. E. 633; *Powers v. Angola Lumber Co.* (1911) 154 N. C. 405, 70 S. E. 629; *Rountree v. Cohn-Bock Co.* (1912) 158 N. C. 153, 73 S. E. 796. According to the court of appeals of Virginia, in *Hartley v. Neaves* (1915) 117 Va. 219, 84 S. E. 97, the ordinary form of timber deeds or contracts "conveys to the grantees an absolute estate in the timber, determinable as to all of the timber not cut and removed within the stipulated period." But in *Blackstone Mfg. Co. v. Allen* (1915) 117 Va. 452, 85 S. E. 568, the court says: "The decisions of this court construing 'timber contracts' such as is under consideration in this case, which are in perfect accord with a large majority of the decisions of the courts in other jurisdictions construing similar deeds or contracts, are to the effect that absolute title to the timber never passes out of the grantor until the grantee cuts and removes the timber within the period of time allowed by the contract for so doing; that there is no 'forfeiture' of the timber remaining uncut or unremoved after the time limit, because there is nothing to forfeit; that there is no 'implied condition subsequent,' because there is an express condition precedent (to the passing of absolute title) in the contract itself." That the contracts involved in these two cases were similar is evidenced by the statement of the court in the *Allen Case* that, "in the present case, the contract differs from the contract in the case cited [*Hartley v. Neaves*] only in the length of the period fixed for the cutting and removal of the timber and in the wording of the 'extension clause.'" In *ZIRKLE v. ALLISON* (reported herewith) ante, 38, the court, referring

to the previous Virginia decision, says: "These cases undoubtedly settle the proposition in Virginia that, under timber contracts which require the timber to be cut and removed by a specified date, the title to the timber never passes out of the grantor until the grantee cuts and removes it within the period of time specified in the contract for so doing." Although the trial court, in *Wright v. Camp Mfg. Co.* (1910) 110 Va. 678, 66 S. E. 843, was of the opinion that the deed in that case vested "the present absolute title to all the pine timber" in the grantee, which title was defeasible as to such of the timber as should not be removed from the land within the prescribed time, the supreme court, in referring to the deed, says that it was not the intention of the parties to give an absolute and unconditional title to the timber, but only so much as was cut and removed within the time limited by the deed, and such extension thereof as the grantee was entitled to demand. In still other cases, no clear distinction has been made between a title subject to be divested and a conveyance of only so much of the timber as is cut and removed within the time limited. For instance, in *Norfolk Bank v. Whipple* (1918) 254 Fed. 195, affirmed on the opinion of the district court in (1919) 169 C. C. A. 647, 258 Fed. 990, the court refers to the case of *Wright v. Camp Mfg. Co. (Va.)* supra, as having adopted the view that an estate in the timber passes subject to be divested upon failure to cut and remove the timber within the time fixed in the deed, and cites as authority for this interpretation the following language of the Virginia court: "We are of opinion that it was not the intention of the parties to give an absolute and unconditional title to the timber, but only such as was cut and removed within the time limited by the deed and such extensions thereof as the grantee was entitled to demand." These instances are not the only ones that might be cited as illustrations of the above statement that too much emphasis cannot be placed upon the language defining the theory. The

fact seems probable that a good many of these courts had in mind the ultimate result,—that is, that the purchaser lost whatever rights he had by failure to remove the timber within the time limited,—and had in mind no very definite technical theory to account for this result. However, in order to preserve these various statements, the cases have been classified, so far as possible, according to theory.

Some cases have not adopted any technical theory as to the nature of the right vesting in the purchaser, but hold, as just stated, that when a purchaser of standing timber, to be removed within a stated time, fails to remove it within the time limited, his rights in the timber terminate. *Bunch v. Elizabeth City Lumber Co.* (1903) 134 N. C. 116, 46 S. E. 24; *Strunk v. Morris Run Coal Min. Co.* (1921) — Pa. —, 114 Atl. 519; *Allen & N. Mill Co. v. Vaughn* (1910) 57 Wash. 163, 106 Pac. 622; *Belcher v. Kleeb* (1910) 59 Wash. 166, 109 Pac. 798; *WILLIAMS v. MCCARTY* (reported herewith) ante, 9.

The court in *Bunch v. Elizabeth City Lumber Co.* (1903) 134 N. C. 116, 46 S. E. 24, after referring to the theory that the title to the entire timber passes, and a reversion takes place as to such as remains on the property at the expiration of the time limited, and that title to so much only of the timber as is cut and removed within the time passes to the purchaser, says: "It can make little or no practical difference in this case, as we have virtually said, whether we adopt the former or the latter view of the relation of the parties, or of the interest which passes by such contracts. In any view that can be taken of the subject, the defendant's assignor had the right to enter upon the land and cut and remove therefrom the timber then standing, and to continue to do so within the five years, but at the expiration of that time his right to cut and remove the timber ceased, whether by revesting the estate in the remaining timber in the grantor, or by a mere cessation of his right or option to cut and remove the timber, under and by virtue of the instrument treat-

ed as an executory contract, is of no importance, in view of the special facts of this case." This view is criticized in *Hawkins v. Goldsboro Lumber Co.* (1905) 139 N. C. 160, 51 S. E. 852, where the theory first above discussed was adopted, that a conveyance of timber conveys a present estate of absolute ownership in the timber, defeasible as to all timber not removed within the time required by the terms of the deed.

In *Heybrook v. Beard* (1913) 75 Wash. 646, 135 Pac. 626, a contract for the sale of timber which recites that the grantors have sold, assigned, transferred, and set over to the purchasers, their heirs and assigns, all the timber standing, lying, and being on the land described, providing that any timber not cut and removed from the land at the expiration of the period limited for the cutting and removing shall "revert" to and become the property of the vendors, was held to pass a present title to the purchasers.

A contract for the sale of timber, which was construed by the court as giving the purchaser three years within which completely to perform his contract, was held to make time the essence of the contract, in *Attridge v. Smith* (1912) 105 Ark. 626, 152 S. W. 300. Accordingly, an action instituted by the purchaser after the expiration of the time fixed, asserting the right to the timber, and seeking to restrain the vendor from interfering, was dismissed.

A contract between the owner of land and another, whereby such other was given the right to enter upon land to deaden, cut down, and trail trees for the period of one year, was held to expire upon the expiration of the year, in *Broussard v. Verret* (1891) 43 La. Ann. 929, 9 So. 905.

A conveyance by the owner of timber to another of the "exclusive privilege for ten years to cut, haul away, and remove" the trees from the land, given for a valuable consideration, was held to give to the grantee the right to cut and remove the trees for the stipulated period, and vested him with the exclusive possessory

rights to and control of them, with the right to protect his title to the trees by cutting and removing them during that time. *McLeod v. Dial* (1896) 63 Ark. 10, 37 S. W. 306.

The contract involved in *Call v. Jenner Lumber Co.* (1917) 33 Cal. App. 310, 165 Pac. 23, contained the following provision: "It is further mutually agreed and made an express condition hereof that said party of the second part is to and will fully complete the cutting and removing of the said pine and redwood timber and trees hereby conveyed to it, within the period of five years from the time when it shall commence to cut the same, but in no event later than the 1st day of July, 1915." There was a further provision that, when it should commence to cut and remove the timber, it should proceed with due diligence and despatch, and as soon as it should stop it would surrender, turn over, and deliver to the vendor the possession of the tract. The purchaser began the cutting in August of 1907, and continued for about three months, at which time it became insolvent, and ceased operations. In 1914 an assignee of the purchaser attempted to cut and remove the timber, and was forbidden by the owner of the land. In sustaining the owner's contention that the right of the timber had been forfeited, the court says: "It is not necessary, in sustaining this judgment, to go so far as to hold that the grantee's rights were forfeited by its discontinuance of operations on October 30, 1907. It is sustainable upon the theory that those rights continued in force five years from the commencement of the removal of the timber, which would be in August, 1912. As we have seen, it was nearly two years later than this date that the defendant prepared to re-enter the lands for the purpose of resuming operations."

A contract for the sale of bark was held to be limited in *Kellam v. McKinstrey* (1877) 69 N. Y. 264, where it contained a clause by which the purchasers agreed to peel the bark and "to have said bark all peeled by the first of September, 1864, piled,

measured, and settled for in full," although it also contained a provision conferring the right of free ingress and egress to enter at any time or all times upon the premises for the purpose mentioned. The court states that the provision as to entering upon the premises must be considered as connected with the preceding portion of the agreement, and, as so considered, limited in point of time.

A timber deed conveying timber of certain dimensions, "or which shall attain such size any time within the period of ten years from the date of this instrument," and granting to the purchaser the perpetual right of way through and over the tract "at any and all times during the term of twenty years . . . for the purpose of removing the above-mentioned timber," conveys to the grantee for a term of twenty years. *Gilbert v. Waccamaw Shingle Co.* (1914) 167 N. C. 286, 83 S. E. 337. The court says that, although the instrument, in connection with the twenty-year limitation, uses the word "remove," considering the extent and purpose of the contract, the term by clear intentment includes the right to cut during said period by the usual and ordinary methods of lumbermen in that vicinity.

As shown in subd. II. c, 1, *supra*, the Texas cases distinguished between a conveyance of the timber as personalty and a conveyance as real estate, upon the question whether the timber is to be removed within a reasonable time, or whether the conveyance will be treated as a grant in perpetuity. This same distinction is observed in case a time is stated in the conveyance for the removal. If the timber is conveyed as personalty, the title is forfeited by failure to remove it within the time limited. *Carter v. Clark & B. Lumber Co.* (1912) — Tex. Civ. App. —, 149 S. W. 278; *North Texas Lumber Co. v. McWhorter* (1913) — Tex. Civ. App. —, 156 S. W. 1152; *Davis v. Conn* (1913) — Tex. Civ. App. —, 161 S. W. 39; *Chavers v. Henderson* (1914) — Tex. Civ. App. —, 171 S. W. 798; *Broocks v. Moss*

(1915) — *Tex. Civ. App.* —, 175 S. W. 791, affirmed in (1919) — *Tex.* —, 212 S. W. 153; *Dunsmore v. Blount-Decker Lumber Co.* (1917) — *Tex. Civ. App.* —, 198 S. W. 603. According to these cases the grant is a grant of only so much lumber as the purchaser cuts and removes within the time limited. The deed involved in *Davis v. Conn* (1913) — *Tex. Civ. App.* —, 161 S. W. 39, conveyed to the purchaser, for the consideration therein stated, all pine timber of a certain description growing on the land described; the purchaser was to have and to hold the timber with all and singular the rights and privileges to enter upon the land to cut and remove it, and he was given five years to cut and remove the timber, with the right to an extension upon certain conditions. The court says: "Thus, there is made to plainly appear a sale made by the parties with the view and intention to the severance and removal of the trees from the land within a stipulated time. And so there are present in the sale all elements within the principle governing the effect given such conveyances of growing trees as a sale of chattels only." After referring to the decision of the supreme court in *Lodwick Lumber Co. v. Taylor* (1906) 100 Tex. 270, 123 Am. St. Rep. 803, 98 S. W. 238, *supra*, the court, in *Carter v. Clark & B. Lumber Co.* (1912) — *Tex. Civ. App.* —, 149 S. W. 278, says of the deed before it: "The language of the instrument in the instant case bargains, sells, and conveys only a particular kind of timber and of prescribed size, expressly providing for its removal from the land within the fixed time of six years from the date of the instrument. This clause, stipulating that the standing timber be removed within the time fixed, decisively shows the intention of the parties to place a limitation upon the extent and duration of the grant, and to determine the right at the end of the period agreed upon. As the right was intended to expire at the end of the fixed time, then there appears a reservation in the deed to the seller of all the timber not removed within

the time agreed upon. Having agreed to a limitation upon the right of removal, then the right of the purchaser to the timber is acquired by the act of removal and appropriation; and as appropriation of the timber, as such, is dependent upon the removal from the soil, the intention of the parties would appear to be a contract of sale of such timber only as is removed within the time limited." The court in *North Texas Lumber Co. v. McWhorter* (1913) — *Tex. Civ. App.* —, 156 S. W. 1153, says: "The conveyance, taking it as a whole and ascertaining what the parties really intended, manifests, we think, an intention to sell and purchase all the timber of the dimensions specified, as the purchaser might cut and remove from the premises within the time limit specified, and no more. The parties were dealing with the timber as personalty, removable within a limited time. And thus the legal effect of the deed is to retain in the vendor the title to the timber on the land not cut and removed therefrom by the purchaser at the expiration of the contractual period of time." There is the implication in these cases that if the trees were conveyed as realty (some cases say a fee-simple absolute title, others simply an interest in realty), the title to the trees would not revert upon failure to remove them within the time limited. It seems, however, that the very fact that there was a time fixed for removal goes a good way, if it is not conclusive that the timber was conveyed as personalty within the meaning of the Texas rule. The Texas court has not consistently adhered to the theory that if the conveyance is in fee simple, then the title remains in the purchaser, although the time fixed in the contract for the removal has expired. In *Lancaster v. Roth* (1913) — *Tex. Civ. App.* —, 155 S. W. 597, the court had before it a contract which it held should be construed as an absolute conveyance of the timber as an interest in realty, had there been no provision in the contract for the removal within a stated time. There was, however, in this case, no

dispute as to the title to the timber standing, the dispute being as to logs and lumber in the mill yard of the purchaser. See *infra*, V. a, 1.

This rule that the rights reinvest in the vendor has been held not to operate in favor of one not the owner of the land, but who was the owner of the timber, and who sold the same under a contract by the terms of which the purchaser was to remove the same within a stated time. *Ford Lumber & Mfg. Co. v. Asher* (1909) 131 Ky. 796, 115 S. W. 790; *Begley v. Consolidated Timber Co.* (1913) 152 Ky. 455, 153 S. W. 734. In *Ford Lumber & Mfg. Co. v. Asher* (Ky.) *supra*, the owner of the timber held under contract from the owner of the land, by the terms of which there was no limit of time for the removal of the trees. In his sale to his purchasers he assigned and transferred to them all the benefits of any and all rights in his various contracts and deeds under which he held the timber, but limited the time for the removal. In holding that he had no cause of action against his purchasers for removal after this time, the court said: "The fatal defect in this theory is that Asher is not the owner of the soil, and it would be a most unwarranted extension of the rule that prevails between the owner of land and the purchaser of timber thereon to include Asher within its scope. Asher, by his sale of the trees, passed to the company not only all his title and interest in the trees, but the privilege to remove them granted to him by the owners of the land. As Asher did not own the land or any interest in it except the timber and the right to remove it, all of which he sold and conveyed, it is no concern of his when the timber is removed."

A purchaser of timber with the right to remove the same within a limited time may abandon his right before the expiration of the time agreed upon. *Kunst v. Mabie* (1913) 72 W. Va. 202, 77 S. E. 987. Whether or not there has been abandonment depends upon the facts and circumstances of the individual case. It is largely a matter of intention. The

mere abandonment of operations and removal of equipment by the purchaser of timber, who has a stated time in which to cut and remove the same, does not show an abandonment if it appears from other acts and conduct, or an express verbal notice or assertion of intention, that he intends to hold his right. *Cunningham v. Heltzel* (1920) — W. Va. —, 105 S. E. 155. Questions relating to abandonment have not been considered generally herein.

Where the rights of a purchaser of timber under a contract required him to remove the same within a stated time are forfeited because of his failure to make the cash payments required, and the timber sold under a foreclosure of the vendor's lien, nothing being said as to the time for removal, the purchaser of the timber upon the foreclosure sale does not obligate himself to remove within the time fixed in the first sale; accordingly, one who thereafter purchased the land, acquiring no rights to the timber, cannot insist that upon the expiration of the original time the timber reverts to him. *Palmer v. Vernon Lumber Co.* (1909) 125 La. 31, 51 So. 58.

The purchaser of timber, with fifteen years in which to "cut and remove," the same, is not limited to a continuous cutting, but, having once cut over the timber, may enter and cut a second time. *Hardison v. Dennis Simmons Lumber Co.* (1904) 136 N. C. 172, 48 S. E. 588.

The case of *Walker v. Johnson* (1904) 116 Ill. App. 145, is meagerly reported. It seems, however, to have been held in that case that the failure of a purchaser of timber to clear sections of the entire tract, as provided in the sales agreement, did not result in a forfeiture of his title to the timber, where there was an ultimate time limitation applicable to the entire purchase.

(b) *Doctrine that title passes subject to be divested by failure to remove.*

Proceeding to the theories that have been advanced by the courts, it appears that some say a sale of standing timber passes an interest in the timber

or land which is subject to be devoted if the purchaser fails to remove within the time limited.

United States.—Southern Lumber Co. v. Long (1910) 182 Fed. 82.

Georgia.—Morgan v. Perkins (1894) 94 Ga. 353, 21 S. E. 574; Perkins v. Peterson (1900) 110 Ga. 24, 35 S. E. 319 (contract provided, "This lease terminates and reverts back to the owner of the land" in the time stated); Jones v. Graham (1913) 141 Ga. 60, 80 S. E. 7.

Missouri.—Hanna v. Buford (1915) 191 Mo. App. 654, 177 S. W. 662, s. c. subsequent appeal in (1917) — Mo. App. —, 194 S. W. 1060.

North Carolina.—Hawkins v. Goldsboro Lumber Co. (1905) 139 N. C. 160, 51 S. E. 852; Dennis Simmons Lumber Co. v. Corey (1906) 140 N. C. 462, 6 L.R.A.(N.S.) 468, 53 S. E. 300; Davis v. Frazier (1909) 150 N. C. 447, 64 S. E. 200; Bateman v. Kramer Lumber Co. (1911) 154 N. C. 248, 34 L.R.A.(N.S.) 615, 70 S. E. 474; Jenkins v. Montgomery Lumber Co. (1911) 154 N. C. 355, 70 S. E. 633; Wiley v. Bradus & I. Lumber Co (1911) 156 N. C. 210, 72 S. E. 305 (obiter); Williams v. Parsons (1914) 167 N. C. 529, 83 S. E. 914; Fowle v. McLean (1915) 168 N. C. 537, 84 S. E. 852.

Oregon.—Anderson v. Miami Lumber Co. (1911) 59 Or. 149, 116 Pac. 1056; Kreinbring v. Mathews (1916) 81 Or. 243, 159 Pac. 75; Kee v. Carver (1920) 95 Or. 406, 187 Pac. 1116.

Pennsylvania.—Bennett v. Vinton Lumber Co. (1905) 28 Pa. Super Ct. 495.

South Carolina.—Hill v. E. P. Burton Lumber Co. (1911) 90 S. C. 176, 72 S. E. 1085.

Tennessee.—Bond v. Ungerecht (1914) 129 Tenn. 631, L.R.A.1915A, 571, 167 S. W. 1116.

Washington.—Allen & N. Mill Co. v. Vaughn (1910) 57 Wash. 163, 106 Pac. 622; Belcher v. Kleeb (1910) 59 Wash. 166, 109 Pac. 798.

West Virginia.—Brown v. Gray (1911) 68 W. Va. 555, 70 S. E. 276 (there was an express provision for reversion in the contract).

That the interest of the grantee in a contract for the sale of growing tim-

ber, to be removed within a certain period of years, is a determinable fee in real estate, is held also in *Midyette v. Grubbs* (1907) 145 N. C. 85, 13 L.R.A.(N.S.) 278, 53 S. E. 795, and as such was held to pass to the heirs, and not to the administrator of the grantee.

A duly authorized contract of sale of timber by the lessee of land, by the terms of which the purchaser was to release a certain number of acres of land each year whether the timber was cut therefrom or not, but was thereafter to have the privilege at any time during the continuance of the agreement to re-enter upon any of the tract so relinquished, and cut therefrom the timber remaining thereon, provided such cutting might be done without interfering with the clearing of the land for purposes of cultivation, was held to pass the absolute title to the purchaser of the timber, so that the lessees or their assignees could not, after a relinquishment of such a tract, sell the timber thereon, their rights being limited to deadening the timber and clearing the tract for cultivation. *Tucker v. Ross Attley Lumber Co.* (1910) 95 Ark. 623, 129 S. W. 1085.

(c) *Doctrine that sale passes to purchaser only so much as he removes within the time limited.*

Other courts say that a contract of sale of standing timber, by the terms of which the timber is to be removed within a specified time, passes to the purchaser, or is a sale of, only so much of the timber as is cut and removed within the time designated, the balance remaining the property of the vendor.

California.—Mallett v. Doherty (1919) 180 Cal. 225, 180 Pac. 531; Call v. Jenner Lumber Co. (1917) 33 Cal. App. 310, 165 Pac. 23.

Kentucky.—Chestnut v. Green (1905) 120 Ky. 385, 86 S. W. 1122; Ford Lumber & Mfg. Co. v. Cress (1909) 132 Ky. 317, 116 S. W. 710; Ford Lumber Co. v. Cornett (1912) 146 Ky. 457, 142 S. W. 718, rehearing denied in (1912) 148 Ky. 25, 145 S. W. 1105; Harrell v. Danks (1912) 151 Ky. 71,

151 S. W. 13; *Wright v. Cline* (1916) 172 Ky. 514, 189 S. W. 425; *Jackson v. Hardin* (1905) 27 Ky. L. Rep. 1110, 87 S. W. 1119; *Bell County Land Coal Co. v. Moss* (1906) 30 Ky. L. Rep. 6, 97 S. W. 354; *Taylor Brown Timber Co. v. Wolf Creek Coal Co.* (1908) 32 Ky. L. Rep. 1015, 107 S. W. 733.

Louisiana.—*St. Louis Cypress Co. v. Thibodaux* (1907) 120 La. 835, 45 So. 742.

Maine.—*Pease v. Gibson* (1829) 6 Me. 81; *Howard v. Lincoln* (1836) 13 Me. 122; *Webber v. Proctor* (1896) 89 Me. 404, 36 Atl. 631.

Massachusetts.—*Reed v. Merrifield* (1845) 10 Met. 155; *Fletcher v. Livingston* (1891) 153 Mass. 388, 26 N. E. 1001.

Michigan. — *Johnson v. Moore* (1873) 28 Mich. 3; *Haskell v. Ayres* (1875) 32 Mich. 93; *Utley v. S. N. Wilcox Lumber Co.* (1886) 59 Mich. 263, 26 N. W. 488; *Williams v. Flood* (1886) 63 Mich. 487, 30 N. W. 93; *Prentiss v. Ross* (1893) 96 Mich. 83, 55 N. W. 613 (purchaser was to have stipulated time, "and no longer"); *Macomber v. Detroit, L. & N. R. Co.* (1896) 108 Mich. 491, 32 L.R.A. 102, 62 Am. St. Rep. 713, 66 N. W. 876; *Michigan Iron & Land Co. v. Nester* (1907) 147 Mich. 599, 111 N. W. 177.

Minnesota.—*J. Neils Lumber Co. v. Hines* (1904) 93 Minn. 505, 101 N. W. 959.

Montana. — *Hollensteiner v. Missoula Lumber Co.* (1908) 37 Mont. 278, 96 Pac. 420.

New York.—*McIntyre v. Barnard* (1843) 1 Sandf. Ch. 52; *Boisaubin v. Reed* (1866) 2 Keyes, 323, 1 Abb. App. Dec. 161; *Kellam v. McKinstry* (1877) 69 N. Y. 264; *Inderlied v. Whaley* (1892) 65 Hun, 407, 20 N. Y. Supp. 183.

Ohio.—*Clark v. Guest* (1896) 54 Ohio St. 298, 43 N. E. 862.

Texas.—*Broocks v. Moss* (1919) — Tex. —, 212 S. W. 153; *Conn v. Houston Oil Co.* (1920) — Tex. Civ. App. —, 218 S. W. 137; and see other Texas cases supra, III. a, 1 (a), the net result of which seems to be an adherence to this theory.

Virginia.—*Wright v. Camp Mfg. Co.* (1910) 110 Va. 678, 66 S. E. 843; *Carpenter v. Camp Mfg. Co.* (1911) 112

Va. 300, 71 S. E. 559; *Quigley Furniture Co. v. Rhea* (1912) 114 Va. 271, 76 S. E. 330; *SMITH v. RAMSEY* (reported herewith) ante, 32; *Hartley v. Neaves* (1915) 117 Va. 219, 84 S. E. 97.

West Virginia.—*Null v. Elliott* (1902) 52 W. Va. 229, 43 S. E. 173; *Electro Metallurgical Co. v. Montgomery* (1912) 70 W. Va. 754, 74 S. E. 994.

Wisconsin.—*Strasson v. Montgomery* (1873) 32 Wis. 52; *Golden v. Glock* (1883) 57 Wis. 118, 46 Am. Rep. 32, 15 N. W. 12; *Bretz v. R. Connor Co.* (1909) 140 Wis. 269, 122 N. W. 717.

In holding that a sale of standing timber to be removed within a time limited is a right to so much timber only as shall be cut and taken off within the limited time, the court in *Clark v. Guest* (Ohio) supra, says that it is a right to only so much timber as shall be cut and taken off within the limited time, and makes it clear that title does not pass out of the owner of the land. The court says: "This was a sale, the title to the trees remaining in the owner of the land until cut and converted into personalty."

A conveyance of "all the hemlock bark and one half of the hemlock logs on the following described land, . . . with the right to enter upon said lot of land . . . during the term of ten years to cut any trees and make necessary roads, to remove said hemlock bark and hemlock trees, or logs from the land during the term aforesaid, without being liable for trespass," conveys to the purchaser only so much bark and such trees as he receives within the time limited; the above provision as to entry and removal limits the grant, according to the court. *Webber v. Proctor* (1896) 89 Me. 404, 36 Atl. 631.

In some cases there arises the question whether there is a sale of the timber, or only a license to cut. For instance, in *Brown v. Bishop* (1909) 105 Me. 272, 74 Atl. 724, a writing under seal, in which the owner of land does "hereby agree, covenant, and permit . . . [the grantee] to have all hemlock, fir, spruce, pine, and cedar on my lot, . . . and to enter with teams and men for the purpose of cutting

said timber," was held to evidence a purchase and sale of the timber, not a mere license to cut.

In *Pease v. Gibson* (1829) 6 Me. 81, the contract of sale was held to be a license, but the court adds: "If we were at liberty to consider a sale of the timber as proof of the license pleaded, still our opinion would be that it was only a conditional sale; that is, a sale of the timber that Howard or his assignee should cut and carry away within the two years mentioned in the license."

The fact that the timber must be removed within a stated period does not prevent title passing to the purchaser. *Mee v. Benedict* (1893) 98 Mich. 260, 22 L.R.A. 641, 39 Am. St. Rep. 543, 57 N. W. 175.

The timber reverts to the owner at the expiration of the time fixed, notwithstanding there is no express provision for reversion. *Adams v. Fidelity Lumber Co.* (1918) — Tex. Civ. App. —, 201 S. W. 1034.

A lease of land for ninety-nine years with appurtenances, including lumbering rights, was held to be a grant of all the timber in place that might be removed within the term of the contract, in *Electro Metallurgical Co. v. Montgomery* (1912) 70 W. Va. 754, 74 S. E. 994.

(d) Doctrine that sale is only a license.

Other cases treat the rights of the purchaser more in the nature of a license. It is the theory that in contracts for the sale of standing timber, to be taken off in a given time, the purchaser takes no beneficial interest in the land itself; he only acquires a right of entry on the land during the time specified in the contract for cutting and carrying away the timber. *Sanders v. Clark* (1867) 22 Iowa, 275. A contract "to let . . . [the purchaser] have all the pine trees" on certain described lands, said purchaser "to have two years from date to take off said timber," was treated as a mere license which expired at the expiration of two years in *Pease v. Gibson* (1829) 6 Me. 81.

A contract by which the owners of lands granted unto the purchasers

"their executors, administrators, and assigns, the right, privilege, and permission to enter and cut, during the logging season of 1883-4 and 1884-5, all the pine timber fit for saw logs growing upon the following described lands," was held in *King v. Merriman* (1887) 38 Minn. 47, 35 N. W. 570, to be a mere license to enter, and an agreement for the sale of such timber as the licensees should cut within the limits of the license. It is added: "But call it by what name we may,—a license to enter and cut; a sale; a conditional sale; or a contract to sell, coupled with the license to enter,—the object and extent of the grant was only so much timber as the grantee should cut during these two logging seasons, and no more. Contracts relating to an interest in standing timber, with an express limitation as to the time of removal, are familiar to the American courts in the timbered states. . . . Sometimes these contracts are in the form of conveyances of timber, sometimes of a sale, coupled with a license to enter, sometimes of a formal license to enter and cut, and again of a reservation of the timber by the grantor in the conveyance of the land. But, whatever the form, the limitation as to the time of removal has been almost invariably held to be a limitation of the grant or reservation itself."

In *Emerson v. Shores* (1901) 95 Me. 237, 85 Am. St. Rep. 404, 49 Atl. 1051, it is said: "It has accordingly become settled law under the decisions of this court, and by the great weight of authority elsewhere, that parol or simple contracts for the sale of growing wood or timber, to be cut and removed from the land by the purchaser, are not to be construed as intended by the parties to convey any interest in land, but as executory contracts for the sale of the timber after it shall have been severed from the soil and converted into chattel property, together with a license to enter upon the land for the purpose of cutting and removing it."

A writing which was held not to be sufficient to convey standing timber, because not executed with the formalities necessary for the execution of deeds, was held to convey to the pur-

chaser of the timber named therein a mere license to go upon the land and cut the trees until the expiration of the time stipulated, and not after that, in *Gibbs v. Wright* (1911) 5 Ala. App. 486, 57 So. 258.

A written contract in which one party agrees to cut timber on a certain tract of land, and deliver a certain amount to the other party, was construed as a mere license in *Polk v. Carney* (1907) 21 S. D. 295, 130 Am. St. Rep. 719, 112 N. W. 147.

A written agreement by which the owner of timber, for a stated consideration, gave to another "the exclusive privilege for sixty days of buying" certain timber, was construed as an offer to sell the trees at a certain price within the sixty days, in *Paddock v. Davenport* (1890) 107 N. C. 710, 12 S. E. 464. It is held that the offer may have been withdrawn, but, not having been withdrawn before acceptance, was constituted a binding contract. The offer of an assignee of persons named as purchasers, to pay the price and mark the trees, was held sufficient to constitute a valid acceptance.

A permit granted for the "ensuing logging season only" was held not to have any definite meaning, and therefore not to be a limitation of time, in *Prentiss v. Lyons* (1901) 105 La. 382, 29 So. 944. See *Prescott v. Betts Co.* (1921) — Fla. —, 88 So. 385.

The present annotation is not concerned with contracts which are in form licenses, but is confined to contracts of sale.

2. *Exceptions and reservations in deed of land.*

Where there is a reservation of trees in a sale of land, with the right to remove limited to a specified period, the right of the grantor to remove the trees is limited to the period stated; upon the expiration of that time his rights terminate. *Hounshell v. Miller* (1913) 153 Ky. 530, 155 S. W. 1148; *Noyes v. Goding* (1908) 104 Me. 453, 72 Atl. 181; *Perkins v. Stockwell* (1881) 131 Mass. 529; *Monroe v. Bowen* (1873) 26 Mich. 523; *Richard v. Tozer* (1873) 27 Mich. 451; *Hodges v. Buell* (1903) 134 Mich. 162, 95 N.

W. 1078 (but see *infra*, VII. a, as to equity aiding in enforcing forfeitures); *Hand v. Fillingame* (1907) 92 Miss. 185, 45 So. 569; *Saltonstall v. Little* (1879) 90 Pa. 422, 35 Am. Rep. 683; *Lehtonen v. Marysville Water & P. Co.* (1908) 50 Wash. 359, 97 Pac. 292, s. c. on subsequent appeal in (1910) 58 Wash. 86, 107 Pac. 878; *Adkins v. Huff* (1906) 58 W. Va. 645, 3 L.R.A. (N.S.) 649, 52 S. E. 773, 6 Ann. Cas. 246; *Rich v. Zeilsdorff* (1868) 22 Wis. 544, 99 Am. Dec. 81; *Martin v. Gilson* (1875) 37 Wis. 360.

The court in *Adkins v. Huff* (1906) 58 W. Va. 645, 3 L.R.A. (N.S.) 649, 52 S. E. 773, 6 Ann. Cas. 246, after stating that the deed in question would have conveyed the timber, but for a subsequent clause reserving the timber with certain exceptions and fixing a limit of time within which it should be removed, says: "Adkins [the grantor] may have still owned the timber under the language of the clause referred to, but, if so, his title, as tested by the principles above stated, was a defeasible one, wherefore it failed by reason of the nonperformance of the condition upon which it was held. The reservation in the deed vested in him a present title to the timber, but his failure to remove it operated to divest it out of him, and vest it in the grantee of the land. If this be not the true interpretation of the deed, then the principles in *Null v. Elliott* (1902) 52 W. Va. 229, 43 S. E. 173, *supra*, apply, and no title vested in Adkins as to the timber remaining uncut at the expiration of the time specified for removal."

The deed involved in *Rich v. Zeilsdorff* (1868) 22 Wis. 544, 99 Am. Dec. 81, was for a stated consideration, and conveyed "all that certain piece or parcel of land, situated, lying, and being . . . reserving the right to cut and remove all the pine timber or trees upon said premises, and one half of all cedar trees upon said premises; and the right is hereby reserved by the party of the first part to enter upon said lands at any time within two years next succeeding the date of this instrument, for the purpose of cutting and removing the trees or timber so

reserved." The court makes a distinction between an exception and a reservation, but admits that in giving a construction to the clause the intention of the parties to the instrument must, if possible, be ascertained. The court says: "And we think that the intention manifestly was to reserve only the right to cut and remove so much of the timber upon the land conveyed as the grantor might remove within two years from the date of the deed. It will be noticed that the reservation is of the right to cut and remove the timber upon the land,—that is, a new right derived from the estate granted,—and hence it falls fully within the definition of a reservation above given. For when the land was conveyed, and this right to cut and remove the timber was reserved, that right, in the sense of the law, became a new thing, separate from the right of the grantee in the premises. In some of the cases, the timber itself is reserved; and the courts hold that this is strictly an exception, since it is a part of the realty, or a part of the estate, and would have passed to the grantee but for the exception. The property in the timber continues in the grantor, with the right in so much of the soil as is necessary to sustain it. . . . But those cases are readily distinguishable from the one we have before us. Here it is not the timber which is excepted from the operation of the deed, but the right to cut and remove only so much as he may take off within the time specified in the deed." In *Martin v. Gilson* (1875) 37 Wis. 360, an action in trover against his grantee who had cut timber before February 1, 1874, the time limited was denied to the grantor who had thus reserved the timber, on the ground that he had no property in the trees nor possession; that the deed gave the right to acquire property in the logs, but did not give the property. The reservation in this case was as follows: "Said . . . [grantor] reserved for himself, his heirs and assigns, the right to cut and remove all the pine, white oak, basswood, and one half the red oak, from said land at any time before February 1, 1874."

In *Saltonstall v. Little* (1879) 90 Pa. 422, 35 Am. Rep. 683, where there was an exception of timber from a deed in which the time for removal was fixed, it was contended that, even if the right of entry was gone, the right of property in the trees remained; but the court, in answer to this contention, said: "It would certainly be a barren right to own trees upon another's land, with no right of entry to take them away. The plaintiffs have no such property in the timber. The limitation upon the right of entry was a limitation upon the exception itself. It was a reservation of the timber for twelve years, and no longer. After that time, the trees remaining passed with the grant of the soil to which they were attached."

The court in *Lehtonen v. Marysville Water & P. Co.* (1908) 50 Wash. 359, 97 Pac. 292, speaks of the timber as "reverting" to the owner of the realty, if not removed within the time limited. The clause reserving the timber involved in this case was as follows: "Also saving and excepting all the timber growing," etc.

An interesting application of this rule appears in *Vincent v. Haycraft* (1914) 158 Ky. 845, L.R.A.1915E, 307, 156 S. W. 613, in the holding of that case that, the removal of the timber within the time specified being an element necessary to the completion of the title, the sale did not include title to the annual product of the tree after it had ripened and fallen to the ground.

A reservation of the timber in a deed which expressly provides that the grantor could let the timber remain upon the land as long as he liked, except "upon such part of the land as second party [grantee] may wish to clear up, then the hickory shall be removed within five years," gives to the grantor five years after the grantee had formed a desire to clear the land and notified the grantor thereof. *Dodson v. Powell* (1919) 185 Ky. 387, 215 S. W. 82.

3. Theory.

Briefly restating the rule now under consideration, it is that upon the fail-

ure of the purchaser of timber, under a contract giving him a stated time to cut and remove it, to remove the timber within the time stated, his rights terminate; not only his rights to enter upon the land, but his rights in the timber itself. Many courts which adhere to this theory point out the anomalous situation which exists in the opposite theory, holding the title to the timber to remain in the purchaser after the right to enter and remove has expired. *Liston v. Chapman & D. Land Co.* (1905) 77 Ark. 116, 91 S. W. 27; *McRae v. Stillwell, M. & Co.* (1900) 111 Ga. 65, 55 L.R.A. 513, 36 S. E. 604; *St. Louis Cypress Co. v. Thibodaux* (1907) 120 La. 834, 45 So. 742; *King v. Merriman* (1887) 38 Minn. 47, 35 N. W. 570. The court in *King v. Merriman* (Minn.) *supra*, says: "The suggestion of counsel, supported, perhaps, by one or two cases, that this contract was an executed sale of all the timber standing on the land, but with a limited license to enter and cut, and that if the licensee should enter and cut after the expiration of the license, while he would be guilty of a trespass on the land, yet plaintiff could not recover the value of the timber, because it was the property of defendant, would seem to us to involve a legal solecism. It would be an anomaly in the law that one man should own standing timber on the land of another, with no right of entry to cut and take it away. Such a right would certainly be a barren one. If the limitation of the right of entry is of any effect at all, it must operate as a limitation upon the grant itself."

The agreement as to removal is not a mere covenant. *Call v. Jenner Lumber Co.* (1917) 33 Cal. App. 310, 165 Pac. 23; *Hollensteiner v. Missoula Lumber Co.* (1908) 37 Mont. 278, 96 Pac. 420; *Hartley v. Neaves* (1915) 117 Va. 219, 84 S. E. 97. The stipulation as to time contained in the deed involved in *Hollensteiner v. Missoula Lumber Co.* (1908) 37 Mont. 278, 96 Pac. 420, was as follows: "It is further understood and agreed that all said timber shall be cut and removed within five years from the date of this

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instrument." In answer to the contention that this was a mere covenant, the breach of which would give rise to an action in damages, but could not forfeit the purchaser's right to the timber, the court says: "To say that the clause requiring that the timber should be cut and removed within five years is merely a covenant on the part of the grantee that he would cut and remove the timber within that time leads to a conclusion which we cannot believe the parties ever contemplated. It means that, after the expiration of five years, the grantee still owns the trees, and has the right to go on the land and cut and remove them, but at the same time plaintiff might maintain an action for damages by reason of the grantee's failure to remove them within the five-year period. If appellant's contention is correct, it may permit these trees to remain standing for an indefinite time, and thereby deprive the plaintiff of the use of his land for agricultural or other purposes with which the presence of the timber would interfere. The result of this would be constantly recurring injury to plaintiff, giving rise to numberless lawsuits for damages, as well as depreciating the value of the land itself by reason of such outstanding title. The language employed does not amount to an express covenant, and we cannot hold that a covenant is implied, when the entire deed is considered."

In holding that trees which have been manufactured into stave bolts remain the property of the purchaser, with the right in him to go upon the premises and take the same therefrom after the time limited, the court in *Golden v. Glock* (1883) 57 Wis. 118, 46 Am. Rep. 32, 15 N. W. 12, says: "The trees from which the bolts were manufactured, having thus been severed from the soil prior to the expiration of the time limited, and their character essentially changed by such manufacture so that the products became personal property, we think they were, in effect, thereby removed from the premises within the meaning of the condition in the deed, and hence that the plaintiff, even after the ex-

piration of two years, had an implied right or license to go upon the premises and take therefrom stave bolts so manufactured."

In the early case of *Green v. Bennett* (1871) 23 Mich. 464, the court does not decide the question, but says that it is to be determined by whether the contract is to be construed as an absolute sale, or whether it is a conditional sale, and the provision as to removal a condition, and not a covenant.

b. Minority rule.

1. In general.

The courts of a few jurisdictions hold that a sale and conveyance of growing timber, in which the purchaser is given a stated time for the removal, passes an absolute title to the timber which is not defeated by failure to remove within the time specified. *C. W. Zimmerman Mfg. Co. v. Daffin* (1906) 149 Ala. 380, 9 L.R.A. (N. S.) 663, 123 Am. St. Rep. 58, 42 So. 858; *Mt. Vernon Lumber Co. v. Shepard* (1913) 180 Ala. 148, 60 So. 825; *Vizard v. Robinson* (1913) 181 Ala. 349, 61 So. 959; *Wright v. Bentley Lumber Co.* (1914) 186 Ala. 616, 65 So. 353; *West v. Maddox* (1915) 193 Ala. 612, 69 So. 101; *Coley v. English* (1920) 204 Ala. 691, 87 So. 81; *Moore v. McAllister* (1921) — Ala. —, 88 So. 643; *Peirce v. Finerty* (1911) 76 N. H. 38, 29 L.R.A.(N.S.) 547, 76 Atl. 194, 79 Atl. 23; *Dyer v. Hartshorn* (1906) 73 N. H. 509, 63 Atl. 231; *Amidon v. Latham* (1915) 78 N. H. 5, 95 Atl. 787; *Wyckoff v. Bodine* (1900) 65 N. J. L. 95, 47 Atl. 23; *DeGoosh v. Baldwin* (1912) 85 Vt. 312, 82 Atl. 182.

At least, title is not lost in the absence of a forfeiture clause. *Halstead v. Jessup* (1898) 150 Ind. 86, 49 N. E. 821; *Watson v. Adams* (1904) 32 Ind. App. 281, 69 N. E. 696; *Advance Veneer & Lumber Co. v. Hornaday* (1911) 49 Ind. App. 83, 96 N. E. 784.

A parol sale of standing timber, giving the purchaser a stated time in which to remove it, and under which the purchaser had entered and cut a large part of the timber, paying the consideration and performing his agreement to furnish lumber for the vendor, was held not to result in a for-

feiture of the timber remaining on the premises at the expiration of the time limited, where there was no forfeiture clause in the agreement, and the vendor did not, within the time limited, give notice to the purchaser that time was of the essence of the contract, and that he would revoke the license if the timber was not removed within the time fixed. *Watson v. Adams* (1904) 32 Ind. App. 281, 69 N. E. 696.

Nor is title lost by failure to remove within a reasonable time after the expiration of the time stipulated. *Peirce v. Finerty* (1911) 76 N. H. 38, 29 L.R.A.(N.S.) 547, 76 Atl. 194, 79 Atl. 23. This is true, no matter what the reason or motive of the owner of the timber may be. *Ibid.*

The owner of land who has conveyed the same by a deed "excepting and reserving the timber" thereon, for the removal of which the grantee gives the grantor a stated time, does not lose title to the timber by failure to remove it within the time stated. *Irons v. Webb* (1879) 41 N. J. L. 203, 32 Am. Rep. 193.

The conveyance of the timber in *C. W. Zimmerman Mfg. Co. v. Daffin* (1906) 149 Ala. 380, 9 L.R.A.(N.S.) 663, 123 Am. St. Rep. 58, 42 So. 858, was in the form of a deed reciting a consideration and containing a covenant of warranty; the stipulation as to removal was to the effect that the purchaser was "allowed two years from this date within which to cut and remove the timber herein above conveyed." That the title to the timber did not vest in the owner of the land upon the expiration of the time fixed in the conveyance was held in *Vizard v. Robinson* (1913) 181 Ala. 349, 61 So. 959, wherein the stipulation is framed in the following words, viz.: "That the rights above conveyed shall continue for a period of eight years from date of this instrument, and no longer." The court holds that the expression, "the rights above conveyed," related to the right given in the conveyance to go upon the land to build and construct tramroads for the purpose of removing the timber, and not to the grant of the timber.

Although the supreme court of ap-

peals of West Virginia had followed the rule that, under a contract conveying timber with right to remove within a stated time, the purchaser's right terminated at the expiration of that time, some doubt is thrown upon those decisions by the decision in *Wilson v. Buffalo Collieries Co.* (1916) 79 W. Va. 279, 91 S. E. 449. In that case there was a conveyance of timber in which it was stipulated and agreed that the purchaser should have three years in which to remove the timber from the land, and "longer, if the party of the second part will pay to the party of the first part \$50 for each additional year." The \$50 agreed upon was paid, and this fact militates somewhat against the following language of the court. The court says: "The grant . . . cannot be differentiated from the one construed in *Keystone Lumber & Min. Co. v. Brooks* (1909) 65 W. Va. 512, 64 S. E. 614, upon any substantial ground. There is no time limit in the granting clause. Being absolute and for a consideration paid, it cannot be cut down by a mere inference arising from a stipulation as to the time of severance and removal, or an additional grant of rights of way and other privileges on the land, for severance and removal. The granting clause is clear, complete, and unlimited, as to the timber. The limitation is upon the removal privileges granted, not on the grant of the timber. . . . Nowhere is there a clause of forfeiture of title for non-payment of such compensation, or delay in severance and removal. Nor is there an express covenant to remove the timber within any stated period of time." But compare with *WILLIAMS v. MCCARTY* (reported herewith) ante, 9.

A covenant on the part of the vendor of timber with a purchaser that he might, during five years, sell and carry away the wood without the interruption of any person, is stated in *Stukeley v. Butler* (1615) Hobart, 168, 80 Eng. Reprint, 316, not so to check and control the grant that the purchaser may not take the trees after the five years, but that, as the trees are absolutely given, the purchaser and his

assigns may take them when they will. It is stated by the court in this case that by the grant of the trees they were absolutely passed away from the grantor and his heirs, and vested in the grantee, who has power incident and implied to the grant to fell them when he will, without any other special license; which can never be restrained by a power given by the grantor in the affirmative, which the grantee had before.

2. Theory.

The theory of these cases is, in brief, that an unconditional conveyance of standing trees severs them from the land and transforms them into personal property. *Peirce v. Finerty* (1911) 76 N. H. 38, 29 L.R.A.(N.S.) 547, 76 Atl. 194, 79 Atl. 23; *Amidon v. Latham* (1915) 78 N. H. 5, 95 Atl. 787.

The court in *Hoit v. Stratton Mills* (1873) 54 N. H. 109, 20 Am. Rep. 119, thus discusses the question: "The deed purported to convey the timber trees 'standing, lying, and being' on the land, with an express agreement that the grantor would deliver them off the land on or before April 1, 1866, and with an implied agreement that the grantee might and should remove, within a reasonable time after that date, such as the grantor did not deliver according to his promise. If any of the trees were 'lying' on the land when the deed was delivered, they passed by the deed when the deed was delivered, as any other personal chattels would pass. Did the trees then 'standing' pass at the same time? The deed does not expressly make any distinction between those 'lying' and those 'standing.' In terms, it conveys those 'standing' and those 'lying' equally without condition. Does a fair construction of the deed make a distinction between them? If there is an implied condition applicable to those 'standing,' and not applicable to those 'lying,' it is not that the former shall be removed from the land within the reasonable time, but merely that they shall be cut down within that time (*Plumer v. Prescott* (1861) 43 N. H. 277), and as the deed, construed

to be absolute and unconditional (as it is, if taken literally), would be a constructive severance of the 'standing' trees, and a transformation of them into personal property (*Kingsley v. Holbrook* (1864) 45 N. H. 313, 86 Am. Dec. 173), what reason is there to infer, in the absence of an express stipulation on the subject, that the parties intended the 'standing' trees should not pass by the deed unless they were cut within the reasonable time? Since a conveyance of standing trees operates as a conveyance of real estate and a severance of it, or as a severance and a conveyance of personal property, and since the parties did not agree that the trees 'lying' on the land when the deed was made, and those cut within the reasonable time, should remain the property of the grantor unless they were removed within the reasonable time—what rule of construction is there upon which it can be held that the parties intended that those 'standing' when the deed was made should remain the property of the grantor, unless they were cut within the reasonable time? When the removal of personal chattels from the vendor's premises within a reasonable time is not necessary to the passing of the title of the chattels to the vendee; when standing trees are more easily changed from real to personal property by a paper instrument than by an iron one; and when the mere cutting down such trees is not a liberation of the land from their encumbrance—how can this deed (unconditional, in its terms, as to vesting in the grantee the ownership of the trees 'standing, lying, and being' on the land) be construed to retain in the grantor the ownership of the 'standing' trees not cut within the reasonable time? Why should 'standing' trees be exempted from the operation of the general rules of law?"

In *Dyer v. Hartshorn* (1906) 73 N. H. 509, 63 Atl. 231, where an owner of land in conveying the same had reserved the timber, with right to remove within a stated time, the court says: "By the reservation the trees were, in contemplation of law, severed from the granted land . . . and as

effectually transformed into personal property as though they had been actually severed."

The New Jersey court in *Irons v. Webb* (1879) 41 N. J. L. 203, 32 Am. Rep. 193, in dealing with a case in which the timber was reserved in a conveyance of the land, holds that the title was not lost by failure to remove it within the time stated, and bases its holding upon the theory that the agreement as to removal was not a condition subsequent, the nonobservance of which resulted in a forfeiture of the timber. The court then refers to the exception, which was as follows: "Excepting and reserving the timber on the said land being conveyed, for the removal of which the said party of the second part agrees to and with the said party of the first part that he, the said party of the second part, that he will give two years from the date hereof to the said party of the first part," and says: "Looking at the terms of the present agreement and its subject-matter, I can see no mark—certainly no decisive mark—signifying that it was the intention of these parties that, by the plaintiff's neglect to remove the timber, it would be forfeited to the defendant. Such a purpose, it is certain, is not contained in any part of the language of the instrument, for it nowhere says that, in any event, the title to the timber is to pass to the grantee. As a consequence, as it is not in the words, such a right must be derived by inference from the nature of the transaction itself. But then, what feature of the business is to have such an effect? The only particular relied on is the circumstance that, if the timber was permitted to remain on the premises until the time of removal had expired, it became unlawful to enter for the purpose of taking it away. But the effect of such an incident is not, in law, to work a forfeiture of title."

The clause as to time for entry and removal is a mere covenant, giving the right of entry and removal within the time stated. *C. W. Zimmerman Mfg. Co. v. Daffin* (1906) 149 Ala. 380, 9

L.R.A. (N.S.) 663, 123 Am. St. Rep. 58, 42 So. 858.

See *Irons v. Webb* (N. J.) *supra*.

IV. *Extension of time.*

a. *In general.*

The parties may by subsequent agreement extend the time for removal, in which event the new time limit takes the place of the former one. *Morgan v. Perkins* (1894) 94 Ga. 353, 21 S. E. 574; *Fletcher v. Livingston* (1891) 153 Mass. 388, 26 N. E. 1001. It has been held that such an agreement may be entered into orally. *Morgan v. Perkins* (Ga.) *supra*. An oral extension was, by an equally divided court, sustained in *Williams v. Flood* (1886) 63 Mich. 487, 30 N. W. 93. In the opinion which prevailed, *Campbell, Ch. J.*, after stating that, at the most, the condition as to time for removal would operate by way of a forfeiture, continues: "The timber had all been paid for, and all belonged to plaintiff unless lost by that forfeiture for nonremoval. This being so, I think there is no more difficulty in showing a waiver of forfeiture in this than in any other case, whether the forfeiture relates to land, or its enjoyment, or any other interest. The parol agreement to extend the time for removal of plaintiff's own property was more than a revocable license. It prevented the enforcement of the forfeiture so long as it lasted, as it was entirely inconsistent with it. During that period plaintiff's vendor would be estopped from preventing him from entering the land and removing his property."

But other cases deny the validity of an oral extension. In *Broussard v. Verret* (1891) 43 La. Ann. 929, 9 So. 905, an oral extension, granted by the president of a school board which had sold trees, was held invalid. In *Clark v. Guest* (1896) 54 Ohio St. 298, 43 N. E. 862, the court, in holding an oral extension invalid, says that the right to cut and carry away the timber extended only to the day limited in the contract. "On that day the trees remaining uncut adhered in the land and lapsed into the fee, freed from the written instrument. To again bring

them within the terms of sale, and extend the time for another year in which to cut and carry them away, is as clearly a contract for an interest in, and concerning of, the trees as was the original sale." The extension agreement involved in this case was entered into before the expiration of the time limited in the writing. That a contract for the sale of timber, to be removed within a stated time, cannot be abrogated or rescinded by an oral agreement, is held in *Thill v. Johnston* (1910) 60 Wash. 393, 111 Pac. 225.

The effect of the Statute of Frauds upon the right to modify by oral agreement a contract required by the statute to be in writing is the subject of an extensive note to *Schaap v. Wolf*, — A.L.R. —.

An extension of the period limited for the cutting of timber granted to one who held from the original purchaser, and after such party had sold to another person, was held not to inure to the benefit of such other person, in *Baker v. Davis* (1906) 127 Ga. 649, 57 S. E. 62.

A transfer by the original purchaser of timber, who, by the contract, had the option to extend the lease by payment of a stated sum per acre per year, assigning all its rights, titles, and privileges to another person, includes the right to extend the time for cutting or removing the timber. *Gaskins v. Green* (1914) 141 Ga. 552, 81 S. E. 882. It was further held in this case that where the assignee of the original purchaser indorsed upon the contract of sale a transfer of the "within lease" to a third person, and where, before the expiration of the time limited in which the original purchaser was authorized to cut and remove the timber, the owner of the land recognized the third person as the owner of the timber by assignment, and entitled to all the privileges of his original grantee, including that of extension, and entered into a parol agreement with him to the effect that he would waive the payment of the sum provided as consideration for the extension, if the third person would surrender his rights to certain timber, and both par-

ties acted upon the agreement, the owner of the land would be estopped, after the time limit fixed in the original contract had expired, from contesting with the third person the sufficiency of the transfer to him as a conveyance of the timber with the appurtenant rights of extension of time.

Provisions for extension of the time fixed in the contract are frequently made in the contract itself.

See *Sanborn v. Franklin County Lumber Co.* (1908) 55 Fla. 389, 46 So. 85, *infra*, *V. c.*, *Baxter v. Mattox* (1898) 106 Ga. 344, 32 S. E. 94, and *Perkins v. Peterson* (1899) 110 Ga. 24, 35 S. E. 319.

Where an extension is provided for, but no time limit fixed, a reasonable time will be granted the purchaser. *Wright v. Camp Mfg. Co.* (1910) 110 Va. 678, 66 S. E. 843; *Carpenter v. Camp Mfg. Co.* (1911) 112 Va. 300, 71 S. E. 559. Under a contract for the sale of approximately 37,000 acres of land, in which the grantor had reserved the timber, agreeing to remove the same at the rate of at least 6,000 acres per year, but providing that, in case of failure so to do, the vendor shall at all times be liable for and pay any increase of taxes or assessments levied or made by reason of such timber remaining or continuing upon the land, the vendor has a reasonable time in which to remove the timber, in case of his failure to remove at the rate stipulated. *Western Lime & Cement Co. v. Copper River Land Co.* (1909) 138 Wis. 404, 120 N. W. 277. Under a contract providing for an extension upon a yearly rental, but placing no limit thereon, the purchaser of the timber does not have a right perpetually to maintain such timber on the land, upon the payment of the yearly rental. *Gibbs v. Peterson* (1912) 163 Cal. 758, 127 Pac. 62. Even under such a contract as was involved in *Crown Orchard Co. v. Dennis* (1915) 144 C. C. A. 62, 229 Fed. 652, where the purchaser of timber was given a stated time in which to cut and remove the same, and, in the event that he did not complete the removal within the time limited, should have "such additional time as

may be desired for cutting and removing said timber," upon certain conditions, it was held that the purchaser could not fix an extension period by an arbitrary or capricious desire, but that he might have "such additional time as may be reasonably desired." This is interpreted in *United Timber Corp. v. Bivens* (1919) — C. C. A. —, 264 Fed. 308, certiorari denied in (1920) 253 U. S. 495, 64 L. ed. 1030, 40 Sup. Ct. Rep. 587, to give to the purchaser a reasonable time after the expiration of the first time limited, in which to cut and remove the timber. In *Young v. Camp Mfg. Co.* (1910) 110 Va. 678, 66 S. E. 843, it was held that the purchaser had only a reasonable extension, although it was expressly provided in the contract that "it should have such further time in which to remove it [the timber] as it [the purchaser] might desire." On the contrary, under a timber contract which stipulates for the removal of the timber within a stated period, and provides that, in case the timber is not cut and removed before the expiration of the period, the grantee "shall have such additional time therefor as it or they may desire," upon the performance of certain conditions, it has been held that the time of the extension cannot be limited to a reasonable time; the grantee has the option or privilege of fixing the extension. *Midland Timber Co. v. J. F. Prettyman & Sons* (1913) 97 S. C. 247, 81 S. E. 484.

In *Branch v. Johnson* (1911) 9 Ga. App. 699, 71 S. E. 1123, it was held unreasonable to construe a parol agreement extending a timber contract giving the purchaser two years to cut and remove the timber, the extension agreement naming no definite period, as extending the time five years.

In *United Timber Corp. v. Bivens* (1919) — C. C. A. —, 264 Fed. 308, a suit at law, the jury found twelve years to be a reasonable time for an extension, while, in an equity suit involving the same parties and from which an appeal is reported in the same place, the court found fifteen years not to be an unreasonable time within which to remove the timber.

The timber on about 5,000 acres was involved in this case, and the original period named in the contract was ten years.

Two sales of timber were involved in *Wright v. Camp Mfg. Co.* (1910) 110 Va. 678, 66 S. E. 843. Under one of them the purchaser had had fourteen years in which to remove the timber; in the other case twelve years; the amount of timber conveyed was small. Upon the whole case the court fixed one year after the judgment as a reasonable time in which the timber should be removed. A similar decision appears in *Carpenter v. Camp Mfg. Co.* (1911) 112 Va. 301, 71 S. E. 559.

An interesting question arises as to whether the first day is to be included in determining the date of the expiration of the time limited. The general question is beyond the scope of this note, but it is interesting to note that it was held in *United Timber Corp. v. Bivens* (Fed.) *supra*, that the first day was to be excluded, and, the last day falling on Sunday, a tender on Monday was held sufficient.

A wife was held bound by the receipts of extension money by her husband, where she had ratified the act of her husband in receiving the money, in *Bethea v. Beaufort County Lumber Co.* (1918) 111 S. C. 97, 96 S. E. 717. Where the owner of the land has died leaving heirs, the contract is not extended by payment of the money to the widow. *Morton v. Pine Lumber Co.* (1919) 178 N. C. 163, 100 S. E. 322.

In some cases the purchaser is given a stipulated time for removal, with the privilege of extension upon the performance of certain obligations. There is a difference of opinion as to the effect of failure to perform the condition, or to perform it before the expiration of the original period. Under contracts providing for an extension, upon the payment by the purchaser of a stipulated sum, it is held in some cases that payment must be made before the expiration of the time agreed upon. Failure of the purchaser to pay or tender, on or before the expiration of the time limited, the sum provided for an extension agree-

ment, was held to operate to defeat the purchaser's claim to an extension in *Hartley v. Neaves* (1915) 117 Va. 219, 84 S. E. 97, under a contract giving the purchaser additional time, "upon the payment of \$15 a year for the said additional time." According to the court, the purchaser can secure the privilege of removing the timber after the first period fixed, only by notice given to the landowners of their intention to exercise that privilege, and paying or tendering the stipulated amount required to be paid for the extension on or before the expiration of the first-named period granted in the contract, and this conclusion is approved and followed in *Blackstone Mfg. Co. v. Allen* (1915) 117 Va. 452, 85 S. E. 568. The failure of the purchaser of timber to tender the amount agreed before the expiration of the time agreed upon, under a contract providing that if the purchaser does not enter upon the land to cut or remove the timber within the time limited, then it shall pay to the landowners, their heirs or assigns, the interest on the purchase money in advance, at a stipulated rate per annum, and that the time shall be extended for and during the period of five years thereafter, results in a termination of the rights of the purchaser. *Granville Lumber Co. v. Atkinson* (1916) 234 Fed. 424. Notice of desire for extension and tender of interest are held necessary in *Bateman v. Kramer Lumber Co.* (1911) 154 N. C. 248, 34 L.R.A. (N.S.) 615, 7 S. E. 474, before expiration of the time specified in a deed of standing timber, to be removed within a specified time, which provides that in the event the grantee does not get it all off in time, he shall have one year's time in which to remove the same, by paying interest on the purchase money. That the landowner must be notified, and the timber owner pay or tender the stipulated amount, on or before the expiration of the first period granted for the purpose of removal of the timber, is held also in *Rountree v. Cohn-Bock Co.* (1912) 158 N. C. 153, 73 S. E. 796, under a contract giving the purchaser five years to remove, and providing that, should

the purchasers "be unable to remove said timber within the time above specified, they shall have further time to remove said timber as they may require, not exceeding three years, upon payment to said parties of the first part of a sum equal to 6 per cent per annum, for the additional three years of time required, on the purchase price as above stated." That the sum required in an extension agreement providing that the purchaser might have an extension of the time, by paying annually, on the 1st day of January of each year, a stated sum, must be made not later than the time stipulated, is held, also, in *Williams v. John L. Roper Lumber Co.* (1917) 174 N. C. 229, 93 S. E. 741. In the event of failure to make the payment by the time required, the right of the purchaser in the timber ceases.

A provision in a contract of sale of timber that if the purchaser has not removed the timber at the end of the time stipulated, "then, by payment of 6 per cent per annum upon the said purchase price within the next ten years, or till said timber has been removed, they can have and may take ten years longer to remove said timber," was held to require a payment of the interest by the year; failure to make the yearly payment was held to forfeit the right of the purchaser. *Matheson v. Marion County Lumber Co.* (1913) 95 S. C. 352, 78 S. E. 970.

Some extension contracts expressly provide for payment in advance. A tender of interest before expiration of the time limited is required under a contract giving the party such additional time as he may desire, upon the payment each year, in advance, of interest on the purchase money. *Powers v. Angola Lumber Co.* (1911) 154 N. C. 405, 70 S. E. 629. Under an extension agreement providing for the payment of a certain sum of money annually in advance, and providing further that the purchaser of timber might at any time surrender his rights under the extension agreement, and that "a failure to pay the \$250 per annum, as above provided, shall be deemed such surrender, and the rights of the

grantee herein shall at once cease and determine," the rights are forfeited upon failure to make the payments in advance as required, and cannot be reinstated without the consent of the landowner, by a subsequent tender of the amount. *Hill v. E. P. Burton Lumber Co.* (1911) 90 S. C. 176, 72 S. E. 1085.

The landowner is not entitled to have from the timber owner, in advance of the payment of the extension money, formal and explicit notice that it was to be paid, to secure an extension in time of the right to cut. *Beaufort County Lumber Co. v. Johnson* (1917) 107 S. C. 147, 92 S. E. 271; *Bethea v. Beaufort County Lumber Co.* (1918) 111 S. C. 97, 96 S. E. 717.

In *Bangert v. John L. Roper Lumber Co.* (1915) 169 N. C. 628, 86 S. E. 516, under a contract providing for an extension "from year to year, for a period of five years, said extension to be made yearly upon the request of the parties of the second part, the said parties of the second part to pay to the party of the first part, upon each yearly extension of said time, the sum of \$25," it was held, where the purchaser gave notice before the expiration of the original period that he would take the entire five years' extension, and tendered the amount for the full time, and, upon refusal of the same by the landowner, paid the yearly sum, and continued to give notice and pay the yearly sum until the last year, when, after having notified the landowner in due time of his desire for the extension, he omitted to tender the last payment until four days after that year had expired, that the purchaser was not in default. The court does not disapprove of the foregoing cases, but treats the original notice and tender of the whole amount as a compliance with the contract. The court says: "It was the defendant's privilege, under the contract, to exercise its right in January, 1911, before the ten years expired, and to notify plaintiff that it would avail itself of the entire period of five years' extension, and to tender the money. When defendant did so, it performed every requirement

and condition of the contract upon its part."

It has been held that a grantor who has reserved "all the pine trees or pine timber thereon standing, and to stand and grow thereon for the term of ten years . . . and longer, by paying . . . \$10 per year after the expiration of the ten years aforesaid," loses his right to the trees by failure for more than a year after the expiration of the ten years, to offer to make the payment stipulated. *Perkins v. Stockwell* (1881) 131 Mass. 529.

Other cases hold that the nonperformance of the agreements mentioned does not result in the reversion of the title to the timber. *Peterson v. Gibbs* (1905) 147 Cal. 1, 109 Am. St. Rep. 107, 81 Pac. 121; *Gibbs v. Peterson* (1912) 163 Cal. 758, 127 Pac. 62; *Ciapusci v. Clark* (1909) 12 Cal. App. 44, 106 Pac. 436. Thus, a contract giving the purchaser of timber ten years in which to remove the same, and containing the further provision that, if not removed within ten years, the purchaser would pay a yearly rental to the owners of the land, together with a provision for the payment by the purchaser of one half of all taxes that may be levied upon the land, from the date of the agreement until all of the timber has been removed, gives the purchaser a period beyond the ten years in which to remove the timber. *Peterson v. Gibbs* (Cal.) *supra*. The fact that the purchaser had failed to pay the taxes was held not to forfeit his right and title to the timber, where no demand for reimbursement had ever been made by the landowner, who had paid the taxes. *Gibbs v. Peterson* (1912) 163 Cal. 758, 127 Pac. 62. In *Ciapusci v. Clark* (Cal.) *supra*, timber was sold by the owner of the real estate, who gave the purchaser four years to take the timber off, with the privilege of a longer time by paying the sum of \$5 per year rent in advance, for a time not to exceed ten years from date of the agreement. At the expiration of the four years, the purchaser made some attempt to make the payment, but, because of the death of the owner of the land and the change of title, he was not successful

in doing so, and it was claimed that the title to the timber was forfeited by his failure. In denying this contention. The court said: "It is not reasonable to suppose that so important a privilege as that of the right to remove the timber, which had been fully paid for, should depend upon so trifling a circumstance as the prompt payment of \$5 per annum. There is nothing in the nature of the transaction to suggest that consequences so serious were intended to be imposed by such failure, or that a forfeiture of all rights was to follow. . . . We see no reason why we may not interpret the provision to mean that the buyer was to pay \$5 per annum in advance, as rent for the privilege of cutting timber after four years, and before the expiration of ten years. As this was a covenant apart from the sale of the timber, and not a condition upon which the sale depended, we are led to the safe conclusion that non-payment at the appointed hour cannot, alone, work a forfeiture of all rights under the contract." It was held in *Gotham v. Wachsmuth Lumber Co.* (1914) 156 Wis. 442, 146 N. W. 505, that an extension agreement between the parties, giving to the purchaser of the timber the option to extend it from year to year, might be exercised by the purchaser after the expiration of the time limit. Eleven days after the expiration was held a reasonable time within which to exercise the option.

Under a contract providing that, if the purchaser of the timber shall fail to cut and remove it within a stated period, the purchaser shall pay all taxes assessed against such lands thereafter until such timber is cut, and providing further that the failure of the purchaser to pay the taxes, when legally called on and reasonable notice given, should render the purchaser legally indebted unto the vendor for the full amount of the taxes, with the proviso that at any time the purchaser may avoid the payment of the taxes by renouncing any and all interest that it may have in said lands, or the timber thereon, when the same shall revert to the vendor, the timber

does not revert to the vendor upon the expiration of the time stated. Under such a contract the purchaser has an indefinite time in which to remove the timber, but under the Louisiana doctrine the owner of the land has the right, after the expiration of the time limited, to apply to the court for the purpose of fixing a reasonable time within which the timber shall be cut. *Franks v. Davis Bros. Lumber Co.* (1920) 146 La. 803, 84 So. 101.

A purchaser of timber who has a stated time within which to remove the same, with a provision that, if he desires to have the trees stand on the land for a longer period, he may do so, subject to the right of the landowner to deaden trees on land he desires to clear, does not lose title to the trees by failure to remove within the time first stated. *Shepherd v. Bank of Montreal* (1913) 156 Ky. 495, 161 S. W. 214.

The purchaser of timber under a contract by which he is given "as long as he wishes" to cut the same, provided he pays the taxes on the land, does not forfeit his rights to the timber by failure to pay the taxes before they have become delinquent; at least, where no demand that he pay them has been made by the grantor. *Mathews v. Mulvey* (1888) 38 Minn. 342, 37 N. W. 794.

Special circumstances or special provisions in contracts may modify the above general theories. In *Taylor v. Munger* (1915) 169 N. C. 727, 86 S. E. 626, where a contract which expired January 14 provided for the payment of the extension money on the first Monday in February of each year, and at the office of the purchaser, the purchaser, who was ready and able to make payment on February 1st, was held not to have lost his rights by reason of his failure to notify the landowner of his desire for an extension, and tender him the money. No notice was provided for by the contract, and the court holds that the extension is in effect. The contract provides the time and place of payment, and it is held the landowner's duty there to demand it.

Where the extension money is not paid or tendered because the pur-

chaser of the timber was led to believe by the conduct of the landowner that it would not be exacted, the landowner cannot treat the failure to make the payment as a forfeiture, and recover the value of timber thereafter taken off the land. *Cromartie v. Virginia-Carolina Lumber Co.* (1917) 173 N. C. 712, 91 S. E. 945.

The purchaser is generally held entitled to yearly extensions. Thus, the grantee of timber under a contract which provides for an extension upon "payment of interest upon the purchase price hereinbefore stated (\$1,400), at 6 per cent per annum, payable at the end of each calendar year, such additional period as may be desired, not exceeding ten years," is entitled to yearly extensions. *Bethea v. Beaufort County Lumber Co.* (1918) 111 S. C. 97, 96 S. E. 717. Under a provision as to the extension that "this contract may be extended for the term of ten years upon the payment to me of the sum of 10 cents per acre per annum," the purchaser is entitled to extend it yearly; he is not required to accept the full extension of ten years. *Adams v. Fidelity Lumber Co.* (1918) — Tex. Civ. App. —, 201 S. W. 1034.

It is not essential that the purchaser begin operation within the original period. Thus, under a sale and conveyance of timber, by the terms of which the purchaser was to have a stated period in which to cut and remove the timber from the land, and which provided that in case the timber was not cut and removed before the expiration of the period, then the purchaser should have such additional time as might be desired for cutting and removing the timber upon certain conditions, the purchaser was held entitled to the extension, although he had not commenced to cut or remove the timber within the first period. *Crown Orchard Co. v. Dennis* (1915) 144 C. C. A. 62, 229 Fed. 652. Under a timber deed giving to the grantee a stipulated period in which to cut and remove the timber, and providing that, in case the timber is not cut and removed before the expiration of the time limited, the grantee shall have such additional time as it or they may

desire, but in the last-mentioned event, the grantee shall, during the extended period, pay interest on the original purchase price year by year in advance, at the rate of 6 per cent per annum, it is not necessary that the grantee begin the cutting and removal of the timber within the first-mentioned period. It is entitled to an extension, although it has not so commenced. *Midland Timber Co. v. J. F. Prettyman & Sons* (1913) 97 S. C. 247, 81 S. E. 484. A contract giving the purchaser of timber four years to cut, haul, and remove the same, and, if longer time was required, granting the right upon certain conditions, the extension not to exceed two years, was held to entitle the purchaser to commence operations within the two years' extension, and not to require him to commence operations within the period of four years, in *Norfolk Lumber Co. v. Smith* (1909) 150 N. C. 253, 63 S. E. 954, reversing upon rehearing the decision in (1907) 146 N. C. 158, 59 S. E. 543.

A contract that has been before the courts of Arkansas a number of times provides that the purchaser shall cut and remove the timber as expeditiously as possible, and, unless it shall be removed within a stated number of years, that the purchaser shall pay taxes accruing on the land thereafter. It has uniformly been held that the purchaser has not, in all events, the time stated in which to remove the timber, that he must proceed expeditiously, and that, if he has done so, he may have a reasonable time beyond that stipulated. *Earl v. Harris* (1911) 99 Ark. 112, 137 S. W. 806; *Yelvington v. Short* (1914) 111 Ark. 253, 163 S. W. 522; *Newton v. Warren Vehicle Stock Co.* (1915) 116 Ark. 393, 173 S. W. 819; *Burbridge v. Arkansas Lumber Co.* (1915) 118 Ark. 94, 178 S. W. 304; *Louis Werner Sawmill Co. v. Sessoms* (1915) 120 Ark. 105, 179 S. W. 185; *Rowland v. Arkansas Lumber Co.* (1916) 124 Ark. 180, 186 S. W. 821; *Polzin v. Beene* (1916) 126 Ark. 46, 189 S. W. 654.

But where the parties wrote into such a contract a provision that the

timber was to be moved off the land in the time stipulated, or, if not, that it should fall back to the vendor, it has been held that the purchaser has the full time in which to remove the timber. *Lawless v. Caddo River Lumber Co.* (1920) 145 Ark. 132, 223 S. W. 395. Apparently it is the idea of the court that the purchaser has a reasonable time after the expiration of the time stipulated. The court says: "We think it was not the intention of the parties, in inserting the written clause of the deed, to entirely eliminate the expeditious clause appearing in the habendum of the deed, but to postpone its operation for a period of twelve years, by providing that there should be no reversion, or 'falling back,' as the parties expressed it, until the expiration of that time." The timber involved in this case was removed, however, before the expiration of the time stipulated, so no question arose as to the rights after that time.

The contract in *Earl v. Harris* (Ark.) supra, fixed five years for removal, while that involved in *Yelvington v. Short* (1915) 111 Ark. 253, 163 S. W. 522, fixed two years. Another contract of the same kind, which specified ten years in which the removal was to be effected, was involved in *Newton v. Warren Vehicle Stock Co.* (1915) 116 Ark. 393, 173 S. W. 819, wherein the court follows *Earl v. Harris* and *Yelvington v. Short*, and says: "Upon the authority of those two cases we must hold that the contract in suit did not give absolutely, and at all events, any definite time for the removal of the timber. The purpose of this contract was to require the timber to be removed expeditiously, and sufficient time for that purpose was given. This might exceed ten years, or it might not require that length of time, but the right to cut and remove the timber expired when a reasonable time had been given for its expeditious removal." The contract in the *Newton Case* provided: "The party of the second part shall cut and remove such timber as expeditiously as possible, and it is agreed that, unless it shall have removed all the same within a period of

ten years from the date hereof, it shall be responsible for, and pay to the first party," the taxes assessed against the land thereafter. In *Burbridge v. Arkansas Lumber Co.* (1915) 118 Ark. 94, 178 S. W. 304, the timber deed contained a clause not found in the other cases, to the effect that "the grantor, whenever the timber from the land shall have been removed, should enter into full possession of the land at once, whether the time for such removal be expired or not." The court says that this clause means something, and indicates that it was contemplated that the timber might be removed before the period mentioned expired.

A purchaser who had failed for about three years to take any steps towards cutting and removing timber was held not to have proceeded expeditiously, and to have forfeited his right, in *Polzin v. Beene* (1916) 126 Ark. 46, 189 S. W. 654, where the timber was $5\frac{1}{2}$ or 6 miles from the main line of a railroad, there had been other timber in the same neighborhood cut and sold in the market, there was a sawmill situated in the neighborhood, and the amount was such that it could have been easily removed in a little over a year.

Inconvenience, or the cost of compliance with the contract, or other like things cannot excuse a party from the performance of his undertaking. *Polzin v. Beene* (Ark.) supra.

A contract similar to that involved in the Arkansas case first above cited was before the supreme court of Louisiana, in *Savage v. Wyatt Lumber Co.* (1914) 134 La. 627, 64 So. 491. The owner of the land did not, however, it seems, in this case, urge that the contract terminated before the time stipulated, but did urge that it terminated with the time stipulated. The court denied this contention, but fixed a short time from the date of the judgment within which the purchaser might remove the trees.

In *Woods v. Union Sawmill Co.* (1918) 142 La. 554, 77 So. 280, where the purchaser under such a contract made no attempt to sell and remove the timber within the time stated, but at its expiration promptly paid the

taxes on the land for each of two years, and then began selling the timber, whereupon the landowner immediately sued for annulment of the contract and for forfeiture of the title to the timber, and by injunction stopped the cutting and removal, the court held that the owner's remedy was not to prevent the purchaser from taking away the timber at the expiration of the term stated in the contract, but to demand that it be removed from the land, and, if necessary, to sue to have the time limit for the selling and removal of the timber fixed by judgment of court. In this case the court held it not necessary to decide whether the purchaser complied with that clause of the contract requiring the grantee to cut and remove the timber as expeditiously as possible, since, if there was a violation of the contract in this respect, it was only a passive violation, and no demand was made that the purchaser cut and remove the timber from the land, and that, without having made demand for performance of the contract, the owner had no right to demand that it be rescinded for nonperformance, or for a passive violation.

A contract of sale of timber to be removed within a stated time, with the privilege of another year "if needed to remove timber," gives to the purchaser an additional year to remove timber from such portion of the land as could not be conveniently lumbered within the first period named. *Oconto Co. v. Lundquist* (1899) 119 Mich. 264, 77 N. W. 950. A showing of diligence was regarded as necessary in order to entitle the purchaser to the additional time, but it is held that the showing of diligence in this case was sufficient.

Under a contract conveying timber with a term of two years for removal, "or such time as may be necessary for the removal of said timber, not exceeding five years," the purchaser of the timber has five years in which to remove, where he has exercised all possible diligence in beginning and prosecuting the work, and was unable to cut and remove all the timber during the two-year term. *Hudnell v. East*

Carolina Lumber Co. (1920) 180 N. C. 48, 103 S. E. 893.

Under a contract requiring the purchaser to cut the timber the first winter, "if possible," what remained uncut to be cut the following winter, the purchaser does not, in all events, have the second winter to cut, but, where conditions over which he had no control were such as to prevent his completion of the cutting the first winter, he may finish the second. *Brown v. Bishop* (1909) 105 Me. 272, 74 Atl. 724.

Under a provision in a deed conveying land, namely, "excepting and reserving . . . unto the party of the first part, its successors and assigns, the timber on said lands and the right of entry thereon, for the purpose of felling, cutting, and removing the timber, . . . during the life of the milling plant now being operated by the party of the first part, . . . but in any event for a period not exceeding twenty-five (25) years from December 30, 1909," the right of the grantor to the timber does not terminate upon the discontinuance of the milling plant specifically referred to, where it does not appear that the grantor does not intend to utilize the timber as contemplated by the parties to the reservation, or that he has unreasonably delayed the removal of the timber so as to prejudice the rights of the purchaser of the land for the purpose of sale in small parcels, mainly to nonresidents, as was contemplated when the reservation of the timber was made. *West v. Walling* (1919) 77 Fla. 739, 82 So. 596.

b. By operation of law.

Some cases have given a reasonable time after the time specified, in case the removal is interfered with by act of God, or act of the seller, or by some unforeseen casualty or misfortune over which the purchaser had no control. *Ford Lumber & Mfg. Co. v. Cress* (1909) 132 Ky. 317, 116 S. W. 710; *Harrell v. Danks* (1912) 151 Ky. 71, 151 S. W. 13; *Wright v. Cline* (1916) 172 Ky. 514, 189 S. W. 425. But in the absence of some such cause the contract will be enforced. The court, in

Taylor Brown Timber Co. v. Wolf Creek Coal Co. 32 Ky. L. Rep. 1015, 107 S. W. 733, says: "A different rule might be applied in a case where it was shown that great injustice might be done by strict enforcement of the letter of the contract, as where it appeared that the vendee, by accident, casualty, misfortune, or other cause that would appeal to the chancellor or the court, was prevented from completing the contract within the time."

An extension of time will not be granted because of the fact that the landowner may have suffered no injury from the failure to remove within the time stipulated. *Monroe v. Bowen* (1873) 26 Mich. 523.

A purchaser of timber in May, to be removed within one year, who has delayed the commencement of cutting operations until August, and the hauling of the timber until November, cannot, because of the bad weather ensuing thereafter, claim to have the time extended on the ground that its removal was prevented by act of God, or unforeseen misfortune, or casualty over which he had no control. *Harrell v. Danks* (1912) 151 Ky. 71, 151 S. W. 13.

The act of the landowner in preventing a removal within the time limited has sometimes resulted in an extension of time. A reasonable time beyond the time fixed was granted in *Wright v. Cline* (Ky.) *supra*, where the purchaser failed to remove the trees, in reliance upon an oral agreement of the owner of the land, entered into by the owner with the purpose of perpetrating a fraud upon the purchaser, and thereby preventing him from cutting and removing the trees before the expiration of the time limited. Where the landowner is interfering with the purchaser's operation, time does not run against his rights until the interference is removed. *Cooksey v. Hartzell* (1915) 120 Ark. 313, 179 S. W. 506. Where pine timber and cedar timber are situated on the same land, and the owner of the cedar timber, who is cutting the pine timber for another person, sells the cedar timber to one, and in the contract stipulates that it shall be removed by a stated

time, but that it shall not be removed ahead of the pine timber, the purchaser of the cedar timber does not lose title to so much thereof as is not cut by reason of the failure of the vendor to cut the pine. *Small v. Robarge* (1903) 132 Mich. 356, 93 N. W. 874.

Where the parties were involved in litigation, a further reasonable time was given in *Kimsey v. Posey* (1912) 148 Ky. 54, 145 S. W. 1121. Time which is lost to the purchasers by reason of an injunction instituted by the landowner must be excluded from a time fixed as reasonable. *Carson v. Three States Lumber Co.* (1902) 108 Tenn. 681, 69 S. W. 320. Where a contract of sale of timber was adjudged invalid by the lower court, and subsequently, and after the expiration of the time limited, was reversed upon appeal, the purchaser should have an extension equal to the time between the date of the decree of the lower court and the date of the expiration of the contract. *Colvin v. Clark* (1918) 101 Wash. 100, 172 Pac. 214.

Extension has been refused where the grantor of land, who reserved timber to be removed in a certain time, has been interfered with in his removal by an attachment action brought by a third party. *Monroe v. Bowen* (1873) 26 Mich. 523. The court says: "Now if the defendants [landowners], by any combination with the plaintiff in the attachment, were even in part responsible for its institution, especially if by any concert they had procured it to be set on foot or prosecuted for the purpose of depriving the plaintiff of the opportunity of removal until the period fixed by the condition had expired, this would have been their own wrongful act; and a breach of the condition produced by their own wrongful act, and against the will of the plaintiff, would be no breach as to him and of no avail to the defendants; and the plaintiff in such case would have been allowed a reasonable time, after the obstacle thus wrongfully thrown in his way was removed, to remove the timber. But nothing of this kind is alleged, and how the defendants

are to be prejudiced by the act of a third person, whether rightful or wrongful, in bringing the attachment suit against the plaintiff, with which they have had no concern and over which they could exercise no control, is not easy to discover." That the owners of the land could not be prejudiced by the act of a third person in bringing an attachment against the owner of the timber was held to be true, although the law had given the owner of the timber no means of getting rid of the attachment until the time fixed by the condition had expired; but it is pointed out that he could have given a bond and relieved his property of the attachment. The fact that he was prevented from availing himself, by pecuniary embarrassment arising from the seizure of his property, from taking advantage of the bond, was held no excuse, and the court concludes: "The answer to this is that, as the defendants had nothing to do with that suit, this poverty or inability of the plaintiff cannot affect them any more for being produced by this particular cause, than if it had been produced in any other way,—by the loss of crops, by unfortunate speculations, or by fire,—or than if the plaintiff had inherited his poverty and had never been otherwise than poor."

An owner of timber who was interfered with by the landowner, so that he was unable to cut the timber within the time limited, was held entitled to recover for the profits of all timber which he might have cut and removed within the time, using the means then at hand or reasonably available to him, in *Williams v. Parsons* (1914) 167 N. C. 529, 83 S. E. 914.

The purchaser of timber, to be removed within a stated time, will not be granted an extension because of the fact that a subsequent purchaser of the land notified him that he, the purchaser of the land, claimed the timber, and that he would hold the purchaser of the timber liable in damages if he cut any of it. *Peshtigo Lumber Co. v. Ellis* (1904) 122 Wis. 433, 100 N. W. 834. The court says

that "it is very clear that, in order to justify relief on this ground, it must appear that the defendant by physical force, or by acts legally equivalent to such force, actually prevented the plaintiff from exercising its right."

V. Effect of fact that trees have been cut or manufactured.

a. Doctrine that title does not revert.

1. In general.

Where the timber is cut but not removed from the land at the expiration of the time limit, the courts are not agreed as to the status thereafter. It has been held, in jurisdictions which adhere to the general theory that the purchaser loses his rights by failure to cut and remove the timber within the time stipulated, that if the timber is cut, title remains in the purchaser, although it remains on the land at the expiration of the time specified.

Arkansas.—Indiana & A. Lumber & Mfg. Co. v. Eldridge (1909) 89 Ark. 361, 116 S. W. 1173 (contract provided a specified time for the "cutting and removing" of the timber); Griffin v. Anderson-Tully Co. (1909) 91 Ark. 292, 134 Am. St. Rep. 73, 121 S. W. 297 (contract gave a specified time "to cut, raft, and carry away").

Georgia.—Jones v. Graham (1913) 141 Ga. 60, 80 S. E. 7.

Maine.—Erskine v. Savage (1901) 96 Me. 57, 51 Atl. 242 (reservation in deed with right of entry for five years for purpose of cutting and removing the timber).

Maryland.—Wimbrow v. Morris (1912) 118 Md. 91, 47 L.R.A.(N.S.) 882, 84 Atl. 238 (were to cut and remove within the time limited).

Michigan.—Hodges v. Buell (1903) 134 Mich. 162, 95 N. W. 1078.

Minnesota.—Alexander v. Bauer (1905) 94 Minn. 174, 102 N. W. 387 (purchaser was to cut and remove).

New Hampshire.—Plumer v. Prescott (1861) 43 N. H. 277 (purchaser of wood and timber was to have a stated time "to take it off in"); Town v. Hazen (1872) 51 N. H. 596 (grantor reserved wood and timber "with one year to remove the same").

Ohio.—Walcutt v. Treisch (1910)

82 Ohio St. 263, 29 L.R.A.(N.S.) 554, 92 N. E. 423 (grantor of land reserved timber "with the privilege of going on to said farm and removing same" within a stated time).

Texas.—Broocks v. Moss (1915) — Tex. Civ. App. —, 175 S. W. 791 (purchaser had a stipulated time to "cut, fell, and remove" the timber).

West Virginia.—Null v. Elliott (1902) 52 W. Va. 229, 43 S. E. 173 (obiter); Keystone Lumber & Min. Co. v. Brooks (1909) 65 W. Va. 512, 64 S. E. 614; Knight v. Smith (1919) 84 W. Va. 714, 100 S. E. 504 ("limit of time for taking timber off of ground is two years").

Wisconsin.—Hicks v. Smith (1890) 77 Wis. 146, 46 N. W. 133 (logs were "to be cut and removed" within the time stated).

Canada. — McGregor v. McNeil (1882) 32 U. C. C. P. 538. And see cases involving special contracts, *infra*, V. c.

See Ross v. Hamilton (1921) — Vt. —, 113 Atl. 781.

The United States circuit court allowed the purchasers of timber to remove that which they had cut but not removed before the expiration of the time limited, under a contract providing that "all trees not cut and removed from said land at the expiration of said contract shall revert to and become the property of" the landowner. In this case the purchasers suffered a delay because the contract, which was one with Indians, was not approved by the Secretary of the Interior for some time after it was entered into, and the court concludes that it would be "wholly inequitable to refuse to allow them [the purchasers] to remove the timber cut within the period limited by the contract." *United States v. W. T. Mason Lumber Co.* (1909) 172 Fed. 714.

One to whom a verbal license has been given by the owner of land to cut timber thereon has, notwithstanding the revocation of the license, been held to have a reasonable time in which to remove timber already cut at the time of the revocation. *Sparkman v. Kirkpatrick* (1920) 17 Ala. App. 428, 85 So. 829. It has been held

that after a license has been acted upon, and the trees cut down by the licensee, it cannot be revoked. *Hill v. Cutting* (1871) 107 Mass. 596. The general question of the revocation of licenses, however, is not within the scope of this annotation. A conveyance of timber by a writing which was not sufficient to pass title to real estate, and which was therefore held to amount to a license to the purchaser to cut and remove the timber, was held to pass title to all timber cut at the time of the revocation of the license by a conveyance of the land, in *Jenkins v. Lykes* (1882) 19 Fla. 148, 45 Am. Rep. 19.

That the timber does not revert if it is cut into logs has been held. *Macomber v. Detroit, L. & N. R. Co.* (1896) 108 Mich. 491, 32 L.R.A. 102, 62 Am. St. Rep. 713, 66 N. W. 376 (purchaser was "to remove" the timber in two years). In *Hodges v. Buell* (1903) 134 Mich. 162, 95 N. W. 1078, it was held enough to retain title in the purchaser that he sever the trees from the soil.

It has been held that, when trees are cut and piled on a river bank, on the land from which the lumber was cut, the purchaser may remove them. *Plummer v. Reeves* (1907) 83 Ark. 10, 102 S. W. 376. The timber contract involved in this case stipulated that the purchaser should "have five years in which to remove the timber from said land." The court says: "This contract limits the time in which the timber could be removed from the land, and there may be room to doubt whether, if nothing more had been done prior to the expiration of that limit than to fell the trees on the land, defendant could have subsequently removed the timber without being liable for conversion. But that question is unimportant here, for the undisputed evidence shows that the logs alleged to have been converted were removed from the place where they were cut to a point on a navigable river from which they were to be shipped. This was a substantial compliance with the terms of the contract, although the river bank was part of the tract from which the timber was cut. The evidence does

not show that defendant cut or removed from the land, after the limit of the contract had expired, any logs except those that had already been piled on the river bank for shipment, and a few that had been carried by the high water a short distance back from the bank where they had been piled for shipment. After these logs had been cut and removed to the river bank for shipment, the contract was performed, and the title to the logs fully vested in defendant, and the fact that they were gathered up afterwards and floated or shipped down the river did not constitute conversion."

Lumber and logs in a mill yard of the purchaser, on the land in question, do not revert to the owner of the land under a contract giving the purchaser a stated time in which to cut and remove the timber, and providing that "any and all timber remaining thereon at the end of the said three years shall become and remain the property of the said D. Roth [the landowner], his heirs or assigns." *Lancaster v. Roth* (1913) — Tex. Civ. App. —, 155 S. W. 597. The court, after pointing out that the purchaser had the right under his contract to establish the mill, says: "Logs which had been brought to this place and stored for the purpose of being manufactured into lumber were removed from their native forest within the terms of the contract, and did not, like the standing timber remaining upon the land, 'become and remain' the property of Roth. If the logs did not revert or become the property of Roth, for a still stronger reason, the lumber was likewise exempt from that provision of the contract." This was held, notwithstanding an extension agreement to the effect that if the purchaser had not, at the expiration of the extensions granted, disposed of all the lumber and logs that he had cut, then he was to have such further time as might be necessary for him to dry and market such lumber as he might have, to manufacture and market such logs as he might have on the skidway or in the woods at the time of the expiration of the time granted, and the further agreement that the necessary

time above mentioned for cutting timber in the woods would expire at a date stated, and a reasonable time for drying and removing lumber should be ninety days after a date stated. The timber over which the dispute arose in this case remained on the premises after the last-named date.

Timber cut, and removed from the land on which it stood to other land of the vendor, does not revert upon failure to remove it within the time limited. *Watson v. Gross* (1905) 112 Mo. App. 615, 87 S. W. 104.

The manufacture of the timber—at least, the extent of manufacture generally taking place on the land—is but a step from the cutting. It is a step which strengthens the position against the reversion of the timber. It has been held, where the timber has been manufactured into crossties, that it becomes the absolute property of the purchaser, and does not revert upon the expiration of the time limited. *Johnson v. Truitt* (1905) 122 Ga. 327, 50 S. E. 135; *Butler v. McPherson* (1909) 95 Miss. 635, 49 So. 257; *Hubbard v. Burton* (1881) 75 Mo. 65; *Richmond Land Co. v. Watson* (1908) 129 Mo. App. 554, 107 S. W. 1045. Trees manufactured into stave bolts were held to remain the property of the purchaser, with the implied right or license to go upon the premises and take the same therefrom. *Golden v. Glock* (1885) 57 Wis. 118, 46 Am. Rep. 32, 15 N. W. 12. Trees which had not only been severed from the land, but which had been cut into saw logs, telephone poles, and railroad ties prior to the expiration of the stipulated date, remain the property of the purchaser, although not removed from the land until afterwards. *Mahan v. Clark* (1908) 219 Pa. 229, 68 Atl. 667, 12 Ann. Cas. 729.

Timber cut into logs was regarded as manufactured in *Macomber v. Detroit, L. & N. R. Co.* (1896) 108 Mich. 491, 32 L.R.A. 102, 62 Am. St. Rep. 713, 66 N. W. 376.

See *Lancaster v. Roth* (1913) — Tex. Civ. App. —, 155 S. W. 597, *supra*, this subdivision.

A provision in a conveyance that "all timber left thereon [premises] is 15 A.L.R.—7.

to revert to the" vendor does not cause the title to crossties to revert; the word "timber" is held to refer to growing trees and logs. *Johnson v. Truitt* (1905) 122 Ga. 327, 50 S. E. 135. This has been held, also, in a case in which a grantor reserved in his deed all the lumber which he might "remove" by a stated time, and provided further that "all the timber thereon which is not removed by us by said date is to be and remain the property of" the grantee. *Butler v. McPherson* (1909) 95 Miss. 635, 49 So. 257. A similar conclusion was reached in *Hubbard v. Burton* (1881) 75 Mo. 65, under a similar contract as to reversion. In *Butler v. McPherson* (Miss.) *supra*, the court here takes the position, also, that the word "timber" does not embrace crossties. The court says: "When the timber was manufactured into railroad crossties, its use and nature changed. 'It was no longer timber. Its character as timber ceased when the labor of' those who felled the trees, and cut the trunks thereof into appropriate lengths, 'ceased, and the labor of the manufacturer commenced. When the article is once perfected for immediate use, it is only known by its appropriate name, and is no more timber than bread is flour, or flour wheat, or mutton sheep, or beef oxen.'" The court in *Hubbard v. Burton* (Mo.) *supra*, says: "We have no doubt that any trees, standing or felled and lying in their natural state upon the land, after the expiration of twelve months from the date of the contract, would belong to the vendor. But does the term 'timber' embrace articles manufactured out of the timber? Suppose, instead of purchasing the timber for the purpose of making railroad ties, the object of the purchaser had been to manufacture barrels, buckets, or shingles, would defendant have been entitled to all such manufactured articles found upon the premises after the expiration of the specified time? It is evident that the object of inserting that provision in the contract was to avoid conferring upon the purchaser a right indefinite as to time to enter upon the land and cut down the

timber—to limit the right to cut and remove the timber, or work it up, after the lapse of twelve months. We think the fair and reasonable construction of the contract is that only the timber standing, or cut and lying upon the ground in its natural state, was forfeited to defendants.”

In *Hampton v. Cope* (1911) 144 Ky. 720, 139 S. W. 937, a case in which the only question was whether the purchaser of timber, who had brought an action to enjoin the owner of the land from interfering with him in removing the timber after the expiration of the time, could bring a subsequent action for damages, the court says that the purchaser is not entitled to recover as damages the value of the ties left upon the land where they were cut, since he had ample time to remove them while the restraining order granted in the equity case was in force; but if, as alleged, the purchaser was annoyed and delayed in removing the ties by the owner of the land, he is entitled to recover for his loss and injury sustained thereby.

Boards which had been sawed from the timber, and allowed to remain on the land after the time limit had expired, were held not to revert under a provision that “whatever lumber remains on said premises at the end of three years reverts to . . . said grantors.” *Tuttle v. D. W. Pingree Co.* (1909) 75 N. H. 288, 73 Atl. 407. The court thus discusses the question: “Did they intend, by ‘lumber,’ standing trees only, or both standing trees and boards? The word is in common use to describe both trees suitable to saw, and the product into which they are sawed, and was used in both senses in this deed; but in every instance in which it was without modifying words, except in the forfeiture clause, it is clear from the context that only standing trees were intended. It is probable, therefore, it was used in this sense in that clause. The fact that this was a sale of ‘trees suitable to saw into lumber’ tends to strengthen this presumption; for, since such trees were the subject-matter of the sale, it is probable that it was such trees, and not the boards into which

they were sawed, which were to revert to the grantors. No facts appear to rebut this presumption. There is nothing in the deed to suggest that the granted trees were to be sawed on the lot; and, if that was not the intention of the parties at the time the deed was made, it is obvious the forfeiture clause was not intended to include sawed lumber. If, however, it is assumed that the parties had agreed before the conveyance was made that a mill should be installed on the lot, that fact would be incompetent to prove that the forfeiture clause was intended to apply to both boards and standing trees; for, if that is the fact, the parties arranged for the mill privilege in a separate contract. Consequently, the question of the defendant’s right to leave the boards on the premises would depend on the proper construction, not of this conveyance, but of that contract. If that is the fact, it is fair to say that, in so far as this conveyance is concerned, no lumber remained on the lot when the trees conveyed had been cut and hauled to the mill. In short, it is probable that the purpose of the forfeiture clause was to limit the time within which the defendants were to have the growth of the trees—not to limit their time for clearing the lot; for the plaintiff’s loss, if the sawed lumber was not removed within that time, would be so insignificant as compared with the defendants’ that it is probable, if the parties had intended that boards remaining on the premises at the end of three years should become the plaintiff’s property, they would have used apt words to express their intention. It must be held, therefore, that ‘lumber’ was used in the forfeiture clause in the sense of standing trees.”

Timber which had been cut into what was apparently firewood, and allowed to remain on the land at the expiration of the time fixed for removal, was held to revert to the owner of the land under an agreement that it was to be removed from the land “within two years from the date hereof, and not afterwards.” *Kemble v. Dresser* (1840) 1 Met. (Mass.) 271, 35 Am.

Dec. 364. The purchaser further agreed in this case that if he did not get off the wood and timber within the term fixed, the owner of the land should have it, but this fact was not known to the plaintiff, to whom the original purchaser had assigned. The fact that he did not know, when he received a transfer of the original purchaser's right, the condition on which that right depended, was held not to be material; he was held to acquire only such right as his assignor had; he must stand in precisely the same situation in regard to the owner of the land, in which his assignor had stood. Accordingly, the plaintiff was held not entitled to recover either for the price or value of the wood, or for the labor of cutting it.

See *Nelson v. Nelson* (1856) 6 Gray (Mass.) 385.

In *Erskine v. Savage* (1901) 96 Me. 57, 51 Atl. 242, *supra*, the timber involved is spoken of as "wood."

The timber involved in *Plumer v. Prescott* (1861) 43 N. H. 277, and *Town v. Hazen* (1872) 51 N. H. 596, was cut into firewood.

Timber which had been sawed into lumber and stacked upon the land of the vendor, outside of the timberland, was held to remain the property of the purchaser, although remaining on the land after the time limited for the removal of the timber, where the right to locate the sawmill at which the timber was sawed was not a right conferred in the contract for the sale of the timber, but under some other arrangement with the landowner, and where the boundaries of the timber tract are definitely pointed out in the contract. *ZIRKLE v. ALLISON* (reported herewith) ante, 38. The court is of the opinion that the timber was removed from the boundaries clearly and definitely designated in the written contract, and that it was therefore removed, within the meaning of that contract, just as clearly as if it had been removed to the land of some other person than the vendor.

But see *SMITH v. RAMSEY* (reported herewith) ante, 32.

In jurisdictions which adhere to the minority rule discussed in II. c, 4 (b),

and III. b, *supra*, the title to the trees remains in the purchaser, notwithstanding his failure to remove them within a reasonable time. It has been held in a jurisdiction which adheres to this rule that the fact that the timber has been cut is unimportant. The court in *Irons v. Webb* (1879) 41 N. J. L. 203, 32 Am. Rep. 193, was dealing with a case in which the timber owner had cut the timber into saw logs in part, and the balance into cordwood, and corded it up on the premises, but no stress was laid on this fact; the court saying that the omission to stress such fact was by design, as it was not perceived how it could add anything to the force of the exception in the conveyance, in the way of fixing the title in the grantor. (The timber in this case was reserved by the owner of the land in making a conveyance of the land.) The court adheres to the theory discussed above in subd. III. b, and says, with reference to the fact that the timber was cut: "I have endeavored to show that the exception is unconditional, and if this be so, by its own efficacy it kept the title to the timber in the plaintiff, but if, on the contrary, the property in the timber was not to remain in the plaintiff unless the trees were removed within such period, then, very clearly, the mere felling of the trees would not satisfy the requirement of such condition."

But see *Inderlied v. Whaley* (1892) 65 Hun, 407, 20 N. Y. Supp. 183, *infra*, V. b.

2. Theory.

It is the general theory of the cases holding that timber that has been cut does not revert that the cutting of the trees converts them into personal property.

Arkansas.—*Indiana & A. Lumber & Mfg. Co. v. Eldridge* (1909) 89 Ark. 361, 116 S. W. 1173.

Maine.—*Erskine v. Savage* (1901) 96 Me. 57, 51 Atl. 242.

Maryland.—*Wimbrow v. Morris* (1912) 118 Md. 91, 47 L.R.A. (N.S.) 882, 84 Atl. 238.

Michigan.—*Macomber v. Detroit, L. & N. R. Co.* (1896) 108 Mich. 491, 32

L.R.A. 102, 62 Am. St. Rep. 713, 66 N. W. 376.

Minnesota.—*Alexander v. Bauer* (1905) 94 Minn. 174, 102 N. W. 387.

Missouri.—*Richmond Land Co. v. Watson* (1907) 129 Mo. App. 554, 107 S. W. 1045.

New Hampshire.—*Plumer v. Prescott* (1861) 43 N. H. 277; *Town v. Hazen* (1872) 51 N. H. 596.

Ohio.—*Walcutt v. Treisch* (1910) 82 Ohio St. 263, 29 L.R.A.(N.S.) 554, 92 N. E. 423.

Pennsylvania.—*Mahan v. Clark* (1908) 219 Pa. 229, 68 Atl. 667, 12 Ann. Cas. 729.

Wisconsin.—*Golden v. Glock* (1883) 57 Wis. 118, 46 Am. Rep. 32, 15 N. W. 12; *Hicks v. Smith* (1890) 77 Wis. 146, 46 N. W. 133.

The court in *Erskine v. Savage* (Me.) *supra*, says: "The question now presented is whether, under such a contract, the wood must be removed as well as severed within the time limit; in order to prevent a forfeiture of title of so much as has been severed, but not removed. We think not. We have already stated that when the tree is severed from the soil the wood becomes personal property, and further, it becomes the property of the licensee. He was licensed to enter, to cut and remove within a limited period. He has entered and cut within the period, and thereby has acquired a property in the wood. Will he lose that property because he neglects to exercise the other powers of his license within the limit of time? We can perceive no valid reason why he should. The contract does not call for a forfeiture, and we are aware of no legal principle that requires it."

In holding that timber cut and removed from the land on which it was standing, to other land of the vendor, did not revert upon failure to remove it within the time limited, the court in *Watson v. Gross* (1905) 112 Mo. App. 615, 87 S. W. 104, says: "From the fact that the timber had been so removed from the land on which it was cut, and deposited in the gulch with defendant's knowledge and sanction, it is reasonable to infer that he was not insisting upon a strict compliance

with the contract for its removal. Defendant expressed his consent to the deposit of the timber, and he certainly understood that it was the intention of plaintiff to let it remain there until it suited his convenience to remove it. This seems to be a fair conclusion which any reasonable person would entertain from the circumstances. It was not shown that it was in defendant's way in any manner, or that it occupied ground that he desired to utilize for farming purposes. In fact, from the kind of place in which it was deposited, we are warranted in coming to the conclusion it was placed there for the reason that it would be out of the way of the owner of the land. Courts are slow to enforce forfeitures, and will not do so if there is any reasonable excuse for doing otherwise. This is a well-established principle of law."

The supreme court of Wisconsin held in *Strasson v. Montgomery* (1873) 32 Wis. 52, that the purchaser under such a contract acquired title only to such trees as he should remove within the time limited. The contract of sale in that case contained a proviso that the conveyance was upon the express condition that the timber should be removed within four years. In the subsequent case of *Golden v. Glock* (Wis.) *supra*, the provision as to time was in the form of an agreement, it being stated in the deed that it is expressly "agreed and understood" that the timber transferred should be removed within the time named. In holding, in *Golden v. Glock*, that the purchaser acquired title only to such timber as he should remove within the time stated, the court, after referring to *Strasson v. Montgomery* (Wis.) *supra*, says: "That case is substantially like this, unless the fact that the words fixing the limitation in the deed under which the plaintiff here claims, not being in the form of a proviso, as in the deed to White, makes the two cases distinguishable. After careful consideration we are constrained to hold that the two cases are not distinguishable in principle by reason of the difference in the phraseology employed." In the subsequent case of

Hicks v. Smith (1890) 77 Wis. 146, 46 N. W. 133, it was held to be the cutting that rendered the trees personal property, so as to prevent the title reverting to the landowner. The court, referring to the case of *Golden v. Glock* (Wis.) supra, says: "It is not made essential in that case that the trees should have been manufactured into anything after they were severed from the soil, to make them personal property. It is a statement of the facts in that case merely, and the severance of the trees from the soil by cutting them down constitutes their conversion into personal property. They are no longer a part of the land, and are not real property, and therefore must be personal property. Manufacturing the timber after it is cut down, into any form, is no part of the act of its severance from the land."

3. Rights and remedies of parties.

The purchaser continuing to be the owner of the trees is, therefore, in the situation of an owner of personal property whose goods are unlawfully upon the land of another. *Erskine v. Savage* (1901) 96 Me. 57, 51 Atl. 242. He may maintain replevin to recover the timber cut by him (*Sanborn v. Franklin County Lumber Co.* (1908) 55 Fla. 389, 46 So. 85; *Wimbrow v. Morris* (1912) 118 Md. 91, 47 L.R.A. (N.S.) 882, 84 Atl. 238; *McGregor v. McNeil* (1882) 32 U. C. C. P. 538); or, where the landowner has converted it, he may maintain an action in damages for such conversion (*Erskine v. Savage* (Me.) supra; *Butler v. McPherson* (1909) 95 Miss. 635, 49 So. 257; *Watson v. Gross* (1905) 112 Mo. App. 615, 87 S. W. 104; *Town v. Hazen* (1872) 51 N. H. 596; *Broocks v. Moss* (1915) — *Tex. Civ. App.* —, 175 S. W. 791).

There is a suggestion in *Adkins v. Huff* (1906) 58 W. Va. 645, 3 L.R.A. (N.S.) 649, 52 S. E. 773, 6 Ann. Cas. 246, that the purchaser has a remedy at law to recover possession of timber already severed, if it belongs to him.

But see *Kemble v. Dresser* (1840) 1 Met. (Mass.) 271, 31 Am. Dec. 364, supra.

That the landowner may merely remove the wood, without being liable for conversion, is held in *Town v. Hazen* (1872) 51 N. H. 596.

Conversely, the landowner cannot maintain an action for damages for conversion of the trees by the owner of the trees, who has taken possession thereof. *Plummer v. Reeves* (1907) 83 Ark. 10, 102 S. W. 376; *Indiana & A. Lumber & Mfg. Co. v. Eldridge* (1909) 89 Ark. 361, 116 S. W. 1173. He cannot recover the value of sawed boards removed after the expiration of the time limit. *Tuttle v. D. W. Pingree Co.* (1909) 75 N. H. 288, 73 Atl. 407. Nor can he lawfully convert crossties to his own use. *Johnson v. Truitt* (1905) 122 Ga. 327, 50 S. E. 135. But the landowner may recover for the unauthorized entry upon his land. *Indiana & A. Lumber & Mfg. Co. v. Eldridge* (Ark.) supra; *Erskine v. Savage* (1901) 96 Me. 57, 51 Atl. 242; *Alexander v. Bauer* (1905) 94 Minn. 174, 102 N. W. 387 (obiter); *Plumer v. Prescott* (1861) 43 N. H. 277, but cannot include in his damages the value of the timber taken (*Plumer v. Prescott* (N. H.) supra).

That the purchaser of the timber, who had manufactured the same into crossties, might go on the land and remove the crossties after the expiration of the time limited, being liable in damages occasioned by his wrongful act in leaving his property on the premises, and in trespass for entering the premises to take possession of his property, seems to be the opinion in *Johnson v. Truitt* (Ga.) supra. But in *Richmond Land Co. v. Watson* (1908) 129 Mo. App. 554, 107 S. W. 1045, the court held that, when timber had been cut into crossties, it was no longer real estate, but personal property, for the removal of which an action of trespass would not lie. The action in this case, however, was by the landowner to recover the value of the timber. It seems clear that the value of the timber cannot be recovered.

It seems to be the doctrine of some cases that the timber owner may continue on the land a reasonable time after the expiration of the time limited, to remove the timber. *Knight v.*

Smith (1919) 84 W. Va. 714, 100 S. E. 505; Hicks v. Smith (1890) 77 Wis. 146, 46 N. W. 133. In Griffin v. Anderson-Tully Co. (1909) 91 Ark. 292, 134 Am. St. Rep. 73, 121 S. W. 297, it is stated that the purchaser has a right, for a reasonable time after the expiration of the contract, to remove logs cut prior thereto.

The purchaser of the land is not entitled to recover from the purchaser of the timber the value of the timber cut at the time of his purchase, although he may be entitled to recover nominal damages for going on the land to get the timber. Jenkins v. Lykes (1882) 19 Fla. 148, 45 Am. Rep. 19.

b. Doctrine that title does revert.

Other cases hold that the purchaser loses his right to the timber at the expiration of the time, even though it is cut. Clark v. Ingram-Day Lumber Co. (1907) 90 Miss. 479, 43 So. 813 (contract gave the purchaser three years "to remove the saw logs" from the premises); Rowan v. Carleton (1911) 100 Miss. 177, 56 So. 329 (purchaser was given stated time to "cut and remove" all merchantable timber); Inderlied v. Whaley (1892) 65 Hun, 407, 20 N. Y. Supp. 183; Anderson v. Miami Lumber Co. (1911) 59 Or. 149, 116 Pac. 1056; Mengal Box Co. v. Moore (1905) 114 Tenn. 596, 87 S. W. 415, 4 Ann. Cas. 1047 (timber cut into logs; contract gave purchaser "privilege of cutting and removing . . . timber for the term of five years") Bond v. Ungerecht (1914) 129 Tenn. 631, L.R.A.1915A, 571, 167 S. W. 1116 (purchaser "allowed five (5) years, but not longer . . . to cut and remove" the timber); Allen & N. Mill Co. v. Vaughn (1910) 57 Wash. 163, 106 Pac. 622 (purchaser was given stated time in which "to remove" the timber).

In Boisaubin v. Reed (1866) 2 Keyes (N. Y.) 323, 1 Abb. App. Dec. 161, where the right of the purchaser was held to expire with the time limited in the contract, this holding was held to apply to timber that had been cut, the court saying: "The defendant here cut down more timber than he

could remove within his term. He knew that his right to enter and carry away expired at a particular day. He attempted to overreach the letter of his covenant, and must be allowed to bear his loss without remedy."

A landowner was held entitled to maintain an action for trespass in removing and converting personal property, consisting of lumber, telegraph poles, railroad ties, and fence posts, in Inderlied v. Whaley (1892) 65 Hun, 407, 20 N. Y. Supp. 183, the same having been removed by the purchaser after the time limited had expired. A mill was located upon the premises involved in this case, but apparently the timber over which the action arose was not located on the mill yard.

Logs drawn off the wood lot and piled on skids on another part of the tract of the landowner revert to the landowner upon the expiration of the time limited, under a contract requiring the purchaser "to cut and draw" the timber by the time stated. Strong v. Eddy (1868) 40 Vt. 547.

At least, where the timber was cut with no hope of being able to remove it, but for the purpose of making a showing of partial performance before the expiration of the contract period, it reverts to the owner. St. Louis Cypress Co. v. Thibodaux (1907) 120 La. 834, 45 So. 742; see Boisaubin v. Reed (N. Y.) supra.

In fact, the right to remove, after the expiration of the stated time, timber that has been cut before the expiration, has been denied under a contract giving the purchaser a stated time "to cut and remove the trees and logs," even though the contract contained a further provision that, at the expiration of the time, "all the timber left standing" should revert to the vendor. Taylor Brown Timber Co. v. Wolf Creek Coal Co. (1908) 32 Ky. L. Rep. 1015, 107 S. W. 733. It was the contention of the purchaser that under this contract all timber that had been cut, although not removed within the contract period, continued to be its property, but the court denied this, saying: "This construction does violence to the plain meaning of the contract, and completely ignores so much

of it as limits the time for the removal of the trees and logs. Read as a whole, it expressly limits the time within which the vendee might cut and remove trees or logs, or disturb standing timber. Under appellant's construction, the vendee had the right to cut all of the trees, and leave all the logs on the ground and remove them after the expiration of the contract; and, if under the contract only such timber as was standing reverted to the vendor, this construction would be correct. But the difficulty with it is that it ignores that part of the contract specifying the time within which the trees and logs shall be removed. It seems manifest that, if the vendee could not remove any trees or logs after the expiration of the contract, neither could he after that time cut any standing trees."

The contract in *Mengal Box Co. v. Moore* (1905) 114 Tenn. 596, 87 S. W. 415, 4 Ann. Cas. 1047, recited a consideration for which the landowner gave and granted unto the purchaser "the privilege of cutting and removing . . . timber for the term of five years from this date." A further provision of the contract was to the effect that "the . . . [purchaser] is to have the right of ingress and egress on said land for his said term, after which time he is to have no right to cut any timber on said land." The court says: "This means that he should have no right of ingress and egress to the land for any purpose after the expiration of the five-year limit, nor should he cut any timber on the land after that time." This construction was confirmed by a further provision of the contract that the purchaser was to have and own all cottonwood timber, "both standing and now down, that he may cut and remove within said five years from said land."

The fact that the logs have been stacked near a tramroad constructed by the purchaser on the land, preparatory to shipment, is immaterial. *Rowan v. Carleton* (1911) 100 Miss. 177, 56 So. 329.

Where the purchaser had mingled logs cut on other lands with logs cut on the lands of the complainant, and

allowed all the logs to remain on the complainant's land after the time limited, it was held that the purchaser must identify the logs cut on other lands if he would reclaim them, in *Rowan v. Carleton* (Miss.) supra.

Where the owner of the land and the purchaser of the timber agreed by parol that the timber owner might have additional time in which to remove logs already cut, the landowner and his vendee were held to be estopped from taking advantage of the timber owner's failure to remove within the time fixed in the writing. *Grange v. Palmer* (1890) 56 Hun, 481, 10 N. Y. Supp. 201.

Some cases in which it appears that the timber was cut make no difference in decision because of that fact, but apply the rule applicable to uncut timber. *Harrell v. Danks* (1912) 151 Ky. 71, 151 S. W. 13. See *Irons v. Webb* (1879) 41 N. J. L. 203, 32 Am. Rep. 193, supra, V. a, 1.

An injunction was obtained in *McIntyre v. Barnard* (1843) 1 Sandf. Ch. (N. Y.) 52, by the owner of the land against the purchaser of the timber removing timber that he had cut after the expiration of the time limited, nothing being said as to the effect of the fact that it had been cut.

See *SMITH v. RAMSEY* (reported herewith) ante, 32.

The trial court in *Quigley Furniture Co. v. Rhea* (1912) 114 Va. 271, 76 S. E. 330, held the purchaser entitled to timber which had been severed within the time limited, but which had not been removed from the premises. This holding was affirmed on technical reasons, and it seems that the decision in *SMITH v. RAMSEY* is a disapproval of this position.

The court in *Clark v. Ingram-Day Lumber Co.* (1907) 90 Miss. 479, 43 So. 813, says: "There are a great many decisions upon this subject, and the courts are in conflict as to whether or not timber shall be considered to be 'removed' within the meaning of a contract of this sort, when it shall have been severed from the soil and left upon the land. We prefer to align ourselves with those authorities which maintain the integrity of the contract

and enforce it according to its clear intent and meaning, when interpreted according to the general acceptance of the word used, rather than to enter into any refined distinction as to what constitutes a 'removal,' and thereby bring into the contract interminable confusion. By the plain terms of this contract, the timber is sold to the grantee on condition that it be removed from the premises within three years from the date of the instrument, and the three years having expired without its having done so, it has no further right on the premises or to the timber, either standing, or which it has cut down and left lying upon the land; after the expiration of the time fixed by the contract for removal. By the terms of the contract it is given 'three years to remove the saw logs from the above-described land,' and a plain interpretation of this language means that it shall not only cut down, but that it shall take from the lands, the timber so granted, else its rights are terminated by the contract itself. . . . Timber cannot be said to be 'removed from the premises' unless it is carried off. . . . If the parties had intended that the grantee under this contract should have any rights additional to those which are granted in the contract,—that is to say, if it was intended that they should have three years within which to cut the timber, and an additional time in which to remove it from the premises,—nothing would have been easier than for the parties to have put this in the contract; and since they have not done so, we cannot say that the parties intended that the grantee should be limited to three years only as to the time in which he shall cut down the timber, and shall have an additional time in which to remove timber cut from the premises. To do this would be to make a new contract and to disregard the agreement which the parties had actually made."

The contract involved in *Anderson v. Miami Lumber Co.* (1911) 59 Or. 152, 116 Pac. 1056, contained a proviso that the grantees, or their successors or assigns, should remove the timber from the premises within five years from the date of the instrument,

and continued: "The title to all timber not so removed, and remaining on said premises at the expiration of said period of five years, shall revert to and become vested absolutely in the grantors herein." In holding that logs cut, but remaining on the premises, reverted to the grantor, the court says: "Now it is conceded that the trees in question were not in fact removed from the premises; that a large part of them remained upon the ground in the shape of felled trees marked for sawing, and that a small quantity were cut already into saw logs. It is claimed that the cutting of these trees and severing them from the soil constituted a technical 'removal from the premises,' and that the defendants had a reasonable time after the expiration of the grant to actually remove them. The very statement of the proposition involves a contradiction. If the timber was removed by the act of cutting, then it was removed, and no further act was required. To say that it was removed as a matter of law, and that defendant had a right to enter upon the premises after the expiration of the time limit set in the deed, and thereafter to remove it as a matter of fact, involves a degree of legal metaphysics which we are unable to attain. If trees which have been cut down and which lie undisturbed at the foot of the stumps are timber, or if the same trees which have been cut into saw logs and which are left lying where they fell are timber, then it follows from a necessary, usual, and common-sense definition of the term, 'removal from the premises,' that they could not be in a legal sense removed while they were in fact remaining physically on the premises."

Where the timber does revert, the vendor may enjoin a trespass by the purchaser for the purpose of removing the timber. *Dye v. East Shore Wood-ware Co.* (1912) 169 Mich. 78, 134 N. W. 986.

c. Special contracts.

The question under consideration herein is determined in some cases by the provisions of the contract. Those cases will now be discussed. It should

be remembered, however, that the contract provisions are important in every case. No clear line can be drawn between contracts which have a direct provision on this question, and those that have not. The reader should therefore consult the previous discussion in subd. V., especially the cases referred to at the end of this discussion of special contracts.

Timber cut and skidded was held to revert to the vendor, under a contract for the sale of the timber standing, lying, or being on the premises, and providing that "whatever of said timber shall remain upon said lands after the limit of the aforesaid five years shall revert and become the property of said first party." *Gamble v. Gates* (1892) 92 Mich. 510, 52 N. W. 941, s. c. on later appeal (1893) 97 Mich. 465, 56 N. W. 855. Compare with *McNeil v. Hall* (1905) 107 App. Div. 36, 94 N. Y. Supp. 920, affirmed without opinion in (1907) 187 N. Y. 549, 80 N. E. 1113. And in *New Hampshire*, where under the ordinary contract the title to standing trees is not lost by failure to remove them within the time limited, although thereafter the purchaser has no right to enter upon the land for that purpose, it is held that the purchaser of timber acquires only such as he removes within the time stipulated under a deed of timber providing that the purchaser had the right to enter to cut and remove timber "at any time before January 1, 1913; all timber not removed before that date should become the property of said grantors." *Paul v. Wiggin* (1916) 78 N. H. 235, 99 Atl. 88. There was a further provision in the deed involved in this case that the buyer might place a mill upon the land, and that "all sawed lumber be removed on or before June 1, 1913." It was held that the purchaser did not have the right to cut any timber after December 31, 1912, that he might remove all that had been cut, whether sawed or unsawed, before January 1, 1913, and that all the unsawed lumber remaining on the premises January 1, 1913, became the property of the landowner.

And under a contract expressly pro-

viding that "all timber, whether cut or uncut, remaining" on the land, should revert to the vendor, logs cut and skidded reverted to the vendor. *Dye v. East Shore Woodenware Co.* (1912) 169 Mich. 78, 134 N. W. 986.

In *McNeil v. Hall* (N. Y.) *supra*, the contract provided that the purchaser should draw all the timber off the lot on or before the date stipulated, "after which date he has no further right on said premises, or in any timber left thereon." The logs in dispute had been cut and skidded, but remained on the premises after the date. In holding that title to these logs reverted to the landowner, the court says: "It is unnecessary to determine the precise nature of the title which the vendee acquired in the first instance by virtue of the contract, because, almost in express language, it provided that he should be prevented from asserting such title, whatever its nature, to any logs which remained upon defendant's premises after the 12th day of April, 1903. He agreed that he would not exercise any act of ownership or dominion over such logs after that date. . . . Clearly the word 'timber,' as used in the first clause of the sentence, has reference to timber already cut, and there is no basis for holding that the word 'timber,' as used in the last clause, has a different meaning and refers to standing timber. The vendee agreed to draw all timber before a certain date, and he agreed to forfeit his right to all timber left on the premises after such date."

The parties may by contract provide that the purchaser may, after the expiration of the time limited, remove timber cut within that time. A contract of sale of standing timber which specified a certain time for cutting and removing the same, and then added, "or until the . . . [purchaser] shall have removed all logs which it may have cut on said lands," and in a subsequent part of the contract gave the purchaser a definite extension to remove logs which it may have cut on the lands by reason of the contract, was construed by the court as giving the purchaser a reasonable time after

the expiration of the definite extension provided in the contract; logs that were cut during the contract period were held to become the chattel property of the purchaser, and he was held entitled to remove them within a reasonable time after the expiration of the definite extension. *Sanborn v. Franklin County Lumber Co.* (1908) 55 Fla. 389, 46 So. 85.

See *Johnson v. Truitt* (1905) 122 Ga. 327, 50 S. E. 135; *Butler v. McPherson* (1909) 95 Miss. 635, 49 So. 257; *Hubbard v. Burton* (1881) 75 Mo. 65; *Tuttle v. D. W. Pingree Co.* (1909) 75 N. H. 288, 73 Atl. 407, and *Kemble v. Dresser* (1840) 1 Met. (Mass.) 271, 35 Am. Dec. 364, V. a, 1.

VI. Rights upon subsequent sale of land.

a. Doctrine that title passes to grantee of land.

Where the land, upon which the timber sold is situated, is subsequently sold, a question arises whether, upon the failure to remove the timber, it reverts to the original landowner, or to the owner of the land at the time the reversion takes place. There is some difference of opinion as to this, and the question is, of course, affected by the contract in certain cases. It is held in some cases that timber sold under a contract specifying a time for removal, which is excepted from a subsequent deed of the land, does not revert to the original owner of the land upon failure to remove the same within the time limited, but passes to the then owner. *Granville Lumber Co. v. Atkinson* (1916) 234 Fed. 424; *Sutton v. Gray Lumber Co.* (1907) 3 Ga. App. 377, 60 S. E. 2; *Hornthal v. Howcott* (1911) 154 N. C. 228, 70 S. E. 171; *Neilson v. McNeil* (1914) 72 Or. 549, 143 Pac. 1119; *Saltonstall v. Little* (1879) 90 Pa. 422, 35 Am. Rep. 683; *Deer Creek Lumber Co. v. Sheets* (1914) 75 W. Va. 21, 83 S. E. 81. See *WILLIAMS v. MCCARTY* (reported herewith) ante, 9; *Strasson v. Montgomery* (1873) 32 Wis. 52.

Where certain timber was sold at judicial sale, with the right to the purchaser to have five years in which to cut the same, and with a further extension of three years upon the pay-

ment of a certain sum of money, and at the time of the sale it was stated by the commissioners that the interest payable for the extended period would belong to the present owners of the land, and not to the purchaser, and subsequently, upon the sale of the land, the same persons who bought the timber bought the land, the former owners of the land were not entitled to have the interest for the extension period secured to them, since, upon the expiration of the five years without any extension being taken, the timber reverted to the purchaser of the land, and he could cut it when he wished to do so. *Shannonhouse v. McMullan* (1915) 168 N. C. 239, 84 S. E. 259.

Where land has been conveyed, with a reservation in the deed of the timber, in accordance with a previous contract for the sale of the timber, and subsequently a release of the rights of the purchaser under this contract are obtained, the grantee obtains title to the timber. *Neilson v. McNeil* (1914) 72 Or. 549, 143 Pac. 1119.

An owner of land who has sold the timber thereon under a contract giving the purchaser five years to remove the timber, and if not taken off in this time "to revert back unless otherwise provided," and who subsequently sells the land, conveying the same by a deed containing the following: "The timber upon this tract of land was sold to . . . and is therefore reserved by the party of the first part in this deed," does not acquire title to the timber on the failure of the purchaser to remove it within the time limited, and has not, therefore, any right which he can transfer to the owner of the timber that will entitle it to remove after the time limited. *Deer Creek Lumber Co. v. Sheets* (1914) 75 W. Va. 21, 83 S. E. 81.

A devisee of the land was held entitled to timber upon the abandonment of their contract by the purchasers, although the proceeds of the contract were devised to the heirs equally, in *Lambden v. West* (1895) 7 Del. Ch. 266, 44 Atl. 797.

In *Strasson v. Montgomery* (1873) 32 Wis. 52, the owner of land, who had sold the timber therefrom by an in-

strument giving the purchaser until December, 1870, to remove the same, subsequently sold the land and conveyed the same by a deed containing the following clause: "Excepting and reserving a certain amount of timber heretofore sold Elias N. White, and the said Elias N. White or his assigns was to have until December, 1871, to take off said timber." In holding that only the timber sold to White was excepted or reserved from the deed, and that the balance passed to the grantee, the court says: "We have already seen that the timber sold to White was only such as he should take off the premises by December 4, 1870. Hence the timber remaining on the premises after that date is not included in the above language, and is not excepted or reserved at all, unless it is so by force of this further language of the deed—'and the said Elias N. White or his assigns is to have until December, 1871, to take off said timber.' The timber here referred to is, of course, the same mentioned in the first clause of the exception or reservation above quoted, and it is quite obvious that it cannot enlarge the operation of that clause. . . . It requires no argument to show that in such case the last clause would necessarily be entirely inoperative." But it is added that, if the court should be wrong in this, there is another view which is fatal to the defense—that is, that if the provision in the deed reserving to White and his assigns the right to take timber from the premises until December, 1871, is a reservation, it is a reservation in favor of a stranger to the deed, and is void for that reason.

An owner of land who has sold timber thereon, giving to the purchaser a stated time in which to remove the same, who subsequently conveys the land by a deed containing an exception as follows: "Excepting, however, from this conveyance certain pine trees now standing on said land," does not acquire title to trees remaining on the land at the expiration of the time limited in the timber contract. *French v. Sparrow Kroll Lumber Co.* (1904) 135 Mich. 424, 97 N. W. 961. And this was held with reference to a

conveyance in which the exception was of the "pine timber . . . which was sold to F. H. Begole." *Ibid.* Compare with *Haskell v. Ayres* (1876) 35 Mich. 89, *infra*, VI. b.

In *Sutton v. Gray Lumber Co.* (1907) 3 Ga. App. 377, 60 S. E. 2, according to this court, the original owner of the land conveyed title to his grantee "to everything on the land lot except the timber which he had previously sold to Banks." Continuing, the court says: "All that was sold to Henry Banks was such timber as he might cut on the land lot within the five years. The exception noted would have been good without having been placed in the deed from Slade to Patton, because the deed from Slade to Banks had been previously recorded, but it was apparently inserted in the deed out of abundance of caution, to protect the warranty of the grantor to Banks, and not for the purpose of reserving any right in the timber to the grantor Slade; and also to protect the right in said timber which had been previously granted to Banks. If Slade had intended to reserve any estate in the timber for himself after the five years expired, he would have used apt words of reversion in the deed to Patton. It is perfectly plain that, if Banks cut no timber at all during the five years, none was sold to him, for the office of the proviso contained in his deed was to limit his right and title to such timber as he might cut during the five years. In other words, his general right to the timber on the land lot was limited and restricted by the proviso." This construction was held not at variance with the decision in *Levis v. Parrott Lumber Co.* (1904) 119 Ga. 476, 46 S. E. 647. In that case, according to the court in the *Sutton Case*, the conveyance from the original owner expressly provided: "'All timber remaining [on said land lot] to revert' to the grantor after a period named, to wit, at the expiration of eight years," while in the *Sutton Case* no provision was made that the timber remaining on the land at the end of five years should revert to Slade, the grantor, or to anyone else,

so that at the end of the period of five years, without such clause, it necessarily remained as a part of the realty, and was the property of whoever at that time had title to the realty.

That purchasers of land from which the timber has been sold, to the notice of the purchasers, acquire no interest in the timber except the right to have it revert to them in case it is not removed under the contract of sale, is stated in *Brodack v. Morsbach* (1905) 38 Wash. 72, 80 Pac. 275.

Where one purchases land which is conveyed to him by deed in which his grantor reserves timber to be removed by a stated date, the grantee being informed by the grantor that he has sold this timber and that is to be removed by the date mentioned in the deed, and that if it is not so removed it shall become the property of the grantee, the grantee acquires title to timber remaining on the land at the expiration of the time specified. *Lockeshan v. Miller* (1894) 16 Ky. L. Rep. 55.

Timber sold under a contract by which the purchaser is given a stated time in which to remove it does not revert to the original owner of the land upon the expiration of that time, where the land was sold without mentioning the timber, and conveyed by a deed containing a stipulation warranting the land to the purchaser, his heirs and assigns, in full warranty forever, free from any lien, mortgage, or encumbrance whatever, with full and general warranty of title, and "with full subrogation to all the rights of warranty and other rights as held therein by said vendor." *Brown v. Minden Lumber Co.* (1920) — La. —, 86 So. 727.

The right of the original owner to grant an extension has been denied. A reservation in a deed by the grantor who had sold timber from the land conveyed, giving the purchasers a limited time for removal, of the right to remove at any time from the date of the deed any and all timber from all the lands above described, was held not to include the right of reversion upon failure of his purchasers to remove timber within the time limited, in *In-*

ternational Lumber v. Staude (1919) 144 Minn. 356, 175 N. W. 909. Accordingly, an extension of time given by him to one of his purchasers, who failed to remove within the time limited in the original contract, was invalid.

And the right of the grantee of the land to payments provided for extensions has been recognized. The payments provided for in the contract of sale of timber, for an extension thereof by the purchaser, must be paid to the grantee of the land. *Granville Lumber Co. v. Atkinson* (1916) 234 Fed. 424. Payments agreed upon to secure an extension were held to have been properly made to a grantee of the land, in *Wilson v. Buffalo Collieries Co.* (1917) 79 W. Va. 279, 91 S. E. 449, where the original owner, who had entered into the timber contract, sold the land by a deed which expressly made the conveyance subject to the rights granted to the purchaser of the timber.

See *Carolina Timber Co. v. Wells* (1916) 171 N. C. 262, 88 S. E. 327, *infra*, VI. b.

b. Doctrine that title reverts to original owner of land.

Other cases hold that the title to timber reverts to the original owner of the land, upon failure of the purchaser of the timber to remove it in the time limited. In *Levis v. Parrott Lumber Co.* (1904) 119 Ga. 476, 46 S. E. 647, one who purchased land by conveyance which recited, "all timber on above lots sold prior to this day reserved," was held not to acquire title to timber thereon, which his grantor had sold giving a period of time for its removal, upon the expiration of the time limited. According to this court, upon the expiration of the time limited the grantor was reinvested with the timber that remained on the land; that the grantor did not, under the conveyance above mentioned, pass the title to his grantee, but expressly excepted or reserved it. It was accordingly held in this case that the grantee of the land could not maintain an action against the purchaser of the timber for the remov-

al of the timber after the expiration of the time limited, for the reason, as above stated, that he did not have title to the timber. In *Ford Lumber Co. v. Cornett* (1912) 146 Ky. 457, 142 S. W. 718, rehearing denied in (1912) 148 Ky. 25, 145 S. W. 1105, the title to timber which had been sold by the owner of land with a requirement that the same be removed within a stated time, which was excepted from a subsequent deed of land by the owner, was held to revert to the original owner. The exception in this case was in the following language: "Excepting all the poplar, ash, and cucumber trees, 6½ feet in circumference and upward, . . . together with the right of way, etc., except over growing crops." Timber which had been sold under a contract by which the purchaser was to have a stated time in which to remove it was held to revert to the vendor, who had sold the land with a reservation of "all the pine timber on said land above the size of 10 inches in diameter 20 feet from the stump." *Howard v. Lincoln* (1836) 13 Me. 122. The court says that the timber that remained on the land after the expiration of the time limited in the sale thereof continued the property of the then owner, by virtue of his reservation in his deed to the land.

The court, in *Gresham v. Atlantic Coast Lumber Corp.* (1913) 96 S. C. 53, 79 S. E. 799, in dealing with a conveyance of land containing an exception of the timber theretofore sold to a lumber company, says that under this conveyance the timber did not pass to the grantee.

The owners of land who had sold the timber therefrom with the provision that if the timber shall not be cut and removed within a stated period, the same shall "revert to us," and who thereafter conveyed the land, excepting from the conveyance all the timber which had theretofore been sold and conveyed, acquired title to the timber upon the failure of the purchaser to remove it within the time stated. *Lewis v. Bennette* (1917) — Tex. Civ. App. —, 193 S. W. 233.

The right of the original owner to

grant an extension of time, or recover the compensation agreed upon for such extension, has been sustained. See *GABBARD v. SHEFFIELD* (reported herewith) ante, 1. The vendor of timber to be removed within a stated time, who had thereafter sold the land expressly reserving the timber, was held to have authority to extend the time for taking off the timber, in *Haskell v. Ayres* (1876) 35 Mich. 89. The court here holds that the reservation in the deed was absolute, but it is stated that there must be undoubtedly the right of the vendor thus to extend the time after he had parted with title to the land, though he could not do so indefinitely to the prejudice of the owner of the land, who might desire to put the land to use; but in this case it did not appear that the owner of the land ever objected, or ever notified the owner of the timber to remove it. Compare with *French v. Sparrow Kroll Lumber Co.* (1904) 135 Mich. 424, 97 N. W. 961, supra. The owner of land who sells the timber thereon with the right for a stated number of years to enter and remove, with the privilege of an extension of five more years upon certain conditions, who thereafter sells the land, excepting from his conveyance the timber sold as above mentioned, may thereafter grant an extension, as provided in the timber contract. *Powell v. Frosburg Lumber Co.* (1913) 163 N. C. 36, 79 S. E. 272. The sum paid by a purchaser of timber to obtain an extension thereof, as provided in the contract, was held to belong to the owner of the land at the time the extension was obtained, in *Carolina Timber Co. v. Wells* (1916) 171 N. C. 262, 88 S. E. 327. In this case it passed to a grantee of the land from the original vendor of the timber. Where an owner of land who has conveyed the timber thereon, giving to the purchaser a stated time in which to remove it, subsequently sells the land, and in the deed conveying the same excepts therefrom all pine timber to be removed from the land within the time fixed in the timber contract, and refers to such deed as being made a part of the deed in con-

veyance of the land, the original owner of the land is the proper person to grant an extension provided for in the timber deed. *Adams v. Fidelity Lumber Co.* (1918) — *Tex. Civ. App.* —, 201 S. W. 1034. An owner of land from which the timber has been sold by a contract giving the right to an extension upon certain conditions, who has thereafter conveyed the land reserving all timber rights until the date fixed in the timber agreement for the removal of the timber, is entitled to recover the compensation agreed upon for the extension. *Ricks v. McPherson* (1919) 178 N. C. 154, 100 S. E. 330.

The right to timber and a mill site, reserved to the grantor in a conveyance of certain parcels of land within a larger tract, does not pass by the subsequent conveyance of the whole tract, in which conveyance there is an express exception of the parcels of land previously conveyed. *Kincaid v. McGowan* (1888) 88 Ky. 91, 13 L.R.A. 289, 4 S. W. 802.

VII. Actions.

a. Under majority view.

As appears from the discussion in III. a, and II. c, 4 (a) *supra*, the majority of courts hold that upon the failure of the purchaser of timber to remove it within the time stated in the contract, or within a reasonable time if no time is stated in the contract, and the contract is construed as one not granting a right in perpetuity, the rights of the purchaser terminate and revert to the vendor, subject to rights acquired by a grantee of the land, as discussed in subd. VI.

It has been held that a landowner may have a forfeiture declared after the expiration of a reasonable time, where the timber was sold under a contract specifying no time for removal. *McNair & W. Land Co. v. Parker* (1912) 64 Fla. 371, 59 So. 959; *Minshew v. Atlantic Coast Lumber Corp.* (1914) 98 S. C. 8, 81 S. E. 1027, writ of error dismissed for want of jurisdiction in (1914) 235 U. S. 685, 59 L. ed. 424, 35 Sup. Ct. Rep. 202. It is not necessary to return the purchase money.

McNair & W. Land Co. v. Parker (Fla.) *supra*; *Berry v. Marion County Lumber Co.* (1917) 108 S. C. 108, 93 S. E. 328, Ann. Cas. 1918E, 877. But it is not necessary that the owner of the land have a forfeiture declared; he may appropriate the timber on the theory of abandonment by the grantee. *Eastern Kentucky Mineral & Timber Co. v. Swann-Day Lumber Co.* (1912) 148 Ky. 82, 46 L.R.A.(N.S.) 672, 146 S. W. 438. The sale by the heirs of one who has granted the timber on his land under the implied condition that it be removed within a reasonable time, of the property after the lapse of such time without any attempt to remove the timber, may be regarded as an entry under theory of abandonment. *Ibid.* It was contended in *Reed v. Merrifield* (1845) 10 Met. (Mass.) 155, that, by the sale of the timber with a stated time within which to remove it, the purchaser acquired an interest in the land and a right to enter and cut the timber, which right could be terminated only by the plaintiff's entry; this contention, however, was denied, the court holding that the purchaser acquired no interest in the land, but simply a right during the time fixed to take off the timber growing on the land.

But in Louisiana a time limit must be fixed by the court, where none is fixed in the contract, before a forfeiture results, the forfeiture resulting from failure to remove within the time thus fixed. *Simmons v. Tremont Lumber Co.* (1919) 144 La. 719, 81 So. 263; *Big Pine Lumber Co. v. Hunt* (1919) 145 La. 342, 82 So. 363. It seems that in this state the title to the timber does not revert by a mere lapse of time, but that it is necessary for the owner of the land to have a time limit fixed; the court states that until a time limit has been fixed, and has expired, the owner has no cause of action to have the timber declared forfeited to him. *Simmons v. Tremont Lumber Co.* (La.) *supra*.

And in other states the theory prevails that the rights of the purchaser do not terminate until after notice. In *Huron Land Co. v. Davison* (1902) 131 Mich. 86, 90 N. W. 1034, where a

reservation of timber in a deed was held to require the grantor to remove the timber within a reasonable time, the court held it to be the duty of the grantee to notify the grantor to remove the timber, and that the grantor was entitled to reasonable time after such notice, the court saying that "the law will not permit the grantee in such a case to obtain the title to the reserved timber without notice to the grantor to remove it." "It is hereby agreed that the lumber shall be cut this winter, if possible, and what remains uncut shall be cut the following winter," was held to convey a title to the lumber, defeasible upon failure to cut within the time limited.

That the right of entry of a grantee of timber, under a contract specifying no time for the cutting and removal, may be terminated by his refusal to exercise the right after a reasonable notice to do so, is recognized in *Boults v. Mitchell* (1810) 15 Pa. 371, and *Boults v. Mitchell* (1810) 15 Pa. 364. That one having the right to cut and remove timber standing on the land of another may be compelled to take it off in a reasonable time is held in *Andrews v. Wade* (1886) 3 Sadler (Pa.) 133, 6 Atl. 48.

That notice must be given the purchaser under a contract specifying no time for removal is held in *Gregg v. Birdsall* (1866) 53 Barb. (N. Y.) 402. On the contrary, it seems to be the opinion in *Decker v. Hunt* (1906) 111 App. Div. 821, 98 N. Y. Supp. 174, that the rights of the purchaser, under a contract specifying no time for removal, terminate without notice. And in *Hayes v. Gregory* (1918) 184 App. Div. 802, 172 N. Y. Supp. 784, the court expressly says: "We do not hold that notice is an essential prerequisite to an action of this nature [action in damages and to restrain the purchaser from removing timber, on the theory that a reasonable time had elapsed], but notice, or the want thereof, is a circumstance to be considered in determining the question of reasonable time." The theory that notice is not necessary to terminate the purchaser's rights is

approved in *Hawkins v. Duvall* (1919) 108 Misc. 333, 177 N. Y. Supp. 584.

See *Ormand Min. Co. v. Bessemer City Cotton Mills* (1906) 143 N. C. 307, 55 S. E. 700, in which a grantor of the fee who reserves or accepts the timber is held entitled to hold until his rights are put an end to by the grantee giving notice for a reasonable time.

The owner of the land may have his title quieted as to timber remaining after the expiration of the time fixed (*Hollensteiner v. Missoula Lumber Co.* (1908) 37 Mont. 278, 96 Pac. 420; *Faulkner v. Allen* (1918) — Okla. —, 173 Pac. 1133), or have the deed set aside as a cloud upon his title (*Gray v. Marion County Lumber Co.* (1915) 102 S. C. 289, 86 S. E. 640; *Allen & N. Mill Co. v. Vaughn* (1910) 57 Wash. 163, 106 Pac. 622), or maintain an action in trespass to try title (*North Texas Lumber Co. v. McWhorter* (1913) — Tex. Civ. App. —, 156 S. W. 1152).

He may maintain an action in trespass when the purchaser has entered and removed after the time fixed. *Morgan v. Perkins* (1894) 94 Ga. 353, 21 S. E. 574; *Noyes v. Goding* (1908) 104 Me. 453, 72 Atl. 181; *Reed v. Merrifield* (1845) 10 Met. (Mass.) 155; *Hand v. Fillingame* (1907) 92 Miss. 185, 45 So. 569; *Patterson v. Graham* (1894) 164 Pa. 234, 30 Atl. 247; *Bennett v. Vinton Lumber Co.* (1905) 28 Pa. Super. Ct. 495; *Hill v. E. P. Burton Lumber Co.* (1911) 90 S. C. 176, 72 S. E. 1085.

He may recover the value of the trees thereafter taken by the purchaser.

Kentucky.—*Ford Lumber & Mfg. Co. v. Cress* (1909) 132 Ky. 317, 116 S. W. 710.

Minnesota.—*King v. Merriman* (1887) 38 Minn. 47, 35 N. W. 570; *Alexander v. Bauer* (1905) 94 Minn. 174, 102 N. W. 387.

Missouri.—*Hanna v. Buford* (1915) 191 Mo. App. 654, 177 S. W. 662, s. c. on subsequent appeal (1917) — Mo. App. —, 194 S. W. 1060.

New York.—*McIntyre v. Barnard* (1843) 1 Sandf. Ch. 52.

Texas.—*Beauchamp v. Williams*

(1909) — Tex. Civ. App. —, 115 S. W. 130; *Carter v. Clark & B. Lumber Co.* (1912) — Tex. Civ. App. —, 149 S. W. 278; *Chavers v. Henderson* (1914) — Tex. Civ. App. —, 171 S. W. 798.

Virginia.—*Quigley Furniture Co. v. Rhea* (1912) 114 Va. 271, 76 S. E. 330.

Washington.—*Lehtonen v. Marysville Water & P. Co.* (1910) 58 Wash. 86, 107 Pac. 378.

Wisconsin.—*Bretz v. R. Connor Co.* (1909) 140 Wis. 269, 122 N. W. 717.

The landowner may reclaim lumber cut after the expiration of the time limited, without being liable to the purchaser for expenditures made in cutting and skidding. *Quigley Furniture Co. v. Rhea* (Va.) *supra*.

It has been held that the owner may recover the agreed purchase price, notwithstanding he has appropriated to himself timber remaining on the land at the expiration of the time agreed. *Sanders v. Clark* (1867) 22 Iowa, 275. But in *McCorkle v. Kincaid* (1917) 121 Va. 546, 93 S. E. 642, an action which is denominated one to recover damages for breach of contract, it was held that the landowner could not recover of the purchaser the contract price of timber that was sound and merchantable and left in the wood by the purchaser, since the timber and logs so left remained the property of the landowners, and if they were utilized, or by reasonable diligence could have been utilized by them, any amounts realized, or which could have been thus realized therefrom, should be set off against the damage which the jury might find in the landowner's favor. In *Furrow v. Bair* (1919) 84 W. Va. 654, 100 S. E. 506, the owner of the land was held not entitled to recover of the timber owner the purchase price of timber which was not cut at the expiration of the time limited. The determination of this question is made to depend by this court upon the further question, whether the conveyance of the timber was a deed which vested in the purchaser the title to the timber upon its delivery, or an executory contract for the sale of the timber, under which the title did not vest in the purchasers until the same

was cut. The court, having reached the conclusion that the conveyance was an executory contract, held, as above stated, that the landowner could not recover for timber not cut. The contract of sale involved in this case was in the ordinary form of a deed, and contained the ordinary granting clause. The timber was to be paid for at so much per thousand feet, as the purchaser "shall ship the said timber." The court said: "While this paper, in some of its aspects, is in the form of a deed, when all of its parts are read together we are forced to the conclusion that it was not the intention of the parties to pass title to any of the timber until it was severed from the land. The time fixed for determining the purchase price was after the severance of the timber, and the fact that the sellers reserved a lien upon the manufactured product, and no lien upon the standing timber, for the purchase money, is practically conclusive that the intention was to pass the title after the timber was cut from the land. This being the case, the provision in the contract for removing the timber within twelve months is a covenant to perform the executory contract within that time. It is an agreement upon the part of the defendants that they will cut all the timber within twelve months. If they fail to perform their covenant in this regard, they are, of course, liable in an action for such damages as result to the owners of the land. The measure of damages for the breach of this covenant would be the difference in the value of the timber standing upon the land at the expiration of the twelve months, and the price agreed to be paid for the said timber as it was severed, provided always that the timber so standing was worth less than the price agreed to be paid." It was held in *Kee v. Carver* (1920) 95 Or. 406, 187 Pac. 1116, that the owner of land who had sold timber thereon, which was to be paid for at so much per cord, could not recover for timber not removed within the time limited, since upon the expiration of that time the timber reverted to him, and he will

not be permitted to recover the purchase price and keep the standing timber.

The right to an injunction has been variously decided. It has been held generally, without much discussion of the form of remedy, that the landowner may enjoin the cutting, after the purchaser's rights have terminated. *Baxter v. Mattox* (1898) 106 Ga. 344, 32 S. E. 94; *Lufburrow v. Everett* (1901) 113 Ga. 1054, 39 S. E. 436; *McIntyre v. Barnard* (1843) 1 Sandf. Ch. (N. Y.) 52; *Hill v. E. P. Burton Lumber Co.* (1911) 90 S. C. 176, 72 S. E. 1085; *Houston Oil Co. v. Boykin* (1918) 109 Tex. 276, 206 S. W. 815; *North Texas Lumber Co. v. McWhorter* (1913) — Tex. Civ. App. —, 156 S. W. 1152; *Chavers v. Henderson* (1914) — Tex. Civ. App. —, 171 S. W. 798; *Broocks v. Moss* (1915) — Tex. Civ. App. —, 175 S. W. 791; *Quigley Furniture Co. v. Rhea* (1912) 114 Va. 271, 76 S. E. 330; *Allen & N. Mill Co. v. Vaughn* (1910) 57 Wash. 163, 106 Pac. 622; *Belcher v. Kleeb* (1910) 59 Wash. 166, 109 Pac. 798.

In sustaining the right of the landowner to injunction, the court in *Anderson v. Miami Lumber Co.* (1911) 59 Or. 149, 116 Pac. 1056, says that it is elementary that equity will interfere to prevent a continuous trespass or repeated trespass involving a multiplicity of suits.

But the general rules relating to the granting of injunctions have in some instances been held to place limitation upon its issuance. The right to an injunction is made in some cases to depend upon the insolvency of the purchaser of the timber. *Bois-aubin v. Reed* (1866) 2 Keyes (N. Y.) 323, 1 Abb. App. Dec. 161.

In denying an injunction the court in *Rickol v. Beaton* (1915) 61 Pa. Super. Ct. 334, says that the granting of an injunction is always the exercise of power to be cautiously used, and it should clearly appear that irreparable injury is likely to follow, and that there is no adequate remedy at law. It is then stated that an action of trespass brought by the landowner will afford him an ample opportunity to recover

any damage that he may have sustained.

In *Hodges v. Buell* (1903) 134 Mich. 162, 95 N. W. 1078, it was held that equity would not aid in enforcing a forfeiture, and therefore would not restrain the cutting and removal of timber after the expiration of the time limited. But in *Dye v. East Shore Woodenware Co.* (1912) 169 Mich. 78, 134 N. W. 986, it was held that equity would enjoin a threatened trespass by the purchaser to remove the timber after the expiration of the time limited. The court stated: "Equity is invoked in this instance, not to declare a forfeiture, as stated by appellant, but to prevent a removal of property belonging to the complainant." And this conclusion is approved in *Harrington v. Kneeland-Bigelow Co.* (1921) — Mich. —, 182 N. W. 68.

An injunction was granted in *McClary v. Atlantic Coast Lumber Corp.* (1911) 90 S. C. 153, 72 S. E. 145; *Atlantic Coast Lumber Corp. v. Litchfield* (1911) 90 S. C. 363, 73 S. E. 182, 728, and *Gresham v. Atlantic Coast Lumber Corp.* (1913) 96 S. C. 53, 79 S. E. 799, pending the determination of what was a reasonable time for the removal of the timber.

The purchaser cannot enjoin the owner from cutting the timber. *McRae v. Stillwell* (1900) 111 Ga. 65, 55 L.R.A. 513, 36 S. E. 604; *Dunsmore v. Blount-Decker Lumber Co.* (1917) — Tex. Civ. App. —, 198 S. W. 603; *Houston Oil Co. v. Bunn* (1919) — Tex. Civ. App. —, 209 S. W. 830. Nor can he enjoin the owner from interfering with him in removing the timber. *Null v. Elliott* (1902) 52 W. Va. 229, 43 S. E. 173; *Adkins v. Huff* (1906) 58 W. Va. 645, 3 L.R.A. (N.S.) 649, 52 S. E. 773, 6 Ann. Cas. 246.

Under the majority rule, the purchaser who has failed to remove the timber within the required time has practically no remedy. It has been held that he cannot recover damages of the owner who has cut and removed timber. *Chestnut v. Green* (1905) 120 Ky. 385, 86 S. W. 1122; *Webber v. Proctor* (1896) 89 Me. 404, 36 Atl. 631. The purchaser

in *Null v. Elliott* (1902) 52 W. Va. 229, 43 S. E. 173, filed a bill in equity setting up the hardships of his contract, the great loss that would entail if he was prevented from reaping the benefits thereof, and asked the court to relieve him by extending the time for the execution of his contract; he also asked that the landowner be enjoined from interfering with him. In dismissing the bill the court says: "He made the contract, and it is not one of peculiar hardship. With his consent the limit of the removal of the timber was fixed at two years. Such a provision as this in timber contracts is held to be a condition of the sale, and not a covenant to remove, and that the purchaser only takes such of the timber as he may cut and remove in the specified time; otherwise it remains the property of the landowner as part of the land. . . . Such being the law, the plaintiff could not ask a court of equity to extend the time limit, for it would be making a new and entirely different contract between the parties. In so far as the standing timber is concerned, it could not become plaintiff's property unless severed during the two years." It was urged in one case, in which the purchaser had failed to remove the timber within the time fixed in the contract, that he should have a reasonable time after the expiration of the contract in which to remove the logs and timber, but should be required to compensate the owner of the land for any injury or damage done to his property in cutting or removing the timber after the contract expired. In answer to this contention, the court says that to accept this view it would be necessary to make for the parties a new contract, or at least to make a substantial modification of the contract entered into, and to impose upon the owner of the land the burden of resorting to means not contemplated by the contract, to protect his rights or secure compensation for the injuries done him by the purchaser's wilful breach. *Taylor Brown Timber Co. v. Wolf Creek Coal Co.* (1908) 32 Ky. L. Rep. 1015, 107 S. W. 733. The purchaser of bark who had failed to

remove the same within the time limited was held not entitled to maintain an action in damages against persons who had purchased the same, after the time limited had expired, from the owner of the land. *Kellam v. McKinstrey* (1877) 69 N. Y. 264.

Nor can a grantor who has reserved the timber in a deed of the land maintain ejectment after the time limited has expired without removal. *Saltonstall v. Little* (1879) 90 Pa. 422, 35 Am. Rep. 683.

The purchaser of timber under a contract in the form of a deed, conveying to him all the merchantable timber on the land with the right or privilege of cutting and hauling the same within a stipulated time, and fixing a consideration at so much per 1,000 feet "for all merchantable timber cut from the tract of land," is not required to cut all the timber, or any designated part thereof, and is, therefore, not liable for timber remaining on the land at the expiration of the period specified. *Ollis v. Drexel Furniture Co.* (1917) 173 N. C. 542, 92 S. E. 371.

b. Under minority view.

Under the minority rule discussed in II. c, 4 (b) and III. b, *supra*, failure to exercise the right of removal within a reasonable time, or within the time limited in the contract, results in a forfeiture of the right to enter and remove, but does not result in a forfeiture of the title. According to this view, the title to the timber remains in the purchaser, but his right to enter and remove is lost. The right to enter and remove the timber having terminated, the purchaser is guilty of trespass in thereafter entering for the purpose of cutting and removing. *Goodson v. Stewart* (1908) 154 Ala. 660, 46 So. 239; *C. W. Zimmerman Mfg. Co. v. Daffin* (1906) 149 Ala. 380, 9 L.R.A. (N.S.) 663, 123 Am. St. Rep. 58, 42 So. 858; *Mt. Vernon Lumber Co. v. Shepard* (1913) 180 Ala. 148, 60 So. 825; *Wright v. Bentley Lumber Co.* (1914) 186 Ala. 616, 65 So. 353; *Means v. Blanks* (1919) 203 Ala. 479, 84 So. 741; *Hoit v. Stratton Mills*

(1873) 54 N. H. 109, 20 Am. Rep. 119; *Hoit v. Stratton Mills* (1874) 54 N. H. 452; *Peirce v. Finerty* (1911) 76 N. H. 38, 29 L.R.A. (N.S.) 547, 76 Atl. 194, 79 Atl. 23; *Boults v. Mitchell* (1850) 15 Pa. 371; *DeGoosh v. Baldwin* (1912) 85 Vt. 312, 82 Atl. 182; *Deerfield Lumber Co. v. Lyman* (1915) 89 Vt. 201, 94 Atl. 837.

In *Dyer v. Hartshorn* (1906) 73 N. H. 509, 63 Atl. 231, the owner of the land conveyed the same after the time limit had expired, making no reservation of the timber; subsequently, the purchaser of the timber cut the same, whereupon the owner of the land sued his grantor for breach of covenant, and recovered judgment; the grantor then sued the purchaser of the timber for breaking and entering his close and cutting away timber; the right to recover was denied, the court saying: "The plaintiff had then parted with her title and right to possession of the land. Not being the owner of the land or the trees when the alleged trespass was committed, she cannot maintain this action."

But the courts recognize that the landowner has no title to the trees. Equity will not quiet title to the land by declaring that the purchaser of the timber has no title to the same. *Vizard v. Robinson* (1913) 181 Ala. 349, 61 So. 959.

A vendor cannot have his title to trees remaining on the land after the expiration of a reasonable time quieted as against the purchaser of the timber. *Peterson v. Gibbs* (1905) 147 Cal. 1, 109 Am. St. Rep. 107, 81 Pac. 121.

A grantee of the vendor of the timber, in whose deed it is stated that the timber, with right of way to reach the same, has been sold, is not entitled to have his title quieted to the timber which remains on the land after the expiration of a reasonable time. *Magnetic Ore Co. v. Marbury Lumber Co.* (1894) 104 Ala. 465, 27 L.R.A. 434, 53 Am. St. Rep. 73, 16 So. 632.

One who has contracted to purchase the land after the timber has been sold is not entitled to injunction against the purchaser of the timber,

to restrain him from cutting timber pending a determination of a bill by the complainant for the specific performance by the landowner of his contract to convey the land to complainant. *Coley v. English* (1920) 204 Ala. 691, 87 So. 81.

The landowner cannot maintain an action for conversion of timber removed by the purchaser after the expiration of the time limit. *West v. Maddox* (1915) 193 Ala. 612, 69 So. 101.

That the landowner has no title to the trees is further recognized in the holding that, if he has cut and removed the timber and sold it, the purchaser can recover damages therefor. *Amidon v. Latham* (1915) 78 N. H. 5, 95 Atl. 787.

An action of trover was held maintainable in *Irons v. Webb* (1879) 41 N. J. L. 203, 32 Am. Rep. 193, by the owner of the timber against the owner of the land, who, after the expiration of the time, removed logs and wood which had been cut down by the timber owner within the time limited, but allowed to remain on the land thereafter.

An action in conversion was sustained in *Wyckoff v. Bodine* (1900) 65 N. J. L. 95, 47 Atl. 23, by the purchaser of timber against his vendor, who had converted the same to his own use after the expiration of the time limited for the removal, and it was held in this case that, in the action in conversion, the owner of the land could not reduce the damages resulting from the conversion by showing his damages resulting from the presence of the timber on his land after the expiration of the time limit, it being the theory of the court that the owners of the timber were entitled to have the market value of the property converted awarded to them, leaving the landowner to recover in an independent action such loss as he had sustained by having had his land wrongfully obstructed by the timber.

It seems to be the rule of the Indiana cases that not only does the title remain in the purchaser, but also the right to obtain the timber, subject, however, to the payment of damages to

the land. *Halstead v. Jessup* (1897) 150 Ind. 85, 49 N. E. 821; *Watson v. Adams* (1903) 32 Ind. App. 281, 69 N. E. 696; *Advance Veneer & Lumber Co. v. Hornaday* (1911) 49 Ind. App. 83, 96 N. E. 784. In *Halstead v. Jessup* (Ind.) *supra*, the court notices the fact that there was no provision for forfeiture contained in the sale contract, and says: "The law does not favor forfeitures and will not enforce them in the absence of clearly stated conditions of forfeiture. Here, as we have said, there is no stated condition of forfeiture. If by delay in taking the timber after the period named damage should accrue to the owner of the land, it could not be questioned that such damage could be recovered. But it would be manifestly unjust that mere delay should forfeit both the appellant's money and his timber, and that the appellee should become the owner of the timber upon the strength of an implied forfeiture."

The action in *Irons v. Webb* (N. J.) *supra*, was one in trover by the grantor of timber who had reserved the same, with the right to remove it within a certain time, against his grantee who had converted the timber to his own use after the expiration of the time limited. It was, therefore, not necessary for the court to express an opinion as to the rights of the owner of the timber to go on the land to remove the same. Seemingly, however, the court was of the opinion that the owner of the timber had such right. After referring to the situation of an owner of chattels which had been left on the land of another without the landowner's permission, and comparing the situation of such owner with the owner of the timber, the court says that, in such case, the landowner has an adequate remedy for the wrong suffered by him, that he is entitled to be indemnified for all the loss he may have sustained by having had his land illegally burdened by chattels placed there without right, and "in consequence of the entry to remove them."

In *Advance Veneer & Lumber Co. v. Hornaday* (Ind.) *supra*, the jury

were permitted to take into account the reasonable cost of removing the timber and piling the brush, which the purchaser had failed to do under his contract, and also the reasonable rental value of the land for the time its agricultural cultivation was prevented by the failure and delay of the purchaser.

As heretofore shown, the title of the parties is well defined under the minority rules; the purchaser remains the owner of the timber, but his right to enter and remove it is lost. With the possible exception of Indiana and New Jersey (as to which, see *supra*), and California (as to which, see *infra*), there seems to be no legal way the timber owner can get his property. He cannot maintain ejectment therefor. *Mt. Vernon Lumber Co. v. Shepard* (1914) 190 Ala. 574, 67 So. 286. A grantor who has reserved the timber cannot maintain ejectment to recover the timber. *Ward v. Moore* (1913) 180 Ala. 403, 61 So. 303.

Nor will an action in replevin lie. *Peirce v. Finerty* (1911) 76 N. H. 38, 29 L.R.A.(N.S.) 547, 76 Atl. 194, 79 Atl. 23. Under the rule in this state replevin may be maintained for a wrongful detention, as well as for a tortious taking, but it was held that it would not lie where the landowner had retained possession, pending an investigation as to the relative rights of the parties. Another and fundamental objection to the maintenance of the suit was that the action lies only in behalf of one entitled to the immediate possession of the property, and it is stated that since the tree owner had not the right to enter and take the property, and since the court had no power to confer such right upon him, it could not be created by the issue of the replevin writ.

Where no decree has been made which the landowner has refused to obey, there is no ground for the appointment of a receiver at the instance of the timber owner. *Ibid.* Partition of the land will not be had at the instance of the purchaser. *SHEPARD v. MT. VERNON LUMBER CO.* (reported herewith) ante, 23. Equity will not aid the purchaser to commit a

trespass by determining the damages of the landowner and granting the purchaser the right to remove. *Mt. Vernon Lumber Co. v. Shepard* (1913) 180 Ala. 148, 60 So. 825. Nor will equity, upon payment of a certain sum and furnishing a bond conditioned upon payment of damages to the land, authorize the owner of the timber to enter and remove the timber. *Peirce v. Finerty* (N. H.) supra.

In some jurisdictions the courts have granted the landowner equitable relief by fixing a time for the purchaser to remove the timber, and providing

for removal by the landowner upon default of the purchaser and payment of the net proceeds of the sale of the timber to the purchaser. *Gibbs v. Peterson* (1912) 163 Cal. 758, 127 Pac. 62; *Anderson v. Palladine* (1919) 39 Cal. App. 256, 178 Pac. 553. As to rights to use land, see opinion of Mayfield, J., in *SHEPARD v. MT. VERNON LUMBER CO.* The relative rights of the landowner and tree owner are discussed at length in *Peirce v. Finerty* (N. H.) supra, but no conclusion is reached as to many of these rights, because the facts were not found. W. A. E.

ELIZABETH WALLIS et al., Respts.,
v.
SOUTHERN PACIFIC COMPANY, Appt.

California Supreme Court (In Banc)—January 17, 1921.

(— Cal. —, 195 Pac. 408.)

Evidence — custom of deceased — care at railroad crossing.

1. In the absence of an eyewitness of a crossing accident, in which one attempting to drive a team across a railroad track was killed, evidence is admissible of his habit of care and caution under such circumstances.

[See note on this question beginning on page 125.]

Negligence — last clear chance — conditions of application.

2. To make a defendant liable notwithstanding contributory negligence of plaintiff, on the theory of last clear chance, defendant must not only be aware of the danger in time to avert it, but must also know or have reason to believe that plaintiff is oblivious of the danger and is in a position where he cannot extricate himself from it.

[See 20 R. C. L. 139 et seq.]

—right to act upon assumption of care.

3. One driving a locomotive engine

has a right to believe that the driver of horses seen approaching the track ahead of the engine will, upon signal, stop and not attempt to cross in front of the engine.

[See 22 R. C. L. 991.]

Railroad — negligence in driving across track.

4. It is contributory negligence to attempt to drive a team across a railroad track ahead of an oncoming train only four or five hundred feet distant, although the train is not exceeding a lawful rate of speed.

[See 22 R. C. L. 1020.]

APPEAL by defendant from a judgment of the Superior Court for Alameda County (Wood, J.) in favor of plaintiffs in an action brought to recover damages for the death of their decedent, alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. A. A. Moore, Stanley Moore, and George K. Ford for appellant.

Mr. Clarence A. Henning, for respondents:

Even where there is direct evidence for and against the existence of the fact, and though the evidence is thus conflicting, then "habit evidence" is

introducible as having some weight.

Craven v. Central P. R. Co. 72 Cal. 345, 13 Pac. 878, 2 Am. Neg. Cas. 180; *Missouri P. R. Co. v. Moffatt*, 60 Kan. 113, 72 Am. St. Rep. 343, 55 Pac. 837; *Davis v. Concord & M. R. Co.* 68 N. H. 247, 44 Atl. 388; *Smith v. Boston & M. R. Co.* 70 N. H. 82, 85 Am. St. Rep. 596, 47 Atl. 290; *Tucker v. Boston & M. R. Co.* 73 N. H. 132, 59 Atl. 943; *Lyman v. Boston & M. R. Co.* 66 N. H. 200, 11 L.R.A. 364, 20 Atl. 976.

The presumption is that deceased exercised ordinary care—did stop, look, and listen.

Crabbe v. Mammoth Channel Gold Min. Co. 168 Cal. 500, 143 Pac. 714.

If there is any evidence, however slight, and although not seemingly convincing to the court, upon which an instruction can be predicated, the court must give the instruction.

Perlberg v. Corham, 10 Cal. 120; *Murray v. White*, 82 Cal. 119, 23 Pac. 35; *Mabb v. Stewart*, 133 Cal. 556, 65 Pac. 1085; *Eppinger v. Kendrick*, 114 Cal. 620, 46 Pac. 613; *Harrington v. Los Angeles R. Co.* 140 Cal. 514, 63 L.R.A. 238, 98 Am. St. Rep. 85, 74 Pac. 15; 38 Cyc. 1623.

Sloane, J., delivered the opinion of the court:

This is an appeal from a judgment in favor of the plaintiffs, heirs of Thomas Henry Wallis, in an action to recover damages for the latter's death, caused from his being run into by an engine of one of defendant's trains.

The accident occurred on the evening of October 16, 1909, at the intersection of Oak street and First street in the city of Oakland. The deceased was driving a lumber wagon, drawn by two horses, south-erly on Oak street. The train was approaching from the east on the tracks of defendant company on First street. There was no load or bed on the wagon, and decedent was seated on what is termed the cinch, about midway between the front and rear wheels. Just as the wagon reached a point where the driver was midway between the rails of the railroad track, it was struck by the engine and the driver was killed.

The case was tried before a jury, which returned a verdict for plaintiffs in the sum of \$3,500.

Plaintiffs' case rests upon allegations of negligence of defendant in running its train at unlawful and excessive speed, and in its failure to exercise due care in giving warning of its approach. Defendant, besides denying its own negligence, pleads contributory negligence of the deceased in failing to stop, look, and listen before attempting to cross the track.

That negligence of the defendant in exceeding the speed limit was shown by the evidence is not seriously disputed. On the defense of contributory negligence there was no direct testimony as to whether or not the decedent took any precautions to ascertain whether the track was clear before driving upon it, but there were circumstances given in evidence which might justify an inference that the decedent did not exercise such precaution.

One of the grounds urged by defendant for a reversal, and the only one upheld by the district court of appeal, is alleged error of the trial court in admitting, over defendant's objection, testimony of plaintiffs' witnesses that the decedent on other occasions, not only at this crossing, but elsewhere, was in the habit of stopping his team, and, when necessary, going ahead to the railroad track to ascertain if any train was approaching. The objection to this testimony was made generally on the grounds that it was incompetent, irrelevant, and immaterial, but the more specific contention of counsel for defendant was that such evidence of custom or habit to support a presumption of conduct in a given case was permissible, if at all, only when there was no eyewitness to the fact. The language of counsel in supplementing his general objection was: "If there is evidence of any eyewitness, then it is not admissible. I think, unless there is evidence that there is no eyewitness, it would be very doubtful."

After the court had overruled the objection, counsel for defendant stated: "I want the evidence to go in subject to my objection that it is

incompetent, irrelevant, and immaterial, and no sufficient foundation has been laid. . . . That is the only point. My theory is that it must first appear there was no eyewitness. . . . It is addressed to that only in this particular, that it has not been shown there was no eyewitness, and it is incompetent, irrelevant, and immaterial."

We think it sufficiently appears that defendant's objection to this evidence was thus limited to the condition that the evidence introduced was inadmissible if there was direct evidence of eyewitnesses to the fact. It was upon this assumption that the ruling of error was made by the district court of appeal. Accepting this theory of the law, we doubt if the foundation appears in the evidence here to exclude this testimony. No eyewitness testified directly on the subject, or made reference to it. Only two witnesses saw the decedent as he approached the crossing. Neither of these saw him for more than a moment. Mrs. Borba, who lived on Oak street a block south of the crossing, opened her door and looked out just as what was probably the crossing whistle of the train sounded, at a point shown to be some 700 or 800 feet east of the crossing. At that time she saw the decedent driving on Oak street toward the crossing at some point between her house and First street. She re-entered the house, closed the door, and heard the continued whistle of the engine. J. F. Finn, the engineer of the locomotive, testified that just after he had finished blowing the crossing whistle he saw the heads of the horses coming into his line of vision at a point about 10 feet from the north rail of the track at the crossing, and that he thereupon began to sound the warning whistles; that the team continued toward the track until the collision happened. We do not agree with appellant's interpretation of the testimony of Mrs. Borba that she saw decedent just after he was past the intersection of Oak and First streets. She distinctly states that

she saw him on Oak street between First and Second streets, "right by the red building" which was between these streets. That would leave a considerable space where he was not seen by either witness. It is obvious that an interval elapsed between the moment when Mrs. Borba saw the decedent and when the moving team came into the engineer's line of vision. There is room for inference, however, that decedent did not stop to look and listen in that brief interim, and yet he might have done so, and there was no eyewitness to testify on that point. The time and place for so stopping would have been as he came into First street, where he could see up and down the railroad track. He might have just started his team after an instant's halt to glance up and down the track, when the engineer first saw the heads of the horses. If ever a cause was entitled to whatever presumption arises from habits of caution to overcome an inference from adverse circumstantial evidence of negligent conduct, it arises under the facts of this case.

We do not understand that the authorities which uphold the admissibility of this class of testimony only in the absence of direct evidence base the conclusion of its admission upon an entire absence of other evidence as to collateral facts that may uphold an inference as to what happened, but upon the absence of direct testimony of any eyewitness that the thing did or did not occur. In this case there was no such direct testimony.

The law governing this class of evidence is perplexingly inharmonious. The weight of authority, however, seems to uphold its use under the conditions stated, that there is an absence of satisfactory testimony of eyewitnesses as to the fact in controversy, while other decisions and authorities consider it legitimate evidence without such condition. This limitation upon the in-

Evidence—
custom of
deceased—care
at railroad
crossing.

roduction of such testimony seems rather illogical. If the fact of the existence of habits of caution in a given particular has any legitimate evidentiary weight, the party benefited ought to have the advantage of it for whatever it is worth, even against adverse eyewitnesses; and if the testimony of the eyewitnesses is in his favor, it would be at least a harmless cumulation of evidence to permit testimony of his custom or habit.

The only authority in this state directly in point is that of *Craven v. Central P. R. Co.* 72 Cal. 345, 13 Pac. 878, 2 Am. Neg. Cas. 180. In that case the plaintiff was suing for damages resulting from a fall from a train. The controversy was as to whether she was thrown off by the jolting movement of the car, or fell in an attempt to step off while the car was moving. Testimony was admitted, as against testimony of eyewitnesses to the actual occurrence, that she was in the habit of alighting from cars while they were still in motion. The court in this connection says: "A sensible man, called upon, out of court, to determine whether or not a certain person had on a certain occasion carelessly jumped off a moving train of cars, and finding the direct testimony as to the matter conflicting, would naturally and properly give some weight to the fact that the person was in the habit of alighting from cars in that manner; and the consideration of such a fact in cases resembling the one at bar has frequently been sanctioned in court. The evidence, at least, had some legal tendency to show that plaintiff's conduct at the time of the injury was such as defendant ascribed to her."

If the evidence of habit is to be recognized at all, this unconditional rule would seem to be the logical ground for its admission. It is contended by appellant that later decisions of this state, though not directly calling in question the case above cited, are in substantial conflict with it,—citing *Towle v. Pacific*

Improv. Co. 98 Cal. 342, 33 Pac. 207; *Cunningham v. Los Angeles R. Co.* 115 Cal. 561, 47 Pac. 452, 1 Am. Neg. Rep. 8; *Langford v. San Diego Electric R. Co.* 174 Cal. 729, 164 Pac. 398; *Carr v. Stern*, 17 Cal. App. 397, 120 Pac. 35.

These are all cases in which negligence was charged against defendant corporations through acts of their servants or employees. In each instance it was sought to prove or disprove negligence by the general character of the servant as to his skill or incompetence, prudence or carelessness, in the certain line of employment involved. Such evidence was excluded. This class of evidence is clearly distinguishable from that establishing a custom or habit of doing some particular thing in a particular way. Because one is a skilful workman in a given occupation does not tend to disprove negligence in some specific act, but if the question in controversy is whether he did the thing at all, or his manner of doing it, his custom or habit regarding that particular matter would be significant. Most of the text-writers seem to recognize the competency of such testimony. 10 R. C. L. p. 955, § 127, thus states the doctrine: "A habit of doing a thing is naturally of probative value as indicating that on a particular occasion the thing was done as usual, and, if clearly shown as a definite course of action, is constantly admitted in evidence;" but recognizes the limitation upon such evidence by adding: "The weight of authority seems to be against admitting evidence of general conduct under proven circumstances, to show conduct of the same kind under similar circumstances on a particular occasion, when there were eyewitnesses of the occurrence."

In *Thompson on Negligence*, vol. 6, § 7140, it is said: "Where there are no witnesses to the accident, evidence of the habitual care of the deceased is often admitted on the question of his exercise of due care at the time of the accident."

Mr. Greenleaf says (1 Greenl. Ev.

16th ed. § 14j): "A habit of doing a thing is naturally of probative value as indicating that on a particular occasion the thing was done as usual, and, if clearly shown as a definite course of action, is constantly admitted in evidence."

In Elliott on Evidence, vol. 1, § 173, the author says: "Evidence of personal habit is often of some probative value and is frequently admitted; but such evidence should not be admitted when to admit it would violate the character rule, and it cannot ordinarily be proved that a person did or did not do a certain thing at a particular time by showing that he acted in a certain way under similar circumstances at other times."

We find in Wigmore on Evidence, vol. 1, § 92, the following strong indorsement of habit evidence: "Of the probative value of a person's habit or custom as showing the doing on a specific occasion of the act which is the subject of the habit or custom there can be no doubt. Everyday experience and reasoning make it clear enough."

The author, however, very pertinently points out the distinction in the probative value of casual and infrequent acts along given lines of conduct, and such a constant and repeated course of action as would indicate a fixed habit. He adds: "It is easy to see why in a given instance something which may be loosely called a habit or custom should be rejected because it may not in fact have sufficient regularity to make it probable that it would be carried out in every instance, or in most instances. Whether or not such sufficient regularity exists must depend largely upon the circumstances of each case."

When we turn to the decided cases there is such a diversity of facts and confusion of rulings that it would be impracticable to analyze them or try to reconcile them other than in a general way.

In *Parsons v. Syracuse, B. & N. Y. R. Co.* 133 App. Div. 461, 117 N. Y. Supp. 1058, it was held in a

case similar to this that evidence was not admissible for the purpose of showing that a decedent who was killed while crossing a railroad track used care at the time of the accident, by introducing evidence of specific instances of care on other occasions, although no eyewitnesses were present. In the opinion, Mr. Justice Chester said: "A man who is careful on one occasion may be careless on another. The circumstances at one time may be such as to induce prudence, while they may not at another."

In that case, however, it was merely offered to show that the decedent had been seen on several isolated occasions to stop and look and listen at this crossing. There may have been many intervening occasions when he failed to observe that precaution.

In the case at bar the testimony of the witness Glass was that he had worked in connection with the decedent, not only in hauling lumber over this particular crossing (which had only been for a few days), but in teaming elsewhere when they hauled hay and grain across a railroad track. The witness was asked if he was familiar with the practice of decedent when he approached a railroad track, and if he knew decedent's habit in that respect. In making objection to the testimony counsel for defendant stated that he did not make the point that the witness had not had sufficient observation, but that his objection was to evidence of decedent's custom in the matter. In testifying, the witness states as to decedent's habit "that he would get off and look to see if there was a train coming," and that for the few days they had been at work over this crossing "he always stopped, looked to see if the train was coming." So the evidence here was not to show the casual acts, but a consistent habit.

In *Smith v. Boston & M. R. Co.* 70 N. H. 53, 85 Am. St. Rep. 596, 47 Atl. 290, another case of a railroad crossing accident, evidence was upheld to the effect that the de-

ceased "for many years always checked his horse and looked and listened for the train at such crossing." The supreme court in the opinion says: "Cate's uniform habit of slackening the speed of his horse to a walk at the Waukegan crossing, and looking and listening for the approach of a train before attempting to pass the crossing, tended to show that he did so on this fatal trip. It was substantial evidence of the exercise of care on that occasion"—citing a number of New Hampshire cases to the same effect.

This subject is quite fully discussed, with citation of numerous authorities, pro and con, by the court of appeals of New York in the case of *Zucker v. Whitridge*, 205 N. Y. 50, 41 L.R.A.(N.S.) 683, 98 N. E. 209, Ann. Cas. 1913D, 1250. In the trial of that case evidence had been introduced of the habitual exercise of caution on the part of the deceased, killed by a street car at a crossing, as tending to prove freedom from contributory negligence at the time of the accident. The admission of the testimony was held prejudicial error, but the ruling was made on the ground that there were eyewitnesses of the occurrence, and expressly withheld any opinion as to the admissibility of such testimony where there was no direct evidence on the subject.

The following cases are cited in the foregoing opinion as disapproving this class of evidence. Attention is called to this list of decisions as indicating how generally the question arose on testimony of casual and disconnected acts or upon evidence of general reputation of carelessness or incompetence not going to a specific act or circumstance: "In Wisconsin, to show that the person injured 'was an habitually careless man' (*Propsom v. Leatham*, 80 Wis. 608, 612, 50 N. W. 587); in Pennsylvania, that the deceased 'had made a practice of jumping from the elevator while in motion' (*Baker v. Irish*, 172 Pa. 528, 531, 33 Atl. 558); in Connecticut, that the intestate 'was a careful

and prudent driver' (*Morris v. East Haven*, 41 Conn. 252); in Illinois, 'that the deceased was in the habit of jumping on trains' (*Peoria & P. U. R. Co. v. Clayberg*, 107 Ill. 644, 648); in Iowa, in a case where there was some evidence that the deceased was asleep in his buggy, when he drove on the track, 'that he had been found asleep in his buggy on other occasions' (*Dalton v. Chicago, R. I. & P. R. Co.* 114 Iowa, 257, 259, 86 N. W. 273); in Maine, that, in the opinion of those who knew the deceased well, he was a cautious and careful man, no witness having seen the accident (*Chase v. Maine C. R. Co.* 77 Me. 62, 65, 52 Am. Rep. 744); in Massachusetts, specific instances of want of care in the engineer in his business of running trains within three months of the injury, before or after (*Robinson v. Fitchburg & W. R. Co.* 7 Gray, 92, 95); also 'previous specific acts of negligence on the part of the engineer known to the defendant's superintendent' (*Connors v. Morton*, 160 Mass. 333, 335, 35 N. E. 860)."

We do not find enough in these authorities, or in the rule laid down in *Towle v. Pacific Improv. Co.*, *Cunningham v. Los Angeles R. Co.*, and *Langford v. San Diego Electric R. Co.* cited in this opinion, to discredit the ruling in the *Craven Case*, supra, so far as it applied to the evidence tending to show a consistent uniformity of action along given lines, indicating a fixed habit, and applied to the question as to whether some specific act involving the same trait was done or was not done in a certain manner.

The probative force of evidence of habit, though not passed upon as a rule of evidence (that question being expressly withheld), is recognized by Mr. Justice Shaw in the case of *Bresee v. Los Angeles Traction Co.* 149 Cal. 131, 5 L.R.A. (N.S.) 1059, 85 Pac. 152. In that case the plaintiff was injured while riding as a passenger in a carriage which was run into by a street car. Evidence of the driver's habitual carelessness in crossing in front of

moving cars, and of plaintiff's knowledge of his customary want of care, was held admissible as tending to show contributory negligence on the part of the plaintiff in failing to keep a lookout or to warn the driver to watchfulness. This, of course, could only be upon the theory that plaintiff, having knowledge that the driver was careless in this particular matter, was bound in common prudence to anticipate the probability of a repetition of his careless conduct on this occasion. The rule admitting evidence of habit to rebut or support conflicting testimony of eyewitnesses, as adopted in this state in *Craven v. Central P. R. Co.* 72 Cal. 345, 13 Pac. 878, 2 Am. Neg. Cas. 180, is cited and approved by the appellate court of Indiana under a similar state of facts, in *Pittsburgh, C. C. & St. L. R. Co. v. McNeil*, — Ind. App. —, 66 N. E. 777. To the same effect is *Denver Tramway Co. v. Owens*, 20 Colo. 107, 36 Pac. 848, 2 Am. Neg. Cas. 231. The supreme court of New Hampshire, in the case of *Parkinson v. Nashua & L. R. Co.* 61 N. H. 416, says: "Although it is quite generally held elsewhere . . . that evidence of other specific instances of negligence on the part of either party is not competent, because raising a collateral issue, yet in this state a different rule prevails, and has become established in cases where the evidence is conflicting; and it is here held to be competent to show that the party charged with negligence had performed or omitted the same act in the same way before, as tending to show that he did or omitted the act at the time in question, on the ground that a person is more likely to do a thing in a particular way, as he is in the habit of doing . . . it."

Gillett's Indirect and Collateral Evidence, § 68, states: "The weight of authority favors the view . . . that, where the direct evidence shows that an act was done or omitted, it is competent to prove that a custom existed prior to that time to do or not to do such an act,

as such evidence legitimately tends to uphold the theory of one of the contending parties."

Other decisions upholding this character of evidence upon one ground or another are: *State v. Manchester & L. R. Co.* 52 N. H. 528; *International & G. N. R. Co. v. Kuehn*, 2 Tex. Civ. App. 210, 21 S. W. 58, 12 Am. Neg. Cas. 602; *Shaber v. St. Paul, M. & M. R. Co.* 28 Minn. 103, 9 N. W. 575; *Saffer v. Dry Dock, E. B. & B. R. Co.* 2 Silv. Sup. Ct. 343, 5 N. Y. Supp. 700; *Bower v. Chicago, M. & St. P. R. Co.* 61 Wis. 457, 21 N. W. 536; *Cleveland, C. C. & St. L. R. Co. v. Moss*, 89 Ill. App. 1; *Cox v. Chicago & N. W. R. Co.* 92 Ill. App. 15; *Mayer v. Milwaukee Street R. Co.* 90 Wis. 522, 63 N. W. 1048; *Meier v. Shrunk*, 79 Iowa, 17, 44 N. W. 209, 1 Am. Neg. Cas. 13.

Most of these cases involve habits of negligence, but, of course, habits of caution and prudence are of equal, if not greater, evidentiary weight. Professor Wigmore, in his work on *Evidence*, vol. 1, § 97, even questions if acts of negligence can be anything more than casual or occasional. Experience, however, will not support that theory. It may be said, however, that prudence and caution in matters involving exposure to danger may more readily become habitual from the incentive always present to follow the path of safety.

The main argument which seems to prevail with the authorities excluding habit evidence is the fact that it introduces into the trial collateral issues of fact of which the opposing party has had no notice. This condition, however, arises in numerous instances in nearly every trial on the introduction of probative facts, collateral in their nature, and of which the ultimate facts pleaded give no inkling.

We think the evidence excepted to in this case was properly admitted. The weight of this class of evidence, of course, depends upon the nature of the act and the fixity of the habit, but that is a question which can

properly be left to the jury under proper instructions.

Men are accustomed to weighing, and acting upon, such evidence of conduct in their everyday affairs. Recognition of its force is seen in the adoption by the law of many presumptions based on common experience, such as the presumption that a letter properly deposited in the mails has reached its destination in due time, the presumption that the regular customs of business have been followed, and the express declaration of our Code of a presumption "that things have happened . . . according to the ordinary habits of life." Code Civ. Proc. § 1963, subd. 28.

It may be doubted if the jury in this case was seriously influenced in its verdict by evidence of decedent's habit of caution, but we have felt justified in devoting so much attention to the question because of the general uncertainty of the law in other jurisdictions and the apparent confusion as to the rule in California, arising out of the suggested conflict between the Craven Case and other later decisions of this court herein cited to that point.

There are only two grounds of error presented. The first, which we have already ruled upon, is the admissibility of the evidence as to decedent's habits of caution. The other is alleged error of the trial court in giving to the jury an instruction submitting an issue on the last clear chance.

Without passing upon the objection, raised for the first time on motion for a hearing in this court, to the sufficiency in form of the instruction given, to fully present the doctrine of the last clear chance, we are compelled to the conclusion that there was not sufficient evidence to justify submitting this instruction to the jury, and for this reason the judgment must be reversed.

This instruction may have governed the jury in arriving at a verdict for the plaintiff, and, in the absence of evidence to support it, must be held fatally prejudicial.

The jury may, under the evidence, have found the decedent guilty of contributory negligence. A verdict for plaintiff after a finding of such negligence could not be supported, excepting under the doctrine of the last clear chance. The rule is well settled in this state that in order to make the defendant liable, notwithstanding contributory negligence of the plaintiff, the defendant must not only be aware of the danger in time to avert it, but must

*Negligence—
last clear chance
—conditions of
application.*

also know or have reason to believe that the plaintiff is oblivious of the danger and is in a position where he cannot extricate himself from it. *Arnold v. San Francisco, Oakland Terminal R. Co.* 175 Cal. 1, 164 Pac. 798; *Basham v. Southern P. Co.* 176 Cal. 320, 168 Pac. 359, 16 N. C. C. A. 291; *Young v. Southern P. Co.* 182 Cal. 369, 190 Pac. 36. The only evidence on this point is that of the engineer himself. He testifies that when he rounded the curve some 400 or 500 feet from the crossing he saw the heads of decedent's horses some 10 feet from the track. He immediately sounded the crossing whistle. He doubtless believed, and had a right to believe, that the driver would at once stop his team and not attempt to cross the track. As soon as he saw that the team was still approaching and the driver not looking toward him, but in an opposite direction, he put on the emergency brakes with full force, and used every means shown by the evidence to be available to stop his train. He was justified in assuming that at the distance from which he sounded the warning, and with the headlight and noise of the approaching train, the driver would be warned of his danger. The team was moving at a walk, and, under ordinary circumstances and so far as appeared here, could have been pulled up within a space of 2 or 3 feet. Even though the train had been running at a lawful rate of

*—right to act
upon assumption
of care.*

speed, it would have been a new act of contributory negligence for the driver to attempt to cross ahead of it after the warning was sounded.

Railroad—
negligence in
driving across
track.

The remarks of Mr. Justice Shaw in his opinion in *Basham v. Southern P. Co.* 176 Cal. 320, 168 Pac. 358, 16 N. C. C. A. 291, apply aptly to the case before us. Commenting on the last clear chance doctrine and the fact that the train whistle was sounding, the bell ringing, and the noise of the moving train considerable, he says: "The horses were in a slow walk. The lines were in Coffey's hands. The horses were under his control. He could have come to a standstill in a second. Under all these circumstances it would be extremely unreasonable for anyone to suppose that he was unaware of the

approaching train, and did not intend to stop before reaching the track, as he could easily have done, and as is the frequent custom. When the fireman did, nevertheless, begin to entertain a fear that Coffey was inattentive, he at once gave the urgent order to the engineer to stop. It cannot be said either that he did realize the danger sooner, or that, in reason, with his knowledge, he had cause to realize it sooner. Hence the last clear chance doctrine never came into operation."

Such was the situation in this case.

The judgment is reversed.

We concur: Angellotti, Ch. J., Olney, J.; Wilbur, J.; Lennon, J.; Shaw, J.

Petition for rehearing denied February 14, 1921.

ANNOTATION.

Habit, custom, or reputation of one injured or killed as evidence of his own negligence or freedom from negligence.

- I. Introductory, 125.
- II. To aid in proving care of plaintiff, 127.
- III. To aid in proving negligence of plaintiff, 129.
- IV. Irrelevant evidence, 135.
- V. Habits of person killed where there are witnesses of the accident, 135.

I. Introductory.

As a practical question, the only instances where testimony of the habit, custom, or reputation of one killed or injured by another's negligence would be of importance are confined almost exclusively to cases where there are no witnesses of the accident, for if there are witnesses their statement of what the injured person actually did at the time is the best evidence of his care or negligence, and his custom or habit in the matter becomes immaterial. Therefore, the cases gathered in this annotation will be confined exclusively to those which throw light upon the rule with respect to the admissibility of evidence under such circumstances, calling attention to

VI. Habits of persons killed where there are no witnesses of the accident:

- a. To prove care of decedent, 138.
- b. To prove negligence of decedent, 144.

enough only of the excluded cases to indicate the reason for their omission. And the study is confined to the question of care or negligence of plaintiff, and cases dealing with the habits of a defendant, such as *Pugsley v. Tyler* (1917) 130 Ark. 491, 197 S. W. 1177, are excluded, because although cases are included where plaintiff is alive and able to testify, so that they may be similar to those raising the question of care or negligence of defendant, yet the evidence is admitted or excluded in cases dealing with defendant's negligence because the other circumstances of the case make it necessary, or unnecessary, as the case may be, and therefore the decision in such cases will establish no general

rule applicable to the rule now under discussion. This will appear from a few examples.

Thus, where there is a conflict of evidence as to whether or not proper signals were given at a crossing where deceased was killed by a train, evidence was held admissible of failure of the same trainman to give signals at the same crossing on former occasions, as bearing upon the question of negligence in the instant case. *State v. Manchester & L. R. Co.* (1873) 52 N. H. 528. The court says it would seem to be axiomatic that a man is more likely to do or not to do a thing, or to do it or not to do it in a particular way, as he is in the habit of doing it or not doing it, and the court held the evidence admissible simply as having some tendency to show that on this particular occasion these agents were more probably negligent and careless because they had before frequently neglected the same duty with impunity, and had thus become habitually negligent in that regard.

So, where in case of an accident at a railroad crossing the question was whether or not the flagman gave the signals for the approach of the train, and it was proved that at the time he was intoxicated, the court held that evidence was not admissible as to his intemperate habits, saying that he was proven to have omitted to give the signal. Had he exhibited the signal, no negligence could have been predicated upon his intoxication. His previous habits of intoxication had nothing to do with the case. If the signal was omitted, the negligence was the same whether he was drunk or sober. His negligence on a former occasion, or his former intemperate habits, would not be sufficient to create negligence, or be any evidence of it when this accident happened. The dissenting judge, however, says that since it was disputed in the case that he failed to give the signal, and there is evidence bearing upon the question, proof that he was habitually drunk when on duty was competent. *Warner v. New York C. R. Co.* (1871) 44 N. Y. 465.

Evidence is not admissible in an ac-

tion to hold a tenant liable for destruction of the leased property by fire, of his habit of carefulness in handling fire. *Scott v. Hale* (1839) 16 Me. 326.

And cases involving the question of negligence of a defendant employer in keeping in his employ an habitually negligent employee, such as *Cleghorn v. New York C. & H. R. R. Co.* (1874) 56 N. Y. 44, 15 Am. Rep. 375, are not within the scope of this annotation.

Another class of cases which is excluded is that holding that evidence of specific instances of care or negligence is not admissible, of which the following are examples: *Robinson v. Fitchburg & W. R. Co.* (1856) 7 Gray (Mass.) 92; *Dalton v. Chicago, R. I. & P. R. Co.* (1901) 114 Iowa, 257, 86 N. W. 257; *Atlanta & W. P. R. Co. v. Johnson* (1881) 66 Ga. 259; *Ross v. Stamford* (1914) 88 Conn. 260, 91 Atl. 201; *Steinberger v. California Electric Garage Co.* (1917) 176 Cal. 386, 168 Pac. 570, 17 N. C. C. A. 926; *Western & A. R. Co. v. Slate* (1919) 23 Ga. App. 225, 97 S. E. 878; *Gray v. Chicago, R. I. & P. R. Co.* (1909) 143 Iowa, 268, 121 N. W. 1097; *Aiken v. Holyoke Street R. Co.* (1904) 184 Mass. 269, 68 N. E. 238.

The reason for the exclusion of such cases is that they throw little light on the question under discussion, for evidence of numerous specific instances of care on former occasions would not prove care on the part of one killed at a railroad crossing at the time of his killing. *Parsons v. Syracuse, B. & N. Y. R. Co.* (1909) 133 App. Div. 461, 117 N. Y. Supp. 1058.

So, in an action to recover damages for injury to a servant on the ground that he was put to work in a dangerous place without warning, and it appeared that plaintiff was employed in the construction of a building, and required to use, in connection with his work, an elevator operated by an engineer whom the employer should have known to be careless, evidence is not admissible of other specific acts of negligence on the part of the engineer to prove the alleged negligence of the master. *Connors v. Morton* (1894) 160 Mass. 333, 35 N. E. 860. The court says proof of prior acts of negligence

is not evidence that the acts in question was negligent, any more than proof that prior acts of care in regard to similar matters is evidence that the act in question was done carefully.

So, where an engineer was killed as a result of both track and engine being defective, evidence that, the day before the wreck, he was running his engine at a high rate of speed, 12 or 14 miles from the place of the accident, was, in *St. Louis, B. & M. R. Co. v. Jenkins* (1914) — *Tex. Civ. App.* —, 163 S. W. 621, held not admissible, in accordance with the general rule that evidence of other acts of negligence is not admissible.

So, in *Gray v. Chicago, R. I. & P. R. Co.* (1909) 143 Iowa, 268, 121 N. W. 1097, the court, while admitting that there might be circumstances under which, in the absence of some direct testimony, evidence as to the general habit or practice of a person killed at a crossing might be admitted, so far as such habits may tend to explain his presence at the place of the collision, and perhaps as having some direct bearing on the question of contributory negligence, held that it was incompetent to go into the realm of specific instances indicating care or the reverse, with reference not only to the crossing in question, but to other crossings, and this decision was suggested by the fear of collateral issues. In this case, the decedent, who was killed by a train at a crossing, was observed last at a distance of about 55 feet from the crossing; and his horse and buggy were seen by the engineer at the instant of the collision; but the case was considered, apparently, by the court, as if there was no direct evidence.

So, in *Parsons v. Syracuse, B. & N. Y. R. Co.* (1909) 133 App. Div. 461, 117 N. Y. Supp. 1058, although there were no eyewitnesses to the accident other than the locomotive engineer, who only saw the deceased when he was upon the tracks, it was held that evidence of numerous specific instances of care on previous occasions, exercised by a person killed at a railroad crossing, was not admissible as tending to prove freedom from negli-

gence on the occasion in question. The decision was prompted by the consideration that such evidence would raise collateral issues. The court said that, so far as it knew, the question had never before been decided in New York.

So far as cases dealing with the admissibility of specific instances were examined in the collection of material for this annotation, the rule seems to be uniform that such evidence is not admissible; and while an exhaustive collection of these cases is not made here, attention is called to them merely as tending to show the doubtful character of evidence of custom or habit of an injured person, where there is any evidence available as to the particular occurrences at the time of the injury.

II. To aid in proving care of plaintiff.

With very few exceptions, the cases hold that evidence of the careful habit of one injured by another's negligence is not admissible to show care on his part at the time of the injury.

Alabama.—*Glass v. Memphis & C. R. Co.* (1891) 94 Ala. 581, 10 So. 215.

Delaware.—*Price v. Charles Warner Co.* (1899) 1 Penn. 462, 42 Atl. 699.

Georgia.—*Central R. & Bkg. Co. v. Kent* (1891) 87 Ga. 402, 13 S. E. 502.

Illinois.—*Illinois C. R. Co. v. Borders* (1895) 61 Ill. App. 55.

Iowa.—*Stafford v. Oskaloosa* (1884) 64 Iowa, 251, 20 N. W. 174.

Kansas.—*Atchison, T. & S. F. R. Co. v. Gants* (1888) 38 Kan. 608, 5 Am. St. Rep. 780, 17 Pac. 54; *Junction City v. Blades* (1895) 1 Kan. App. 85, 41 Pac. 677.

Kentucky.—*Chesapeake & O. R. Co. v. Riddle* (1903) 24 Ky. L. Rep. 1687, 72 S. W. 22.

Maine.—*Lawrence v. Mt. Vernon* (1852) 35 Me. 100.

Massachusetts.—*McDonald v. Savoy* (1872) 110 Mass. 49; *Carr v. West End Street R. Co.* (1895) 163 Mass. 360, 46 N. E. 185.

New Hampshire.—*Bourassa v. Grand Trunk R. Co.* (1909) 75 N. H. 359, 74 Atl. 590.

New York.—*McCarragher v. Rogers* (1890) 120 N. Y. 526, 24 N. E. 812;

Wooster v. Broadway & 7th Ave. R. Co. (1893) 72 Hun, 197, 25 N. Y. Supp. 378.

Texas.—Gulf, C. & S. F. R. Co. v. Hamilton (1897) 17 Tex. Civ. App. 76, 42 S. W. 358.

If there is positive evidence of what one injured at a railroad crossing did at the time of the injury, evidence of his custom in such places is immaterial. *Bourassa v. Grand Trunk R. Co.* (1909) 75 N. H. 359, 74 Atl. 590.

In an action for damages by a passenger for being ejected from a train, defended, *inter alia*, on the ground that he used profane and obscene language, and he offered evidence as to his habit in that regard, the court said if such evidence was permitted it would present a collateral issue, and that it was not competent. *Atchison, T. & S. F. R. Co. v. Gants* (1888) 38 Kan. 608, 5 Am. St. Rep. 780, 17 Pac. 54.

Where there are witnesses who testify as to how an accident at a railroad crossing occurred, evidence is not admissible that the injured person was a careful man. *Illinois C. R. Co. v. Borders* (1895) 61 Ill. App. 55.

Upon the question of negligence of an engineer who was injured when his train ran into a washout on the track, evidence of his general reliable character is not relevant. *Central R. & Bkg. Co. v. Kent* (1891) 87 Ga. 402, 13 S. E. 502.

In an action for personal injuries, plaintiff cannot prove his habitual carefulness, where there is evidence to show care on the occasion of the accident, before defendant has made any attempt to show that he was habitually careless. *Price v. Charles Warner Co.* (1899) 1 Penn. (Del.) 462, 42 Atl. 699.

Where a woman was hit and killed by a train while attempting to cross a railroad trestle, the court says evidence of the habits of the person injured, whether those of a careful and prudent person, or the reverse, is never admissible in actions sounding in damages for personal injuries. *Glass v. Memphis & C. R. Co.* (1891) 94 Ala. 581, 10 So. 215.

Where an employee was injured at

his machine, the exclusion of evidence as to whether or not he was generally careful or careless in his work was held proper, the court saying: "The fact of care or carelessness of the plaintiff was not one involving any question of skill or science to determine, nor was it founded upon any knowledge peculiar to any class of persons. His conduct, as bearing upon the question of care or want of care, was susceptible of such description as to convey information of it to common understanding, and to enable the jury intelligently to determine it and the relation it had to the accident. In such case the evidence of witnesses must be confined to a statement of facts, and their opinions or conclusions derived from them are not competent." *McCarragher v. Rogers* (1890) 120 N. Y. 526, 24 N. E. 812.

In an action to recover damages for injuries caused by overturning of a sleigh on a public highway, defendant introduced evidence that the general habit of the driver was reckless, and plaintiff then sought to show that he was skilful. The court said the question to be determined was whether or not, at the time of the accident, he was using ordinary care. Neither his usual manner of driving nor his general character as a driver would have much weight in determining this question, but that, since defendant had gone into the question, it could not object to evidence offered by plaintiff upon the same question. *Stafford v. Oskaloosa* (1884) 64 Iowa, 251, 20 N. W. 174.

Upon the question of care exercised by one injured by a defect in a street, evidence is not admissible as to her general habit of care. *Junction City v. Blades* (1895) 1 Kan. App. 85, 41 Pac. 677. The court says ordinary habits of carefulness raise no presumption that they are always indulged in. It is well known that very prudent people sometimes act very imprudently. Testimony of general habits of carefulness is too remote to raise the presumption that they are exercised upon a particular occasion.

Where, in an action to recover for injuries alleged to have been caused

by a defect in a highway, evidence was received that plaintiff appeared at other times to be a competent driver; but the appellate court said the question of ordinary care on the part of the driver must depend upon the facts developed in each case. *Lawrence v. Mt. Vernon* (1852) 35 Me. 100.

To prove the care and skill with which one was driving at the time his horse is alleged to have been injured by a defect in the highway, evidence is not admissible that he was commonly careful and skilful in driving his team. *McDonald v. Savoy* (1872) 110 Mass. 49.

The court in that case overruled *Adams v. Carlisle* (1838) 21 Pick. (Mass.) 146, which was an action for injuries alleged to have been caused by defects in the highway, where the court held that plaintiff must establish that he was driving with ordinary care and skill, and, as bearing upon this, the jury might consider that the driver was commonly careful and skilful.

In an action to recover for injuries caused by collision with a street car, evidence is not admissible as to the carefulness of the driver of the vehicle in which plaintiff was riding as tending to show that his act did not contribute to the injury. *Wooster v. Broadway & 7th Ave. R. Co.* (1893) 72 Hun, 197, 25 N. Y. Supp. 378. The court says it has been many times held that it is not competent for a plaintiff to give evidence that a person by whom the alleged negligent act was committed had previously committed similar acts, or that he was generally negligent or skilful.

In an action for injuries by collision with a street car, where there is evidence tending to show that plaintiff was intoxicated at the time, evidence of his habits with respect to the nonuse of intoxicating liquor is not admissible. *Carr v. West End Street R. Co.* (1895) 163 Mass. 360, 40 N. E. 185.

Upon the question whether or not one killed at a railroad crossing was sober, evidence is not admissible as to his general habit of sobriety. *Chesa-* 15 A.L.R.—9.

peake & O. R. Co. v. Riddle (1903) 24 Ky. L. Rep. 1687, 72 S. W. 22.

But in *Gulf, C. & S. F. R. Co. v. Johnson* (1897) — Tex. Civ. App. —, 42 S. W. 584, where a boy was injured by cars at a crossing, and the railroad company attempted to show that he was in the habit of crawling under cars at that place, he was permitted to testify that such was not his habit. The court says that ordinarily the habit of a person injured is not admissible, but that, in this particular instance, permitting such testimony to rebut that of the railroad company was not error.

In *Plummer v. Ossipee* (1879) 59 N. H. 55, which was an action for injury alleged to have been caused by an unsafe highway, defendant introduced evidence to show that the driver at the time of the accident was fast and careless, and introduced in evidence particular instances of his fast and careless driving. Plaintiff was then permitted to show instances of his careful driving, which the court held to be relevant to his character for safe driving.

Where a railroad company sued for damages for injuries caused to the driver of an automobile at a highway crossing, and defended on the ground that plaintiff caused his own injury by approaching the track in a careless and reckless manner, he was permitted to introduce evidence to the effect that he was a cautious and careful driver. *Bush v. Brewer* (1918) 136 Ark. 246, 206 S. W. 322.

III. To aid in proving negligence of plaintiff.

The circumstances which would admit evidence of habits of an injured person have been regarded as more numerous when the evidence was offered to prove his negligence than when it was offered to prove his care, but the general rule, supported by the weight of authority, is that such evidence is not admissible even in such cases.

District of Columbia.—*Fontaine v. Washington R. & E. Co.* (1914) 42 App. D. C. 295.

Georgia.—*Atlanta & W. P. R. Co.*

v. Smith (1894) 94 Ga. 107, 20 S. E. 763; *Central R. & Bkg. Co. v. Ryles* (1889) 84 Ga. 420, 11 S. E. 499.

Illinois.—*Linck v. Scheffel* (1889) 32 Ill. App. 17, 1 Am. Neg. Cas. 87; *Salem v. Webster* (1901) 192 Ill. 369, 61 N. E. 323.

Iowa.—*Hubbard v. Mason City* (1882) 60 Iowa, 400, 14 N. W. 772.

Kentucky.—*Belknap & D. Stone Co. v. Harris* (1892) 13 Ky. L. Rep. 684; *Louisville & N. R. Co. v. Chism* (1898) 20 Ky. L. Rep. 584, 47 S. W. 251; *Lexington R. Co. v. Herring* (1906) 29 Ky. L. Rep. 794, 96 S. W. 558.

Massachusetts.—*Baldwin v. Western R. Corp.* (1855) 4 Gray, 338.

Michigan.—*Hill v. Snyder* (1880) 44 Mich. 318, 6 N. W. 674; *Langworthy v. Green Twp.* (1891) 88 Mich. 207, 50 N. W. 130; *Kingston v. Ft. Wayne & E. R. Co.* (1897) 112 Mich. 40, 40 L.R.A. 131, 70 N. W. 315, 74 N. W. 230, 1 Am. Neg. Rep. 467.

Minnesota.—*Kaillen v. Northwestern Bedding Co.* (1891) 46 Minn. 187, 48 N. W. 779.

New York.—*Eppendorf v. Brooklyn City & N. R. Co.* (1877) 69 N. Y. 197, 25 Am. Rep. 171, 5 Am. Neg. Cas. 219; *Senecal v. Thousand Island S. B. Co.* (1894) 79 Hun, 574, 29 N. Y. Supp. 884.

Pennsylvania.—*Baker v. Irish* (1896) 172 Pa. 528, 33 Atl. 558.

Rhode Island.—*Hampson v. Taylor* (1885) 15 R. I. 83, 8 Atl. 331, 23 Atl. 732.

Texas.—*Mayton v. Sonnefield* (1898) — Tex. Civ. App. —, 48 S. W. 608; *Missouri, K. & T. R. Co. v. Johnson* (1898) 92 Tex. 380, 48 S. W. 568, 5 Am. Neg. Rep. 473; *International & G. N. R. Co. v. Ives* (1903) 31 Tex. Civ. App. 272, 71 S. W. 772; *American Automobile Ins. Co. v. Struwe* (1920) — Tex. Civ. App. —, 218 S. W. 534.

Wisconsin.—*Brennan v. Friendship* (1886) 67 Wis. 223, 29 N. W. 902; *Propson v. Leatham* (1891) 80 Wis. 608, 50 N. W. 586.

Carelessness at other times cannot be proved for the purpose of showing contributory negligence at the time of injury of a servant. *Belknap & D. Stone Co. v. Harris* (1892) 13 Ky. L. Rep. 684.

In an action to recover for injury to

a small child knocked down in a street by a street car, evidence that it was accustomed to play in the street unattended is inadmissible. *Smith v. Grand Street P. P. & F. R. Co.* (1882) 11 Abb. N. C. (N. Y.) 62.

Where a boy was bitten by a dog, and there was some evidence that just prior to his being bitten he had attempted to kick the dog, the court said evidence was not admissible that at other times and other places he had teased and worried the dog. *Linck v. Scheffel* (1889) 32 Ill. App. 17, 1 Am. Neg. Cas. 87.

Where a man is injured in attempting to make a coupling of cars by and under orders of a superior officer, evidence is not admissible of his habit of making couplings in that way contrary to the rules of the road, the court saying that a man's habit should not prejudice him when his duty to act has been determined by his superior, and not by himself. *Central R. & Bkg. Co. v. Ryles* (1889) 84 Ga. 420, 11 S. E. 499.

In an action by a railroad employee for injuries received in the course of his employment, evidence is not admissible that he was habitually careless in the performance of his work. *Atlanta & W. P. R. Co. v. Smith* (1894) 94 Ga. 107, 20 S. E. 763. The court says one of the controverted questions of fact was whether, on the occasion on which he was injured, plaintiff was using due care for his protection. We do not think this question could be elucidated by evidence one way or the other as to the general character of the plaintiff for prudence or recklessness.

In an action for injuries to a child on a railroad track, evidence is not admissible that he had been in the habit of putting pins on the track to be run over by the trains, and had been warned of the danger of such practice. *Louisville & N. R. Co. v. Chism* (1898) 20 Ky. L. Rep. 584, 47 S. W. 251.

Where a passenger in a carriage was thrown out and injured by collision with a train at a railroad crossing, defendant offered evidence that by common reputation the one in charge of the horse was a careless driver; but

the court ruled that the testimony that the person who was driving the carriage in which the plaintiff was at the time of the accident was by common reputation a careless driver was rightfully rejected, saying that it might have been competent to show that he was in fact unskilful or careless in the management of the horse, but that evidence on this point must come from those who could testify to the fact on their own knowledge. It could not be proved by reputation. *Baldwin v. Western R. Corp.* (1855) 4 Gray (Mass.) 333.

In an action for injury to an employee by getting his hand cut in rollers, evidence is not admissible that on former occasions he had been seen looking out of the window while at work. *Kaillen v. Northwestern Bedding Co.* (1891) 46 Minn. 187, 48 N. W. 779.

Where a boy was caught between an elevator in which he was riding and the floor at which he wished to get off, and badly injured, defendant claimed that his reckless attempt to jump off the elevator while it was in motion was the cause of the accident, and offered evidence of such conduct on former occasions. This evidence was, however, rejected, the court saying what he had done before would warrant no inference, or support any presumption that he had done the same thing on the day of the accident, that the evidence was inadmissible. *Baker v. Irish* (1896) 172 Pa. 528, 33 Atl. 558.

Contributory negligence of an employee injured by a pile of lumber falling upon him cannot be shown by evidence that he was a careless, reckless man, and had been careless upon other occasions. *Mayton v. Sonnefield* (1898) — Tex. Civ. App. —, 48 S. W. 608.

Where the engineer of a train was injured by colliding with the rear of a train which had become stalled on his grade, evidence is not admissible that he was in the habit of going to sleep on his engine while it was running. *Missouri, K. & T. R. Co. v. Johnson* (1898) 92 Tex. 380, 48 S. W. 568, 5 Am. Neg. Rep. 473. The court says: "The principle, as applicable to this

class of cases generally, is that when the habit of care or of negligence, as the case may be, has no connection with the specific facts in evidence bearing upon the question of care, evidence of such care or habit is without sufficient probative force to affect the determination of the question. In the present case, the evidence that the passenger train ran by without paying any regard to the signals did tend to show that they were not seen. But at the same time it was consistent with the theory that the plaintiff was not asleep. The testimony on his own behalf, on the other hand, tended to show that the cause of the signals not being discovered was that both the engineer and the fireman were engaged in the performance of other duties, and were therefore not on the lookout. The evidence as to the cause of the accident and the conduct of the servants of the company in charge of the respective trains was direct, and, under the circumstances, proof that the engineer had slept while running his trains on other occasions was calculated to mislead the jury, and not to enlighten them."

And the same rule was applied to exclude testimony that one who was injured when attempting to drive across a railroad track was in the habit of going to sleep in his wagon. *International & G. N. R. Co. v. Ives* (1903) 31 Tex. Civ. App. 272, 71 S. W. 772.

Where an employee on a dock was injured by falling through a hole in the planking, evidence is not admissible, upon the question of his contributory negligence, that he was an habitually careless man. *Propsom v. Leatham* (1891) 80 Wis. 608, 50 N. W. 586.

To show intoxication.

In an action by a pedestrian for injuries caused by falling on a defective sidewalk, defendant cannot give evidence as to plaintiff's intemperate habits, since, if he was sober at the time of the accident, proof of intemperate habits would be immaterial, while mere proof of such habits would not warrant the inference that he was not sober at the time. *Hampson v.*

Taylor (1885) 15 R. L. 83, 8 Atl. 331, 23 Atl. 732.

In an action involving liability for the collision of two steamers, where there is no evidence that the captain of one of them, whose actions were somewhat peculiar at the time of the collision, was intoxicated, evidence is not admissible as to his habit of taking intoxicating liquors. *Senecal v. Thousand Island S. B. Co.* (1894) 79 Hun, 574, 29 N. Y. Supp. 884.

Upon the question of liability for injury to a street car passenger by falling from the car, which defendant claimed was due to plaintiff's intoxication, evidence is not admissible as to his habit of becoming intoxicated. *Kingston v. Ft. Wayne & E. R. Co.* (1897) 112 Mich. 40, 40 L.R.A. 121, 70 N. W. 315, 74 N. W. 230, 1 Am. Neg. Rep. 467.

To sustain the defense that plaintiff was intoxicated at the time he fell on defendant's sidewalk, for the injuries resulting from which the action was brought, evidence of his habit of drinking intoxicating liquors is not admissible. *Hubbard v. Mason City* (1882) 60 Iowa, 400, 14 N. W. 772.

To show careless driving.

In an action for injury to a horseback rider by an alleged defect in the highway, evidence is not admissible that he was habitually a careless and reckless rider. *Brennan v. Friendship* (1886) 67 Wis. 223, 29 N. W. 902.

In defense of an action for injury on a defective highway, evidence is not admissible of plaintiff's manner and method of driving horses, as tending to establish his negligence. *Langworthy v. Green Twp.* (1891) 88 Mich. 207, 50 N. W. 130.

In an action for injury caused by careless driving on the highway, where it is not pretended that at the time of the accident plaintiff was either careless or intoxicated, evidence as to his habits with respect to careless driving and the use of intoxicating liquors is inadmissible. *Hill v. Snyder* (1880) 44 Mich. 318, 6 N. W. 674.

Where there is direct evidence as to the rate at which one injured by a defect in a highway was driving when he

met with the accident, evidence is not admissible as to his habit with respect to rapid driving. *Salem v. Webster* (1901) 192 Ill. 369, 61 N. E. 323.

Where there were eyewitnesses, evidence that a person in a vehicle, injured in collision with an automobile, was in the habit of going to sleep while driving on the highway, was, in *Scott v. O'Leary* (1912) 157 Iowa, 222, 138 N. W. 512, held inadmissible.

To show habit of boarding moving cars.

To show that one thrown from a street car which he was attempting to board was attempting to get onto a moving car, evidence is not admissible that his custom was to board cars in motion. *Fontaine v. Washington R. & E. Co.* (1914) 42 App. D. C. 295. The court says the reason is that the lack of connection between the act charged and the prior acts makes evidence of the earlier ones irrelevant.

In case of injury to one attempting to board a street car, because of the alleged sudden jerking of the car, evidence is not admissible that plaintiff had been in the habit of jumping on the cars when in motion. *Eppendorf v. Brooklyn City & N. R. Co.* (1877) 69 N. Y. 195, 25 Am. Rep. 171, 5 Am. Neg. Cas. 219. The court says, even if the evidence was offered to show that plaintiff was generally careless and reckless, it would be incompetent.

In an action for injuries to a lady by falling when attempting to board a street car, as she alleged, by the sudden starting of the car, and, as defendant alleged, by her attempting to board the car when it was in motion, evidence is not admissible that she had frequently been seen getting on and off cars when in motion. *Lexington R. Co. v. Herring* (1906) 29 Ky. L. Rep. 794, 96 S. W. 558. The court says: "Nearly every person is at times guilty of some negligent act, and frequently a person prompted by entirely different motives and moved by dissimilar influences will do the same thing, and, if evidence of previous similar acts was admitted, the plaintiff should be permitted to explain, if possible, the reasons or the motives prompting him to do each particular act. This would inject into the trial of the case numerous collateral and

irrelevant issues, and would result in not only confusing the mind of the jury, but in diverting their attention from the issues presented by the pleadings that they were called on to try."

Exceptional cases.

In case of a conflict of evidence as to the intoxication of a person injured by a fall on the sidewalk, evidence is admissible of his habit of getting drunk. *McCracken v. Markesan* (1890) 76 Wis. 499, 4 N. W. 323. The court said, if he had been habitually in the habit of getting drunk, it would be very probable that he was drunk then, and if drunkenness was his habitual condition it would tend to corroborate the testimony that he was drunk at the time.

In an action for injuries to a quarry employee by explosion of a blast, the master may prove, in support of his defense of contributory negligence, that plaintiff had grown careless with respect to blasts and did not get under cover after being warned. *Allard v. Northwestern Contr. Co.* (1911) 64 Wash. 14, 116 Pac. 457. The court said if he had on different occasions remained in an exposed position while the blast was being fired, after having received warning thereof, it afforded some ground for belief that such might have been his conduct on the occasion of the accident. The court further says that evidence of prior negligent acts of the principal himself is admissible on the issue of want of ordinary care.

In *Fitzpatrick v. Fitchburg R. Co.* (1879) 128 Mass. 13, where a boy was struck and injured by a moving car, and it appeared that he had been in the habit of gathering seed on the car tracks, the court held that evidence that he had been warned of the danger of being there, and was therefore aware of the danger, was admissible as tending to show that he was not using due care at the time of the accident.

In an action by a railroad employee for injuries by being struck by a train on the track, evidence is admissible of his boasting of his ability to keep out of the way of trains and not get hurt, as bearing upon his carefulness or

readiness to take risks. *Brouillette v. Connecticut River R. Co.* (1894) 162 Mass. 198, 38 N. E. 507.

Where a boy was injured by a train at a highway crossing, and the railroad company defended on the ground that the injury was caused by his own act in attempting to board a moving train, and there was direct evidence that he made the attempt and that he did not, evidence is admissible of his habit to jump on moving trains at that place. *Pittsburgh, C. C. & St. L. R. Co. v. McNeil* (1903) — Ind. App. —, 66 N. E. 777. The court says: "The jurors, being sensible men of fair reason and discernment, were called upon to determine the pivotal question in the case—as to the manner in which appellee was injured. As to this question there was direct conflicting evidence. The manner of the injury being in conflict, a sensible and reasonable man would naturally and properly give some weight to the fact that the injured party was in the habit of jumping on and off of moving trains in the manner indicated by one witness, on the reasonable and well-supported theory that a person is more likely to do or not to do a thing, or to do a thing or not to do it, in a particular way, as he is in the habit of doing or not doing it. The rejected evidence had a legal tendency to show that appellee's conduct at the time he was injured was such as appellant ascribed to him. It is not for the court to say what effect such evidence would have had upon the minds of the jury, but it being material, and going to a vital question in the case, we can declare, as a correct legal principle, that it was error to keep it from the jury."

In an action for damages for injuries caused by falling into an unguarded hole in a public street, where the defense was that plaintiff was drunk at the time, the court held that the admission of evidence of his habit of inebriety was not error, where the jury was cautioned that such testimony could have no effect in the case unless plaintiff was under the influence of liquor at the time of the accident. *Enright v. Atlanta* (1886) 78 Ga. 288. The question may be asked of what use

such testimony was. It was offered for the purpose of throwing light on the question whether or not plaintiff was under the influence of liquor at the time in question, and the jury was told that it would not affect the case unless he was so. The jury certainly could not have found intoxication at the time from the fact of a habit of inebriety, and if he was shown by competent evidence to have been intoxicated at the time, evidence of former intoxication was certainly of no moment.

Where the question is whether injury to one falling from a street car was caused by the sudden starting of the car, or her attempt to jump off the car while it was in motion, evidence is admissible of her habit of jumping from moving cars. *Craven v. Central P. R. Co.* (1887) 72 Cal. 345, 18 Pac. 878, 2 Am. Neg. Cas. 180.

In *Gibson v. Burlington, C. R. & N. R. Co.* (1899) 107 Iowa, 596, 78 N. W. 190, 5 Am. Neg. Rep. 325, evidence was held admissible of an engineer's custom of separating his engine from the cars for inspection, for several months shortly prior to the accident, within the personal knowledge of the witness, where he had failed so to do at the time in question, and he knew that other coaches were always added to the train at this particular station, and that it was the decedent's custom to notify other trainmen before he began the inspection of his engine, but that he had failed so to do on the night of the accident; and this evidence was admitted as tending to prove the decedent's negligence, not by proof of habitual negligence, but by proof of habitual caution, the failure to exercise which resulted in the accident.

So, evidence as to one's habit of getting on trains at a particular station, and dropping off after riding several hundred feet, is admissible to corroborate testimony that he jumped off on the occasion in question, and fell to his injury, and was not pushed off, as he claimed. *Preston v. Hannibal & St. J. R. Co.* (1896) 132 Mo. 111, 33 S. W. 783.

In *Canada Paint Co. v. Trainor* (1898) 28 Can. S. C. 352, where a per-

son was injured in some extraordinary manner, evidence was admitted, apparently without objection, as corroborative of the theory offered by the defendant, to show that the injured girl had frequently rocked in her seat at the machine at which she was engaged, although warned against the habit, and that it was possible for the injury to have been occasioned under this condition if she had extended her leg to a certain degree.

In *Grand Trunk R. Co. v. Griffith* (1911) 45 Can. S. C. 380, Ann. Cas. 1912B, 711, 1 N. C. C. C. A. 503, it was apparently assumed that the decedent's daily precaution to take a longer road home to avoid walking along the tracks was a proper matter for consideration on the question whether, on the occasion in question, he was struck while walking along the tracks, or at a crossing.

In the case of *McCarragher v. Rogers* (1890) 120 N. Y. 526, 24 N. E. 812, evidence of the general carelessness or the reverse in his work, of one injured, was held inadmissible as opinion evidence, as was testimony that he was careless or careful about the time of the accident; but the witness was permitted to testify as to the conduct of the injured person when he saw him a short time before the injury, though such conduct may not necessarily have characterized the plaintiff at that time.

Upon the question of contributory negligence of a seven-year-old boy injured in a railroad yard, evidence of his brightness and intelligence is admissible. *Atchison, T. & S. F. R. Co. v. Potter* (1899) 60 Kan. 808, 72 Am. St. Rep. 385, 58 Pac. 471, 6 Am. Neg. Rep. 512.

In *Hodges v. Hill* (1913) 175 Mo. App. 441, 161 S. W. 633, where plaintiff's horse was killed by a collision on the highway with a team driven by defendant, evidence was admitted in defense of the habit of plaintiff's son, who was riding the horse at the time, of riding it along the highway at a rapid rate of speed. The court, after a full discussion of the cases dealing with the habits of both plaintiffs and defendants, concludes that, since the

trial judge instructed the jury that, in determining the question of the son's negligence at the time and place of the accident, it is not material that at different times or occasions he may have ridden at a rapid or fast rate of speed, it would rule, "though with some doubt as to the correctness," that the court did not commit reversible error in admitting the evidence.

IV. Irrelevant evidence.

Evidence of habits of a plaintiff may be irrelevant to the issue before the court, and, if so, of course the evidence is not admissible on general principles, whether or not it would, if relevant, be admitted as throwing light on the question at issue.

Thus, the mere fact that a boy injured on a defective platform of a railroad station, where he was on business, had been in the habit of jumping on moving trains, is immaterial. *Louisville & N. R. Co. v. Berry* (1889) 88 Ky. 222, 21 Am. St. Rep. 329, 10 S. W. 472.

So, in an action for damages for injuries received by one attempting to board a street car, by being thrown to the pavement by a sudden jerk of the car, evidence is not admissible as to his habit of riding on car platforms. *Birmingham R. Light & P. Co. v. Selhorst* (1910) 165 Ala. 475, 51 So. 568.

So, in an action for injury to a child by being struck by a car when attempting to cross railroad tracks, evidence is not admissible that he had been in the habit of catching rides upon cars moving on the track, if there was nothing to show that the injury grew out of such attempt. *St. Louis, I. M. & S. R. Co. v. Sparks* (1906) 81 Ark. 187, 99 S. W. 73.

But upon the question of the negligence of a railway conductor in requiring a boy to leave a moving train, evidence of his habit in jumping on and off moving trains is admissible. *Thompson v. Yazoo & M. Valley R. Co.* (1895) 72 Miss. 715, 17 So. 229.

It cannot be shown that one injured by ice thrown from a moving train was in the habit of jumping on moving trains, and that he was near the

train for that purpose when injured. *Maysville & B. S. R. Co. v. Willis* (1907) 81 Ky. L. Rep. 1249, 104 S. W. 1016.

V. Habits of person killed where there are witnesses of the accident.

If there are witnesses of an accident in which a person is killed, evidence of his habits is not admissible to show either care or negligence on his part.

United States.—*Louisville & N. R. Co. v. Summers* (1903) 60 C. C. A. 487, 125 Fed. 719.

Alabama.—*Louisville & N. R. Co. v. Bogue* (1912) 177 Ala. 349, 58 So. 392.

Dakota.—*Elliot v. Chicago, M. & St. P. R. Co.* (1889) 5 Dak. 523, 3 L.R.A. 363, 41 N. W. 758.

Georgia.—*Atlanta & W. P. R. Co. v. Newton* (1890) 85 Ga. 517, 11 S. E. 776.

Illinois.—*Chicago & A. R. Co. v. Pearson* (1900) 184 Ill. 386, 56 N. E. 633; *Gardner v. Chicago, R. I. & P. R. Co.* (1885) 17 Ill. App. 262; *Chicago, St. P. & K. C. R. Co. v. Anderson* (1893) 47 Ill. App. 91; *Chicago & A. R. Co. v. Gibbons* (1896) 65 Ill. App. 550; *Indiana, D. & W. R. Co. v. Koons* (1897) 72 Ill. App. 497; *Cleveland, C. C. & St. L. R. Co. v. Moss* (1900) 89 Ill. App. 1; *Cox v. Chicago & N. W. R. Co.* (1900) 92 Ill. App. 15; *Quincy Gas & E. Co. v. Clark* (1903) 109 Ill. App. 20; *Anderson v. Metropolitan West Side Elev. R. Co.* (1912) 170 Ill. App. 210.

Iowa.—*Adams v. Chicago, M. & St. P. R. Co.* (1895) 93 Iowa, 565, 61 N. W. 1059.

Kansas.—*Southern Kansas R. Co. v. Robbins* (1890) 43 Kan. 145, 23 Pac. 113.

Kentucky.—*Louisville & N. R. Co. v. Taylor* (1907) 81 Ky. L. Rep. 1142, 104 S. W. 776.

New Hampshire.—*Minot v. Boston & M. R. Co.* (1905) 73 N. H. 317, 61 Atl. 509.

New York.—*Zucker v. Whitridge* (1912) 205 N. Y. 50, 41 L.R.A. (N.S.) 633, 98 N. E. 209, Ann. Cas. 1913D, 1250; *Totarella v. New York, & Q. C. R. Co.* (1900) 53 App. Div. 413, 65 N. Y. Supp. 1044.

Ohio. — *Pennsylvania R. Co. v. Trainer* (1896) 12 Ohio C. C. 66, 5 Ohio C. D. 519.

Texas. — *Missouri, K. & T. R. Co. v. Johnson* (1898) 92 Tex. 380, 48 S. W. 568, 5 Am. Neg. Rep. 473.

Utah. — *Wells v. Denver & R. G. W. R. Co.* (1891) 7 Utah, 482, 27 Pac. 688; *Spiking v. Consolidated R. & P. Co.* (1908) 33 Utah, 313, 93 Pac. 838.

In case of a railroad employee killed by falling from a car, where witnesses described his conduct at the time of the injury, there is no necessity or propriety in admitting opinions as to whether or not he was generally a careful man. *Southern Kansas R. Co. v. Robbins* (1890) 43 Kan. 145, 23 Pac. 113. The court says the determination of whether he was exercising due care when he fell does not depend upon the care exercised by him at other times, or whether he was usually careful, but upon his conduct at the time of the accident.

In *Louisville & N. R. Co. v. Bogue* (1912) 177 Ala. 349, 58 So. 392, it was held that evidence as to how one killed while lighting the switch lamps in a railroad yard did his work on former occasions was immaterial.

Where a lineman fell from a pole and was killed, and there were witnesses of the accident, the court held that evidence that he was a cautious and careful man was wholly immaterial. It was opinion evidence, tending to prove by influence that he was careful on the occasion on which he was killed. It usurps the province of the jury in impliedly answering the very question the jury was called upon to answer. *Quincy Gas & E. Co. v. Clark* (1903) 109 Ill. App. 20.

Where a railroad employee was killed by a train in the yard, and the evidence showed that he stepped onto the track in front of the moving train, the court held that evidence of his general habit of care was immaterial. *Adams v. Chicago, M. & St. P. R. Co.* (1895) 93 Iowa, 565, 61 N. W. 1059. The court says: "Such a line of evidence raises a collateral and remote issue, which, if sustained, would lead to all manner of complications. Of course, if the general character of the

deceased as to care to avoid injury may be shown by witnesses, the defendant would have the right to rebut that by calling witnesses to give their opinions or estimate of him as a reckless and careless man, and it would be competent for the defendant to prove by witnesses that the coemployees charged with negligence are always careful to perform their duties."

Where there was positive evidence that a boy killed by a street car was attempting to cross the street when he stumbled and fell in front of the car, evidence is not admissible that on other occasions he had stolen rides on defendant's cars. *Totarella v. New York & Q. C. R. Co.* (1900) 53 App. Div. 413, 65 N. Y. Supp. 1044.

In *Missouri, K. & T. R. Co. v. Johnson* (1898) 92 Tex. 380, 48 S. W. 568, 5 Am. Neg. Rep. 473, the court held inadmissible evidence of an engineer's habitual negligence in taking naps in his cab in the course of his journey, and of running past stops, since there was direct evidence as to his conduct at the time in question, and the habit bore no relation to those facts, as bearing on the question of due care.

If there are witnesses of the transaction who saw all the circumstances leading up to the instant the accident occurred, evidence of careful habits of decedent is not admissible. *Cox v. Chicago & N. W. R. Co.* (1900) 92 Ill. App. 15.

Where witnesses saw decedent immediately before and immediately after he was struck, the rule does not apply which admits evidence of habit in case of absence of eyewitnesses, although no one saw the accident. *Anderson v. Metropolitan West Side Elev. R. Co.* (1912) 170 Ill. App. 210.

Injury at railroad crossing.

Evidence of the habits, in regard to carefulness in driving, of one killed at a railroad crossing, is not admissible, where there were witnesses who could testify to his conduct at the time of the accident. *Pennsylvania Co. v. Trainer* (1896) 12 Ohio C. C. 66, 5 Ohio C. D. 519.

In *Louisville & N. R. Co. v. Taylor* (1907) 31 Ky. L. Rep. 1142, 104 S. W.

776, where there were witnesses to the killing of one attempting to drive across railroad tracks, the court held that evidence that he was by custom reckless in driving across the railroad was properly rejected. The court says, in a civil action, neither side can give in evidence what the custom or practice of either of the parties is. The question is not what they were accustomed to do, but what they did at the time of the accident.

In *Indiana, D. & W. R. Co. v. Koons* (1897) 72 Ill. App. 497, where there were witnesses to a crossing accident, which resulted in death, the court said evidence of habits of deceased is admissible only in the absence of eyewitnesses, and it is admitted then only as a matter of necessity, in the absence of better proof.

Where there are witnesses as to what occurred when a person was killed at a railroad crossing, evidence is not admissible that he was habitually reckless in making crossings in front of moving trains. *Chicago & A. R. Co. v. Gibbons* (1896) 65 Ill. App. 560.

Evidence of the habits of the driver of a team, struck at a railroad crossing, is not admissible upon the question of his care at that time, if other witnesses were within a few feet of him at the time of the accident, and testify at the trial as to his conduct at the time. *Gardner v. Chicago, R. I. & P. R. Co.* (1885) 17 Ill. App. 262.

Proof of the habits of the victim of an accident is not admissible, where there is direct evidence of the circumstances of the accident, and therefore evidence as to the habit of inebriety of one killed at a railroad crossing is not admissible, if he was seen by witnesses just prior to the accident, so that the question of his condition at the time was subject to direct proof. *Chicago & A. R. Co. v. Pearson* (1900) 184 Ill. 386, 56 N. E. 633.

In case of the killing by a train of one attempting to drive across a railway track, where there were witnesses to transactions more or less directly associated with the accident, the court said that the question at issue was his conduct at the particular

time, and that, therefore, evidence that he was a prudent and cautious man was not admissible. *Atlanta & W. P. R. Co. v. Newton* (1890) 85 Ga. 517, 11 S. E. 776.

Where it appeared that deceased crossed a railroad track immediately in front of a moving train, without looking or listening, the court held that evidence was not admissible that he was ordinarily a careful man. The court says: However careful he may have been generally would be of no avail to him if his negligence in fact contributed to the injury, and however careless he might have been usually would not have been any defense to this action had he been free from negligence at the time of the accident. *Elliot v. Chicago, M. & St. P. R. Co.* (1889) 5 Dak. 523, 3 L.R.A. 363, 41 N. W. 758.

Evidence that persons killed at a railroad crossing had, on previous trips, stopped to look and listen before crossing, is not admissible in corroboration of evidence that they in fact stopped on the occasion in question. *Louisville & N. R. Co. v. Summers* (1903) 60 C. C. A. 487, 125 Fed. 719.

Where eyewitnesses testify that one who stepped on a street car track in front of a moving train did not look to see if a car was coming, evidence of his careful habit upon such occasions is not admissible. *Zucker v. Whitridge* (1912) 205 N. Y. 50, 41 L.R.A. (N.S.) 683, 98 N. E. 209, Ann. Cas. 1913D, 1250. The court says: "The weight of authority seems to be against admitting evidence of general conduct under proven circumstances, to show conduct of the same kind under similar circumstances on a particular occasion, when there were eyewitnesses of the occurrence, including the person injured, if he survived the accident. We are not now called upon to decide whether evidence of the habits of a decedent in crossing railroads is competent, when there is no eyewitness of the event. . . . A question of evidence, to some extent, is a question of sound policy in the administration of the law. Sometimes it is necessary to weigh the probative force of evidence offered, compare it with the practical incon-

venience of enforcing a rule to admit it, and decide whether, as matter of good policy, it should be admitted. Uniform conduct under the same circumstances on many prior occasions may be relevant, as tending somewhat to show like circumstances on the occasion in question. All relevant evidence, however, is not competent. . . . Assuming the evidence in question to be relevant, I think it should be held incompetent under the circumstances, because its probative force does not outweigh the inconvenience of a multitude of collateral issues, not suggested by the pleadings, the trial of which would take much time, tend to create confusion, and do little good."

Evidence admitted.

In an action for causing death at a railroad crossing, where the evidence was conflicting, defendant was permitted to introduce evidence of the negligence of deceased in driving over crossings at other times and places. This was placed on the ground that a person is more likely to do a thing in a particular way, as he is in the habit of doing or not doing it. *Parkinson v. Nashua & L. R. Co.* (1881) 61 N. H. 416.

In *Fike v. Atchison, T. & S. F. R. Co.* (1913) 90 Kan. 409, 133 Pac. 871, evidence was admitted as to the habit of care of one killed at a railroad crossing, in passing over the crossing at other times, and the court held that if there was error in so doing it was non-prejudicial, so that it was not necessary to pass upon the question of its admissibility.

VI. Habits of person killed where there are no witnesses of the accident.

a. To prove care of decedent.

Although the cases are not in accord, and decisions from the same state do not always apply a uniform general rule, the numerical weight of authority is to the effect that, if a person is killed in an accident of which there are no eyewitnesses, evidence of his habits is admissible as tending to throw light upon his probable conduct at the time of the injury.

United States.—*Overman Wheel Co.*

v. Griffin (1895) 14 C. C. A. 609, 33 U. S. App. 147, 67 Fed. 659.

California.—*Gay v. Winter* (1867) 34 Cal. 153; *WALLIS v. SOUTHERN P. Co.* (reported herewith) ante, 117.

Illinois.—*Missouri Furnace Co. v. Abend* (1883) 107 Ill. 44, 47 Am. Rep. 425, 14 Am. Neg. Cas. 250; *Chicago, R. I. & P. R. Co. v. Clark* (1883) 108 Ill. 113; *Toledo, St. L. & K. C. R. Co. v. Bailey* (1893) 145 Ill. 159, 33 N. E. 1089; *Illinois C. R. Co. v. Nowicki* (1893) 148 Ill. 29, 35 N. E. 358; *Illinois C. R. Co. v. Ashline* (1898) 171 Ill. 313, 49 N. E. 521; *Chicago, B. & Q. R. Co. v. Gunderson* (1898) 174 Ill. 495, 51 N. E. 708; *Dallemand v. Saalfeldt* (1898) 175 Ill. 310, 48 L.R.A. 753, 67 Am. St. Rep. 214, 51 N. E. 645, 5 Am. Neg. Rep. 9; *Illinois C. R. Co. v. Prickett* (1904) 210 Ill. 140, 71 N. E. 435; *Chicago & A. R. Co. v. Wilson* (1906) 225 Ill. 50, 116 Am. St. Rep. 102, 80 N. E. 56; *Collison v. Illinois C. R. Co.* (1909) 239 Ill. 532, 88 N. E. 251; *Stollery v. Cicero & P. S. R. Co.* (1909) 243 Ill. 290, 90 N. E. 709, affirming (1909) 148 Ill. App. 499; *Humason v. Michigan C. R. Co.* (1913) 259 Ill. 462, 102 N. E. 793; *Newell v. Cleveland, C. C. & St. L. R. Co.* (1914) 261 Ill. 505, 104 N. E. 223; *Casey v. Chicago R. Co.* (1915) 269 Ill. 386, L.R.A.1916B, 824, 109 N. E. 984; *Greene v. L. Fish Furniture Co.* (1916) 272 Ill. 148, 111 N. E. 725; *McNulta v. Lockridge* (1889) 32 Ill. App. 86, affirmed in (1890) 137 Ill. 270, 31 Am. St. Rep. 362, 27 N. E. 452; *Illinois C. R. Co. v. Pummill* (1895) 58 Ill. App. 83; *Atchison, T. & S. F. R. Co. v. Alsdurf* (1896) 68 Ill. App. 149; *Dallemand v. Saalfeldt* (1897) 73 Ill. App. 158; *Corbin v. Western Electric Co.* (1898) 78 Ill. App. 516; *Chicago, R. I. & P. R. Co. v. Downey* (1899) 85 Ill. App. 175; *Cox v. Chicago & N. W. R. Co.* (1900) 92 Ill. App. 15; *Wisenger v. Donk Bros. Coal & Coke Co.* (1905) 119 Ill. App. 298; *Devine v. National Safe Deposit Co.* (1908) 145 Ill. App. 322, affirmed in (1909) 240 Ill. 369, 88 N. E. 804; *O'Donnell v. Riter-Conley Mfg. Co.* (1912) 172 Ill. App. 601; *Smith v. Kewanee Light & P. Co.* (1912) 175 Ill. App. 354; *Kohl v. Clarkson* (1913) 182 Ill. App. 519; *Casey*

v. Wabash R. Co. (1915) 192 Ill. App. 430; Noonan v. Maus (1915) 197 Ill. App. 103; Speihs v. Insull (1917) 207 Ill. App. 256.

Indiana.—Pittsburgh, C. C. & St. L. R. Co. v. Parish (1902) 28 Ind. App. 189, 91 Am. St. Rep. 120, 67 N. E. 514.

Iowa.—Frederickson v. Iowa, C. R. Co. (1912) 156 Iowa, 26, 135 N. W. 12, Ann. Cas. 1915B, 224; Platter v. Minneapolis & St. L. R. Co. (1913) 162 Iowa, 142, 143 N. W. 992.

Kansas.—Missouri, P. R. Co. v. Mofatt (1899) 60 Kan. 113, 72 Am. St. Rep. 343, 55 Pac. 837; Angell v. Chicago, R. I. & P. R. Co. (1916) 97 Kan. 688, 156 Pac. 763.

New Hampshire.—Evans v. Concord R. Corp. (1890) 66 N. H. 194, 21 Atl. 105; Davis v. Concord & M. R. Co. (1894) 68 N. H. 247, 44 Atl. 388; Smith v. Boston & M. R. Co. (1899) 70 N. H. 53, 85 Am. St. Rep. 596, 47 Atl. 290; Stone v. Boston & M. R. Co. (1903) 72 N. H. 206, 55 Atl. 359; Tucker v. Boston & M. R. Co. (1905) 73 N. H. 132, 59 Atl. 943; Tyrrell v. Boston & M. R. Co. (1914) 77 N. H. 320, 91 Atl. 179; Nawn v. Boston & M. R. Co. (1914) 77 N. H. 299, 91 Atl. 181.

Rhode Island.—Cassidy v. Angell (1879) 12 R. I. 447, 34 Am. Rep. 690.

Texas.—Southern Traction Co. v. Kirksey (1920) — Tex. Civ. App. —, 222 S. W. 702.

In an action for death of a watchman by falling from a bridge which he was required to cross, evidence is admissible as to his habits of doing work, and his mental and physical characteristics. Overman Wheel Co. v. Griffin (1895) 14 C. C. A. 609, 33 U. S. App. 147, 67 Fed. 659.

In Gay v. Winter (1867) 34 Cal. 153, it is said that, in the absence of direct proof as to the care of a deceased person at the time of the accident which caused his death, the jury are at liberty to infer ordinary care and diligence on his part from all the circumstances of the case,—as character, and habits, and the natural instinct of self-preservation.

Where one was burned to death in a building, evidence is admissible as to his habit of care. Greene v. L. Fish

Furniture Co. (1916) 272 Ill. 148, 111 N. E. 725.

In case of the death of an employee, where there is no eyewitness of the accident, the administrator may establish due care on the part of decedent by the highest proof of which the case is capable, including the habits of deceased. Humason v. Michigan C. R. Co. (1913) 259 Ill. 462, 102 N. E. 793.

Where a boy ten years old was killed by being caught in an exposed coal conveyer, and there is no eyewitness to the killing, his administrator may establish the exercise of ordinary care on the part of the deceased by the highest proof of which the case is capable, including the habits of deceased, and other facts and circumstances from which the jury may rightfully find that he was exercising such care. Stollery v. Cicero & P. Street R. Co. (1910) 243 Ill. 290, 90 N. E. 709.

The jury may infer care on the part of a person killed by another's negligence, from evidence that he was intelligent, sober, and careful. Dallemand v. Saalfeldt (1898) 175 Ill. 310, 48 L.R.A. 753, 67 Am. St. Rep. 214, 51 N. E. 645, 5 Am. Neg. Rep. 9.

Evidence is admissible of the careful habits of a lineman electrocuted while repairing wires, a witness, upon hearing a crackling noise, having observed deceased in the act of falling from the crossarm on the pole, and the court stating that if deceased was electrocuted it was when the crackling noise was heard, before he was seen by the witness. Smith v. Kewanee Light & P. Co. (1912) 175 Ill. App. 354.

Evidence was admitted that deceased, who had fallen from a building under construction, was a careful man, where there was no eyewitness who could testify just what the deceased was doing immediately before he fell, or how he came to fall. O'Donnell v. Riter-Conley Mfg. Co. (1912) 172 Ill. App. 601.

In Pittsburgh, C. C. & St. L. R. Co. v. Parish (1902) 28 Ind. App. 189, 91 Am. St. Rep. 120, 62 N. E. 514, where there was slight direct evidence, it was said that the sobriety and carefulness of decedent, and his experience and

competency as a railroad conductor, together with the facts and circumstances of the accident as proved, and the inferences to be drawn therefrom, offer some foundation for a finding of due care on the part of the decedent; and, in addition to the circumstances of the accident, it is proper to consider, on the question of the deceased's due care, that he was industrious, in good health, experienced in his work, and providing for his family; and under such conditions it is to be inferred that he was possessed normally of the instinct of self-preservation. However, in another portion of this same opinion, evidence to show that decedent was a careful railroad man, or the reverse, was declared incompetent to excuse negligence, upon an objection that it was opinion evidence, but such evidence was held competent upon the question of damages, and, upon a proper request, the court should so limit such evidence by an instruction.

Where a brakeman was killed in the performance of his duties, and no one saw the accident, the court held that evidence of his habits tended to prove the necessary averment that he was in the exercise of due care at the time of the accident, saying: "If he was habitually prudent, cautious, and temperate, it tended to prove he was so at the time of the injury, which, with the instinct of self-preservation, would be evidence for the consideration of the jury in determining whether he was in the exercise of care. Had there been witnesses who saw the infliction of the injury, the jury could then have determined from such evidence whether he was careful or negligent, and in such a case this evidence would not be admissible. When there are no witnesses to describe such an occurrence, the defendant would surely have the right to prove the person was habitually rash, imprudent, and intemperate, to repel the presumption that he was in the exercise of proper care at the time he received the injury." *Chicago, R. I. & P. R. Co. v. Clark* (1888) 108 Ill. 113.

In *Missouri Furnace Co. v. Abend* (1883) 107 Ill. 44, 47 Am. Rep. 425, 14 Am. Neg. Cas. 250, where an engineer

fell from his engine and was killed, the court says the testimony shows that he was a careful engineer, and holds that this habit, together with the fact that, when last seen he was in the exercise of due care, furnished evidence from which the jury might find that he was in the exercise of such care at the time of the accident.

It is admissible to show that an engineer killed by the explosion of his engine was competent and careful, and to show his habits with respect to care and caution. *Toledo, St. L. & K. C. R. Co. v. Bailey* (1893) 145 Ill. 159, 33 N. E. 1089; *Illinois C. R. Co. v. Prickett* (1904) 210 Ill. 140, 71 N. E. 435.

Where a person is found dead in an excavation in a highway, his habits as to temperance, heedlessness, etc., may be considered upon the question whether or not he was exercising due care at the time of the accident. *Cassidy v. Angell* (1879) 12 R. I. 447, 34 Am. Rep. 690.

Evidence that deceased was careful and steady is proof prima facie that he was exercising due care at the time of the accident. *Devine v. National Safe Deposit Co.* (1908) 145 Ill. App. 322, affirmed in (1909) 240 Ill. 369, 88 N. E. 804.

If eyewitnesses are looking to some part of the accident, although some parts may have been seen by the witnesses, evidence of careful habits is admissible. *Noonan v. Maus* (1915) 197 Ill. App. 103.

Where there is doubt whether any witness saw deceased when he was killed, the rule admitting evidence of careful habits applies. *Illinois C. R. Co. v. Ashline* (1898) 171 Ill. 313, 49 N. E. 521.

Death at railroad crossing.

Upon the question of the care of one killed at a railroad crossing, evidence is admissible that he had upon former occasions remarked that the crossing was dangerous, and had taken precautions against collision. *Stone v. Boston & M. R. Co.* (1903) 72 N. H. 206, 55 Atl. 359.

The fact that a person killed at a railroad crossing habitually stopped, looked, and listened at that point was competent to prove similar conduct at

the time of the accident. *Tucker v. Boston & M. R. Co.* (1905) 73 N. H. 132, 59 Atl. 943. The court says, upon the question of the conduct of decedent as he approached the crossing, his custom and habit is evidence, and from such evidence the exercise of care may be found if it does not conclusively appear that in the particular instance such custom was not observed.

Evidence that one killed at a railroad crossing had the uniform habit for many years to check his team when approaching the crossing, and look and listen for approaching trains, is admissible upon the question of his negligence at the time he was killed by a train. *Smith v. Boston & M. R. Co.* (1900) 70 N. H. 53, 85 Am. St. Rep. 596, 47 Atl. 290.

Evidence that one killed at a railroad crossing was a sober, careful man, and had previously exercised due care for his safety when approaching the same crossing, would justify a finding of due care on the occasion of the accident. *Missouri P. R. Co. v. Moffatt* (1899) 60 Kan. 113, 72 Am. St. Rep. 343, 55 Pac. 837. The court held that it tended to repel any inference of negligence that might arise from the facts that he was on a railroad track and was killed by a locomotive.

If there is no eyewitness of a railroad-crossing accident in which a traveler is killed, evidence of his habit and custom in the matter of using care and caution in such places is admissible. *Platter v. Minneapolis & St. L. R. Co.* (1913) 162 Iowa, 142, 143 N. W. 992.

Evidence of the general habit in using a particular railroad crossing is competent, at least where there are no eyewitnesses of the accident; it may tend to aid the presumption of self-preservation that arises in such cases, because a person is more likely to do what he is in the habit of doing under the same conditions. *Frederickson v. Iowa C. R. Co.* (1912) 156 Iowa, 26, 135 N. W. 12, Ann. Cas. 1915B, 224.

In case of the killing of a pedestrian at a railroad crossing, evidence is admissible of his care and sobriety upon the question of his own negligence.

Illinois C. R. Co. v. Nowicki (1893) 148 Ill. 29, 35 N. E. 358.

Evidence of the careful habits of one killed by a train at a street crossing is admissible. *Chicago & A. R. Co. v. Wilson* (1906) 225 Ill. 50, 116 Am. St. Rep. 102, 80 N. E. 56.

In *Newell v. Cleveland, C. C. & St. L. R. Co.* (1914) 261 Ill. 505, 104 N. E. 223, where a person was found dead at a railroad crossing, the court said that plaintiff could not rely on the instinct of self-preservation to establish due care on the part of deceased, but it was incumbent on him to prove the habits of deceased as to sobriety, prudence, and the exercise of care and caution in the ordinary affairs of life, and as to any other particular that would tend to throw light upon the question of whether, at the time of the fatality, he was likely to have been in the exercise of ordinary care.

In the absence of eyewitnesses, or circumstances tending to show the cause of the accident, evidence that one found to have been killed by a street car was habitually prudent, careful, and cautious is admissible to raise the presumption that he was in the exercise of due care and caution at the time of his death. *Casey v. Chicago R. Co.* (1915) 269 Ill. 386, L.R.A.1916B, 824, 109 N. E. 984.

Where a person was killed by a train at a farm crossing, evidence that she was in the habit of listening for trains at such crossing was, in *Tyrrell v. Boston & M. R. Co.* (1914) 77 N. H. 320, 91 Atl. 179, held admissible, where the only eyewitness to the accident who was near her was occupied in closing a gate, with his back toward her, during the latter part of her approach to the crossing.

Where a railroad employee was killed by a train while carrying boiler flues across the tracks, evidence that he looked up the track on one or more occasions previous to the time he was struck, before picking up a flue, was, in *Nawn v. Boston & M. R. Co.* (1914) 77 N. H. 299, 91 Atl. 181, held competent on the question of his care.

In *Evans v. Concord R. Corp.* (1890) 68 N. H. 194, 21 Atl. 105, the habit of one killed at a railroad crossing, not

to leave home to cross the track until an expected train had passed, was held to be one of the circumstances which might be considered upon the question of her due care at the time of the accident.

In *Southern Traction Co. v. Kirksey* (1920) — Tex. Civ. App. —, 222 S. W. 702, it was held that evidence that one injured by a collision of his automobile with a street car was intoxicated was admissible, and, as bearing upon that fact, evidence was also admissible that he was in the habit of becoming intoxicated and driving recklessly. The court said, the fact of intoxication being relevant, any fact that would legitimately tend to establish such fact was also relevant. "We think that the fact that a person was in the habit of getting drunk, and, while in such condition, driving recklessly upon public highways, roads, and street crossings, would be a matter for the proper consideration of a jury as to whether or not he was intoxicated at the time of his injury, and we think that his habit in this regard could be proven by general reputation. We do not think it would be permissible to prove particular or isolated instances as to his reckless driving while drunk."

Plaintiff unable to testify.

The same rule would apply if a plaintiff was unable to testify, for any reason that would apply in case he was killed.

Thus, where a person injured in an accident was rendered insane thereby so that she was unable to testify, evidence of her habits of carefulness is admissible upon the question whether or not she was exercising due care at the time of the accident. *Chicago v. Doolan* (1901) 99 Ill. App. 143.

Cases holding evidence inadmissible.

In an action to recover damages for death by collision with a train at a highway crossing, the jury have nothing to do with habits of care, or want of care, of the person injured, in using the crossing at other times. *Guggenheim v. Lake Shore & M. S. R. Co.* (1887) 66 Mich. 150, 33 N. W. 161. The court says it would not avail his

administrator in this action how careful he had been in crossing at other times, if he was negligent on this occasion, nor would the defendant's liability be lessened if deceased had been careless at other times, if he was careful when injured.

Where deceased was killed by his horse backing over an embankment which had no guard rail, evidence of his careful habit in driving was excluded for two reasons: First, that carefulness on other occasions did not prove care on this; and, second, that the question of carefulness rested merely on the opinion of the witnesses. *Morris v. East Haven* (1874) 41 Conn. 252.

In *Frounfelker v. Delaware, L. & W. R. Co.* (1900) 48 App. Div. 206, 62 N. Y. Supp. 840, the deceased, a conductor, was killed in a train collision, and it was said, in substance, of an instruction of the lower court to the effect that, on the question of the deceased's contributory negligence, the jury might regard the testimony that he was a careful man, that such a consideration was irrelevant as to whether the deceased had complied with the company's rule (the measure of care necessary), requiring, in part, that conductors, when stopping their trains, should send back a flagman a distance of half a mile, etc.; and it was further said that, "so far as appears, . . . the flagman was merely acting upon his own judgment. Certainly he signally failed to comply with these rules"—and there was no proof here that the deceased fulfilled his duty.

In *Baltimore & O. R. Co. v. State* (1908) 107 Md. 642, 69 Atl. 439, it was held that evidence as to the habits of one killed at a crossing, as to being a careful and cautious driver, was inadmissible as tending to prove freedom from negligence, although it expressly appeared that there were no eyewitnesses to the accident.

In *Greenwood v. Boston & M. R. Co.* (1913) 77 N. H. 101, 88 Atl. 217, an employee was struck by cars while clearing snow from a switch; his failure to obey the injunction to look out for the cars had a part in causing the accident, and the question was wheth-

er there was any evidence upon which to base a finding that while so acting, or failing to act, he was in the exercise of ordinary care; the court stated that while it was the rule that it was "competent to show that the party charged with negligence had performed or omitted the same act in the same way before, as tending to show that he did or omitted the act at the time in question, on the ground that a person is more likely to do a thing in a particular way, as he is in the habit of doing or not doing it," evidence of a general character for care or negligence is not competent.

In *Swift & Co. v. Zerwick* (1900) 88 Ill. App. 558, evidence was excluded as to the customary caution exercised by the deceased in oiling the machinery in which he was killed, where there were no eyewitnesses to the accident. But in this case it appears that the evidence was excluded because of the witness's inability to testify from his personal knowledge.

In *Erb v. Popritz* (1898) 59 Kan. 264, 68 Am. St. Rep. 362, 52 Pac. 871, where an engineer was killed by the derailment of the engine, the court, without alluding to any distinction between cases where there is direct evidence, and cases where there is none, declared generally that evidence as to the general reputation of the engineer and his fireman for care and prudence was not admissible for the purpose of proving freedom from negligence on his part.

Evidence that a man killed at a railroad crossing was of prudent habit will not support a finding that he looked and listened at the time he was killed by a passing train. *Parsons v. Syracuse, B. & N. Y. R. Co.* (1912) 205 N. Y. 226, 98 N. E. 331.

Opinions of neighbors as to the general character of one killed at a railroad crossing, for carefulness, are not admissible upon the question of negligence on the particular occasion, although there were no witnesses of the accident. The court says, if a man who is customarily careful was always so, there would be no reason for admitting the evidence. *Chase v. Maine*

C. R. Co. (1885) 77 Me. 62, 52 Am. Rep. 744.

So, where there were no eyewitnesses, evidence that a servant killed while adjusting a set screw on a machine was an ordinarily cautious man when employed around various kinds of machinery was, in *Gibson v. Casein Mfg. Co.* (1913) 157 App. Div. 46, 141 N. Y. Supp. 887, held inadmissible.

So, where a street car passenger was injured while alighting, evidence that she was habitually cautious whenever there was any risk of personal injury was, in *Small v. San Antonio Traction Co.* (1912) — Tex. Civ. App. —, 148 S. W. 883, held inadmissible to show that she waited for the car to stop, and alighted with care. The reasons for the exclusion of such evidence are that it is only of slight value to establish any fact in issue, and it is calculated to lead the jury into collateral inquiry which will confuse and obscure real issues. The court states that evidence that either the plaintiff or the defendant was ordinarily of either careful or careless habits is generally inadmissible. The weight of authority is against the admission of such evidence on the question of contributory negligence. Exceptions to the rule have sometimes been made when no witness was present and the exact manner in which the accident happened is not shown.

It is stated in *Chabott v. Grand Trunk R. Co.* (1913) 77 N. H. 183, 88 Atl. 995, an action for the death of one killed on a railroad track, that while such evidence as that deceased had the habit of looking and listening before stepping upon or walking along a railroad track, for the purpose of discovering whether or not a train was in his vicinity, has been admitted to show whether a person did or did not do a particular act at the time in question, upon the ground that a person is more apt to do a thing in the manner in which he has been in the habit of doing it, such evidence is not admissible to show general character for carefulness, the court observing that such evidence, if admitted and given its full weight, would merely have established that, before deceased

began his use of the defendant's tracks for travel, he looked and listened for a train, and saw and heard none; there was no evidence where or when he entered upon the tracks, and it could not be found for how long or over what distance he had traveled since he had taken the precaution.

b. To prove negligence of decedent.

In an action for death of a railroad engineer by running into an open switch, where the defense is that he was guilty of negligence in running at too great speed, evidence that he was habitually reckless in running at an excessive speed, and running too fast over switches, is not admissible; at least, where it is based upon the witness's observation of only two or three occasions. *East Tennessee, V. & G. R. Co. v. Kane* (1893) 92 Ga. 187, 22 L.R.A. 315, 18 S. E. 18.

In *Southern R. Co. v. Rice* (1913) 115 Va. 235, 78 S. E. 592, an action for the death of an engineer by the derailment of his engine, the court refused to permit the railway company to introduce evidence tending to show that the plaintiff's decedent had the reputation among his fellow employees of a fast runner, and had, previous to the accident in which he was injured, and at the same point, disregarded the speed ordinance. The court observed that Professor Wigmore, in his work on Evidence, § 65, in discussing the admissibility of evidence of this character, says: "A few courts have shown an inclination to admit exceptionally the character of a person charged with a negligent act (contributory negligence, if a plaintiff), as throwing light on the probability of his having acted carelessly on the occasion in question, provided that the other evidence leaves the matter in great doubt, or that the evidence is purely circumstantial, or (as sometimes put) that there are no eyewitnesses testifying. . . . Such evidence is no doubt likely to be of some probative value in such cases, and under the above limitations is hardly contrary to the ordinary policy of avoiding confusion of issues. Id. § 64. As a matter of law, however, the doc-

trine is maintained in a few jurisdictions only, and has been expressly repudiated in many." The court goes on to say that "even in those jurisdictions where this exceptional rule prevails, as stated by Professor Wigmore, the rejected evidence would not have been admissible under the facts of this case, since the uncontradicted evidence shows that the engineer was running his engine at a speed of from 12 to 15 miles an hour, instead of 4 miles, the maximum speed permitted by the ordinance."

So, evidence that a servant killed in a mine explosion was, for a month preceding the explosion, habitually negligent in remaining in the mine while shots were being fired, was, in *Great Western Coal & Coke Co. v. McMahan* (1914) 48 Okla. 429, 143 Pac. 23, where apparently there were no eyewitnesses, held inadmissible to prove that deceased was guilty of contributory negligence, the court observing that evidence of habitual negligence as to past occurrences is inadmissible to prove contributory negligence on the particular occasion under inquiry.

In an action for damages for the killing of a boy at a railroad crossing, evidence is not admissible as to his habit of jumping on and off moving cars, if he was not doing so at the time of the accident. *Georgia Midland & G. R. Co. v. Evans* (1891) 87 Ga. 673, 13 S. E. 580.

In an action to recover on an accident insurance policy for the death of insured, who was killed by the cars, evidence is not admissible of his practice of jumping onto the train which killed him. *Mulville v. Pacific Mut. L. Ins. Co.* (1896) 19 Mont. 95, 47 Pac. 650, 1 Am. Neg. Rep. 108.

In an action for death of a person at a railroad crossing, who is alleged to have been contributorily negligent because intoxicated at the time, evidence is not admissible of his habit of intoxication. *Lane v. Missouri P. R. Co.* (1895) 182 Mo. 4, 83 S. W. 645, 1128.

In *Mansfield Coal & Coke Co. v. McEnery* (1879) 91 Pa. 185, 86 Am. Rep. 662, where one employed to drive a mule fell from a bridge of his em-

ployer, which was alleged to have been defective, and was killed, defendant offered evidence that he was a fast and careless driver. The court said the offer was vague in this, that it fixed no time during which it was proposed to inquire into the habits of deceased as to carefulness. For anything that appears in the offer, it might have been ten years prior to his death. Had it been confined to a short time before, it would have been competent.

Evidence is not admissible, in an action for death of a boy killed at a railroad crossing without eyewitnesses, of his habit in jumping on trains. The court says no authority is referred to, sanctioning the admission of such evidence, and it is not aware of any. If such evidence is admissible to prove negligence on the part of the intestate, then the same character of evidence must be admissible to prove negligence on the part of defendant, which has been condemned by the entire weight of judicial authority. *Peoria & P. U. R. Co. v. Clayberg* (1883) 107 Ill. 644.

Where, in an action for injuries to an engineer by a car, negligently left unfastened, backing against his engine, there was nothing contrary to evidence showing that he strictly obeyed the signal given him at the time of the accident, by stopping his engine within eight seconds after receiving it, resulting in the injuries complained of, the question whether he failed to obey some other signal at some other time was, in *Arizona & N. M. R. Co. v. Clark* (1913) 125 C. C. A. 305, 207 Fed. 817, affirmed in (1915) 235 U. S. 669, 59 L. ed. 415, L.R.A. 1915C, 834, 35 Sup. Ct. Rep. 210, without reference to this question, held immaterial; so, evidence of his general

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reputation for prudence or recklessness in the operation of his engine was held inadmissible.

Where a railroad company defended an action for the killing of a person walking along its track, by the fact that the death was caused by a habit of boarding moving trains, and offered evidence that such was his habit, the court says that the better rule is that such testimony tends to raise collateral issues, to beget uncertainty and false inferences from events which have no bearing upon the real issue. A man may be careful on one occasion and careless on another. *Louisville & N. R. Co. v. McClish* (1902) 53 C. C. A. 60, 115 Fed. 268. "It is not fair deduction to say that because the deceased sometimes boarded trains in motion, that therefore he was attempting to board a train when killed. Such testimony, tending to show contributory negligence, could be met with other testimony tending to show that such was not his habit, and the attention of the jury would be diverted from what happened on the occasion of the injury, to the consideration of the character and habits of the deceased at other times. We think the testimony should be confined to the conduct of the deceased in the particular instances under investigation, in the light of the facts competent to be directly or circumstantially proved."

In *Kroy v. Chicago, R. I. & P. R. Co.* (1871) 32 Iowa, 357, however, the fact that a trainman found dead on the track practised and helped to establish a custom at a particular station, where the accident occurred, of uncoupling cars from the engine while the train was moving rapidly, was held admissible as tending to prove his negligence.

H. P. F.

**PRUDENTIAL INSURANCE COMPANY OF AMERICA, Respt.,
v.
NATIONAL BANK OF COMMERCE IN NEW YORK, Appt.**

New York Court of Appeals — January 6, 1920.

(227 N. Y. 510, 125 N. E. 824.)

Bank — duty to examine returned vouchers — signatures of indorsers.

1. The rule that a depositor of a bank who receives from it a statement of his account, with the paid checks as vouchers, is bound to examine the account and vouchers and to report to the bank without unreasonable delay any errors which may be discovered, does not extend to an examination of the indorsements of the payees of checks to ascertain the genuineness of such indorsements.

[See note on this question beginning on page 159.]

Checks — indorsement by agent — effect on principal.

2. One sending checks to his agent for delivery to the payee is not bound in favor of the drawee by the agent's implied guaranty of former indorsements by indorsing them himself after forging the indorsement of the payee so as to prevent the maker from contesting their payment by the drawee.

Trial — question for jury — care in examining vouchers.

3. The jury must determine whether or not a drawer having the genuine signature of the payee of a check in his possession exercises due care in examining his returned vouchers, where the indorsements on checks sent to his agent for delivery were forged by the agent, and there are circumstances in evidence tending to charge the makers with notice of irregularities of the agent.

[See 3 R. C. L. 535.]

Bank — liability for payment of check on forged indorsement — negligence of maker.

4. A bank may escape liability for money paid out on forged indorsements of its customer's checks, by es-

tablishing that the customer had been guilty of negligence which contributed to such payment, and that it had been free from negligence.

[See 3 R. C. L. 542.]

Trial — question for jury — duty of maker to notify bank of agent's forgery.

5. The jury must determine whether or not the maker of a check who sent it to his agent for delivery was negligent in failing to notify the drawee that he had discovered that the agent had forged the signatures of drawees on checks formerly sent to him for delivery, so as to enable the bank to be on its guard with respect to other checks passing through the agent's hands.

[See 3 R. C. L. 538.]

Evidence — receipt of money in satisfaction of claim.

6. In an action by a maker to hold the bank liable for money paid on forged indorsements of checks by the maker's agent, evidence is admissible that the maker has received from the agent money applicable in satisfaction of the loss thereby caused.

APPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, First Department, affirming a judgment of a Trial Term, Part XVII., for New York County (Whitaker, J.), in favor of plaintiff in an action brought to hold defendant liable for money paid on forged indorsements of certain checks. *Reversed.*

The facts are stated in the opinion of the court.

Mr. Frank Parker Ufford, for appellant:

The indorsement of the checks by the plaintiff's agent, Eaton, was

equivalent to a guaranty of the genuineness of the prior indorsements, which the plaintiff is estopped to deny, and the plaintiff is precluded thereby,

as a matter of law, from recovering in this action.

London L. Ins. Co. v. Molsons Bank, 5 Ont. L. Rep. 407; Oriental Bank v. Gallo, 112 App. Div. 360, 98 N. Y. Supp. 561; Otis Elevator Co. v. First Nat. Bank, 163 Cal. 31, 41 L.R.A. (N.S.) 529, 124 Pac. 704.

Plaintiff was responsible for its negligence generally and for the misconduct of its agent in the conduct of its business with the defendant.

Morgan v. United States Mortg. & T. Co. 208 N. Y. 218, L.R.A.1915D, 741, 101 N. E. 871, Ann. Cas. 1914D, 462; Meyers v. Southwestern Nat. Bank, 193 Pa. 1, 74 Am. St. Rep. 672, 44 Atl. 280; Leather Mfrs. Bank v. Morgan, 117 U. S. 96, 29 L. ed. 811, 6 Sup. Ct. Rep. 657; North British & M. Ins. Co. v. Merchants' Nat. Bank, 161 App. Div. 341, 146 N. Y. Supp. 720; Dana v. National Bank, 132 Mass. 156; Critten v. Chemical Nat. Bank, 171 N. Y. 219, 57 L.R.A. 529, 63 N. E. 969.

The plaintiff's concealment of the forgeries after it discovered them precludes a recovery.

Leather Mfrs. Nat. Bank v. Morgan, 117 U. S. 96, 29 L. ed. 811, 6 Sup. Ct. Rep. 657; Morgan v. United States Mortg. & T. Co. 208 N. Y. 218, L.R.A. 1915D, 741, 101 N. E. 871, Ann. Cas. 1914D, 462; Rothschild v. Title Guarantee & T. Co. 204 N. Y. 458, 41 L.R.A. (N.S.) 740, 97 N. E. 879.

Mr. R. Dulany Whiting, for respondent:

The plaintiff is not responsible for nor to be bound by the act of Eaton, its agent, in the forgery of the payees' indorsements upon the checks in suit.

Welsh v. German American Bank, 73 N. Y. 424, 29 Am. Rep. 175; Corn Exch. Bank v. Nassau Bank, 91 N. Y. 74, 43 Am. Rep. 655; Henry v. Allen, 151 N. Y. 11, 36 L.R.A. 658, 45 N. E. 355.

There was no negligence on the part of the plaintiff adduced upon the trial which would have justified the court in submitting the case to the jury.

Prudential Ins. Co. v. National Bank, 177 App. Div. 438, 164 N. Y. Supp. 269; Metallurgical Securities Co. v. Mechanics & Metals Nat. Bank, 171 App. Div. 321, 157 N. Y. Supp. 321; Critten v. Chemical Nat. Bank, 171 N. Y. 219, 57 L.R.A. 529, 63 N. E. 969; Harlem Co-op. Bldg. & L. Asso. v. Mercantile T. Co. 1 Misc. 680, 31 N. Y. Supp. 790; American Surety Co. v. Pauly,

170 U. S. 133, 42 L. ed. 977, 18 Sup. Ct. Rep. 552; Carpenter v. Stilwell, 11 N. Y. 61; Hamlin v. Sears, 82 N. Y. 327.

All allegations of the complaint being admitted by defendant, including the forgery, every defense falls.

Geering v. Metropolitan Bank, 225 N. Y. 711, 122 N. E. 881, affirming 170 App. Div. 751, 156 N. Y. Supp. 582.

Chase, J., delivered the opinion of the court:

The plaintiff is an insurance corporation having its principal place of business in Newark, New Jersey. In 1912 and prior to that time, one Eaton was its manager and agent for the states of Maine and New Hampshire, and had his office at Portland, Maine. In the course of the plaintiff's business, and on March 18, 1912, it sent to Eaton at Portland a check drawn on the defendant bank to the order of Rena C. Phipps for \$1,983.26, dated on that day, which stated on the face of the check that it was "in full for all claims under policy No. 164,163" (being a policy in which said Phipps was the beneficiary), and on the 24th day of March, 1912, another check on said bank to the order of Ella M. Wade for \$1,633.70, on the face of which was a similar statement to the effect that it was in full of a specified policy. Said checks were sent to Eaton to be delivered by him to the payees thereof, but, instead of delivering the checks in accordance with his instructions, he in each case forged the name of the payee to the check, and deposited the same to his personal account with the Fidelity Trust Company of Portland, Maine, and converted the proceeds thereof to his own use. The Phipps check was paid by the defendant on March 20, 1912, and the Wade check on March 28, 1912. The plaintiff demanded of the defendant that it return the amount so paid on said checks to it, but the defendant has neglected and refused to do so. This action is brought to recover the amount of said checks, with interest. The trial court directed a verdict in favor of the plaintiff, and the judgment entered

thereon has been unanimously affirmed by the appellate division.

The Negotiable Instruments Law (Consol. Laws, chap. 38) provides: "Where a signature is forged or made without authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party, against whom it is sought to enforce such right, is precluded from setting up the forgery or want of authority." Section 42.

It is conceded that the name of the payee in each of said checks was forged thereon by Eaton, and that he also personally indorsed said checks, and that they were paid by the defendant as stated.

The defendant claims that the plaintiff is precluded from asserting in this action the forgery of the payee's name on said checks, respectively, because Eaton, the manager and agent of the plaintiff, as stated, by his indorsement of the checks, guaranteed the genuineness of the indorsement of the payees, and that the plaintiff is bound thereby.

The defendant's claim, in substance, is that Eaton by personally indorsing the checks in legal effect said to the trust company and all subsequent holders of the checks, and to the defendant, that the signatures of the payees on the checks and each of them was the genuine signature of such payee, and that he guaranteed the same, and also that, as Eaton was the representative of the plaintiff at Portland, his representation and guaranty were the representation and guaranty of the plaintiff company.

The defendant bases its claim in large part upon the reasoning and conclusion stated in *London L. Ins. Co. v. Molsons Bank*, 5 Ont. L. Rep. 407, which is a report of a case at a trial of the issues therein before a judge without a jury. The decision in that case, so far as it supports the contention of the defendant, is

not in accord with the decisions of this court.

This court in *Welsh v. German-American Bank*, 73 N. Y. 424, 29 Am. Rep. 175, says: "The fact that the plaintiff intrusted checks to his clerk, . . . who forged the indorsements, made him no more responsible than if he had intrusted them to an expressman . . . and the expressman had forged the name of the payee."

And in *Henry v. Allen*, 151 N. Y. 1, 36 L.R.A. 658, 45 N. E. 355, this court says: "When an agent abandons the object of his agency and acts for himself by committing a fraud for his own exclusive benefit, he ceases to act within the scope of his employment, and to that extent ceases to act as agent."

See *Shipman v. Bank of State*, 126 N. Y. 318, 12 L.R.A. 791, 22 Am. St. Rep. 821, 27 N. E. 371; *Frank v. Chemical Nat. Bank*, 84 N. Y. 209, 38 Am. Rep. 501. Eaton had no apparent authority as an agent of the plaintiff to acquire the checks for deposit in his personal account.

We are of the opinion that Eaton, in forging the names of the payees of the checks and his indorsement of the checks following such forged indorsements, was acting independently of his agency, and wholly in violation of the same, and that the plaintiff is not responsible therefor. The guaranty of the genuineness of the indorsement of the payees by reason of Eaton's subsequent indorsement of such checks was the personal guaranty of Eaton, and not that of the plaintiff.

It is also claimed by the defendant that the plaintiff is precluded in this action from setting up the forgeries by Eaton of the checks under consideration, because of its negligence in sending such checks to Eaton after knowledge of his previous forgeries and misapplication of its money, or of facts which required the plaintiff to have made further inquiry and investigation

Checks—
indorsement by
agent—effect on
principal.

into his acts before sending him such further checks.

It is also claimed by the defendant that the record discloses such conduct on the part of Eaton of which the plaintiff had knowledge, or ought to have had knowledge, before the checks under consideration were paid, as required it in good faith and fair dealing to have informed the defendant not to pay such checks, or at least which required the plaintiff to disclose to the defendant the possibility of irregularities or forgeries by Eaton in connection with checks sent by it to its Portland office, that the defendant might have had an opportunity for special investigation of the indorsement of such checks before paying them.

Eaton had held his position with the plaintiff at the time of the forgeries of the two checks under consideration for about four years. Such forgeries were among the last of a long series of fraudulent and criminal acts in connection with his position as a district manager and agent of the plaintiff. As long prior to 1912 as the early part of 1910 one of the plaintiff's policyholders made application to Eaton for a loan by the plaintiff. An application therefor was forwarded to the plaintiff and passed upon favorably, which resulted in a check for the amount of the loan payable to the policyholder being sent to Eaton. He forged the name of the payee on that check, and deposited it in his personal account in the Fidelity Trust Company. Some time thereafter the policyholder, who had not received the amount of the loan, wrote to the plaintiff, making complaint because of the delay. The plaintiff wrote to Eaton, sending him a copy of the letter of the policyholder. Eaton forwarded his personal check to the policyholder, and wrote the plaintiff that payment had been made. The check of the plaintiff bearing the forged indorsement of the payee's name must have been in its possession when the letter of complaint was received; and the plaintiff, with the genuine signature

of the policyholder on the application for the loan in its possession, could have known of the forgery by Eaton, if it had made any reasonable investigation of the check and documents in its possession. Similar forgeries by Eaton continued thereafter from time to time, and became more and more frequent until, during the six months prior to March, 1912, Eaton forged the payee's indorsement on substantially every check that was forwarded to him for delivery to policyholders. It appears that Eaton forged the signature of the payee on 100 or more of such checks.

Eaton collected the premiums on the plaintiff's policies in the states mentioned. A thirty-day period of grace was allowed the policyholders after the premiums were due. Eaton took advantage of this fact to use the premiums promptly paid for himself. He not only persistently used such premiums during such period of grace, but frequently, upon excuses to the plaintiff, continued to use such money even after the thirty-day period had expired. His use of such premiums was in effect called to the plaintiff's attention at different times by letters from policyholders, saying, in substance, that they had not received a receipt for the premiums paid by them. When Eaton's attention was called by the plaintiff to such complaints, he would reply with some feigned excuse for his failure to deliver such receipts.

The plaintiff inspected Eaton's office every six months, and the defendant claims that it knew, or should have known, at each of such times, that Eaton had misappropriated some of the premiums collected by him. In November, 1911, an examiner for the plaintiff was at Eaton's office. At that time he had misappropriated premiums collected to the extent of about \$4,000. After the inspector arrived, and while he remained at the office, Eaton from day to day deposited in an account kept by the plaintiff in its name in said Trust Company of Portland ex-

ceptionally large amounts to make good the premiums that had been collected by him and not reported as paid. By such deposits he reduced the amount of his misappropriations about one half. When the inspector left the office the misappropriations by Eaton of premiums collected by him and not settled and adjusted amounted to about \$2,000, knowledge of which the defendant claims that the plaintiff had, or should have had, at that time.

On February 27, 1912, the plaintiff sent to Eaton its check for \$425 to the order of John H. Cuzner and Eva May Cuzner in payment of the cash surrender value of a policy on Cuzner's life, in which Eva May Cuzner was named as beneficiary. It was sent to Eaton for delivery to the Cuzners, who resided at Belfast, Maine, about 125 miles distant from Portland. Eaton forged the indorsement of the Cuzners thereon, and deposited it to his personal account, and the same was without delay collected from the Union National Bank of Newark, on which it was drawn. It was paid by the Union National Bank on March 1. That bank returned plaintiff's checks, paid by it, daily. This particular check was returned to the plaintiff on March 2, but the receipt by the Cuzners for the payment was not returned until many days thereafter.

On March 19, the day after the Phipps check was drawn, but before it was paid, the plaintiff received a letter from Mr. Cuzner dated March 18, in which he called the plaintiff's attention to the surrender of his policy early in February for the purpose of obtaining the cash value thereof, and said: "I have heard nothing from you since then. . . . Please let me hear from you at earliest convenience."

The jury could have found that a casual comparison of the indorsements on the Cuzner check in its possession with the genuine signatures of the Cuzners, also in plaintiff's possession, would have shown that the indorsements were not the genuine signatures of the Cuzners.

Nothing was done by the plaintiff

relating thereto, so far as appears, until March 21, when the plaintiff wrote to Eaton, saying that it had received a letter from Cuzner. In the letter it says that it forwarded a check to him, Eaton, on February 27, for the amount of the surrender value of the Cuzner policy, and further says: "On referring to the check which has been paid and returned to us by the Union National Bank, Newark, New Jersey, we find that it bears the indorsement of the payees and also your indorsement. Kindly inform us if you cashed this check for Mr. Cuzner."

The plaintiff was, by the letter of Mr. Cuzner received by it March 19, informed that he was at Belfast, and had not received its check, although plaintiff knew that the check had in fact been promptly returned from Portland and paid upon the apparent indorsement of the payees, followed by Eaton's personal indorsement. No notice was given to the defendant of the facts about the Cuzner check, although the Phipps check was then outstanding and unpaid. Eaton replied that the check had been delivered to Spencer, a special agent, and returned by him because the insured wished two checks for different amounts. He then says: "I therefore deposited the check and forwarded my checks in place, and it seems the delay was occasioned by Mr. Spencer being out of town."

He adds that the matter is now satisfactorily adjusted. This was received by the plaintiff March 24. The check was then in the possession of the plaintiff, and it had been considered by it, as appears by plaintiff's letter to Eaton, and it necessarily knew that the statements in the letter of Eaton were false. On March 24 Cuzner wrote the plaintiff, acknowledging the receipt of a check from Eaton on March 23, nearly a month after plaintiff's check had been sent to Eaton for the Cuzners and it had been returned to the plaintiff apparently indorsed by the Cuzners. In such letter Cuzner said: "Inclosed find letter I received with

check from Mr. Eaton. I received no check from you, so could not have possibly indorsed it."

The letter of Eaton to Cuzner inclosed stated that the check of \$425 was handed to him therewith, and adds: "Will arrange for Mr. Spencer to return the check which is in his possession."

This statement in the letter by Eaton to Cuzner was not true, and the plaintiff then had in its possession indisputable evidence of its being untrue, because, as stated, the check with the forged indorsement was in its possession and had been for days. Notwithstanding this evidence in the possession of the plaintiff, it, on March 25, sent to Eaton the check payable to Ella M. Wade. He immediately forged the name of the payee thereto, and placed it in his customary way to his personal account, and it came back to the defendant bank for payment on March 28. The correspondence relating to the Cuzner check was called to the attention of the plaintiff's superintendent of eastern agencies on March 27, and he stated that Eaton would be at the office the next day. On the morning of the 28th Eaton arrived at the plaintiff's office and confessed to said superintendent of agencies that he had forged the indorsements on the Cuzner check. He was referred to the president of the plaintiff, where he made a similar confession, but so far as appears he was not questioned in any way whatever in reference to other forgeries. So far as appears, all other transactions were ignored. The conversation with said superintendent of agencies and with the president of the plaintiff occurred in the morning of March 28. The payment of the Wade check could have been stopped at the defendant bank at any time before 3 o'clock in the afternoon of that day. Nothing was done by the plaintiff. It does not appear that any examination whatever was made prior to March 28, 1912, with reference to the genuineness of the indorsement of the 100 or more checks that had been

forged by Eaton. Unless special request was made by the plaintiff to the defendant bank, the checks paid by it were not returned to the plaintiff by that bank until the first of the following month. The checks paid by it in February were returned to the plaintiff March 1, and those paid in March were returned April 1. So far as appears, no special requisition for the return of the checks that had been sent to the Portland office was asked by the plaintiff. On April 9, Eaton wrote the plaintiff, confessing that he had forged the indorsements on the Phipps and on the Wade checks. In the meantime the plaintiff had its examiners at the office of Eaton in Portland, and reports were made from time to time by them to it. Eaton had also been attempting to borrow of the plaintiff, on the value of the anticipated renewal premiums on policies written pursuant to the contract between Eaton and the plaintiff, to pay his indebtedness. The plaintiff paid the claims of Phipps and of Wade by giving them, and each of them, a new check for the amounts due them respectively. It is conceded that the plaintiff received some amount from Eaton to make good its losses by reason of his forgeries and misappropriations of its money, but the court refused to allow evidence of the amount of such receipts. On April 22, on the plaintiff's complaint or by its procurement, Eaton was arrested. After such arrest the plaintiff for the first time notified the defendant bank that the indorsements on the checks now in suit had been forged, and demanded the return of the money to it.

A depositor of a bank who receives from it a statement of his account, with its paid checks as vouchers, is bound to examine the account and vouchers and to report to the bank with-

out unreasonable delay any errors which may be discovered. Morgan v. United States Mortg. & T. Co. 208 N. Y. 218, L.R.A.1915D, 741, 101 N.

Bank—duty to examine returned vouchers—signatures of indorsers.

E. 871, Ann. Cas. 1914D, 462; *Leather Mfrs. Nat. Bank v. Morgan*, 117 U. S. 96, 29 L. ed. 811, 6 Sup. Ct. Rep. 657; *Dana v. National Bank*, 132 Mass. 156.

The general rule, stated in the *Morgan Case* in this court, has been generally held not to extend to an examination of the indorsements of the payees of checks to ascertain the genuineness of such indorsements.

In *Critten v. Chemical Nat. Bank*, 171 N. Y. 219, 227, 57 L.R.A. 529, 63 N. E. 972, this court says: "When a depositor has in his possession a record of the checks he has given, with dates, payees, and amounts, a comparison of the returned checks with that record will necessarily expose forgeries or alterations. It is true that it will give no information as to the genuine character of the indorsements, and because the depositor has no greater knowledge on that subject than the bank, it owes the bank no duty in regard thereto. *Welsh v. German-American Bank*, 73 N. Y. 424, 29 Am. Rep. 175; *Shipman v. Bank of State*, 126 N. Y. 318, 12 L.R.A. 791, 22 Am. St. Rep. 821, 27 N. E. 371. It is also true that verification of the returned checks would not prevent a loss by the bank in the case of the payment of a single forged check, and probably not in many cases enable the bank to obtain a restitution of its lost money. It would, however, prevent the successful commission of continuous frauds by exposing the first forgeries. . . . Considering that the only certain test of the genuineness of the paid check may be the record made by the depositor of the checks he has issued, it is not too much, in justice and fairness to the bank, to require of him, when he has such a record, to exercise reasonable care to verify the vouchers by that record. . . . If the depositor has, by his negligence in failing to detect forgeries in his checks, and give notice thereof, caused loss to his bank, either by enabling the forger to repeat his fraud or by depriving the bank of

an opportunity to obtain restitution, he should be responsible for the damage caused by his default, but beyond this his liability should not extend."

The reason given for not extending the rule to include an examination of indorsements for the purpose of determining whether they are genuine is that the depositor has no greater knowledge on the subject of the genuineness of the signature of the payee than the bank. In the case now before us the plaintiff had in its possession the genuine signature of each of the payees in the several checks, whose names were forged by Eaton. Whether the plaintiff exercised reasonable care in examining the checks returned as vouchers by the defendant

Trial-question for jury—care in examining vouchers.

is a question of fact. *Critten v. Chemical Nat. Bank*, supra; *Leather Mfrs. Nat. Bank v. Morgan*, 117 U. S. 96, 29 L. ed. 811, 6 Sup. Ct. Rep. 657; *Shipman v. Bank of State*, supra.

We think in this case that it was at least a question of fact upon the evidence before the court, a brief statement of which we have given, whether the plaintiff was negligent in failing to compare the indorsements on the checks which had been returned to it by the defendant and other banks, with the genuine signatures of the payees in its possession, prior to the payment of the Phipps and Wade checks, and whether such negligence, and the consequent failure of the plaintiff to notify the defendant of the information that it would have obtained by such examination, contributed to the payment of said checks by the defendant bank.

It is permitted to a bank to escape liability for repayment of amounts paid out on forged checks, by establishing that the depositor has been guilty of negligence which contributed to such payment, and that it has been free

Bank—liability for payment of check on forged indorsement—negligence of maker.

from any negligence. *Morgan v. United States Mortg. & T. Co. supra.*

We think it was also a question of fact whether the plaintiff, after it knew, or should have known, that Eaton had forged the indorsement

on the Cuzner check, was negligent in failing to notify the defendant of such facts, and the consequent danger of paying other checks sent by the plaintiff to its Portland office without special information and knowledge in regard to the genuineness of the payee's indorsements thereon.

We are also of the opinion that evidence to a reasonable extent should have been permitted to show that the amount recovered by the plaintiff from Eaton after the defendant bank had paid the Phipps and Wade checks included a repayment to it of the amounts, in whole or in part, charged to the plaintiff by reason of its payment of said

Trial-question for jury—duty of maker to notify bank of agent's forgery.

Evidence—receipt of money in satisfaction of claim.

checks, and also whether the defendant bank was prejudiced by the plaintiff withholding its knowledge of Eaton's crimes until after his arrest on April 22.

Because of the failure of the court to submit the questions of fact arising upon the trial to the jury for its determination thereof, and because of errors in the rulings of the court in excluding material evidence, the judgments should be reversed, and a new trial granted, with costs to abide the event.

Hiscock, Ch. J., and Collin, Hogan, McLaughlin, Crane, and Andrews, JJ., concur.

NOTE.

The various phases of the duty of a bank depositor to examine the account, pass book, or canceled checks are treated in the annotation following *MCCARTY v. FIRST NAT. BANK*, post, 158.

W. C. MCCARTY, Appt.,

v.

FIRST NATIONAL BANK OF BIRMINGHAM.

Alabama Supreme Court—May 18, 1920.

(204 Ala. 424, 85 So. 754.)

Bank — duty of depositor to ask for statement.

1. In the absence of an agreement, express or implied, between a bank and a depositor, the depositor is not bound to ask for a statement of his account at any time, or initiate an inquiry as to whether or not there are irregularities in his account.

[See note on this question beginning on page 159.]

— duty to call for statement when prepared.

2. A depositor in a bank who has left his pass book to be balanced is not bound to call for the statement within a reasonable time, so as to be chargeable with the payment by the bank of forged checks during the time the statement of account remains at the bank ready to be delivered to him.

Account stated — balancing of bank pass book.

3. A statement by a bank of a de-

positor's account, although prepared and ready for delivery, does not become a stated account until it is actually placed in the depositor's hands, and, with knowledge of its purport, he has acquiesced in its correctness.

[See 3 R. C. L. 582.]

Evidence — presumption — acquiescence in payment of forged checks.

4. There can be no presumption that a depositor has acquiesced in the payment of checks bearing a forged signature, while they remain in the

custody of the bank and he has no notice or knowledge of them.

— burden of proof — payment of bank account.

5. The bank has the burden of showing that a depositor's account was paid out by his order.

— payment of forged check — inference of deposits.

6. The payment by a bank of forged checks may support the inference that the amounts so paid out were on deposit to the credit of the one whose checks the forgeries purported to be.

APPEAL by plaintiff from a judgment of the Circuit Court for Jefferson County (Boyd, J.) in favor of defendant in an action brought to recover the balance alleged to be due on plaintiff's checking account in the defendant bank. *Reversed.*

Statement by Somerville, J.:

The plaintiff sues to recover \$7,290 alleged to be due him from the bank as a balance on his checking account carried with the bank. The bank paid out the amount in question upon a series of checks, drawn in the name of the plaintiff, and shown to have been forgeries. The bank denies any liability for this money, on the ground that the plaintiff was guilty of negligence in failing to discover and report other forgeries of his checks by the same party on the same account, during a period just preceding the forgeries in question, whereby the bank was induced to pay the latter series later, and prevented from having prompt recourse. The plaintiff, a business man of Birmingham, became a depositor of the defendant bank in January, 1915. This was his reserve account, as to which his deposits and withdrawals were in substantial sums; his regular daily checking account being kept elsewhere.

One Carney, whose social relations with plaintiff's son gave him access to plaintiff's office, began his series of forgeries against this account on March 5, 1917, drawing one or more checks each month down to September, when he drew September 1st a check for \$800, September 10th a check for \$500, and a check for a like amount on September 24th. The last check overdrew the account and led to the discovery of the forgery. The checks were all made payable to plaintiff's son, were ostensibly in-

dorsed by him, and were presented by and paid to Jim Carney. The checks thus drawn and paid prior to July, 1917, aggregated \$2,400, and this sum was repaid to plaintiff by the bank in October. Plaintiff's bank book was balanced and returned to him, with his canceled checks, on February 24, 1917. He kept the book from then until July 3, 1917, when it was sent to the bank to be balanced. It was balanced and ready for delivery to the plaintiff along with the canceled checks on July 5th following, and was placed near the bookkeeper's window, along with other similar books, to be delivered to plaintiff whenever he might call for it.

Testimony for the bank tended to show that plaintiff did not call for the book until September 4th following, on which date it was in fact delivered to his agent on call; but plaintiff placed it in his safe, without examining it or the canceled checks, and plaintiff had no actual knowledge of the forgeries until September 24th, the date of the last forged check, which overdrew his account. The bank also had no knowledge of the forgeries until then informed by the plaintiff.

Robinson, a bookkeeper at the bank, testified that when the pass books were written up, with statements and canceled checks in them, they were placed at the window in alphabetical order. Certain business houses and firms and a few individuals have their accounts balanced every thirty days, at certain times during the month. The balance of

the individual accounts were only balanced when parties left their books and called for them later. The bank had no rule to require the balancing of a book at any particular time, but there was a request to have them balanced often or every thirty days. The bank did not require that rule or that request to be enforced. It is a fact that accounts ran for months or even years, without being balanced up.

Barker, another bookkeeper, testified that the custom and practice at that bank is for the customers to come to the bank and get their pass books and written-up accounts. The bank had a form of post card that it used to mail out, saying that the statement had been there quite a while, prepared and balanced, and asking the customer to call and get it. These cards were not sent out to call attention to the books that had been lying there for an unreasonable length of time. These cards were used in cases where a great many checks had accumulated and were in the way, and the head bookkeeper would write them a card, just to get them out of the way. The bank did not have or employ any rule as to how long pass books should be held in the pass-book window after they were written up. That was entirely at the pleasure of the customer. There was no obligation on his part to come soon or late for the books, and the bank made no protest if the customer did not come promptly.

Kitchens, the head bookkeeper, testified that the custom at the bank as to pass books was for the customer to call for the pass book at the pass-book window. There was no rule requiring the books to be balanced. They left their books at any time they wanted to, and "some books ran a year or two before they were balanced, and I have had books to come in that had not been balanced for eight or ten years." A customer would call for his book at any time that he came, and it was the bank's duty to hold it until the customer or some authorized person

came for it. It is a fact that a great many pass books were left there for months at a time after being written up. The bank never raised any objection to those customers, and if anything came up that way they were willing to correct it at most any time. The bank did not take advantage of the book being left there for any considerable length of time.

The vice president of the bank testified that the bank had no rule requiring the writing up of any book at any particular time, nor did it seek to enforce any rule about asking for pass books after they were written up and ready for delivery by the bank. We could not compel customers to come and get their books. The bank had no system of delivery of bank books to customers by mail or messenger, especially in the city, but in some cases did send them to out-of-town customers.

The trial judge instructed the jury as follows: "While it is the duty of the bank to know the signatures of its customers and depositors, the depositors also owe the bank certain duties by way of protecting the bank, and one of these duties . . . is, when its pass books or checks are given him, to examine them, and if he finds any errors there, or forged checks, to notify the bank at a reasonable time."

To this he added: "And I charge you that he also owes the further duty, and that is, that if he leaves his bank book to be balanced and statement rendered, it is his duty to call for his bank book and statement and canceled checks within a reasonable time thereafter; . . . and if the plaintiff in this case failed to call there in a reasonable time, and without good excuse, to get the book, that would be a good defense to the extent that the defendant suffered damage after the expiration of a reasonable time."

Plaintiff had a judgment for \$550, apparently for the amount of the check of September 10th.

Messrs. Allen & Fisk for appellant.
Messrs. Cabaniss & Cabaniss, for
appellee:

When a bank depositor sends his pass book to the bank to be written up, it is his duty, upon its return, either in person or by duly authorized agent, to examine the account and vouchers returned within a reasonable time, and give to the bank timely notice of any objections thereto; and where the bank is injured by such omission of duty on the part of the depositor, such depositor is liable to the bank for the loss sustained by it from such neglect of duty.

First Nat. Bank v. Allen, 100 Ala. 476, 27 L.R.A. 426, 46 Am. St. Rep. 80, 14 So. 335; Leather Mfrs. Nat. Bank v. Morgan, 117 U. S. 96, 29 L. ed. 811, 6 Sup. Ct. Rep. 657; Dana v. National Bank, 132 Mass. 156; Weinstein v. National Bank, 69 Tex. 38, 5 Am. St. Rep. 23, 6 S. W. 171; Hardy v. Chesapeake Bank, 51 Md. 562, 34 Am. Rep. 325; Morgan v. United States Mortg. & T. Co. 208 N. Y. 218, L.R.A. 1915D, 741, 101 N. E. 871, Ann. Cas. 1914D, 462; National Dredging Co. v. Farmers Bank, 6 Penn. (Del.) 580, 16 L.R.A.(N.S.) 593, 130 Am. St. Rep. 158, 69 Atl. 607; Brown v. Lynchburg Nat. Bank, 109 Va. 530, 64 S. E. 950, 17 Ann. Cas. 119; National Bank v. Tacoma Mill Co. 104 C. C. A. 441, 182 Fed. 1; Scanlon-Gibson Lumber Co. v. Germania Bank, 90 Minn. 478, 97 N. W. 380; Janin v. London & S. F. Bank, 92 Cal. 14, 14 L.R.A. 320, 27 Am. St. Rep. 82, 27 Pac. 1100; Kenneth Invest. Co. v. National Bank, 103 Mo. App. 613, 77 S. W. 1002; Israel v. State Nat. Bank, 124 La. 885, 50 So. 783.

Where there is a series of checks forged and paid at different times, some before the depositor is chargeable with notice and some after he is thus charged, the bank is entitled to invoke the equitable doctrine of estoppel as to those paid after the depositor is chargeable with notice, if the failure of the depositor to call attention to the forgeries misleads the bank into paying the subsequent checks.

Hardy v. Chesapeake Bank, 51 Md. 562, 34 Am. Rep. 325; Kenneth Invest. Co. v. National Bank, 103 Mo. App. 613, 77 S. W. 1002; Critten v. Chemical Nat. Bank, 171 N. Y. 219, 57 L.R.A. 529, 68 N. E. 969; First Nat. Bank v. Allen, *supra*.

Somerville, J., delivered the opinion of the court:

In the case of First Nat. Bank v. Allen, 100 Ala. 476, 27 L.R.A. 426, 46 Am. St. Rep. 80, 14 So. 335, it was said: "The correct principles by which the respective liabilities of the bank and depositor are determined are these: The bank is bound to know the signature of its depositors, and the payment of a forged check, however skilfully executed, cannot be debited against the depositor. From the relations the depositors and the bank bear to each other, there is a duty also upon the depositor to examine his accounts and vouchers, and to make known to the bank any improper vouchers or charges returned, and where injury results to the bank from the failure of the depositor to do his duty in this respect, the law holds the depositor liable for such injury, the result of the depositor's omission."

This statement of the law is unquestionably based upon sound reason, and is supported by practically all the authorities, which are collected in 7 C. J. 687, § 415, and notes. The most recent case in point is that of *Hammerschlag Mfg. Co. v. Importers' & Traders' Nat. Bank*, — C. C. A. —, 262 Fed. 266, wherein the leading cases are reviewed at some length. A comprehensive and valuable discussion will be found also in *National Dredging Co. v. Farmers' Bank*, 6 Penn. (Del.) 580, 16 L.R.A.(N.S.) 593, 130 Am. St. Rep. 158, 69 Atl. 607, and many cases are collected in the note to *Brown v. Lynchburg Nat. Bank*, 17 Ann. Cas. 122.

In all of the reported cases, this duty of diligence was imposed upon the depositor by reason of the fact that his pass book and canceled checks had actually been returned to him, so that notice of the forgeries was placed in his possession, and knowledge of them thereby made immediately accessible. The rationale of the rule is that, having been furnished with the means of knowledge, it is the depositor's duty to

know; and, knowing, he is under the further duty of informing the bank of whatever he finds to be wrong.

It is the contention of the defendant bank in the instant case, and the jury were so instructed by the trial judge, that when a depositor has called for a statement of his account, by leaving his pass book with the bank, and it is balanced by the bank, and is ready for delivery to the depositor, along with the canceled checks charged by the bank against his account, it then becomes the duty of the depositor to call for the book and the checks within a reasonable time, failing in which he is in the same position as to imputed knowledge of forgeries, and as to negligence with respect to their disclosure to the bank, as he would be in if he had actually received the book and the checks from the bank. The contention of the bank is, in short, that when the book and checks were thus prepared, pursuant to the depositor's request, and placed at the bookkeeper's window, where the depositor could get them upon demand, this was in law a constructive delivery to the depositor, with the same consequences in every respect as would have accompanied an actual delivery.

No case in point, for or against this proposition, has been cited by counsel; and, in view of our own unrewarded search for authority, we are inclined to accept the statement, made by counsel for appellant, that this case is one of first impression, at least in American courts. It is clear that a depositor is not required to anticipate errors or irregularities in his account, and particularly the payment by the bank of forged checks; and hence the law imposes upon him no duty to initiate an inquiry with respect to such matters, and, in the absence of an agreement, express or implied, between him and the bank, he is not bound to ask for a statement of his account at any time, but may rely upon the bank's

observance of all of its obligations in the premises. There was no such agreement here, and the question is whether merely leaving his pass book to be balanced by the bank imposed upon plaintiff the duty of calling for the book, and the canceled checks customarily returned therewith, in a reasonable time, or, indeed, at any time, under the penalty of releasing the bank from liability for the repetition of errors already committed.

We are satisfied that the law, operating upon the mere relation of the parties, imposed no such duty upon the depositor, and,

—duty to call for statement when prepared.

so far as we are advised, no court has ever so held. A statement of account, though prepared and ready for delivery, does not become a stated account, with legal consequences, until it is actually placed in the hands of the

Account stated—balancing of bank pass book.

party to be charged, and, with knowledge of its purport, he has acquiesced in its correctness. *Comer v. Way*, 107 Ala. 300, 54 Am. St. Rep. Rep. 93, 19 So. 966; 1 C. J. 679, § 250. Manifestly the balanced pass book could not have become a stated account until after its reception by plaintiff on September 4, 1914. The theory upon which a depositor is required to examine his balanced pass book and his canceled checks within a reasonable time, and with due care, after they are returned to him by the bank, and to report errors and irregularities, if any there be, with reasonable promptness to the bank, is that, if he fails to do so, the bank may rightly presume that previous payments of checks were properly made upon the authority of the depositor, and that they have his sanction and approval, and that, so presuming, the bank may be naturally induced to make similar payment of similarly forged or unauthorized checks in the future. But where the pass book and checks have not been actually returned to the depositor, and remain in the custody of the

Bank—duty of depositor to ask for statement.

bank, the reason of the rule entirely fails, since there can be no presumption that the depositor has acquiesced in or approved an act or a course of dealing of which he has no actual notice or knowledge, and the bank cannot justly claim to have been misled by the conduct of the depositor.

The testimony of the officers of the bank shows that the bank had no system for the delivery of balanced pass books to its local customers, other than at the bookkeeper's window, upon the customer's call in person or by agent. But it shows, also, that the bank had no rule, and never sought to enforce any, that its customers should call for their balanced pass books and canceled checks at any time, except as their convenience or fancy might suggest. So, very clearly, the plaintiff was under no contractual duty, express or implied, or prescribed by any regular and well-known custom, to call for his book and vouchers at any particular time, or within any period of time that might be designated as reasonable, even if it were conceded that his breach of such an agreement could be visited with the consequences here insisted upon by the bank.

No doubt the bank discharged its duty to the plaintiff by balancing his pass book, and having it and the vouchers ready for delivery at the window when called for. So far as the plaintiff's right to have a statement of account is concerned, that was in accordance with the prevailing custom, and if he failed to call for his book he could not complain of the failure of the bank to render him a statement. But that is not the question with which we have to do; and if the bank, for its own protection, desired to charge him with knowledge of its dealings with his account, and to have his assurance, express or implied, that those deal-

ings were authorized, and might be safely repeated in the future, it could and should have rendered the statement by actual delivery of the book and vouchers to the plaintiff.

We are not insensible to the reasons so ably and persuasively presented by counsel for the bank in support of the contrary view; but, upon a very careful consideration of the question, we hold to our conclusion, as above set forth, as the sounder and better rule. It results that the trial court erred in the instruction given to the jury in this regard.

It is suggested by counsel for the bank that the evidence fails to show that the bank was indebted to the plaintiff in any amount at the time this suit was brought; and that, not being entitled to recover in any event, the errors assigned were harmless. This suggestion is without merit, since it appears that the plaintiff's balance on February 24, 1917, was \$6,898.20, and that he afterwards deposited sums amounting to \$1,500. If all of this was repaid to plaintiff, or paid out on his order, which does not appear, the burden was, of course, upon the bank to show it. Moreover, the payment of the forged checks by the bank may of itself support the inference that the amounts so paid out were on deposit to the credit of the plaintiff.

—burden of proof—payment of bank account.

—payment of forged check—
inference of deposits.

It is unnecessary to consider other questions that have been argued, since they probably will not be presented again. For the error pointed out, the judgment will be reversed, and the cause remanded for another trial.

Anderson, Ch. J., and McClellan and Thomas, JJ., concur.

Petition for rehearing denied June 30, 1920.

ANNOTATION.

Examination of account, pass book, or canceled checks by bank depositor.

- I. Duty to make examination, 159.
- II. Duty to procure pass book for examination, 162.
- III. Delegation of duty to examine, 162.
- IV. Sufficiency of examination:
 - a. In general, 164.
 - b. Examination of indorsement, 166.
- V. Effect of failure to examine, 168.

I. Duty to make examination.

As a general rule it is the duty of a depositor on receiving from the bank a balanced pass book, statement of account, or canceled checks, to examine the same with reasonable promptness, and report to the bank any error, forgery, or the like which he may discover.

United States.—*Leather Mfrs. Nat. Bank v. Morgan* (1886) 117 U. S. 96; 29 L. ed. 811, 6 Sup. Ct. Rep. 657; *New York Produce Exch. Bank v. Houston* (1909) 95 C. C. A. 251, 169 Fed. 785; *National Bank v. Tacoma Mill Co.* (1910) 104 C. C. A. 441, 182 Fed. 1; *Hammerschlag Mfg. Co. v. Importers' & Traders' Nat. Bank* (1919) — C. C. A. —, 262 Fed. 262; *First Nat. Bank v. Farrell* (1921) 16 A.L.R. —, — C. C. A. —, 272 Fed. 371, certiorari denied in U. S. Adv. Ops. 1921–22, p. 8. See also *Armour & Co. v. Greene County State Bank* (1901) 50 C. C. A. 399, 112 Fed. 631.

Alabama.—*First Nat. Bank v. Allen* (1893) 100 Ala. 476, 27 L.R.A. 426, 46 Am. St. Rep. 80, 14 So. 335.

Arkansas.—See *State v. Abramson* (1893) 57 Ark. 142, 20 S. W. 1084; *Citizens Bank v. Hinkle* (1916) 126 Ark. 266, 189 S. W. 679.

California.—*Janin v. London & S. F. Bank* (1891) 92 Cal. 14, 14 L.R.A. 320, 27 Am. St. Rep. 82, 27 Pac. 1100.

Delaware.—*National Dredging Co. v. Farmers' Bank* (1908) 6 Penn. 580, 16 L.R.A.(N.S.) 593, 130 Am. St. Rep. 158, 69 Atl. 609.

Iowa.—*Cole v. Charles City Nat. Bank* (1901) 114 Iowa, 635, 87 N. W. 671.

Louisiana.—*Israel v. State Nat. Bank* (1909) 124 La. 885, 50 So. 783.

Maryland.—*Hardy v. Chesapeake Bank* (1879) 51 Md. 562, 34 Am. Rep. 325.

Massachusetts.—*Dana v. National Bank* (1882) 132 Mass. 156; *Jordan Marsh Co. v. National Shawmut Bank*, 201 Mass. 397, 22 L.R.A.(N.S.) 250, 87 N. E. 740.

Minnesota.—*Scanlon-Gipson Lumber Co. v. Germania Bank* (1903) 90 Minn. 478, 97 N. W. 380.

Missouri.—*Wind v. Fifth Nat. Bank* (1890) 39 Mo. App. 72; *Kenneth Invest. Co. v. National Bank* (1903) 103 Mo. App. 613, 77 S. W. 1002.

New Jersey.—*Harter v. Mechanics' Nat. Bank* (1899) 63 N. J. L. 578, 76 Am. St. Rep. 224, 44 Atl. 715.

New York.—*Critten v. Chemical Nat. Bank* (1902) 171 N. Y. 219, 57 L.R.A. 529, 63 N. E. 969; *Clark v. National Shoe & Leather Bank* (1898) 32 App. Div. 316, 52 N. Y. Supp. 1064, affirmed in (1900) 164 N. Y. 498, 58 N. E. 659; *Morgan v. United States Mortg. & T. Co.* (1913) 208 N. Y. 218, L.R.A.1915D, 741, 101 N. E. 871, Ann. Cas. 1914D, 462, affirming (1908) 125 App. Div. 22, 109 N. Y. Supp. 274; *PRUDENTIAL INS. CO. v. NATIONAL BANK* (reported herewith) ante, 146; *Wachsman v. Columbia Bank* (1894) 8 Misc. 280, 28 N. Y. Supp. 711; *Harlem Co-op. Bldg. & L. Asso. v. Mercantile Trust Co.* (1894) 10 Misc. 680, 31 N. Y. Supp. 790. See also *Frank v. Chemical Nat. Bank* (1881) 84 N. Y. 209, 38 Am. Rep. 501. Compare *Weisser v. Denison* (1854) 10 N. Y. 68, 61 Am. Dec. 731.

Pennsylvania.—*Myers v. Southwestern Nat. Bank* (1899) 193 Pa. 1, 74 Am. St. Rep. 672, 44 Atl. 280.

Texas.—*Weinstein v. National Bank* (1887) 69 Tex. 38, 5 Am. St. Rep. 23, 6 S. W. 171; *Fifth Nat. Bank v. Iron City Nat. Bank* (1899) 92 Tex. 436, 49 S. W. 368.

Virginia.—*First Nat. Bank v. Richmond Electric Co.* (1907) 106 Va. 347, 7 L.R.A.(N.S.) 744, 117 Am. St. Rep. 1014, 56 S. E. 152; *Brown v.*

Lynchburg Nat. Bank (1909) 109 Va. 530, 64 S. E. 950, 17 Ann. Cas. 119.

In *Leather Mfrs. Nat. Bank v. Morgan* (U. S.) supra, the court said: "It is within common knowledge that the object of a pass book is to inform a depositor from time to time of the condition of his account as it appears upon the books of the bank. It not only enables him to discover errors to his prejudice, but supplies evidence in his favor in the event of litigation or dispute with the bank. In this way it operates to protect him against the carelessness or fraud of the bank. The sending of his pass book to be written up and returned with the vouchers is, therefore, in effect, a demand to know what the bank claims to be the state of his account. And the return of the book, with the vouchers, is the answer to that demand, and in effect imports a request by the bank that the depositor will, in proper time, examine the account so rendered, and either sanction or repudiate it. . . . The depositor cannot, therefore, without injustice to the bank, omit all examination of his account when thus rendered at his request. His failure to make it or to have it made, within a reasonable time after opportunity given for that purpose, is inconsistent with the object for which he obtains and uses a pass book."

In *National Bank v. Tacoma Mill Co.* (1910) 104 C. C. A. 441, 182 Fed. 1, it was said: "It has long been the usage of banks to give out pass books to their customers, in which the latter are credited with their proper deposits. These pass books are sent in as occasion may seem to demand, often periodically and by request of the bank, as well as upon the volition of the depositors, and are posted, or statements returned with them, along with the paid checks or vouchers, showing the condition of the depositor's account upon the books of the bank. It matters little whether the pass books are sent in voluntarily or by request of the bank to be posted—the purpose and effect of the statements rendered by the bank in connection therewith are the same. They not only afford a means whereby the

depositor may discover errors to his prejudice, but furnish evidence in his favor in the event of dispute or litigation with the bank. They serve to protect him against the carelessness and fraud of the bank. The right thus accorded by banks to frequent accountings in this manner, so that the depositor may keep informed as to the condition of his account as it appears upon the books of his depository, is one of such manifest advantage that it entails a correlative duty upon the depositor. It requires of him an examination of the account rendered, and, if errors or omissions become apparent, it is then incumbent upon him to bring them to the attention of the bank, by returning his pass book for correction, or by other convenient method."

The circumstance that the depositor's account is overdrawn when his pass book is returned to him specially imposes on him the duty of examining his account immediately. *Farry v. Farmers' & M. Bank* (1904) — N. J. Eq. —, 58 Atl. 305.

The examination must be made within a reasonable time. *Janin v. London & S. F. Bank* (Cal.) supra.

Ten days is a reasonable time in which to make an examination, where the depositor resides in the town in which the bank is situated. *Kenneth Invest. Co. v. National Bank* (1903) 103 Mo. App. 613, 77 S. W. 1002; *McKeen v. Boatmen's Bank* (1898) 74 Mo. App. 281. In the case last cited it appeared that the receipt given by the depositor to the bank contained a clause that all claims of reclamation should be made in ten days.

The Negotiable Instruments Law provides that no bank shall be liable to a depositor for the payment by it of a forged or raised check, unless, within one year after the return to the depositor of the voucher of such payment, such depositor shall notify the bank that the check so paid was forged or raised. Under this statute a corporate depositor which had failed to notify the bank of a forgery until after the expiration of a year from the time the vouchers were returned to it was held to be precluded from recovering of the bank.

Shattuck v. Guardian Trust Co. (1912) 204 N. Y. 200, 97 N. E. 517. The checks involved in that case were to be signed by the president and countersigned by the treasurer. The president's name was signed to the checks in question, but the treasurer's name was forged. The pass book and vouchers were receipted for by the president, and the pass book was afterward given to the treasurer, showing the balance, but the vouchers were not received by the treasurer. Time was counted from the date of the receipt of the pass book by the treasurer, but both that date and the date of the receipt by the president were more than a year before the notification of the bank.

In Illinois, it has been held that the balancing of a pass book and the return of checks are for the protection of the depositor, and not for the bank, and that there is no duty cast on the depositor to examine them. **Manufacturers' Nat. Bank v. Barnes** (1872) 65 Ill. 69, 16 Am. Rep. 576. The court in that case based its opinion on **Weisser v. Denison** (1854) 10 N. Y. 68, 61 Am. Dec. 731, a case which has been disapproved by later decisions in New York. The decision in the Barnes Case, however, has been followed in more recent holdings. **Merchants' Nat. Bank v. Nichols & S. Co.** (1906) 223 Ill. 41, 7 L.R.A. (N.S.) 752, 79 N. E. 38; **Rettig v. Southern Illinois Nat. Bank** (1909) 147 Ill. App. 193.

In Ohio, the conclusion has been reached that it is the duty of a depositor to examine his return vouchers for the discovery of alterations therein, but that no duty is imposed on him to examine them to determine whether his signature thereto has been forged. **Cincinnati Nat. Bank v. Creasy** (1887) 10 Ohio Dec. Reprint, 121, 18 Ohio L. J. 410, wherein the court explained this difference as follows: "The signature must be that of the depositor, while the body of the check may be filled up by anyone; and it is well known that checks are frequently drawn up by a clerk or bookkeeper and subsequently signed by the employer. The signature is the invariable guide to the paying
15 A.L.R.—11.

teller; but changes in the body of the check, alteration of figures, or variances in handwriting, do not necessarily imply a criminal alteration. When we come then to consider the duty of the depositor after his book has been balanced, and the paid checks returned to him, we find that he has the complete right to assume that the bank has only paid the checks signed by himself. A payment made upon a forgery of his own signature is no payment, and cannot affect his rights. . . . Why, then, should he be on the lookout for forgeries of his signature? On the other hand, he knows the amount for which each check was drawn, and if an alteration be so skilfully made as to defy detection by the most careful and experienced bank officer, it is within the drawer's power to discover it at once, and, what is of still more importance to him, the circumstances may be such as to cast upon him the loss occasioned by the alteration, and to make it to his interest to discover the change at the earliest moment, so as, if possible, to recover the amount from the forger. In the case of an alteration he has such interest in the discovery as to put upon him the duty of examining the checks to protect himself as well as the bank; but in the case of a forged signature such an examination would be made for the sole benefit of the bank, and it is difficult to discover any reason why such duty should be cast upon the depositor."

In England and Canada, it seems to have been held that in the absence of contract there is no duty imposed on a depositor to examine his pass book and vouchers. **Kepitigalla Rubber Estates v. National Bank** [1909] 2 K. B. (Eng.) 1010, 78 L. J. K. B. N. S. 964, 100 L. T. N. S. 516, 25 Times L. R. 402, 53 Sol. Jo. 377, 14 Com. Cas. 116, 16 Manson, 234; **Walker v. Manchester & L. Dist. Bkg. Co.** (1913) 108 L. T. N. S. (Eng.) 728, 29 Times L. R. 492, 57 Sol. Jo. 478; **Rex v. Bank of Montreal** (1906) 11 Ont. L. Rep. 595, affirmed in (1906) 38 Can. S. C. 258.

Compare Bank of England v. Vagliano [1891] A. C. (Eng.) 107, 60 L. J.

Q. B. N. S. 145, 64 L. T. N. S. 353, 39 Week. Rep. 657, 55 J. P. 676, wherein, in passing on the rights between bank and depositor with respect to the payment of forty-three forged bills of exchange at various times, one of the justices referred, in passing, to the fact that the payments were entered in the depositor's pass book, "and, so far as the banker could know or conjecture, brought to his knowledge upon every occasion in which payment was made and the bills returned."

II. Duty to procure pass book for examination.

In the reported case (*MCCARTY v. FIRST NAT. BANK*, ante, 153), which is said by the court to be of first impression, it is held that while a depositor is bound to examine promptly his pass book and canceled checks when they are returned to him, and report any errors found therein, he is not bound, in the absence of a rule or custom, to call at the bank to procure the pass book after it has been balanced, and is not charged with notice of what is shown thereby until he actually receives it. That decision finds some support in the case of *Citizens' Bank & T. Co. v. Hinkle* (1916) 126 Ark. 266, 189 S. W. 679, wherein it was held that a bank president is not bound to make any special examination of his own account to discover errors therein.

III. Delegation of duty to examine.

It has been held that a depositor is not bound to make a personal examination of his pass book and vouchers, but that he may fulfil his duty to the bank by intrusting the examination to a competent and trustworthy employee. *Leather Mfrs. Nat. Bank v. Morgan* (1886) 117 U. S. 96, 29 L. ed. 811, 6 Sup. Ct. Rep. 657; *National Bank v. Tacoma Mill Co.* 182 Fed. 1; *Merchants' Nat. Bank v. Nichols & S. Co.* (1906) 223 Ill. 41, 7 L.R.A.(N.S.) 752, 79 N. E. 38; *Kenneth Invest. Co. v. First Nat. Bank* (1903) 103 Mo. App. 613, 77 S. W. 1002; *Clark v. National Shoe & Leather Bank* (1898) 32 App. Div. 316, 52 N. Y. Supp. 1064, affirmed in (1900) 164 N. Y. 498, 58 N. E. 659. And this

is the rule, even though the examination fails to disclose irregularities which might have been discovered had it been made by the depositor personally. *Shipman v. Bank of State* (1891) 126 N. Y. 318, 12 L.R.A. 791, 22 Am. St. Rep. 821, 27 N. E. 371.

However, when the agent to whom the duty of examination is intrusted is a dishonest employee, who, by forgery, has obtained from the bank funds of his employer, and who does not disclose to his employer the circumstances which would naturally have been disclosed by a proper examination, the question whether the depositor has fulfilled his duty to the bank has given rise to a diversity of opinion. In some jurisdictions it has been held that under such circumstances the depositor has not discharged his duty to the bank. But this conclusion is reached by reason of the fact that there is a duty on the depositor, not only of examining the vouchers, but of notifying the bank of any forgeries therein within a reasonable time after obtaining knowledge thereof; and it is held that the knowledge of the dishonest agent as to his forgeries is to be imputed to the principal, and that, therefore, the principal, failing to disclose such forgeries, has not discharged his duty to the bank. *First Nat. Bank v. Allen* (1893) 100 Ala. 476, 27 L.R.A. 426, 46 Am. St. Rep. 80, 14 So. 335. See also *First Nat. Bank v. Richmond Electric Co.* (1907) 106 Va. 347, 7 L.R.A.(N.S.) 744, 117 Am. St. Rep. 1014, 56 S. E. 152. In *First Nat. Bank v. Allen* (Ala.) supra, the court said: "It is clear that in forging the checks Tomlin did not act within the scope of his authority, but upon what principle can it be said that, in the matter of examining the pass book and vouchers, he was not acting within the scope of his authority? He was appointed and directed by the plaintiff to do this very thing. If Tomlin had not been the forger and in no manner interested in concealing the forgeries, and, in making the examination of the pass books and vouchers, had discovered that numbers of the checks were forgeries committed by other persons, would not such knowl-

edge on his part be chargeable to the principal? The law is that the principal is chargeable with the knowledge of such facts as the agent acquired acting within the scope of his business. Is the rule to be changed because of the dishonesty of the agent? His dishonesty cannot change his relationship to his principal to the detriment of third parties. If the duty would have been within the scope of an honest clerk, it is none the less within the scope of duty of a dishonest clerk. We have held that it was the duty of the depositor, by himself or an authorized agent, to examine the account and vouchers or checks. If the agent employed by him to perform this duty is culpably negligent, is not the principal to be held liable for such want of due care on the part of the agent? Or, if the agent, in making such examination, detects palpable forgeries, is not the principal chargeable with the knowledge of his agent? It can make no difference that the agent himself was the forger and did not act within the scope of his authority in perpetrating the forgery. He was acting within the scope of his employment in the examination of the vouchers, and it then became his duty to his employer to make known the forgery—as much so as if the forgeries had been perpetrated by some other person,—which were discovered by him in the examination made. Our opinion is that under the circumstances the plaintiff was chargeable with the facts within the knowledge of his agent and clerk at the time of the examination of the pass book and vouchers, and which should have been communicated to the principal or the bank. Certainly the bank should not suffer because of the fact that plaintiff's dishonest clerk prevented the plaintiff from doing his duty to the bank."

In other jurisdictions it has been held that, although knowledge of the forgeries by a dishonest agent is not to be imputed to the principal; yet the principal is chargeable with such information as an honest employee, unaware of the fraud, would have acquired from the pass book and vouchers, and that the depositor's entire duty to the bank is not dis-

charged unless such imputed knowledge is rendered to the bank within a reasonable time after the return to the depositor of the pass book and vouchers. *First Nat. Bank v. Farrell* (1921) 16 A.L.R. —, — C. C. A. —, 272 Fed. 371, certiorari denied in U. S. Adv. Ops. 1921-22, p. 8; *National Dredging Co. v. Farmers' Bank* (1908) 6 Penn. (Del.) 580, 16 L.R.A.(N.S.) 593, 130 Am. St. Rep. 158, 69 Atl. 607; *Hardy v. Chesapeake Bank* (1879) 51 Md. 562, 84 Am. Rep. 325; *Dana v. National Bank* (1882) 132 Mass. 156; *Critten v. Chemical Nat. Bank* (1902) 171 N. Y. 219, 57 L.R.A. 529, 63 N. E. 969; *Myers v. Southwestern Nat. Bank* (1899) 193 Pa. 1, 74 Am. St. Rep. 672, 44 Atl. 280. Compare *Wachman v. Columbia Bank* (1894) 8 Misc. 280, 28 N. Y. Supp. 711; *August v. Fourth Nat. Bank* (1888) 48 Hun, 620, 1 N. Y. Supp. 139.

In the Federal courts it is held that where the agent designated to examine the pass book and vouchers is the forger, and conceals the true state of facts, the depositor is in no better position than if he had not designated anyone to make an examination, but that the question to be determined is whether the depositor exercised due diligence in fulfilling his duty of examination. *Leather Mfrs. Nat. Bank v. Morgan* (1886) 117 U. S. 96, 29 L. ed. 811, 6 Sup. Ct. Rep. 657. See also *Hennessy Bros. & E. Co. v. Memphis Nat. Bank* (1903) 64 C. C. A. 125, 129 Fed. 557. In *Leather Mfrs. Nat. Bank v. Morgan* (U. S.) *supra*, the court said: "But when, as in this case, the agent commits the forgeries which misled the bank and injured the depositor, and, therefore, has an interest in concealing the facts, the principal occupies no better position than he would have done had no one been designated by him to make the required examination—without, at least, showing that he exercised reasonable diligence in supervising the conduct of the agent while the latter was discharging the trust committed to him. In the absence of such supervision, the mere designation of an agent to discharge a duty resting primarily upon the principal cannot be deemed the equivalent of performance by the

latter. While no rule can be laid down that will cover every transaction between a bank and its depositor, it is sufficient to say that the latter's duty is discharged when he exercises such diligence as is required by the circumstances of the particular case, including the relations of the parties, and the established or known usages of banking business."

In Missouri, it has been held that if the depositor uses ordinary care in the selection of the employee to whom the duty of examination is intrusted, he fulfills his duty to the bank. *Kenneth Invest. Co. v. National Bank* (1903) 103 Mo. App. 613, 77 S. W. 1002.

IV. Sufficiency of examination.

a. In general.

Reasonable care in making the examination was the test applied in *Critten v. Chemical Nat. Bank* (1902) 171 N. Y. 219, 57 L.R.A. 529, 63 N. E. 969, wherein after stating that when a depositor has in his possession a record of checks he has given, with dates, payees, and amounts, a comparison of the record with the returned checks will necessarily expose forgeries or alterations, the court continued: "Considering that the only certain test of the genuineness of the paid check may be the record made by the depositor of the checks he has issued, it is not too much, in justice and fairness to the bank, to require of him, when he has such a record, to exercise reasonable care to verify the vouchers by that record."

It was stated in *Leather Mfrs. Nat. Bank v. Morgan* (1886) 117 U. S. 96, 29 L. ed. 811, 6 Sup. Ct. Rep. 657, that the depositor's duty to the bank is discharged when he exercises such diligence as is required by the circumstances of the particular case, including the relations of the parties and the established or known usages of banking business.

In *Brown v. Lynchburg Nat. Bank* (1909) 109 Va. 530, 64 S. E. 950, 17 Ann. Cas. 119, it appeared that where the account of a depositor was fraudulently charged by employees of the bank with amounts not withdrawn by him, and that a monthly statement was

rendered to the depositor, consisting of his canceled checks for the past month, a machine-made slip, supposed to contain a list of these checks, a statement showing the totals of debits and credits, and the balance to the credit of the depositor. The depositor did not keep a pass book, but relied solely on these statements rendered by the bank. His examination of these statements consisted of seeing that his checks as drawn were returned to him as vouchers, that his signature to the checks was genuine, and that the checks returned corresponded with the stubs from which they were taken, and of verifying the total debits and credits. He did not check the individual checks with the items on the machine-made list of checks, but assumed that this list corresponded with the checks returned with it, and correctly represented his withdrawals from the bank. He did not examine it to see if it contained any item of charge against his account not represented by a check. The defalcation could have been discovered by a comparison between the machine-made slip and the checks which he had drawn. Under this state of facts the cause of action was held to be one for the jury, the failure of the depositor to take the simple procedure necessary to discover the error being treated as not negligence barring a recovery from the bank as a matter of law.

It was shown in *Cole v. Charles City Nat. Bank* (1901) 114 Iowa, 632, 87 N. W. 671, that a depositor executed and delivered his note to the bank and was given credit therefor in his pass book. He saw the entry made, but did not observe that it was not in the proper place in the book, but was on a page where the account had been fully settled and balanced. Subsequently a debtor of his deposited in the bank a sum equal to that for which he had previously given his note, and this amount was credited in its proper place on the pass book. He, however, did not know of this payment by his debtor, and was told by the president of the bank that no such payment had been made. In his settlement with the bank he received

credit for only one of these sums. Under these facts it was held to be for the jury to say what knowledge an examination of the pass book and vouchers would have or should have conveyed to the depositor.

The depositor involved in *Clark v. National Shoe & Leather Bank* (1900) 164 N. Y. 498, 58 N. E. 659, caused his pass book and returned checks, and the bank slip of checks paid, to be examined soon after their return from the bank, by an expert, who reported the account to be correct. It was held, however, that a finding of fact had been made that the depositor was not negligent, and therefore this question was not before the appellate court. The forgery involved in that case consisted in raising the amounts for which checks had been drawn.

It has been held that a depositor who, on each occasion after the return of his pass book and checks, examined the account as rendered, with the assistance of a clerk who had been guilty of forgery, and who in the examination of the account covered up the forgery, had notice of such forgery, on the theory that notice to the agent is notice to the principal, and therefore that he was negligent in not discovering the forgery, so that he could not recover from the bank the amount paid out on the forged checks. *First Nat. Bank v. Allen* (1893) 100 Ala. 476, 27 L.R.A. 426, 46 Am. St. Rep. 80, 14 So. 335.

A depositor who personally signs all his checks, which are written either by himself or by his clerk, is bound to discover, on the return of the pass book and canceled checks to him, forged checks which are written in a strange handwriting, although the signatures are so well imitated as to defy detection. *Israel v. State Nat. Bank* (1909) 124 La. 885, 50 So. 783.

The exact examination which was made by the depositor does not clearly appear from the report of *Frank v. Chemical Nat. Bank* (1881) 84 N. Y. 209, 38 Am. Rep. 501. It was stated that the depositor, on each occasion after the pass book had been written up and the vouchers returned, made an examination of the account by comparing the checks returned to him

by his confidential clerk with the memorandum of checks in the margin of the check book, and the balance in the pass book with the balance appearing in the check book, and on each occasion they were found to correspond. He then compared the checks with the entries in the pass book by having the confidential clerk read the entries while he had the checks, and, no discrepancy appearing, the account was deemed to be correct and was not further examined. It appeared that the confidential clerk, who was guilty of forgery, by abstraction of the forged vouchers and by false balances and readings, deceived the depositor and prevented him from ascertaining by means of the examination as conducted, the true state of the account and the facts of the forgery. This was held to relieve the depositor from any liability for the loss.

In *Stumpp v. Farmers' Loan & T. Co.* (1919) 109 Misc. 24, 178 N. Y. Supp. 811, affirmed without opinion in (1921) — App. Div. —, 188 N. Y. Supp. 952, the court, in holding that a depositor was not negligent in failing to detect a series of forgeries by his clerk, said: "With respect to the point that the plaintiffs failed to exercise ordinary care in checking up the monthly statements delivered to them by the Bank of New York, it suffices to say that, aside from the doubtful legal proposition that the plaintiffs owed the defendant the duty of examining these statements, the proofs indicate that the plaintiffs were not guilty of any negligence in that respect. The evidence is that the plaintiffs regularly examined the monthly statements rendered to them by the Bank of New York, and shows that the reason why plaintiffs were deceived into thinking that the accounts were correct was that the accounts were usually gone over in the presence of the bookkeeper, Pratt, who committed the forgeries, and who so manipulated the examinations as to throw the plaintiffs off their guard in discovering his criminalities. In their salient features the facts are quite similar to those appearing in the case of *Frank v. Chemical Nat. Bank* (N. Y.) supra."

It has been held that a depositor

fulfilled its duty when it examined the pass book as written up and returned by the bank, checking the statements over with the depositor's books to verify their accuracy, and not pursuing the inquiry further when the bank's statements corresponded with the cash book and check book, and no irregularities appeared. It was not the duty of the depositor, it was held, to pursue the inquiry further so as to discover the fact that an employee of the depositor, instead of depositing certain items, received the same in cash, a transaction that nowhere appeared in the statement of the account with the bank. *National Bank v. Tacoma Mill Co.* (1910) 104 C. C. A. 441, 182 Fed. 1. After stating that this could have been discovered if the depositor had sent out to its customers for their statements of account, the court continued: "We think, however, the duty of a depositor towards his bank in relation to the examination of the bank statements made in connection with its writing up and balancing the depositor's pass book does not reach to that extremity. The statements, as we have shown, are rendered for the purpose of advising the depositor of the state of his account. If those statements tally with the deposit slips made up by the depositor and the checks drawn against the bank, and if the balances agree one with the other, the depositor is not obliged to look further nor to bear in mind some irregularity that may appear elsewhere in his general books, although a searching inquiry might lead to a discovery of the fraud." But see *Scanlon-Gipson Lumber Co. v. Germania Bank* (1903) 90 Minn. 478, 97 N. W. 380.

A depositor is not bound to examine his pass book to ascertain whether the bank cashier has correctly counted the money deposited. *Kemble v. Nat. Bank* (1904) 94 App. Div. 544, 88 N. Y. Supp. 246, affirmed in (1905) 183 N. Y. 545, 76 N. E. 1098.

b. Examination of indorsement.

The duty imposed on a depositor to examine his pass book as to vouchers does not extend to an examination of the signatures of the payees on the

returned vouchers, as it is the duty of the bank to determine the genuineness of a payee's indorsement, and the depositor is not expected to know his signature.

California.—*Los Angeles Invest. Co. v. Home Sav. Bank* (1919) 180 Cal. 601, 5 A.L.R. 1193, 182 Pac. 298.

Georgia.—*Atlanta Nat. Bank v. Burke* (1888) 81 Ga. 597, 2 L.R.A. 96, 7 S. E. 738.

Iowa.—*German Sav. Bank v. Citizens' Nat. Bank* (1897) 101 Iowa, 530, 63 Am. St. Rep. 399, 70 N. W. 769, 2 Am. Neg. Rep. 349.

Massachusetts.—*Murphy v. Metropolitan Nat. Bank* (1906) 191 Mass. 159, 114 Am. St. Rep. 595, 77 N. E. 693; *Jordan Marsh Co. v. National Shawmut Bank* (1909) 201 Mass. 397, 22 L.R.A. (N.S.) 250, 87 N. E. 740.

Mississippi.—*Masonic Ben. Asso. v. First State Bank* (1911) 99 Miss. 610, 55 So. 408.

New Jersey.—*Harter v. Mechanics' Nat. Bank* (1899) 63 N. J. L. 578, 76 Am. St. Rep. 224, 44 Atl. 715; *Pratt v. Union Nat. Bank* (1909) 79 N. J. L. 117, 75 Atl. 313.

New York.—*Welsh v. German American Bank* (1878) 78 N. Y. 425, 29 Am. Rep. 175; *Shipman v. Bank of State* (1891) 126 N. Y. 318, 12 L.R.A. 791, 22 Am. St. Rep. 821, 27 N. E. 371; *National Bd. Marine Underwriters v. National Bank* (1894) 9 Misc. 862, 29 N. Y. Supp. 698; *Harlem Co-op. Bldg. & L. Asso. v. Mercantile Trust Co.* (1895) 10 Misc. 680, 81 N. Y. Supp. 790; *Kearny v. Metropolitan Trust Co.* (1905) 110 App. Div. 236, 97 N. Y. Supp. 274, affirmed in (1906) 186 N. Y. 611, 79 N. E. 1108; *Bank of British N. A. v. Merchants' Nat. Bank* (1881) 13 N. Y. Week. Dig. 374, affirmed in (1883) 91 N. Y. 106.

Pennsylvania.—*United Security L. Ins. & T. Co. v. Central Nat. Bank* (1898) 185 Pa. 586, 40 Atl. 97; *Califf v. First Nat. Bank* (1908) 37 Pa. Super. Ct. 412.

Texas.—*Guaranty State Bank & T. Co. v. Lively* (1912) — Tex. Civ. App. —, 149 S. W. 211, affirmed in (1917) 108 Tex. 898, L.R.A. 1917E, 673, 194 S. W. 937.

Utah.—*Brixen v. Deseret Nat. Bank* (1888) 5 Utah, 504, 18 Pac. 48.

The fact that an agent in the employ of the depositor has forged the payee's indorsement does not affect the foregoing rule. *Welsh v. German American Bank* (1878) 73 N. Y. 425, 29 Am. Rep. 175; *United Secur. L. Ins. & T. Co. v. Central Nat. Bank* (1898) 185 Pa. 586, 40 Atl. 97.

In *Welsh v. German American Bank* (1878) 73 N. Y. 424, 29 Am. Rep. 175, an action by a depositor to recover a balance from the bank, which balance the bank claimed to have been paid out on checks of the depositor, it appeared that the checks in question were procured by a confidential clerk of the depositor, who presented to the depositor fictitious accounts, in payment of which the depositor drew checks and handed them to the clerk to send to the payees. The clerk, instead of sending them to the payees, forged the name of the payees and drew the money. The court adhered to the doctrine announced in *Weisser v. Denison* (1854) 10 N. Y. 68, 61 Am. Dec. 731, and held that the depositor owed no duty to the bank which required him to examine his pass book or vouchers with a view to the detection of forgeries of his name. With reference to the question of the balancing of the pass book and the return thereof with the vouchers to the depositor as being an account stated, it was held, in accordance with the earlier decision, that the proof of payment afforded by the stated account might be overthrown, and was overthrown, by proof of the forgery.

While citing *Welsh v. German American Bank* (N. Y.) supra, as authority, the court in *Shipman v. Bank of State* (1891) 126 N. Y. 318, 12 L.R.A. 791, 22 Am. St. Rep. 821, 27 N. E. 371, stated that the depositor had exercised sufficient care through an agent to discover the forged indorsements. There was a finding that the depositor had not been guilty of any negligence in failing to discover the forgery, and this finding, being supported by evidence, was taken as conclusive. It was accordingly held that the bank was liable to the depositor for checks paid out by it on the indorsement of the payee, forged by the depositor's employee,

and also those made payable to a fictitious payee by the employee without the knowledge of the depositor, the indorsement of such fictitious payee being forged by him.

Shipman v. Bank of State (N. Y.) supra, was approved in *Kearny v. Metropolitan Trust Co.* (1905) 110 App. Div. 236, 91 N. Y. Supp. 274, affirmed in (1906) 186 N. Y. 611, 79 N. E. 1108, but it was therein stated that, even if it should be conceded that the depositor was negligent in failing to discover the forgery of the indorsement, the bank was not aided, because it did not appear that it was injured in any way by his failure.

No distinction was made in the New York cases just cited, between forged indorsements and forgeries appearing on the face of the check, but in *Critten v. Chemical Nat. Bank* (1902) 171 N. Y. 219, 57 L.R.A. 529, 63 N. E. 969, this distinction was made in an obiter statement to the effect that the depositor's sources of information and means of knowledge may lead to an exposure of forgeries or alterations, but will give no information as to the genuine character of the indorsements, and because the depositor has no greater knowledge of that subject than the bank, it owes the bank no duty in regard thereto.

In *Harlem Co-op. Bldg. & L. Asso. v. Mercantile Trust Co.* (1895) 10 Misc. 680, 31 N. Y. Supp. 790, it appeared that the depositor's treasurer examined the returned checks as received from the bank with regard to their dates and amounts, but did not examine the signature of the payees as indorsed thereon. It was held that, although these indorsements might have been verified by reference to the records of the association, such verification would appear to be an act in excess of the duty owing from the depositor to the bank.

A bank has been held liable to a depositor for an amount paid on a check drawn by him, on which the indorsement of the payee had been forged, about seven years after he had received the pass book and forged check from the bank. *Bank of British N. A. v. Merchants' Nat. Bank* (1883) 91 N. Y. 106, wherein it was held that

the depositor lost none of his rights by receiving, under a mistake as to the facts, the check as one properly paid and charged to its account by the bank.

A bank was held liable to a depositor for the amount paid on a check the indorsement of the payee of which had been forged, in *National Bd. of Marine Underwriters v. National Bank* (1894) 9 Misc. 362, 29 N. Y. Supp. 698; but there was no discussion in that case of the duty of the depositor to discover this forgery. In fact it was said that the matter of an account stated had nothing to do with the question on which the determination of the case depended.

But in *PRUDENTIAL INS. Co. v. NATIONAL BANK* (reported herewith) ante, 146, it was said: "The reason given for not extending the rule to include an examination of indorsements for the purpose of determining whether they are genuine is that the depositor has no greater knowledge on the subject of the genuineness of the signature of the payee than the bank. In the case now before us the plaintiff had in its possession the genuine signature of each of the payees in the several checks whose names were forged by Eaton. Whether the plaintiff exercised reasonable care in examining the checks retained as vouchers by the defendant is a question of fact."

In Missouri, it seems that a depositor is bound to examine his returned checks for forged indorsements. *Wind v. Fifth Nat. Bank* (1890) 39 Mo. App. 72; *Lieber v. Fourth Nat. Bank* (1909) 137 Mo. App. 158, 117 S. W. 672. In each of these cases, however, it was held that the bank had sustained no injury from the negligence of the depositor.

V. Effect of failure to examine.

It has been held that silence on the part of a depositor who has received from the bank a pass book and canceled checks showing the state of his account on a balance thereof amounts to an admission of the correctness of the entries of debits and credits in the pass book. In such a case the account is presumed to be correct until shown

otherwise. *Citizens Bank & T. Co. v. Hinkle* (1916) 126 Ark. 266, 189 S. W. 679 (money wrongfully transferred from account); *Benton County Bank v. Walker* (1892) 85 Iowa, 728, 51 N. W. 241 (notes given by depositor charged to his account); *Schoonover v. Osborne Bros.* (1899) 108 Iowa, 453, 79 N. W. 263 (interest charges by bank); *Des Moines Nat. Bank v. Sisson* (1909) 143 Iowa, 191, 121 N. W. 533 (accounting for collateral claimed incorrect); *Nodine v. First Nat. Bank* (1902) 41 Or. 386, 68 Pac. 1109 (failure to credit deposits).

The evidence to open up such an account should be clear and satisfactory. *Farry v. Farmers' & M. Bank* (1904) — N. J. Eq. —, 58 Atl. 305. In that case it appeared that the account had extended over a number of years, and had been balanced a number of times, and the claim of irregularity was that certain charges had been made without vouchers. It was said that vouchers for the payments were returned by the bank to the depositor with the pass book; and an examination of the pass book in connection with the vouchers, if made at the time, would have disclosed any charges without vouchers, and the question of propriety of such charges could have been settled while the transaction was fresh in the minds of the parties. It was further said that the circumstance of the account having been overdrawn when the pass book was returned was a matter which specially imposed on the depositor the duty of immediate examination of the account; that, while the account might be questioned for fraud or mistake, not only must the burden of proving the fraud or mistake be on the complainant, but, since the particular charge on which the fraud or mistake was based was the absence of any voucher for the charge, and these vouchers had been for years in the possession of the depositor, and the bank had lost control of the evidence on which it was entitled to rely, proof of the impropriety of the charge should be clear and satisfactory.

The balancing of a pass book and the return thereof with the canceled

checks to the depositor, on one account which the bank has with the depositor, do not amount to an account stated as to another and separate account. *Second Nat. Bank v. Thompson* (1910) 44 Pa. Super. Ct. 200.

Other courts hold that the effect of a depositor's failure to examine his pass book and vouchers and report to the bank any forgeries in the vouchers is that the depositor is estopped, if his conduct operates to the prejudice of the bank, from questioning the accuracy of the account as stated in the pass book, and in some jurisdictions it is held that such prejudice as the loss of the right to proceed against the forger to compel restoration is sufficient to estop the depositor from questioning the account. *Leather Mfrs. Nat. Bank v. Morgan* (1886) 117 U. S. 96, 29 L. ed. 811, 6 Sup. Ct. Rep. 657; *New York Produce Exch. Bank v. Houston* (1909) 95 C. C. A. 251, 169 Fed. 785; *Wind v. Fifth Nat. Bank* (1890) 39 Mo. App. 72; *McKeen v. Boatmen's Bank* (1898) 74 Mo. App. 281; *Fifth Nat. Bank v. Iron City Nat. Bank* (1899) 92 Tex. 436, 49 S. W. 368, followed in *Iron City Nat. Bank v. Fifth Nat. Bank* (1903) 31 Tex. Civ. App. 308, 71 S. W. 612. See also *Weinstein v. National Bank* (1887) 69 Tex. 38, 5 Am. St. Rep. 23, 6 S. W. 171.

With regard to the effect of the failure of a depositor to examine his pass books and vouchers within a reasonable time, and notify the bank of any irregularities therein, it was said in *National Bank of Commerce v. Tacoma Mill Co.* (1910) 104 C. C. A. 441, 182 Fed. 1: "It is manifest that the depositor sustains such a relation to his banker as that he is bound to give heed to the periodical statements coming from the bank in connection with the return of his pass book, showing the balancing of his account with the bank. If he interposes no objection to such statements, the presumption naturally follows that he deems them correct. The bank has a right to rely upon such presumption, and to act upon it in the future. If, furthermore, transactions of an irregular character have been noted therein, such as the inadvertent payment of

checks and drafts by the bank beyond the scope of express authority, it may be, depending upon the peculiar facts and circumstances attending the transactions themselves, that the depositor will be subsequently estopped to deny the authority of the bank to make such payments."

The resultant loss to the bank must, however, be clearly shown. *Janin v. London & S. F. Bank* (1891) 92 Cal. 14, 14 L.R.A. 320, 27 Am. St. Rep. 82, 27 Pac. 1100.

In a few jurisdictions it is held that there is no estoppel as to payments made by the bank previous to the failure of the depositor to examine his pass book and vouchers, but that the depositor is estopped from questioning the validity of payments made after such failure, when such subsequent payments are a part of a series of forgeries committed by the same person. *First Nat. Bank v. Allen* (1893) 100 Ala. 476, 27 L.R.A. 426, 46 Am. St. Rep. 80, 14 So. 335; *California Vegetable Union v. Crocker Nat. Bank* (1918) 37 Cal. App. 743, 174 Pac. 920; *National Dredging Co. v. Farmers' Bank* (1908) 6 Penn. (Del.) 580, 16 L.R.A.(N.S.) 593, 130 Am. St. Rep. 158, 69 Atl. 607; *Israel v. State Nat. Bank* (1909) 124 La. 885, 50 So. 783; *Hardy v. Chesapeake Bank* (1879) 51 Md. 562, 34 Am. Rep. 325; *Kenneth Invest. Co. v. National Bank* (1902) 96 Mo. App. 125, 70 S. W. 173.

In New York, a depositor is not estopped from questioning his account by reason of a failure in his duty of examination, but it is held that the depositor is liable to the bank for such damages as are caused by his negligence in examining his pass book and vouchers. *Critten v. Chemical Nat. Bank* (1902) 171 N. Y. 219, 57 L.R.A. 529, 63 N. E. 969. See also *Wachsman v. Columbia Bank* (1894) 8 Misc. 280, 28 N. Y. Supp. 711.

A bank is not in position to claim an estoppel against a depositor if the bank itself has been guilty of negligence in paying a check the forgery of which could have been detected by the exercise of reasonable care. *New York Produce Exch. Bank v. Houston*

(1909) 95 C. C. A. 251, 169 Fed. 785; Leather Mfrs. Nat. Bank v. Morgan (1886) 117 U. S. 96, 29 L. ed. 811, 6 Sup. Ct. Rep. 657; First Nat. Bank v. Farrell (1921) 16 A.L.R. —, — C. C. A. —, 272 Fed. 371, certiorari denied in U. S. Adv. Ops. 1921-22, p. 8; National Dredging Co. v. Farmers Bank (1908) 6 Penn. (Del.) 580, 16 L.R.A.(N.S.) 593, 130 Am. St. Rep.

158, 69 Atl. 607; Manufacturers' Nat. Bank v. Barnes (1872) 65 Ill. 69, 16 Am. Rep. 576; Merchants' Nat. Bank v. Nichols & S. Co. 223 Ill. 41, 7 L.R.A.(N.S.) 752, 79 N. E. 38; Brixen v. Deseret Nat. Bank (1888) 5 Utah, 504, 18 Pac. 43; First Nat. Bank v. Richmond Electric Co. (1906) 106 Va. 347, 7 L.R.A.(N.S.) 744, 117 Am. St. Rep. 1014, 56 S. E. 152. W. A. S.

NANNIE HACKWORTH, Exrx., etc., of B. F. Hackworth, Deceased,
Respt.,

v.

MISSOURI SOUTHERN RAILROAD COMPANY, Appt.

Missouri Supreme Court (In Banc)—December 31, 1920.

(— Mo. —, 227 S. W. 1032.)

Rates — confiscatory on one class of traffic — validity.

1. A state cannot establish a rate for a particular class of freight on a short-line railroad which will compel its carriage at a loss, although the rate for all kinds of traffic, taken as a whole, will produce an adequate return on the investment.

[See note on this question beginning on page 185.]

Evidence — judicial notice.

2. The courts of a state take judicial notice of the character of country through which one of its railroads runs, and of its products.

[See 15 R. C. L. 1120.]

— when taken.

3. Judicial knowledge of facts is measured by general knowledge of the same facts.

[See 15 R. C. L. 1057.]

(Williams, J., dissents.)

APPEAL by defendant from a judgment of the Circuit Court for Reynolds County (Dearing, J.) in favor of plaintiff in an action brought to recover alleged overcharges collected by defendant for the shipment of railroad ties over its road. *Reversed.*

The facts are stated in the opinion of the court.

Mr. J. B. Daniel, for appellant:

If the rates prescribed by § 3241, Rev. Stat. 1909, for the transportation of railroad ties, would not yield to defendant a substantial return upon that portion of the fair value of its property used in said service which is properly assignable to that service, that provision of the statute is, as to defendant, void, irrespective of the return it could earn from all of its business, or from all of its intrastate business.

Northern P. R. Co. v. North Dakota, 236 U. S. 585, 59 L. ed. 735, L.R.A. 1917F, 1148, P.U.R.1915C, 277, 35 Sup.

Ct. Rep. 429, Ann. Cas. 1916A, 1; Norfolk & W. R. Co. v. Conley, 236 U. S. 605, 59 L. ed. 745, P.U.R.1915C, 293, 35 Sup. Ct. Rep. 437.

Mr. Arthur T. Brewster also for appellant.

Mr. Stuart L. Clark for respondent.

Graves, J., delivered the opinion of the court:

B. F. Hackworth, to the May term, 1915, of the Reynolds county circuit court, instituted his action in 748 counts against the defendant, for alleged overcharges in the shipment of railroad ties. The several

counts are in the nature of actions for money had and received, and so the judgment runs. Upon trial the plaintiff dismissed as to 15 counts, and had judgment on the remaining counts in the aggregate sum of \$10,572.36, with interest thereon at 6 per cent per annum from February 23, 1915. The amount sued for in each count was the difference between the freight rate fixed by § 3241, Rev. Stat. 1909, and the rate actually charged.

The answer was: (1) A general denial; (2) a plea that the rates fixed by said § 3241 were confiscatory, and violative of stated provisions of the Federal Constitution, as well as stated provisions of the state Constitution; (3) the five-year Statute of Limitations was invoked as to certain counts; and (4) the three-year Statute of Limitations (§ 1890) was likewise invoked as to all of the counts. This paragraph was stricken out upon motion of plaintiff. The shipment of ties ran through the years (or parts of years) 1909, 1910, and 1911.

By reply plaintiff sought to evade concededly outlawed counts, by pleading the pendency of the Missouri Rate Cases in the courts of the United States, and averred that the statute would not run against him until the United States Supreme Court decided the validity of § 3241, supra, on June 16, 1913, the enforcement of the statute having been stayed by injunction in such Rate Cases. Defendant was not a party to such cases, nor was the plaintiff herein.

From the judgment indicated the defendant has appealed. The present plaintiff is the executrix of the will of B. F. Hackworth, now deceased.

This outlines the case.

I. The railroad in question is in a rough mountainous section of the state, and has sharp curves and excessive grades. A large portion of its business is the transportation of railroad ties. In fact, this court would have to judi-

cially know the character of the country and its products. Of matters of state history the courts are not more ignorant than the general public. Judicial knowledge of facts is —when taken.

measured by general knowledge of the same facts. We judicially know the different sections of our state, its products and industries, because such are taught in the schools, and are matters of general knowledge. But the evidence in this case shows that a very large per cent of this railroad's business was carload shipments of railroad ties. Defendant has challenged the validity of the Act of 1907, now § 3241, Rev. Stat. 1909, as applied to it, in the matter of the rates on railroad ties, as fixed by such act; this upon the ground that they are confiscatory, in that they are bringing, and during the years herein involved brought, to the railroad less money than it expended in the hauling of the ties. In 1907 this road did not have mileage enough to place it within class C, as railroads were then and now classified. Rev. Stat. 1909, § 3231. The Act of 1907, now Rev. Stat. § 3241, did not then apply to it, so that it had no part or parcel in the Missouri Rate Cases. In 1909, and before the shipment of the ties herein involved, its mileage exceeded 45 miles, and it thereupon fell within the terms of said § 3241. Its present mileage but little more than brings it within the statute supra; i. e., 54 miles of main line, 10 miles of branch lines, and 5 miles of sidings and spur tracks. Its line is in a tie, lumber, and wood district of the state.

Up to 1913 schedules of rates within the statutory maximums were fixed by the railroad and warehouse commissioners. Since 1913 they have been fixed by the public service commission, under the Act of 1913. Laws 1913, pp. 557 et seq.

Counsel have, by the following table, shown the rates on railroad ties both before and after the Act of 1907, now Rev. Stat. 1909, § 3241. This table shows:

Evidence—
Judicial
notice.

Rates on Ties and on Lumber, 1906, in Cents Per Owl.		Distance Not Exceeding Miles.									
		5	10	15	20	25	30	35	40	45	50
1906	Lumber.....	5	5	5	5	5	5.5	5.5	5.5	5.5	5.5
	Ties.....	2	2	3	3	3.25	3.25	3.50	3.50	3.75	3.75
1907	Lumber.....	5	5	5	5	5	5.5	5.5	5.5	5.5	5.5
	Ties.....	2	2	2	2	2	2	2	2	2	2.25
1915	Lumber.....	4	4.2	4.4	4.6	4.8	5	5.1	5.3	5.4	5.6
	Ties.....	2.5	2.7	2.9	3.1	3.3	3.5	3.6	3.8	3.9	4.1
1917	Lumber.....	4.6	5	5.4	5.8	6.1	6.4	6.6	6.9	7.1	7.4
	Ties.....	3.1	3.5	3.9	4.3	4.6	4.9	5.1	5.4	5.6	5.9

From this table it appears that, both before and after the Act of 1907, the rate on ties for this short road was much more favorable than those fixed by the Act of 1907. The rate fixed in 1907, quoting from § 3241, is: "For a carload of 40,000 pounds of minimum weight undressed stone, crushed rock, sand, railroad ties, cordwood, building or paving brick, not exceeding 40 cents per ton of 2,000 pounds to the ton for the first fifty miles or fractional part thereof, and not exceeding 5 cents per ton per carload for the next ten miles or fractional part thereof, and not exceeding 5 cents per ton per carload for each additional ten miles or fractional part thereof. In computing the rate of freight, according to the provisions of this article, the distance shall be computed from the point where it is received to the point of destination in the state, notwithstanding it may pass from one road to another."

The rates prior to 1907 were rates fixed by the Missouri railroad and warehouse commissioners. From 1915 on, the rates are those fixed by the public service commission, under the Act of 1913 supra. Those for 1915 were fixed in the case of Re

Missouri Southern R. Co. 3 Mo. P. S. C. 1, loc. cit. 66, P.U.R.1916C, 607. This proceeding was begun in 1914.

By an expert in this case it is shown that the hauling of ties at the statutory rate would have entailed a loss upon this carrier, as follows:

Years.	Cost of Service.	Revenue from Statutory Rates.	Loss from Operation.
1910 ...	\$11,400.25	\$7,918.97	\$3,481.27
1911 ...	13,596.26	9,028.25	4,568.01
1912 ...	10,677.31	6,647.43	4,029.88
1914 ...	29,454.31	18,346.10	11,108.21

In fact, it is not seriously questioned that the statutory rate fixed by § 3241, supra, would have entailed a loss upon the defendant during the years covered by this suit. It is urged by counsel for plaintiff that this record does not show that the road was not getting fair returns upon its investment, notwithstanding this loss upon railroad ties. If the matter reaches this point, those facts can be dealt with later. This matter is practically disposed of by the briefs filed in banc, which we will not. To this point we have this simple question: Can this statute, as applied to this defendant, stand, when the rates fixed therein compel the defendant to carry a very large per cent of its carload traffic at an absolute loss? Of this, next.

II. As stated above, it is not seriously contended that the hauling of railroad ties at the rate fixed by § 3241, supra, would have been a losing game for this short railroad.

It is presumed to be nonconfiscatory until its confiscatory character is made to appear. Its confiscatory character is made to appear: (1) By the fact that the previous rate (likewise presumed to be reasonable) was much higher; (2) by the direct evidence of a railroad expert, who, according to well-established railroad rules, made the specific calculations set out in the statement; and (3) by the later rulings of the public service commission. Upon the question now for determination, suggested at the close of the previous paragraph, learned counsel

for plaintiff in his divisional brief says: "Appellant also invokes the rule laid down in the North Dakota Rate Cases (Northern P. R. Co. v. North Dakota, 236 U. S. 585, 59 L. ed. 735, L.R.A.1917F, 1148, P.U.R. 1915C, 277, 35 Sup. Ct. Rep. 429, Ann. Cas. 1916A, 1) that the state cannot require it to transport any class of traffic where it is shown that it would be required to transport the same at a loss, or without sufficient return upon that class alone to give it a fair return upon that property devoted to the transportation of the class of traffic in question. It is the theory of respondent, sustained by the trial court, that this rule can only be invoked where the state segregates from an entire mass of traffic a single commodity or class of traffic, and prescribes rates which, considering that traffic alone, do not yield a reasonable return, and that, where the state has prescribed and established a complete schedule of rates affecting all traffic, the rule stated in the North Dakota Rate Cases cannot apply; that, where the state has prescribed a complete schedule of rates affecting all traffic, as was done in § 3241, supra, it must be shown that the rates, considered in their entirety, are not sufficient to yield a reasonable return upon the property used in the public service at the time it is being so used. That confiscation of property is not shown where the corporation may be required to perform certain service at an insufficient profit, or even at a loss, when the entire schedule of rates may yield a sufficient return upon all the property used in the public service."

Contra, the appellant counsel plants his case (on this point) upon his conception of the rules announced by Mr. Justice Hughes in Northern P. R. Co. v. North Dakota, 236 U. S. 585, 59 L. ed. 735, L.R.A. 1917F, 1148, P.U.R.1915C, 277, 35 Sup. Ct. Rep. 429, Ann. Cas. 1916A, 1, and another case by the same learned justice about the same date.

For this court the case is one of first impression.

Can a valid rate law be passed which, when applied to a common carrier, will compel such carrier to haul a large per cent of its freight at a clear loss, simply because the other rates named in the state law will make up that loss, and, in addition, allow a reasonable return upon the investment? This is the broad question at the threshold of this case. In the language of appellant's counsel it is thus stated: "The theory on which this case was tried, as well as the theory on which it was presented to division 2 of this court by both parties, was that appellant contended that, if the revenue which would have been derived from the application of the rates prescribed by § 3241 to the shipments in question would not have yielded any substantial return upon the property properly assignable to that traffic after paying proper costs of operation, then the statute was as to appellant confiscatory and void; while counsel for respondent contended that in order for appellant to escape the mandate of the statute it must show that all the revenue which it would have derived from all intrastate traffic mentioned in said § 3241 would not yield to it a reasonable return upon the property of appellant properly assignable to such intrastate traffic. That this was the theory of counsel for respondent, see page 7 of his brief filed herein. A decision of this question of law determines the question now under consideration, for there was no attempt on the part of appellant to show what return was or would have been received from all the intrastate traffic mentioned, if the rates prescribed in said § 3241 had been applied thereto; neither was there any attempt on the part of counsel for respondent to show that the rates charged and collected by appellant were unreasonably high, other than to show that they were higher than those prescribed by the statute aforesaid, nor were there

any allegations that the rates charged were unreasonably high."

In his brief before the court in banc counsel for respondent quotes the foregoing, and adds that the respective theories of counsel are correctly stated by counsel for appellant. Stating the proposition differently, can a state law be confiscatory as to a given class of freight, and yet stand as to such confiscatory portion, because, by other provisions, Jones is made to pay Smith's legitimate freight? The proposition does not savor of sound reason, if it is to be answered in the affirmative.

It is always true that the question of whether or not a statute fixing rates is confiscatory is a question of fact (*Missouri Rate Cases* (*Knott v. Chicago, B. & Q. R. Co.*) 230 U. S. loc. cit. 508, 57 L. ed. 1594, 33 Sup. Ct. Rep. 975), but in this case the confiscatory character of this portion of § 3241 is not seriously questioned. We mean by this that there is no doubt that the rate fixed by this statute, so far as the hauling of railroad ties is concerned, was confiscatory as to this defendant. Defendant would have been hauling them at a loss. For the single issue which counsel upon both sides admit to be the issue here, this will suffice. Appellant contends that we should declare this portion confiscatory and void, for the reasons stated, whilst respondent contends that there has been a failure to show that the whole scheme of rates was confiscatory, and therefore defendant's defense fails.

Counsel for respondent cite to us the cases of *Minnesota Rate Cases* (*Simpson v. Shepard*) 230 U. S. loc. cit. 433, 57 L. ed. 1555, 48 L.R.A. (N.S.) 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18; *Knoxville v. Knoxville Water Co.* 212 U. S. 19, 53 L. ed. 382, 29 Sup. Ct. Rep. 148, and *San Diego Land & Town Co. v. Jasper*, 189 U. S. 439, 47 L. ed. 892, 23 Sup. Ct. Rep. 571, but these cases do not go to the single and simple issue here. Lest we forget, let us reiterate the issue here. Is that portion of a state rate law valid which

compels a railroad to carry the freight, or the class of freight, therein mentioned, at a loss, although it be admitted that the rates under the law, taken as a whole, would give adequate returns? This is the question here. Public policy should not stand for a law which compels Jones to make good the losses on Smith's freight.

The ruling in *Northern P. R. Co. v. North Dakota*, 236 U. S. 585, 59 L. ed. 735, L.R.A.1917F, 1148, P.U.R.1915C, 277, 35 Sup. Ct. Rep. 429, Ann. Cas. 1916A, 1 et seq., in our judgment, settles this case. The court there had under consideration chapter 51 of the Laws of 1907 of North Dakota. This law of 1907 (N. D. Laws 1907, p. 73) amended § 4395 of the Revised Code of 1905. In the Code of 1905 this § 4395 appears in article 10 of such Code, entitled "To Regulate Common Carriers and Define the Duties of the Commissioners of Railroads." In the said article 10, Code of 1905, the commissioners of railroads, by § 4343, are empowered to fix maximum schedules of rates for the railroads of the state, and to this end were empowered to classify freight. Section 4395 of article 10, Code of 1905, fixed the maximum rates for coal, and these maximum rates so fixed were by the Act of 1907 (chap. 51) further lowered. The *Northern Pacific* and two other roads named in the opinion refused to put the rates in force, for that such rates compelled them to carry coal at a loss. The case was decided nisi on the theory that, if all the intrastate business of these roads gave them returns upon their property, then such roads could not complain of carrying coal at a loss. The roads tried the case upon the theory that they could not be compelled to carry any particular article or class of freight at a loss. The state court found in its way of figuring that the *Northern Pacific* made some \$847 in twelve months on coal. The other roads carried at a loss. By the state court the roads, by mandatory injunction, were compelled to put in

force the statute, and this ruling Mr. Justice Hughes reversed as to all three of the roads. The returns of other articles or classes of articles were not gone into in these cases. At page 594 of 236 U. S., Mr. Justice Hughes outlines the holdings of the state court upon the law as follows:

"As to the law, the state court held:

"(a) The statutory freight rate is presumed to be reasonable, which presumption continues until the contrary appears, and the rate is shown beyond a reasonable doubt to be confiscatory.

"(b) Proof that a rate is non-compensatory—that is, while producing more revenue than sufficient to pay the actual expenses occasioned by the transportation of the commodity, but insufficient to also reimburse for that proportion of the railroad's fixed or overhead costs properly apportionable to such commodity carried—is not sufficient to establish that the rate is confiscatory in law.

"(c) In order to establish such a noncompensatory rate to be confiscatory, it must further appear that any deficit under the rate affects the net intrastate freight earnings materially, and reduces them to a point where they are insufficient to amount to a reasonable rate of profit on the amount of the value of the railroad property within the state contributing to produce such net earnings."

"Accordingly it was further held that, after establishing the value of the property employed in the production of the net intrastate freight earnings, it must appear, in order to show confiscation, either: (1) That such earnings are insufficient to yield a fair return upon that value, and that the commodity in question is carried for less than what is sufficient to meet all expenses, including 'out-of-pocket costs' and fixed charges; or (2) that the loss on the commodity under the rate attacked 'reduces the balance of the net intrastate freight earnings' to a point where, including the

loss on the commodity rate, they fail to yield such return. 26 N. D. 440, 145 N. W. 135."

Speaking to the issue here involved, Mr. Justice Hughes, at pages 595 et seq. of 236 U. S., says: "But, broad as is the power of regulation, the state does not enjoy the freedom of an owner. The fact that the property is devoted to a public use on certain terms does not justify the requirement that it shall be devoted to other public purposes or to the same use on other terms, or the imposition of restrictions that are not reasonably concerned with the proper conduct of the business according to the undertaking which the carrier has expressly or impliedly assumed. If it has held itself out as a carrier of passengers only, it cannot be compelled to carry freight. As a carrier for hire, it cannot be required to carry persons or goods gratuitously. The case would not be altered by the assertion that the public interest demanded such carriage. The public interest cannot be invoked as a justification for demands which pass the limits of reasonable protection and seek to impose upon the carrier and its property burdens that are not incident to its engagement. *In such a case it would be no answer to say that the carrier obtains from its entire intrastate business a return as to the sufficiency of which in the aggregate it is not entitled to complain.*" (The italics are ours.)

Again, at page 598 of 236 U. S., the learned justice further says: "The state insists that the enactment of the statute may be justified as 'a declaration of public policy.' In substance, the argument is that the rate was imposed to aid in the development of a local industry, and thus to confer a benefit upon the people of the state. The importance to the community of its deposits of lignite coal, the infancy of the industry, and the advantages to be gained by increasing the consumption of this coal and making the community less dependent upon fuel supplies imported into the state are empha-

sized. But, while local interests serve as a motive for enforcing reasonable rates, it would be a very different matter to say that the state may compel the carrier to maintain a rate upon a particular commodity that is less than reasonable, or—as might equally well be asserted—to carry gratuitously, in order to build up a local enterprise. That would be to go outside the carrier's undertaking, and outside the field of reasonable supervision of the conduct of its business, and would be equivalent to an appropriation of the property to public uses upon terms to which the carrier had in no way agreed. It does not aid the argument to urge that the state may permit the carrier to make good its loss by charges for other transportation. If other rates are exorbitant, they may be reduced. *Certainly it could not be said that the carrier may be required to charge excessive rates to some in order that others might be served at a rate unreasonably low. That would be but arbitrary action. We cannot reach the conclusion that the rate in question is to be supported upon the ground of public policy if, upon the facts found, it should be deemed to be less than reasonable.*

At page 601 of 236 U. S., appears this significant remark from the learned justice: "It has repeatedly been assumed in the decisions of this court that the state has no arbitrary power over the carrier's rates and may not select a particular commodity or class of traffic for carriage without reasonable reward."

As I read this opinion from our highest court, and the one which has the power of final action upon the Federal question herein involved, the theory of the trial court in the instant case was wrong. Both counsel agree as to the theory of the trial below, and that theory clearly contravenes the rule in *Northern P. R. Co. v. North Dakota*, supra. Under the conceded facts this rate upon railroad ties was so inadequately low as to be confiscatory. It is a wholesome rule for the state, in

making rates, to obviate a rate which will compel the carrying of a commodity at a loss. If the state can do that, it can compel some commodities to be carried free, and give the railroad fair net earnings by having high rates on other commodities. In these days of enlightened rate experts, it is not hard to determine whether or not a given rate upon a particular commodity will bear its reasonable proportion toward a fair income from a whole schedule of rates, after paying its legitimate proportion of carriage cost. Nor is it hard to determine, in these days, whether a given rate upon a particular commodity entails loss upon the carrier. The rate in question here is confiscatory under the conceded facts and the Federal rulings, and when the Federal Constitution is applied that portion of the law must fall.

Rates—confiscatory on one class of traffic—validity.

Since the hearing in division, both counsel in their briefs say this is the sole question for determination, and other matters need no further notice.

The judgment is reversed, and the cause remanded to be disposed of in accordance with this opinion.

All concur except Williams, J., who dissents, and adopts the opinion of White, C., in division No. 2, as his dissenting opinion:

The plaintiff, executrix of the will of B. F. Hackworth, deceased, brought this suit for alleged overcharges which the defendant collected from B. F. Hackworth for the shipment of ties over its road. The petition contained 748 counts. Plaintiff dismissed as to 15 counts, and recovered judgment on the remainder, amounting in the aggregate to \$10,572.36. The amount prayed for in each count of the petition was the amount charged in excess of the rates provided by § 3241, Rev. Stat. 1909, and collected by the defendant for a particular shipment of ties.

After a general denial the defendant for answer averred that the

charges alleged to have been collected for services rendered by the defendant were reasonable and proper, and that the rates prescribed by § 3241 were in violation of several enumerated sections of the Constitutions of the United States and of the state of Missouri, in that they operated as a confiscation, and deprived the defendant of its property without due process of law.

Defendant further set up the five-year Statute of Limitations in defense of 127 counts of the petition; also the three-year Statute of Limitations (Rev. Stat. 1909, § 1890,) as to all the counts of the petition, in that the action was for penalties.

The plaintiff, in reply to the pleas of the Statute of Limitations, alleged that before the charges were collected an injunction was granted by the United States circuit court of the western district of Missouri, in favor of certain railroads in the state of Missouri, whereby the railroad and warehouse commissioner and the attorney general of the state of Missouri were restrained from enforcing the provisions of § 3241, Rev. Stat. 1909, and that such injunction remained in force until the judgment was reversed by the Supreme Court of the United States in 1913, and during that time the plaintiff was unable to sue, and the Statutes of Limitations did not run.

The defendant's road did not exceed 45 miles in length until May, 1909, when it was extended to the length of 54 miles of main line, besides branches, etc. At that time the Rate Act, including § 3241, was in force. By the extension in 1909 the defendant's railroad was brought within class C, as defined by § 3231, Rev. Stat. 1909, so that the rates provided by § 3241, Rev. Stat. 1909, were applicable to the traffic on defendant's road. The aggregate amount sued for in the 127 counts to which defendant seeks to apply the five-year Statute of Limitations was \$1,401.19. There was a judgment on all counts except those dismissed. Seven of the 15 dismissed were among those to which

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the five-year Statute of Limitations was pleaded, leaving 120 counts in which that issue was joined. The defendant appealed from the judgment. The facts in record, as they pertain to the different points presented, will be considered in their order.

The record of the proceedings of the Federal circuit court, pleaded in plaintiff's reply, was not introduced in evidence, but this court may take judicial cognizance of it as a matter of current history. *State ex rel. Missouri Southern R. Co. v. Public Service Commission*, 259 Mo. 704, loc. cit. 726, 168 S. W. 1156; *St. Louis & S. F. R. Co. v. Hadley (C. C.)* 168 Fed. 317; *Missouri Rate Cases (Knott v. Chicago, B. & Q. R. Co.)* 230 U. S. 474, 57 L. ed. 1571, 33 Sup. Ct. Rep. 975.

I. The plaintiff relies upon the case of *State ex rel. Missouri P. R. Co. v. Williams*, 221 Mo. 227, 120 S. W. 740, in support of her position that the Statute of Limitations did not run because the plaintiff could not sue the defendant in this case while the injunction in the Federal court remained in force. A suit was brought by Mr. Jones, the circuit attorney of the city of St. Louis, against certain railroads that were parties to the proceeding in the Federal court, seeking to enjoin them from collecting fares in excess of the statutory rate. The defendants then began the proceeding in this court (*State ex rel. Missouri P. R. Co. v. Williams*) to prevent by prohibition a prosecution of the injunction suit in St. Louis, and this court awarded a peremptory writ. The opinion expressly placed the ruling upon the ground that the parties to the two suits were the same; the parties to the suit in St. Louis, where it was sought to enjoin the charging in excess of the statutory rate, were the same parties, in effect, as the parties to the suits in the Federal court, where the enforcement of the statutory rate was enjoined. Inasmuch as the Federal court had first acquired jurisdiction of the parties and of the subject-

matter of the suit, which affected the constitutionality of the statute, this court would not interfere, but let the matter proceed to final determination in the Federal court. While the attorney general and the railroad and warehouse commissioner of Missouri were the nominal parties defendant to the suits in the Federal court, those officials of the state represented the passengers and shippers whose interests or rights might be affected, so that the real parties in interest were shippers or passengers over any of the railroads involved, and the circuit attorney of St. Louis in the suit brought by him represented the same shippers and passengers. The opinion says (221 Mo. loc. cit. 254): "Thus we have two cases in courts of . . . co-ordinate jurisdiction where the power of the courts is being exercised between practically the same parties in interest, to wit, the carriers on one hand and the shippers and passengers on the other, upon the same subject-matter, and the two courts are thus brought in conflict with each other."

Plainer language could hardly be used by the court to show that the ruling was distinctly upon the ground of identity of parties. None of the parties to the present suit were parties to that injunction suit in the Federal court. The defendant railroad company was not a party, and at the time the judgment was rendered in the Federal circuit court it was not of sufficient length to bring it within the provisions of § 3241, but was built to the requisite length in 1909. Not only that; the plaintiff here was not a party to that injunction suit; the real parties there, represented by the officials, were the shippers and passengers over the railroads who were parties to that suit; they were not shippers and passengers, as such, over the railroad of defendant in this case.

Appellant, however, claims that, inasmuch as there was a judgment by a Federal court having jurisdiction, holding the statute unconstitutional, after that decree was entered,

there was no statutory maximum rate law in force in this state until the decree was reversed by the United States Supreme Court; this on the theory that the doctrine should be applied as laid down in several decisions. Where a statute has been declared unconstitutional, or constitutional, by a court of last resort, its constitutionality ceases to exist as an open question. *Schmidt v. United Order of Foresters*, 259 Mo. 491, loc. cit. 497, 168 S. W. 626; *State v. Finley*, 259 Mo. 414, loc. cit. 422, 168 S. W. 921; *Non-Royalty Shoe Co. v. Phoenix Assur. Co.* 277 Mo. 399, 210 S. W. 37, loc. cit. 43; and cases of like import. In those cases it was held no longer permissible to raise a constitutional question so as to confer jurisdiction upon this court. If that principle could be applied to this case, where the statute was held unconstitutional by the Federal circuit court, not a court of last resort, so that everybody would be bound by that decree while an appeal was pending in the United States Supreme Court (which we do not by any means concede), the issues determined in the Railroad Rate Case would not support the position. The Rate Cases, eighteen in number, were determined in one opinion. *St. Louis & S. F. R. Co. v. Hadley (C. C.)* 168 Fed. 317. The Federal circuit court in that case held (loc. cit. 347) that the statutes such as the one under consideration "should be declared valid or void as the facts might warrant," and said (loc. cit. 348): "Therefore the holding is that these statutes are not void upon their face, and cannot be declared void for the one reason that the evidence shows that they are not enforceable as to two or more roads." (Italics ours.) And further, on page 352 of 168 Fed: "This leaves but one question for decision, and that question largely one of fact."

The court then proceeded to consider the evidence, and held the statute to be confiscatory and unconstitutional because of the facts shown in regard to the investment and

earnings of the particular roads which were parties to the eighteen suits. When the case reached the Supreme Court (230 U. S. 474, 57 L. ed. 1571, 33 Sup. Ct. Rep. 975, and 230 U. S. 509 et seq., 57 L. ed. 1595, 33 Sup. Ct. Rep. 984), it held, under the facts, that the Rate Statute was not shown to be confiscatory as to some of the railroads, while as to others it was. None of these eighteen railroads relied upon a judgment in favor of any of the others as being conclusive. Each relied upon the ruling in its own particular case. Thus, according to the ruling in the Federal circuit court, as well as in the Supreme Court of the United States, § 3241 is confiscatory or otherwise, constitutional or unconstitutional, not upon its face, but upon the facts shown and applied to a particular road. Otherwise, if the statute had been held constitutional upon its face by the Supreme Court of the United States so as to remove all questions as to its constitutionality, then the plaintiff in this case might have pleaded that judgment as settling once for all the question of the confiscatory or fair quality of the rates as applied to the defendant's railroad, and there would be no necessity of inquiring into the facts in this case.

So we hold that the plaintiff might have brought his suit against the defendant at any time after the overcharges were made.

It remains to consider whether the three-year Statute of Limitations, which would bar all counts of plaintiff's petition, or the five-year Statute of Limitations, which would bar 120 counts, should be applied, and that question turns upon whether the plaintiff is suing at common law for excessive charges, or for the penalty provided by § 3248, Rev. Stat. 1909.

II. Of the statutes with which we have to deal, § 3241, Rev. Stat. 1909, provides a maximum freight rate, and the suit is in form a common-law action for the amount charged and collected in excess of that rate. The appellant asserts the petition

sufficiently states a cause of action for recovery of the penalty mentioned in § 3248 in the same article and chapter. That section provides that a corporation making such overcharge shall "forfeit all right to recover or receive any compensation," and may be convicted of a misdemeanor, and fined not exceeding \$200 for each offense. The party injured may bring action against the railroad company in such case, and "be entitled to recover three times the amount taken or received from him in excess of the rate prescribed by this article."

While it is admitted that ordinarily an action at common law could be maintained for charging and collecting for carrying freight more than the service was reasonably worth, appellant claims the statutes just mentioned afford exclusive remedies and repeal the common law upon the subject. It is necessary to call attention to some of the principles laid down in the books applicable to the matter at hand.

An action will lie at common law to enforce a remedy for neglect of a statutory duty. *McCaskey v. Quincy, O. & K. C. R. Co.* 174 Mo. App. 724, loc. cit. 726, 161 S. W. 277. Where the statute creates a new right and provides a remedy for its enforcement, the remedy is exclusive. *Chandler v. Chicago & A. R. Co.* 251 Mo. 592, loc. cit. 600, 158 S. W. 35; *Clinton v. Henry County*, 115 Mo. 557, loc. cit. 569, 37 Am. St. Rep. 415, 22 S. W. 494. But where there is already a right of action at common law, and the statute provides an additional remedy, the remedy is only cumulative, and the remedy at common law still obtains.

"When the statute creates a special duty, for the neglect of which a common-law action would lie, that action is not forbidden by the fact merely that an extraordinary liability in the nature of a penalty is also provided. The latter is only cumulative." *Iba v. Hannibal & St. J. R. Co.* 45 Mo. 469, loc. cit. 474; *Hill v. Missouri P. R. Co.* 49 Mo. App. 520, loc. cit. 528; *Hill v. Missouri P. R.*

Co. 121 Mo. 477, loc. cit. 482, 26 S. W. 576.

Where the statute merely enlarges the right which existed at common law, it will not be deemed to have repealed the common-law remedy; but, if the statute restricts the right and provides a remedy for its enforcement, it is exclusive. *Wyckoff v. Southern Hotel Co.* 24 Mo. App. 382, loc. cit. 388, 389. That case is an instructive illustration of the principle. It was an action to enforce an innkeeper's lien. The statute provided a lien for innkeepers, and stated the subjects to which the innkeeper's lien would apply, including some articles for which the common law did not allow a lien to innkeepers, and excluding some to which the common-law innkeeper's lien would apply. Since it enlarged the right in some respects and restricted it in others, it was held to repeal the common law on the subject of innkeeper's lien.

Section 3241 and § 3248 appeared in different acts of the legislature, enacted at different times, and later brought together in the revisions. It is argued by the respondent with plausibility, and his position supported by authority, that, on account of the difference in origin and purpose of the acts, including them together in the same article and chapter of the Revised Statutes does not necessarily make them applicable to the same subject, and that the penalty provided in § 3248 cannot be applied to the violation of § 3241. *Paddock v. Missouri P. R. Co.* 155 Mo. 524, loc. cit. 535, 536, 56 S. W. 453; *Miller v. Boulware*, 267 Mo. 487, 184 S. W. 1148; *Strottman v. St. Louis, I. M. & S. R. Co.* 211 Mo. 227, loc. cit. 256, 257, 109 S. W. 769.

However, it is not necessary to apply the principle announced in these decisions to the question under consideration. For the purpose of this argument, but without deciding such to be the case, it may be conceded that § 3248 is applicable to a violation of § 3241. The appellant argues that the statutes cover the entire subject-matter under consideration, and so repeal the common

law upon the subject; therefore the only remedy which the plaintiff had in this case was an action for the penalty provided by § 3248. In the *Iba Case*, 45 Mo. loc. cit. 474, the ruling in which has been approved by later decisions (*Chandler v. Chicago & A. R. Co.* 251 Mo. loc. cit. 600, 158 S. W. 35), this court had under consideration the statute requiring railroads to fence their tracks at certain points. It was held that, since an action would lie at common law for the negligent killing of stock which got upon the railroad company's track, the statute, by merely providing an additional remedy, was not exclusive, and the common-law remedy still remained. Appellant asserts that ruling is not in point, because the entire subject is not covered in the Fencing Statute; that there are various circumstances under which the stock might be killed so as to render the railroad company liable where the statute affords no remedy, and the only remedy would be at common law. By the same token we may say the entire subject is not covered in the case of freights by § 3241 and other sections relating to maximum freight charges. It is entirely conceivable that a railroad company of the class under consideration might charge the maximum freight rate provided in § 3241, and the circumstances might be such that the maximum charge would be excessive. Such a situation is both theoretically and practically possible. In that case the only remedy of the shipper would be an action at common law for overcharges. A significant statement in the *Iba Case*, 45 Mo. loc. cit. 474, is this: "The statute under consideration imposes the obligation to fence. It dispenses with any other proof of negligence if the fence is not built, and it compensates the sufferer with double the loss. If nothing were said about damages, the defendant would be liable for the actual loss; so, I imagine, he would be liable if nothing were said about the evidence. The obligation of itself creates the liability."

In this case the statute (§ 3241)

provides a maximum freight rate, and a charge in excess of that maximum is excessive. The statute dispenses with proof that the charge is excessive, just as the Fencing Statute dispenses with the proof of negligence. If there were no penalty provided anywhere, the shipper could recover for overcharges, just as in the cattle case they could recover for the actual damages inflicted; the case would turn upon a matter of evidence.

Further light is thrown upon the matter by the conclusion announced in the case of *White v. Delano*, 270 Mo. 16, 191 S. W. 1012. That was a suit brought to recover the penalty provided by § 3248, thrice the charges for freight in excess of the rates provided by § 3241. The court held that by the injunction proceeding in the Federal court, to which the defendant railroad company was a party, the same injunction proceeding mentioned in the pleadings in the present case, the penalty section, 3248, was suspended from the time the act was held unconstitutional in the Federal circuit court until the decision was reversed by the United States Supreme Court, and the penalty could not afterwards be imposed for any violation of the Rate Statute during that period. The court held, further, that the rate section, 3241, was not suspended during the period; so by the reversal by the United States Supreme Court the penalty section was not restored to life so as to take effect during the period the injunction held, but the rate section was revived so as to take effect during that period, and the plaintiff was allowed to recover the actual overcharge. The case separated the rate section from the penalty section, and allowed a recovery for violation of the former when the latter was not enforceable.

We hold the penalty is not an exclusive remedy, plaintiff's action is at common law, and the five-year Statute of Limitations applies.

III. We come now to inquire whether the rate provided for in § 3241, Rev. Stat. 1909, is confisca-

tory when applied to the shipment of the ties of Hackworth over the defendant's road. Certain principles have been laid down in rate cases before the Supreme Court of the United States, to be applied in determining whether a rate is confiscatory and unconstitutional.

The shipments must be considered with all the traffic on the particular road whose rate is attacked. Account must be taken not only of the actual expense in carrying the particular commodity under consideration, but all other expenses, outlays, etc., such as maintenance, replacement, general expense, taxes, etc. All this must be properly apportioned with other intrastate traffic, and in turn the intrastate traffic must be properly apportioned with the interstate traffic. The general expense mentioned must be apportioned, even though it would have been incurred to the same extent if the freight under consideration had not been shipped at all. After these expenses are ascertained and deducted from the receipts at the prescribed rate, there must be sufficient balance to offer a reasonable return upon the value of the plant.

These general principles were applied by the trial court in the determination of this case, as shown by the declarations of law asked by the defendant and given. They covered every contingency in such apportionment which could be thought of, and gave the defendant even more than it was entitled to. There is necessarily a wide discretion in the application of these rules. For instance, it is held not to be necessary that all commodities should be treated as carried at the same rate of expense. *Northern P. R. Co. v. North Dakota*, 236 U. S. 597, 59 L. ed. 742, L.R.A.1917F, 1148, P.U.R.1915C, 277, 35 Sup. Ct. Rep. 429, Ann. Cas. 1916A, 1. The legislature is not bound to fix uniform rates for all commodities, nor to require that the same percentage be made on all sorts of business. *Id.* 236 U. S. loc. cit. 598, 599.

Another principle must be kept in mind. Rate making is purely a leg-

islative function, and may be exercised by the legislature directly, or by some subordinate administrative body, or "administrative arm of the legislature," such as the utilities commission. *Knoxville v. Knoxville Water Co.* 212 U. S. 8, 53 L. ed. 378, 29 Sup. Ct. Rep. 148; *Missouri Southern R. Co. v. Public Service Commission*, 279 Mo. 484, P.U.R. 1919F, 584, 214 S. W. loc. cit. 380; *Louisville & N. R. Co. v. Garrett*, 231 U. S. loc. cit. 305, 58 L. ed. 240, 34 Sup. Ct. Rep. 48.

In the case last cited it was said (231 U. S. loc. cit. 313): "The rate-making power necessarily implies a range of legislative discretion; and, so long as the legislative action is within its proper sphere, the courts are not entitled to interpose, and, upon their own investigation of traffic conditions and transportation problems, to substitute their judgment with respect to the reasonableness of rates for that of the legislature or of the railroad commission exercising its delegated power."

Whether a rate fixed by the legislature is confiscatory is a question of fact, and the facts which would invalidate the rate-fixing act must be clearly established. *Minnesota Rate Cases* (*Simpson v. Shepard*) 230 U. S. 452, 453, 57 L. ed. 1563, 48 L.R.A. (N.S.) 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18; *Knoxville v. Knoxville Water Co.* supra.

The trial court found as a fact that the rates during the years under consideration were not confiscatory as applied to the shipments of the plaintiff's ties. Unless the evidence clearly shows to the contrary, that finding of the trial court must be sustained.

The most important element to consider in connection with rate fixing is the value of the property on which the carrier must have a reasonable return. The cost of reproduction is mentioned as proper to consider in ascertaining the present value of the plant. *Minnesota Rate Cases*, supra. But this is subject to limitations. Property other

than land will depreciate so as to be worth less than if reproduced new, and that depreciation must be deducted. 230 U. S. loc. cit. 457. In case of real estate which forms a part of railroad property, increase in value may be considered, provided a speculative increment is not to be taken into consideration. *Minnesota Rate Cases*, 230 U. S. loc. cit. 454. The value must be no greater in the case of real estate than the value of similar lands.

In 1913 the defendant railroad company applied to the Missouri public service commission for the purpose of procuring an order to increase the statutory rates, on the ground that such rates were unreasonable and confiscatory. The public service commission, after hearing the case on November 10, 1915, decided the matter, and promulgated rates to be applied to all the intrastate shipments of the defendant company. The evidence, comprising several hundred pages, taken before the commission, was introduced in this case and admitted without objection. Other evidence was also introduced upon the trial of this case, all of which has been considered by us. It shows such values in the year 1914, so that the public service commission might fix rates for the future. The appellant asks this court to consider that evidence for the purpose of determining values, and the returns on such values, for the years 1909, 1910, and 1911. While the report of the public service commission in that case was not introduced in evidence, it is constantly referred to by the appellant (3 Mo. P. S. C. p. 1) as if before the court, and therefore appellant cannot complain if we take in some matters the conclusions reached by the public service commission, instead of examining the details of figures and calculations from which that body drew its conclusions.

There was a conflict in the evidence between the chief engineer of the defendant company, Mr. H. H. Woodman, and that of W. K. Spar-

row, representing the public service commission in the inventory and appraisalment of the property. There was also a conflict in the evidence between Mr. McShane, chief accountant of the public service commission, and Mr. Fremon, for the defendant company, as to the proper division and apportionment of operating expenses for the year 1914.

In estimating the values the public service commission ascertained the cost of defendant's property as shown by the books of the company and by the commission's accountant. The estimate of this book cost commences with July 1, 1891, and shows the investment in "road equipment and supplies" up to June 30, 1914. It embraces all items of expenditure, including the right of way, station grounds, real estate, grading, bridges, trestles, etc. The commission, after reviewing and analyzing the evidence, found the original cost of the defendant's plant, "together with additions and betterments, material, and stores on hand, did not exceed a total investment of \$740,000 at June 30, 1914. In determining the value at that date the commission apparently took into consideration depreciation and appreciation. It was stated that there appeared no question that parts of the property had appreciated in value—such parts as land and solidification of the roadbed. The cost of grading the roadbed was shown by the evidence to be between \$250,000 and \$272,000. The land was valued at \$38,000, showing the part of the property which had appreciated was very considerable. The commission then, for the purpose of estimating the present value in 1914, found the property could be reproduced new for \$894,500. It then determined the value to be fixed for the purpose of settling the rates June 30, 1914, as \$823,000. Since that amount is largely in excess of the original cost, without analyzing the evidence, we conclude it must have been determined by the commission that the appreciation of the property had been very considerable—more than

the depreciation. It is the value thus fixed for 1914 which the appellant desires this court to take into consideration. It suggests the only method of arriving at the value of the property during the years 1909, 1910, and 1911, is to take account of additions to the plant and deductions from it between those years and 1914. With additions the plant in 1914 was worth about \$17,000 more than in 1909, and about \$3,000 more than in 1910. These additions were right of way, station grounds, etc. In 1911 the plant is estimated to be \$11,000 greater than in 1914, because a part of the railroad had been abandoned between those dates so as to reduce the value that much. Thus it appears that the value which the appellant would have this court attach to the property in 1909, 1910, and 1911, is substantially the same as the value which it claims the evidence shows and the commission found was its value in 1914. The only variations suggested are those slight additions and subtractions to the plant.

The commission, in fixing the value, employed as the most important element in its calculations the cost of reproduction new, and from this all calculations were drawn. This was reproduction in 1914, and following closely estimates made by engineers for the company and for the commission. The value fixed was a compromise of those estimates. To arrive at the value of the plant in 1909, 1910, and 1911, there is no estimate as to the cost of reproduction new then. From those years until the estimate in 1914, the solidification of the roadbed and the real estate sensibly appreciated; how much, is not shown. The cost of reproduction in 1909 probably would not have been anything like such cost in 1914, five years later, when everything probably was higher. No figures are given as to the value of steel rails in 1909; yet steel rails constituted about one fourth of the cost of reproduction in 1914. Since the original cost and all betterments were placed at \$740,000, it is fair to

say there had been great depreciation from 1891 down to that date. And there is no evidence to show whether the cost in 1909 would have been greater or less than the original cost; whether the property was worth more in 1909 than the original cost less actual depreciation. So, in estimating the value for the years under consideration, the following elements, taken into consideration in fixing the value in 1914, are entirely lacking: The cost of reproduction new; the depreciation of property other than land; the cost of reproduction in its then condition; the appreciation from 1909, 1910, and 1911, until 1914, of the land or property which appreciates.

In arriving at the net income for 1914 the commission summarizes the evidence of McShane and Fremon, and finds that the net income for 1914, while the statutory rate was applied, was \$55,775. 3 Mo. P. S. C. loc. cit. 41. That was for the total business, interstate and intrastate, transacted by defendant company. The net income was much greater for previous years. The evidence of McShane is that the net income for 1909 was \$22,516; for 1910, \$83,579; for 1911, \$72,855, when the charge was in excess of the statutory rate. The commission notes, as shown by the evidence, that there was a sudden increase of income for 1910, which prevailed during all the subsequent years. The gross income, by the testimony of McShane, for 1910, was \$174,648; for 1911, \$171,177; for 1914, \$174,069. Thus the gross income, grand total revenue, was about the same in the years 1910 and 1911 as it was in 1914, while the total expense in 1914 is shown to be from 15 to 20 per cent in excess of what it was in either of the three years under consideration. Maintenance for the year 1914 was found by the commission to be about \$55,000, while in the year 1909 it was \$34,000; 1910, \$22,000; 1911, \$20,000.

During the year 1914, it will be noted, the company operated at much greater expense than during

the years under consideration. If the company had operated in 1914 at the same expense, for instance, as in 1910, its earnings, instead of being \$55,000, would have been about \$75,000, a net return of more than 10 per cent on what was the probable value in 1914. This, of course, takes the total return and expense for operating the road on all classes of traffic. Mr. Fremon, the general auditor of the defendant company, produced evidence—and this was the only evidence offered upon the point—showing the apportionment of the revenue derived from and the expenses assigned to each class of traffic, to the freight and passenger traffic, and to the interstate and the intrastate traffic. He shows the cost of the intrastate service to be more than 76 per cent of the total. He estimates the value of the property devoted to each class of service, and about the same per cent of property is assigned to intrastate use. The revenue from the interstate traffic appears from Fremon's calculation to have been, for the year 1914, almost 40 per cent of the total.

Taking these figures with the entire net return for 1914, making proper adjustment between the interstate and intrastate traffic, considering the elements lacking in a proper estimate of the values of property for the years under consideration, and the lessened expense of operation during those years, we cannot say that the trial court was in error when it found that the defendant company had failed to prove that the charges during those years were excessive and confiscatory.

If one apportions the expense of operation so as to make it in the same proportion as the income between interstate and intrastate traffic, and then makes allowance for the smaller expense for the years 1909, 1910, and 1911, as compared with 1914, it is easy to figure a fair rate of interest on the investment for those years, especially if the value for those years was appreciably less than in 1914.

From the record there are 127 counts of the petition barred by the five-year Statute of Limitations, but seven of these were dismissed, and respondent does not dispute the statement that the overcharges alleged in these counts occurred more than five years before the suit was filed.

The judgment is therefore reversed as to the 120 counts mentioned by number in the answer after the dismissal of the 7 mentioned, and the judgment of the trial court is affirmed as to the other counts.

Petition for rehearing denied January 29, 1921.

ANNOTATION.

Consideration of body of rates in determining the reasonableness of carrier's rates for a particular commodity.

The rule now appears to be that a state cannot establish a rate for a particular commodity which is below the cost to the carrier of handling that commodity, or which, considering all the traffic to which the rate applies, leaves no reasonable margin above such cost, even though, when the intrastate rates on all commodities are taken into account, the total receipts of the carrier are remunerative. *Vandalia R. Co. v. Schnull*, U. S. Adv. Ops. 1920-21, p. 372, 255 U. S. 113, 65 L. ed. —, 41 Sup. Ct. Rep. 324, reversing (1919) 188 Ind. 87, P.U.R. 1919C, 637, 122 N. E. 225; *Northern P. R. Co. v. North Dakota* (1915) 236 U. S. 585, 59 L. ed. 735, L.R.A.1917F, 1148, P.U.R.1915C, 277, 35 Sup. Ct. Rep. 429, Ann. Cas. 1916A, 1; *Interstate Commerce Commission v. Union P. R. Co.* (1912) 222 U. S. 541, 56 L. ed. 308, 32 Sup. Ct. Rep. 108; *Union P. R. Co. v. Public Utilities Commission* (1915) 95 Kan. 604, P.U.R.1915D, 377, 148 Pac. 667; *Morgan's L. & T. R. & S. S. Co. v. Railroad Commission* (1910) 127 La. 636, 53 So. 890; *Louisiana R. & Nav. Co. v. Railroad Commission* (1912) 131 La. 387, 59 So. 820; *HACKWORTH v. MISSOURI SOUTHERN R. Co.* (reported herewith) ante, 170; *Re Atchison, T. & S. F. R. Co.* (1915) 3 Mo. P. S. C. 75, P.U.R.1916A, 594 (decision by public service commission).

The law on the present subject centers chiefly about the effect of the decision by the Federal Supreme Court in *Northern P. R. Co. v. North Dakota* (U. S.) supra, which will be

referred to in the present annotation as the *North Dakota Case*. It was there held that maximum intrastate rates fixed by a state for the transportation of coal in carload lots were confiscatory, and denied the carrier due process of law, where, taking into account the entire traffic to which such rates were applicable, they compelled the carrier to transport the commodity for less than cost, or without substantial compensation in addition to cost, although the returns of the carrier from its entire intrastate operations might be adequate. The court, by Mr. Justice Hughes, said: "The public interest cannot be invoked as a justification for demands which pass the limits of reasonable protection, and seek to impose upon the carrier and its property burdens that are not incident to its engagement. In such a case, it would be no answer to say that the carrier obtains from its entire intrastate business a return as to the sufficiency of which, in the aggregate, it is not entitled to complain. Thus, in *Lake Shore & M. S. R. Co. v. Smith*, (1899) 178 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565, the regulation as to the sale of mileage books was condemned as arbitrary, without regard to the total income of the carrier. Similarly, in *Missouri P. R. Co. v. Nebraska* (1910) 217 U. S. 196, 54 L. ed. 727, 30 Sup. Ct. Rep. 461, 18 Ann. Cas. 989, it was held that the carrier could not be required to build mere private connections, and the adequacy of the receipts from its entire busi-

ness did not enter into the question. And this was so because the obligation was not involved in the carrier's public duty, and the requirement went beyond the reasonable exercise of the state's protective power. We have, then, to apply these familiar principles to a case where the state has attempted to fix a rate for the transportation of commodity, under which, taking the results of the business to which the rate is applied, the carrier is compelled to transport the commodity for less than cost, or without substantial compensation in addition to cost.

. . . The legislature undoubtedly has a wide range of discretion in the exercise of the power to prescribe reasonable charges, and it is not bound to fix uniform rates for all commodities, or to secure the same percentage of profit on every sort of business. . . . Nor is its authority hampered by the necessity of establishing such minute distinctions that the effective exercise of the rate-making power becomes impossible. It is not bound to prescribe separate rates for every individual service performed, but it may group services by fixing rates for classes of traffic. . . . The court, therefore, is not called upon to concern itself with mere details of a schedule; or to review a particular tariff or schedule which yields substantial compensation for the services it embraces, when the profitability of the intrastate business as a whole is not involved. But a different question arises when the state has segregated a commodity, or a class of traffic, and has attempted to compel the carrier to transport it at a loss, or without substantial compensation, even though the entire traffic to which the rate is applied is taken into account. On that fact being satisfactorily established, the presumption of reasonableness is rebutted. If in such a case there exists any practice, or what may be taken to be (broadly speaking) a standard of rates with respect to that traffic, in the light of which it is insisted that the rate should still be regarded as reasonable, that should be made to appear. As has been said, it does not

appear here. . . . The constitutional guaranty protects the carrier from arbitrary action and from the appropriation of its property to public purposes outside the undertaking assumed; and where it is established that a commodity, or a class of traffic, has been segregated, and a rate imposed which would compel the carrier to transport it for less than the proper cost of transportation, or virtually at cost, and thus the carrier would be denied a reasonable reward for its service, after taking into account the entire traffic to which the rate applies, it must be concluded that the state has exceeded its authority."

In the case last cited the Federal Supreme Court distinguished *Minneapolis & St. L. R. Co. v. Minnesota* (1902) 186 U. S. 257, 46 L. ed. 1151, 22 Sup. Ct. Rep. 900, which involved the validity of a rate fixed by the railroad commission of Minnesota for intrastate transportation of coal in carload lots, on the ground that there was no proof that the carrier was compelled to transport the coal at a loss, or without substantial compensation, but merely evidence tending to show that, if the rates fixed for coal were applied to all freight, the road would not pay its operating expenses. Inferences which might be drawn from expressions in the opinion in the latter case must, accordingly, be subjected to the more recent utterances of the Supreme Court on the subject. For instance, in the *Minnesota Case* it was said: "Notwithstanding the evidence of the defendant that, if the rates upon all merchandise were fixed at the amount imposed by the commission upon coal in carload lots, the road would not pay its operating expenses, it may well be that the existing rates upon other merchandise, which are not disturbed by the commission, may be sufficient to earn a large profit to the company, though it may earn little or nothing upon coal in carload lots."

In line with the authority of the *North Dakota Case* (U. S.) *supra*, is the decision in the reported case (*HACKWORTH v. MISSOURI SOUTHERN R. Co. ante*, 170), which holds that a state, in fixing a schedule of rates by

statute, cannot establish a rate for a particular class of freight which will compel its carriage at a loss, although the rates for all kinds of traffic, taken as a whole, will produce an adequate return on the investment. The doctrine was applied to a short line railroad, the confiscatory rate, which was on railroad ties, applying to a large per cent of the business.

The particular feature of the decision in the *HACKWORTH CASE* by which counsel attempted to distinguish it was that in this instance the state had prescribed a complete schedule of rates affecting all traffic, and, it was contended, under these circumstances the rates, considered in their entirety, must be shown to be insufficient to yield a reasonable return. This contention the decision overrules.

The decisions of the Federal Supreme Court, prior to that in the *North Dakota Case*, have been interpreted by some of the courts as declaring a contrary doctrine, which that case in effect overrules.

Thus, in *Union P. R. Co. v. Public Utilities Commission* (1915) 95 Kan. 604, P.U.R.1915D, 377, 148 Pac. 667, the court said that, in view of this decision, "the rule of law hitherto prevalent, that the rate on each and every commodity transported in intrastate commerce need not return a profit, provided the entire intrastate business of the carrier shows a fair profit, must be abandoned, in deference to the decision of the Supreme Court of the United States," in the *North Dakota Case*.

And the Missouri public service commission in *Re Atchison, T. & S. F. R. Co.* (1915) 3 Mo. P. S. C. 75, P.U.R. 1916A, 594, supra, said that, in view of the decision in the *North Dakota Case*, whatever had been said in decisions and text-books to the effect that a state legislature or commission could establish a rate not in itself compensatory, provided all the intrastate rates were profitable, might as well be discarded.

But there are several decisions, decided prior to the *North Dakota Case*, in which the doctrine of that case finds support. Thus, in *Interstate*

Commerce Commission v. Union P. R. Co. (1912) 222 U. S. 541, 56 L. ed. 308, 32 Sup. Ct. Rep. 108, the court by Mr. Justice Lamar said: "Whether the carrier earned dividends or not sheds little light on the question as to whether the rate on a particular article is reasonable. For, if the carrier's total income enables it to declare a dividend, that would not justify an order requiring it to haul one class of goods for nothing, or for less than a reasonable rate. On the other hand, if the carrier earned no dividend, it would not have warranted an order fixing an unreasonably high rate on such article."

So, in *Morgan's L. & T. R. & S. S. Co. v. Railroad Commission* (1910) 127 La. 636, 53 So. 890, the court said that while, in establishing a complete schedule of rates, the total revenue of the road is a factor to be considered, nevertheless, when a rate is fixed for a particular commodity, the only question is whether such rate will pay the actual cost of the service and a fair return on the investment. This decision was followed in *Louisiana R. & Nav. Co. v. Railroad Commission* (1912) 131 La. 387, 59 So. 820.

Several earlier decisions must apparently be considered as overruled, or at least as of doubtful authority. Thus, in *Atchison, T. & S. F. R. Co. v. United States* (1913) 203 Fed. 56, it was held that a carrier cannot complain of a violation of its constitutional rights in being compelled to make a rate for some particular commodity which would be confiscatory as applied to all its freight. The decision is affirmed, without discussion, in (1913) 231 U. S. 736, 58 L. ed. 460, 34 Sup. Ct. Rep. 316.

And in *State ex. rel. Railroad Commission v. Florida East Coast R. Co.* (1913) 65 Fla. 424, 62 So. 591, the court said that the railroad commission had the power to reduce charges for a particular class or kind of service, providing such reduction did not in fact render the carrier unable to earn a fair profit upon the entire business, or a reasonable compensation for the service it rendered as an entirety.

Although on facts beyond the scope of the present annotation, attention is called to *State ex rel. Caster v. Kansas Postal Teleg. Cable Co.* (1915) 96 Kan. 298, P.U.R.1915E, 222, 150 Pac. 544, in which the court, referring to the North Dakota Case, said: "A third contention in the state's brief was that, notwithstanding the deficit in operating the telegraph station at Syracuse, the company should be required to maintain it, unless it could be shown that the entire intrastate business of the company was operated at a loss; but ere the oral argument was reached certain decisions of the Supreme Court of the United States were handed down, which abrogated that doctrine, and it was abandoned."

The North Dakota Rate Statute involved in *Northern P. R. Co. v. North Dakota* (1915) 236 U. S. 585, 59 L. ed. 735, L.R.A.1917F, 1148, P.U.R.1915D, 377, 148 Pac. 667, was previously sustained by the state court in *State ex rel. McCue v. Northern P. R. Co.* (1909) 19 N. D. 45, 25 L.R.A. (N. S.) 1001, 120 N. W. 869, and the decision was affirmed by the United States Supreme Court in (1910) 216 U. S. 579, 54 L. ed. 624, 30 Sup. Ct. Rep. 423, on the ground that the evidence left the question of reasonableness of the rates in doubt, the affirmance being without prejudice to the right of the railroad to reopen the case, if, after adequate trial, the carrier thought it could prove the confiscatory character of the rates. In upholding the statute the state court said that there was no contention that the railroad would not be able, upon its entire intrastate traffic, to earn, in addition to its gross operating expenses, a sum amply sufficient to yield a reasonable income upon its investment, and that consequently it could not successfully urge the unconstitutionality of the statute.

The North Dakota Case is cited with approval by the Federal Supreme Court in *Brooks-Scanlon Co. v. Railroad Commission* (1920) 251 U. S. 396, 64 L. ed. 323, P.U.R.1920C, 579, 40 Sup. Ct. Rep. 183, where it was held that a corporation which, in connection with its sawmill and lumber

business, operated a railroad on which it did a small business as a common carrier, could not be compelled to continue the operation of the railroad after it had ceased to be profitable, merely because a profit would be derived from the entire business, including the operation of the railroad. The question here presented is somewhat analogous to that as to whether an electric or gas company, or other public utility, which has several branches of business, may be required to operate one of them at a loss, provided the receipts from the company's entire business are remunerative.

A comparatively recent case in which the state court distinguishes the North Dakota Case (U. S.) *supra*, is *Vandalia R. Co. v. Schnull* (1919) 188 Ind. 87, P.U.R.1919C, 637, 122 N. E. 225, although some of the language of the court seems difficult to reconcile with the former decision. In this case the railroad commission of Indiana had made an order fixing rates for certain classes of freight, over a division extending from Indianapolis west to the state line. The case turns chiefly on the question of the showing which the carrier must make in order to avoid putting into effect a rate order of the commission, it being held that it was insufficient for the carrier merely to allege and prove that the rate was not remunerative in respect to the particular property involved, in transporting the particular classes of freight over the division to which the rate applied. The court said that if the carrier received in the aggregate fair remuneration on its investment, notwithstanding the rates on a part of its business were not remunerative, it had no basis for complaint; that when a rate on a part of its business was too low, some other part of the business might be paying too much, thus preventing a deficiency of income, and in such cases a shipper affected by the higher rates might have a basis for complaint; and that if, on such shipper's complaint, the rates were reduced, and thus the carrier's total net returns became nonremunerative, the carrier might then be entitled to

complain and show the facts, and might be entitled to an increase of the unfairly low rates. The decision, however, was reversed by the Federal Supreme Court in (U. S. Adv. Ops. 1920-21, 'p. 372) 255 U. S. 113, 65 L. ed. —, 41 Sup. Ct. Rep. 324, in which that court reaffirmed the doctrine of the North Dakota Case, and held that a state may not segregate a class of traffic and compel a carrier to transport it in intrastate commerce at less than cost, or without a substantial compensation, although the return by the carrier from its entire intrastate operations may be adequate. The court stated that its decisions in the North Dakota Case and other cases on the question did not discredit the earlier decisions, but only removed them from misunderstanding and controversy, and declared a principle that assigned to the state a useful power of regulation, while it accorded to railroads a reasonable return upon the capital invested and a reward for its enterprise.

Another recent case which, so far as the language of the opinion is concerned, does not seem entirely in harmony with the North Dakota Case, is *Alexandria & W. R. Co. v. Railroad Commission* (1918) 143 La. 1067, 79 So. 863, where the court quotes, with implied approval, the doctrine that, in determining the reasonableness of a rate fixed by legislative authority on a particular commodity, the proper test is not whether, as to the particular commodity, the rate is sufficiently high to enable the carrier to earn a fair compensation after allowing for legitimate expenses, but whether the carrier will be able, from its total freight receipts on all its traffic, to earn a sum, above operating expenses reasonably necessary for such traffic, sufficient to yield a fair and reasonable profit on its investment. It was held, however, in this case, that the rate for transporting lumber fixed by the railroad commission for a short line railroad was unreasonable and unjust, and that the order of the commission should be set aside, as it appeared

that the revenue produced by the rate would be barely sufficient, if sufficient at all, to pay the actual cost of moving the commodity to which it was applicable, leaving nothing, or next to nothing, to compensate the railroad company for the use of its property, the payment of its debts, or for betterments or dividends.

Although the question is, in itself, beyond the scope of the present annotation, attention is called to some cases on the question of the right and the duty to take into consideration the revenue from the entire system, in determining the reasonableness of the rates on a part or branch of the system only. And for the purpose of showing more fully the effect of the decision in the North Dakota Case (U. S.) *supra*, attention is called to several cases involving passenger rates, and the right to consider both freight and passenger rate schedules in passing on the reasonableness of a particular rate. In that case the court distinguished *St. Louis & S. F. R. Co. v. Gill* (1895) 156 U. S. 649, 39 L. ed. 567, 15 Sup. Ct. Rep. 494, on the ground that in the latter case, where the statute fixed a maximum rate for passengers in the state of Arkansas, the validity of which was challenged, the allegation and offer of proof that the rate would compel the carriage of passengers at a loss related only to a portion, or division, of the railroad, and not to the result of all the traffic to which the rate in question applied.

The true test of the reasonableness of a rate, it is said in *Milwaukee Electric R. & Light Co. v. Railroad Commission* (1920) 171 Wis. 297, 177 N. W. 25, is its effect upon the entire system operated by the public utility, and not whether a particular part thereof is operated at a profit or loss under the prescribed rate. The action was to set aside an order of the railroad commission, requiring the plaintiff to continue the operation of one of its suburban lines, on the ground that it was unreasonable in that it required the plaintiff to operate it at a loss. It was held that a general demurrer was properly sustained to

the complaint, in that it failed to allege that the entire system would be operated at a loss, the true test being not the effect of the order upon a single line, or upon a part of the system, but upon the entire system.

The last case follows the decision in such cases as *Puget Sound Traction, Light & P. Co. v. Reynolds* (1917) 244 U. S. 574, 61 L. ed. 1325, 5 A.L.R. 13, P.U.R.1917F, 57, 37 Sup. Ct. Rep. 705, where it was held that the question whether an order of a public service commission, requiring street railway passengers to be carried beyond the limits of the particular franchises covering those lines, and at a reduced rate, was confiscatory or otherwise arbitrary within the inhibition of the 14th Amendment to the Federal Constitution, was not to be determined with reference to earnings and operating expenses of the lines in question, separately considered, such lines having been long operated as parts of a system.

The weight of the decisions, both court and commission, is to the effect that, in considering the question whether or not a railroad company should be compelled to continue the operation of a branch line, the entire revenues of the system are to be considered, and not merely the direct return from the branch line itself; in other words, the branch line is not to be considered as an independent enterprise, but rather in the nature of a feeder to the system. In addition to the authorities already cited, this doctrine finds support in the following, among possibly other, cases:

United States.—*St. John v. Erie R. Co.* (1874) 22 Wall. 136, 22 L. ed. 743; *Re Arkansas R. Rates* (1909) 168 Fed. 720; *Billings Chamber of Commerce v. Chicago, B. & Q. R. Co.* (1910) 19 Inters. Com. Rep. 71.

Colorado.—*Colorado & S. R. Co. v. State R. Commission* (1911) 54 Colo. 64, 129 Pac. 506.

Illinois.—*People ex rel. Cantrell v. St. Louis A. & T. H. R. Co.* (1896) 176 Ill. 512, 35 L.R.A. 656, 45 N. E. 824, 52 N. E. 292.

Michigan.—*Northwestern Cooperative & Lumber Co. v. Minneapolis,*

St. P. & S. Ste. M. R. Co. (No. D—1048, March 23, 1917) P.U.R.1917F, 1021 (railroad commission case).

Missouri.—*State ex rel. Missouri P. R. Co. v. Atkinson* (1917) 269 Mo. 634, L.R.A.1918A, 46, P.U.R.1917C, 971, 192 S. W. 82, Ann. Cas. 1917E, 987.

Nebraska.—*Marshall v. Bush* (1918) 102 Neb. 279, L.R.A.1918E, 385, 167 N. W. 59.

West Virginia.—See also *Chesapeake & O. R. Co. v. Public Service Commission* (1914) 75 W. Va. 100, L.R.A.1917F, 1190, 83 S. E. 286.

Wisconsin.—*Nelson v. Northern P. R. Co.* (1912) 8 Wis. R. C. 685 (railroad commission case); *Werner v. Chicago, M. & St. P. R. Co.* (1914) 14 Wis. R. C. 573 (same).

That, in determining the validity of a statutory 2 cent per mile maximum passenger rate, every part of the railway system over which the passenger is entitled by the statute to ride at this fare, must be taken into consideration, as well as the entire passenger service, including sleeping-car, parlor-car, and dining-car service, see *Groesbeck v. Duluth, S. S. & A. R. Co.* (1919) 250 U. S. 607, 63 L. ed. 1167, 40 Sup. Ct. Rep. 38.

However, in *Re Minneapolis, St. P. & S. Ste. M. R. Co.* (1915) 30 N. D. 221, P.U.R.1915D, 434, 152 N. W. 513, Ann. Cas. 1917B, 1205, in passing upon the validity of an order of the state board of railroad commissioners, requiring the installation of separate daily passenger and freight service upon a branch line, the North Dakota supreme court held that the case was governed by the decision of the Federal court in the North Dakota Case (U. S.) supra. The railroad commissioners had found that the entire system was earning a reasonable return. But the court said: "The only purpose of such finding was to allow the court to reason along lines parallel with those heretofore followed by this court in the Lignite Coal Rate Cases; but as this reasoning was recently condemned by the Federal Supreme Court, when applied to a commodity or a classification, it must be equally untenable when used as a basis for determining whether or not

the income of a branch line is to be treated with reference to the earnings of the whole system within the state. The Federal Supreme Court negatives any such conclusion, and by analogous reasoning we must determine the question as one of receipts and expenditures of the branch line alone."

It appears, however, from the Federal decisions above cited, that it was not the intention of the United States Supreme Court in the North Dakota Case to change the rule with respect to the consideration of the income from the entire system to which the rates in question were applicable, as distinguished from consideration of the income from a branch or part only of the system.

In holding that the validity of a state statute prescribing a maximum passenger rate must be determined by its effect upon the passenger business of the company, separately considered, the court, in *Norfolk & W. R. Co. v. Conley* (1915) 236 U. S. 605, 59 L. ed. 745, P.U.R.1915C, 293, 35 Sup. Ct. Rep. 437, referred to the North Dakota Case, stating that that decision made an extended discussion of the question unnecessary; that it was held in that case that, despite the discretionary power of the state in prescribing rates, its power was not arbitrary, and it might not select a commodity, or class of traffic, and, instead of fixing what might be deemed to be reasonable compensation for its carriage, compel the carrier to transport it either at less than cost, or for compensation which was merely nominal. The court continues: "These considerations are controlling here. The passenger traffic is one of the main departments of the company's business; it has its separate equipment, its separate organization and management, and, of necessity, its own rates. In making a reasonable adjustment of the carrier's charges, the state is under no obligation to secure the same rate of return from each of the two principal departments of business—passenger and freight; but the state may not select either of these departments for arbitrary control. Thus, it would not be contended that the

state might require passengers to be carried for nothing, or that it could justify such action by placing upon the shippers of goods the burden of excessive charges, in order to supply an adequate return for the carrier's entire service. And, on the same principle, it would also appear to be outside the field of reasonable adjustment that the state should demand the carriage of passengers at a rate so low that it would not defray the cost of their transportation, when the entire traffic under the rate was considered, or would provide only a nominal reward in addition to cost."

From the rule that a railroad cannot be required to carry a commodity at a loss, or without a substantial profit, merely because its return as a whole is adequate, there follows naturally the corollary that a railroad cannot increase its rates upon a particular commodity merely because its return as a whole is not adequate. Among the cases asserting this latter rule are: *Tift v. Southern R. Co.* (1905) 10 Inters. Com. Rep. (Fed.) 548, affirmed by the Supreme Court in (1907) 206 U. S. 428, 51 L. ed. 1124, 27 Sup. Ct. Rep. 709, 11 Ann. Cas. 846; *Re Rates on Common Brick* (1913) 26 Inters. Com. Rep. (Fed.) 129; *Re Denver & S. L. R. Co.* (1917; Colo.) P.U.R.1917C, 195; *State ex rel. Railroad Comrs. v. Florida East Coast R. Co.* (1916) 72 Fla. 379, P.U.R.1917B, 1023, 73 So. 171, Ann. Cas. 1918E, 1206.

So, in *Garwood v. Colorado & S. R. Co.* (1915; Colo.) P.U.R.1916A, 911, the Colorado district court said: "If it be the law, as held by the Federal Supreme Court in the North Dakota Case, that the rate on one commodity or class must not be reduced below a profitable amount, even though a general profit still remains on the whole traffic of the road, it must, conversely, be true that such rates must not be raised above a reasonable amount, even though a general loss still remains on the whole traffic of the road."

Where the Interstate Commerce Commission has found that an individual rate is unreasonable, the

carrier which seeks to set aside the order of the commission reducing such rate, upon the ground that the effect of the order will be to confiscate its property by reducing its total revenues to a point where it cannot earn more than a given per cent upon the alleged total value of its road, is not

aided by a presumption in favor of the reasonableness of the other rates not under direct investigation, so as to overthrow substantial evidence to the effect that the individual rate under investigation is unreasonable in itself. *Lehigh Valley R. Co. v. United States* (1913) 204 Fed. 986. R. E. H.

ANDREA FIGARI, Appt.,

v.

G. B. OLCESE et al., Respts.

California Supreme Court (In Banc)—January 28, 1921.

(— Cal. —, 195 Pac. 425.)

Bills and notes — signing as witness — right to show.

1. One who with knowledge of the payee signs a note as witness, and qualifies his signature by prefixing the word "Witness" to it, may show that his name was written and accepted in that capacity alone.

[See note on this question beginning on page 197.]

— signature of witness — effect of retracing.

2. That one signing a note as a witness retraces his signature at the request of the payee does not change his relation to the note.

Appeal — credibility of witnesses.

3. The question of credibility of witnesses is exclusively within the province of the trial court.

[See 2 R. C. L. 205, 206.]

Evidence — testimony of adverse party — weight.

4. That by statute one calling an adverse person as a witness is not bound by his testimony does not prevent such testimony from being given its proper weight by the jury.

APPEAL by plaintiff from a judgment of the Superior Court for the city and county of San Francisco (Troutt, J.) in favor of the defendant son in an action brought to recover on a promissory note, alleged to have been executed by defendants. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. Frank Schilling for appellant.
Messrs. William A. Kelly and H. C. Faulkner for respondents.

Per Curiam:

Plaintiff brought this action to recover on a promissory note purporting to have been executed by the defendants.

The question here presented is whether the respondent, Emilio Olcese, signed the note as a maker, or merely as a witness to the signature of his codefendant, G. B. Olcese.

The trial court found that re-

spondent signed the instrument only as a witness.

The appeal is from the judgment in respondent's favor, and is based upon the contention that the above finding is not supported by the evidence.

The instrument, as reproduced in the record, shows the names of both defendants in the usual place of signature by the makers of a promissory note. The name of respondent, Emilio Olcese, is directly under that of his codefendant, an admitted

maker of the note. The only distinguishing feature is that the word "Witness" appears immediately in front of respondent's signature.

The undisputed facts are that the plaintiff, Figari, loaned \$1,300 to the defendant G. B. Olcese, and received this note as evidence of the indebtedness. The defendant Emilio Olcese is the son of the other defendant, and at the time of this transaction was twenty-six years old, and was in the employment of his father in the latter's grocery store, and had no personal interest in and received no part of the borrowed money.

Figari was about fifty-six years of age and an Italian. Both he and the elder Olcese had an imperfect knowledge of English. The plaintiff was unable to read or write the English language.

Although the testimony is conflicting on the point at issue, plaintiff's testimony is that he had been given to understand by the elder Olcese that the note was to be signed by both the father and son, and that he accepted the note in the belief that both had signed it as makers, and did not know that Emilio Olcese had written the word "Witness" before his name until many months after the note was executed. The two principals, Figari and Olcese, went to a notary and had the note drawn up. It does not appear clearly whether the elder Olcese signed it at the notary's office, or later. At any rate, the deal was not closed there, but the parties met the next morning at the office of Olcese over his store, at which time and place Figari produced his money to complete the loan. It is at this point that the matter in controversy arises as to Emilio Olcese's relation to the transaction. Figari says that he went the next morning to get the note. He testifies: "Emilio, the son, gave me the note. I say, 'I want to see you put your name.' He says, 'I put it already.' I say, 'I like to see it. Sometime I can't read. I like to see you put your name.' He told his father, 'He wants me to

put my name again,' and the father say, 'Yes; put it again.'"

He further testified in this connection that the son then took the pen and retraced his name, and handed him the note. There was other testimony of Figari indicating that it was agreed between him and the elder Olcese that the son, and perhaps the wife, were to join in signing the note. At any rate, it is enough to say, from plaintiff's standpoint, that Figari's testimony, standing uncontradicted, would sufficiently establish Emilio's liability as a maker of the note, and had the trial court found accordingly, such finding might well be held conclusive.

Both the father and the son, however, dispute this version of the transaction.

On this controverted point the testimony of the elder Olcese, in substance, is as follows: My son was present when the money was delivered. He was outside of the store, and I told my son, Mr. Figari told me, "I would like to see your son, and I give you the money;" so I called Emilio to come up, and Emilio came up, and Mr. Figari looked at the money, and he told me, "Now, you got the money here," and he say, "Your son can sign." He says, "You have your son sign this note to see I give you the money." Well, my son was there, and I told him myself to sign the note.

Q. But you have just stated that Mr. Figari said to you, in your son's presence, to have your son sign as a witness.

A. Mr. Figari told me, and he said he was telling me. He told me first; my son was not present, and I called him up and I told him to come up to the office. . . . Mr. Figari came to my office and counted the money and put it on the desk, and after he got the money counted, and before I took the money, he asked me, "We are here alone, and I give you the money." He would like to have somebody see that I give you the money, and he says, "Is your

son downstairs," and I said, "Yes," and called my son up, and I says, "I got some money here, and I would like to have you come up;" and I told him—he don't know Figari—I told my son, "I got some money, and I show it, and he loan some money, and I want you to come up and see the man lend the money." Mr. Figari was present.

Q. Did you hear your son testify here a little while ago that Mr. Figari was not present; that he was on the outside?

Mr. Kelly: That is not the testimony. The testimony of both witnesses is to the effect that Mr. Olcese went outside and called Emilio, and brought him into the room where the money was, and had Emilio sign the paper in the presence of both of them.

The Court: That is the testimony.

Q. At what particular place did you ask your son Emilio to come and sign the note?

A. Right there in front of the money, in my office. . . . In the presence of Mr. Figari I asked my son to sign the note to witness, so Figari says, so Figari could see him loan me the money, and my son sign as a witness, and Mr. Figari turned around, and he didn't see my son do the writing, and he said to my son, "I like to see you sign; I like to see you sign your name next," and my son says, "Yes; I have signed that." Mr. Figari never say nothing about a witness; he never mentioned anything about seeing the money turned over, and like to see him sign like a witness, and he never say anything else. My son don't have anything to do with the business.

This testimony is confusing and perhaps contradictory, but there is nothing in it to indicate that Emilio Olcese had any intimation from either his father or the plaintiff that he was signing other than as a witness. It would appear from the testimony of this witness that Figari had no conversation with Emilio as to the capacity in which he was to sign the note, that his communication in that

regard was entirely with the father, but that the statement was made to the son in Figari's presence that he was asked to sign as a witness.

The respondent's own testimony on this point is more explicit.

His testimony in substance is as follows:

The first time I saw Mr. Figari to know him was when I signed the note. I knew nothing about the negotiation of the note. I saw the money delivered to G. B. Olcese. Mr. G. B. Olcese came outside and I saw him; he was borrowing some money from Mr. Figari. Mr. Figari was upstairs in the office, and he wanted me to sign the note as a witness. Mr. G. B. Olcese asked me to sign the note as a witness that he took the money. I was outside handling potatoes and stuff, and Mr. Olcese asked me to sign the note as a witness. I believe the note was signed by my father when I signed it. I signed right under his name. I saw him sign it. He signed first and I signed afterwards. Mr. Figari was there, right between me and my father. He told me to go over it again, and I went over it. He says, "Let me see you sign it," and I went over it again and signed the note. I don't know whether he saw me sign it the first time; he was there. He never asked me to go over it again. I ran my pen over my name a second time. Mr. Olcese asked me to sign the note. Figari never asked me to sign the note. I never signed the note for Figari. I went over it when he asked me to go over it. I will show you just how it was done. Mr. G. B. Olcese came out and asked me if I would sign the note as a witness, and I told him "Yes." I come upstairs, took the pen, and signed that note. Mr. Figari was there, and he says, "Let me see you sign the note; go over it."

Q. Mr. Figari did not ask you to sign the note as a witness?

A. Not at all; he asked me to go over it. I never had any experience with a promissory note. That was the first note seen. I had never had

any experience with promissory notes at that time. I did not know anything about whether a promissory note needed to be witnessed. The first time I knew anything at all about the fact of a loan was when I was asked to go up where the note was signed.

It seems to be conceded that the respondent wrote the word "Witness" before his name when he signed the note. The only reference in the evidence to this point is the following questions by plaintiff's attorneys and respondent's answers thereto:

Q. And you signed the word "Witness" in front of your name?

A. I know what I signed, and he had the note there and I signed.

Q. So when you put your name to the note, and put in front of it "Witness," you are not positive whether or not you had seen your father sign the note?

A. Oh, yes; G. B. Olcese's name was on the note before I signed it.

It also appears from other evidence that the word "Witness" was written before respondent retraced his signature at plaintiff's request.

It is argued in behalf of appellant that when the respondent, at Figari's statement that he wanted to see him sign, retraced his signature without retracing the word "Witness," it was a new and unqualified signing of the note. No such inference can be drawn from this circumstance. Respondent had been told, according to the testimony, in the presence of Figari, that he was to sign as a witness. If he signed as a witness under these circumstances, he had a right, when told by Figari that he wanted to see him sign, to assume that he was retracing his signature for the same purpose and in the same capacity that he originally wrote it.

Of course, it seems improbable that Figari should have been so insistent upon seeing the signature made, if it was only to witness the making of the note by the elder Ol-

cese. But that is not the point. The controlling circumstance is that Emilio Olcese was acting with the understanding that he was only signing in the capacity of a witness, and there was nothing in the fact of this request to rewrite his name calculated to change the situation.

There is no doubt under the law that if he had subscribed his name without qualification, and without notice or knowledge on the part of Figari that he was only intending to witness his father's execution of the note, he would be bound as a maker; but such is not the situation here. He was not in any way a party in interest. If the trial court believed the testimony of the defendants, as it apparently did, Emilio Olcese went into his father's office where the note was being executed, with no other idea in his mind than that he was being asked to put his name to the paper merely as a witness, and that both parties so understood. He was told by his father in Figari's presence that the latter wanted him to see the money delivered and to sign as a witness. He made his own understanding of the matter plain by writing the word "Witness" immediately preceding his signature. It is true that Figari testified that he could not read or write the English language, but the court finds that this fact was not known to respondent. The only evidence tending to show such knowledge was the remark testified to by Figari that in asking respondent to again sign his name he gave as a reason the statement, "Sometime I can't read." Respondent had a right to assume, not only from what his father had told him in Figari's presence, but from what he had signified on the note itself, that it was understood by Figari that he was signing as a witness. Under these circumstances the request that he sign again, or that he retrace his signature so that Figari could see it written, would not carry any different significance as to what was expected of him than attended the original signature. Even where one

has joined apparently as a maker of a note, he may show by parol evidence, as against the payee, that he has signed, with the knowledge of the payee, in a different capacity and with a different liability, where, as here, such facts are pleaded. Civ. Code, § 2832; 3 R. C. L. p. 1138; Kelly v. Gillespie, 12 Iowa, 55, 79 Am. Dec. 516; Spencer v. Alki Point Transp. Co. 53 Wash. 77, 132 Am. St. Rep. 1058, 101 Pac. 509; Gillett v. Taylor, 14 Utah, 190, 60 Am. St. Rep. 890, 46 Pac. 1099; Windhorst v. Bergendahl, 21 S. D. 218, 130 Am. St. Rep. 715, 111 N. W. 544; Farmers' Nat. Gold Bank v. Slover, 60 Cal. 387; Casey v. Gibbons, 136 Cal. 368, 68 Pac. 1032. This is true for the purpose of showing that an apparent principal is only bound as a surety, notwithstanding the appending of the word "Surety" after the signature does not in itself change the liability of the party so signing. Aud v. Magruder, 10 Cal. 282; Southern California Nat. Bank v. Wyatt, 87 Cal. 616, 25 Pac. 918. It surely follows that where the signer, with the knowledge and assent of the payee, has signed only as a witness, and has qualified his signature on the note itself by so significant a designation as the word "Witness," he may be permitted to show that his name was written and accepted in that capacity alone.

Bills and notes—signature of witness—effect of retracting.

—signing as witness—right to show.

It may be admitted that it is an unnecessary and unusual precaution to have the execution of a promissory note witnessed, but it appears that all of the parties to this transaction were unfamiliar with business customs and requirements, and the respondent testified that this was his first experience with a promissory note.

If it is assumed, as the trial judge had a right to assume from the evidence, that the respondent was acting in good faith, and that the testimony of both defendants was to be accepted as true, there is no justifi-

cation for setting aside the findings and judgment of the trial court, as affirmed by the district court of appeal.

It is wholly a matter of the credibility of the witnesses, which is a consideration exclusively within the province of the trial court.

Appeal—credibility of witnesses.

There could be no question about the matter were it not for the unusual circumstance of having a witness to such an instrument, the apparent inexperience and ignorance of the appellant, and the further fact that, by the time the payment of his note was due, the elder Olcese had gone through bankruptcy, and the son had succeeded to the position of financial responsibility. But even in this particular the respondent's explanation is plausible, and he testifies that it was not until after his father's financial failure, and until long after the note was due, that appellant made any claim upon respondent as a maker of the note. It is something, too, of a testimonial to the good faith of the elder Olcese, that about \$250 was paid by him on this note since his discharge in bankruptcy.

There is no merit in appellant's objection that no testimony was taken in behalf of defendants, because of the fact that the defendants were called only as plaintiff's witnesses. Section 2055 of the Code of Civil Procedure, as added by Stat. 1917, p. 58, provides that a party calling and examining as a witness an adverse party "shall not be bound by his testimony," and that the testimony of such adverse witness "may be rebutted by the party calling him." This provision does not mean that such testimony may not be given its proper weight, but merely,

Evidence—testimony of adverse party—weight.

as it declares, that the party calling such witness shall not be concluded from rebutting his testimony, or from impeaching the witness. Dravo v. Fabel, 132 U. S. 487, 33 L. ed. 421, 10 Sup. Ct. Rep. 170. In other words, such testimony is to

be treated as though given on cross-examination.

The findings of the court sufficiently cover all the material issues raised by the pleadings.

The judgment is affirmed.

Angellotti, Ch. J., and Gloane, Olney, Shaw, Wilbur, Lennon, and Lawlor, JJ., concur.

Petition for rehearing denied February 26, 1921.

ANNOTATION.

Parol evidence as to whether one whose name appears on the face of a note signed as a witness or as maker.

In *Thompson v. Wilkinson* (1911) 9 Ga. App. 367, 71 S. E. 678, it was held competent in an action by the payee of a promissory note, for one whose name appeared on the note as the maker to prove that she signed the note as a witness, and not as maker.

In *Palmer v. Stephens* (1845) 1 Denio (N. Y.) 471, it is held competent, in a suit between original parties, for one to show that he placed his name on a note to attest the execution of the instrument, and not as a maker. In this case where the defendant had merely written his initials below the signature of the maker of the note, the court says: "The initials might have been written, and so might the full name, to attest the execution of the note by the one who was maker, or to indicate that the one who wrote the initials had, as agent of the person whose name appeared as maker,

executed the note for him and in his name. These are supposable cases, but they present questions on which the jury should have passed. Ordinarily a witness places his name at the left-hand side of the instrument he attests, as the one who executes it signs on the right. But although these are the positions usually and presumptively occupied by the maker and the witness, it is not indispensable that their names should be so located. It is always competent, certainly between the original parties, to show that one whose name appears to a note, or any other obligation, whatever may be the relative position which the name occupies, placed it there, not as a maker of the instrument, but to attest its execution, or for some other lawful purpose."

See the reported case (*FIGARI v. OLCESE*, ante, 192). W. A. E.

JAMES H. LANE, Respt.,

v.

OREGON SHORT LINE RAILROAD COMPANY, Appt.

Idaho Supreme Court — May 27, 1921.

(— Idaho, —, 198 Pac. 671.)

Carrier — absence of locks on stockyards — negligence.

1. No inference of negligence can be drawn from the failure of a carrier to provide its stockyards with patented locks, unless the circumstances are shown to be such that a prudent person would have provided locks.

[See note on this question beginning on page 200.]

Headnotes by RICE, Ch. J.

— **contract to care for stock.**

2. A contract between a shipper and carrier, which provides that the shipper would, "at his own risk and expense, load, unload, care for, feed, and water the stock until delivery of the same to the consignee at destination," is valid and binding.

[See 4 R. C. L. 956, 980.]

Evidence — burden of proof — negligence.

3. Where a shipper accompanies a shipment of live stock under such a contract, the burden of proving negligence resulting in injury thereto rests upon him.

[See 4 R. C. L. 995.]

Carrier — duty to provide facilities.

4. It is the duty of a carrier transporting live stock to furnish reasonable and proper facilities and opportunities for feeding, watering, and resting them.

[See 4 R. C. L. 979.]

— **measure of duty to stock.**

5. When live stock is accompanied by the shipper under a contract to care for them at his own risk and expense, and when he has unloaded them in the stockyards, the carrier's duty is performed when it furnishes suitable yards in proper condition and reasonably secure.

[See 4 R. C. L. 971.]

APPEAL by defendant from a judgment of the District Court for Lincoln County (Ensign, J.) in favor of plaintiff in an action brought to recover damages for loss of an interstate shipment of live stock alleged to have been due to defendant's negligence. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. George H. Smith and H. B. Thompson, for appellant:

The carrier is not made an absolute insurer of the safety of sheep in transit, but its duty is fully performed by providing pens properly equipped and of sufficient structural strength to retain them.

Beckman v. Southern P. Co. 39 Utah, 472, 118 Pac. 118.

A provision of the shipping contract that in consideration of a reduced freight rate the shipper assumes the duty to load, unload, reload, feed, water, tend, and care for the sheep at his own risk during the entire transportation, was valid and binding upon the parties; and under the statute the primary obligation is on the shipper.

Webster v. Union P. R. Co. 200 Fed. 597.

The provision of the shipping contract that the shipper's agent should accompany the stock, and load, unload, reload, feed, water, and tend and care for the stock at Shoshone, was controlling and binding upon both the shipper and carrier, and established the status and rights of the parties thereunder.

Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A. (N.S.) 257, 33 Sup. Ct. Rep. 148; Boston & M. R. Co. v. Hooker, 233 U. S. 97, 58 L. ed. 868, L.R.A.1915B. 450, 34 Sup. Ct. Rep. 526, Ann. Cas. 1915D, 593; Northern P. R. Co. v. Wall, 241

U. S. 87, 60 L. ed. 905, 36 Sup. Ct. Rep. 493; Erie R. Co. v. Stone, 244 U. S. 332, 61 L. ed. 1173, 37 Sup. Ct. Rep. 633.

The duty of feeding and watering stock and otherwise caring for them may be imposed upon the shipper or owner by the terms of the contract of shipment, and if this is done, or he volunteers or undertakes this duty, he alone is responsible for the neglect to discharge it.

Heller v. Chicago & G. T. R. Co. 109 Mich. 53, 63 Am. St. Rep. 541, 66 N. W. 667; Michie, Carr. § 1756.

The burden is on the shipper to show that the loss, if any, was occasioned by the negligence of the carrier.

4 R. C. L. 995.

Mr. C. O. Stockslager, for respondent:

The Carmack Amendment as to liability of carrier superseded all state regulations and policies on the same subject.

Spada v. Pennsylvania R. Co. 86 N. J. L. 187, 92 Atl. 379; Donovan v. Wells, F. & Co. 265 Mo. 291, 177 S. W. 839; Bailey v. Missouri P. R. Co. 184 Mo. App. 457, 171 S. W. 44; Cranor v. Southern R. Co. 13 Ga. App. 86, 78 S. E. 1014; Southern P. Co. v. Granshaw Bros. 5 Ga. App. 675, 63 S. E. 865; Galveston, H. & S. A. R. Co. v. Sparks, — Tex. Civ. App. —, 162 S. W. 943; Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A. (N.S.) 257, 33 Sup. Ct. Rep. 148.

(— Idaho, —, 198 Pac. 671.)

Rice, Ch. J., delivered the opinion of the court:

Respondent, Lane, recovered a judgment against appellant railroad company for damages to an interstate shipment of lambs, alleged to have been wholly and entirely due to the careless and negligent manner in which the stockyards in the village of Shoshone were managed and controlled by appellant. An agent of respondent accompanied the shipment under a shipping contract which provided that the shipper would, "at his own risk and expense, load, unload, care for, feed, and water the stock until delivery of the same to consignee at destination." When the lambs reached Shoshone they were unloaded by respondent's agents and placed in the stock pens provided by appellant, and were fed by respondent. The gates were fastened by pins which dropped into hasps, and were not provided with patented locks. After feeding the lambs, respondent's agent fastened the gates and left the sheep unattended. During the night a large number of the lambs escaped from the pens, and thirty-eight of them were lost. In the morning the gates were found closed, and in the same condition in which they had been left the night before.

The provision in the shipping contract quoted above is valid and binding between the shipper and the carrier. Webster v. Union P. R. Co. (D. C.) 200 Fed. 597;

Cranor v. Southern R. Co. 13 Ga. App. 86, 78 S. E. 1014.

Where a shipper accompanies a shipment of live stock under a contract to care for them en route, the burden of proving negligence resulting in injury thereto rests upon him. Starr v. Chicago, B. & Q. R. Co. 103 Neb. 645, 173 N. W. 682; McBeath v. Wabash St. L. & P. R. Co. 20 Mo. App. 445; Weesen v. Missouri P. R. Co. 175 Mo. App. 374, 162 S. W. 304, 6 N. C. C. A. 521; Needy v. Western Maryland R. Co. 22 Pa. Super. Ct. 489; Bartelt v. Oregon R. & Nav. Co. 57 Wash.

16, 135 Am. St. Rep. 959, 106 Pac. 487; 4 R. C. L. p. 995, § 462; 10 C. J. p. 381, § 583.

It is the duty of a carrier transporting live stock to furnish reasonable and proper facilities and opportunities for feeding, watering, and resting them. Pecos & N. T. R. Co. v. Meyer, — Tex. Civ. App. —, 155 S. W. 309; 2 Hutchinson, Carr. p. 555, § 510. In this case, so far as the evidence discloses, the pens were suitable and in good condition.

It is claimed that the failure to provide the gates with patented locks was negligence. No inference of negligence can be drawn from such failure, unless there was a showing of such circumstances that a prudent person would have provided locks, as, for example, that others in the community locked their pens and corrals in which live stock was kept at night, or that sheep or other live stock had escaped from the pens previously, or that it was customary for railroad stockyards to be provided with locks. Beckman v. Southern P. R. Co. 39 Utah, 472, 118 Pac. 118; Ft. Worth & D. C. R. Co. v. Gatewood, — Tex. Civ. App. —, 185 S. W. 932; Colsch v. Chicago, M. & St. P. R. Co. 149 Iowa, 176, 34 L.R.A. (N.S.) 1013, 127 N. W. 198, Ann. Cas. 1912C, p. 915.

The court instructed the jury, at the request of respondent, that the gates should be so secured that they could not be opened by anyone who attempted to interfere with the possession of the property, without committing a crime. This instruction does not state the proper measure of the duty of the carrier of live stock when unloaded into the yards for food and rest, accompanied by the shipper under a contract such as was executed in this case. Under such circumstances, the carrier is not an insurer, and its duty is performed when it furnishes suitable yards in proper condition and reasonably secure.

Carrier—duty to provide facilities.

—absence of locks on stockyards—negligence.

Carrier—contract to care for stock.

Evidence—burden of proof—negligence.

—measure of duty to stock.

Missouri, O. & G. R. Co. v. French, 52 Okla. 222, 152 Pac. 591; St. Louis & S. F. R. Co. v. Zickafoose, 39 Okla. 302, 135 Pac. 406, 6 N. C. C. A. 717; Beckman v. Southern P. R. Co. and Starr v. Chicago, B. & Q. R. Co. *supra*.

There is in the record an entire absence of evidence of negligence on

the part of appellant, and its motion for a directed verdict in its favor should have been granted.

The judgment is reversed, with directions to dismiss the action. Costs awarded to appellant.

Budge, McCarthy, Dunn, and Lee, JJ., concur.

ANNOTATION.

Duty of carrier to shipper as to condition of stock pens or yards.

- I. In general, 200.
- II. Size of pens, 201.
- III. Insufficient inclosures:
 - a. Fences, 202.
 - b. Gates, 205.
- IV. Condition of floors, 207.
- V. Contagious diseases in pens, 208.

I. In general.

In Covington Stock Yards Co. v. Keith (1891) 139 U. S. 128, 35 L. ed. 73, 11 Sup. Ct. Rep. 469, which was a proceeding to prevent the imposition upon a shipper of an extra charge for the use of yards, pens, and other shipping facilities, the court said: "The railroad company, holding itself out as a carrier of live stock, was under a legal obligation, arising out of the nature of its employment, to provide suitable and necessary means and facilities for receiving live stock offered to it for shipment over its road and connections, as well as for discharging such stock after it reaches the place to which it is consigned. The vital question in respect to such matters is whether the means and facilities so furnished by the carrier, or by someone in its behalf, are sufficient for the reasonable accommodation of the public."

This statement of the law seems to have been accepted generally, and the only question which has arisen has been whether or not the facilities furnished were adequate, and their condition such as to meet the requirements which the shipper had a right to demand. For the most part the carriers have not denied their duty to furnish yards and pens. They have, however, attempted to place the responsibility upon the shipper in re-

- VI. Dangerous substances in pens, 209.
- VII. Absence of water, 210.
- VIII. Shelter and ventilation, 210.
- IX. Racks and troughs, 211.
- X. Chutes and runways, 211.
- XI. Condition due to shipper personally, 211.

gard to their condition, alleging contributory negligence if the shipper made use of a yard or pen which he knew to be deficient. But the courts have not permitted the carrier to shift its liability in this manner.

In Gulf, C. & S. F. R. Co. v. Trawick (1891) 80 Tex. 270, 15 S. W. 568, where the carrier attempted to relieve itself from liability for the escape of cattle from its pens, because of contributory negligence of the shipper, the court said: Where the statute requires the carrier to maintain pens "for the shipment of cattle, . . . they cannot absolve themselves from their statutory duty to keep such as are suitable for the business, by showing that they were so badly kept or constructed as to make it contributory negligence upon the part of the shipper to use them."

The general rule is that, while a carrier is not an insurer with respect to cattle in its yards and pens, it is bound to use reasonable care to have such facilities reasonably adequate and safe for the service for which they are intended, and will be liable for losses caused by its failure to exercise such care.

United States.—Missouri, K. & T. R. Co. v. Byrne (1900) 40 C. C. A. 402, 100 Fed. 359, affirming (1899) 3 Ind. Terr. 740, 49 S. W. 41.

Alabama.—Nashville, C. & St. L. R.

Co. v. Farrell (1915) 14 Ala. App. 380, 70 So. 986, 11 N. C. C. A. 826.

Georgia.—East Tennessee, V. & G. R. Co. v. Herrman (1893) 92 Ga. 384, 17 S. E. 344.

Indian Territory.—St. Louis, I. M. & S. R. Co. v. Keys (1906) 2 Ind. Terr. 396, 98 S. W. 138.

Iowa.—Chapin v. Chicago, M. & St. P. R. Co. (1890) 79 Iowa, 582, 44 N. W. 820; Dorr Cattle Co. v. Chicago G. W. R. Co. (1905) 128 Iowa, 359, 103 N. W. 1003.

Kansas.—St. Louis & S. F. R. Co. v. Beets (1907) 75 Kan. 295, 10 L.R.A. (N.S.) 571, 89 Pac. 683.

Kentucky.—Louisville & N. R. Co. v. Thompson (1911) 144 Ky. 765, 139 S. W. 939; Louisville, C. & L. R. Co. v. Hedger (1873) 9 Bush, 645, 15 Am. Rep. 740.

Maryland.—Baltimore & O. R. Co. v. Dever (1910) 112 Md. 296, 26 L.R.A. (N.S.) 712, 75 Atl. 352, 21 Ann. Cas. 169.

Michigan.—Snyder v. King (1917) 199 Mich. 345, 1 A.L.R. 893, 165 N. W. 840.

Missouri.—Hardesty v. Atchison, T. & S. F. R. Co. (1915) — Mo. App. —, 179 S. W. 725; Bilby v. Chicago, B. & Q. R. Co. (1914) 184 Mo. App. 644, 171 S. W. 39; Reading v. Chicago, B. & Q. R. Co. (1912) 165 Mo. App. 123, 145 S. W. 1166; Cooke v. Kansas City, Ft. S. & M. R. Co. (1894) 57 Mo. App. 471; Mason v. Missouri P. R. Co. (1887) 25 Mo. App. 473; McCullough v. Wabash Western R. Co. (1889) 34 Mo. App. 23; Tracy v. Chicago & A. R. Co. (1899) 80 Mo. App. 389.

New Hampshire.—Flint v. Boston & M. R. Co. (1905) 73 N. H. 141, 59 Atl. 938.

New Jersey.—Feinberg v. Delaware, L. & W. R. Co. (1890) 52 N. J. L. 451, 20 Atl. 33.

Texas.—Hines v. Davis (1920) — Tex. Civ. App. —, 225 S. W. 862; Gulf, C. & S. F. R. Co. v. Culwell (1919) — Tex. Civ. App. —, 216 S. W. 457; Pecos & N. T. R. Co. v. Meyer (1913) — Tex. Civ. App. —, 155 S. W. 309; Missouri, K. & T. R. Co. v. Rogers (1911) — Tex. Civ. App. —, 141 S. W. 1011; El Paso & N. E. R. Co. v. Lumbley (1909) 56 Tex. Civ. App. 418, 120 S. W. 1050;

International & G. N. R. Co. v. McCullough (1909) — Tex. Civ. App. —, 118 S. W. 558; Galveston, H. & S. A. R. Co. v. Jackson (1896) — Tex. Civ. App. —, 37 S. W. 255; Missouri P. R. Co. v. Ivy (1891) 79 Tex. 444, 15 S. W. 692; Gulf, C. & S. F. R. Co. v. York (1885) 2 Tex. App. Civ. Cas. (Willson) 718; Gulf, C. & S. F. R. Co. v. Frost (1896) — Tex. Civ. App. —, 34 S. W. 167; Ft. Worth & D. C. R. Co. v. Wagoner Nat. Bank (1904) 36 Tex. Civ. App. 293, 81 S. W. 1050; Texas & P. R. Co. v. Turner (1896) — Tex. Civ. App. —, 37 S. W. 643; Houston & T. C. R. Co. v. Trammell (1902) 28 Tex. Civ. App. 312, 68 S. W. 716.

Virginia.—Norfolk & W. R. Co. v. Harman (1895) 91 Va. 601, 44 L.R.A. 289, 50 Am. St. Rep. 855, 22 S. E. 490.

Washington.—Buck v. Oregon, R. & Nav. Co. (1909) 53 Wash. 113, 101 Pac. 491.

Ireland.—Shaw v. Great Southern & W. R. Co. (1881) Ir. L. R. 8 C. L. 10.

II. Size of pens.

Of course, "adequate pens" mean those of sufficient size fairly to accommodate the stock which may reasonably be expected to enter them; and the carrier has, in some cases, been held liable for injury to cattle by being crowded into pens too small to meet their needs.

In Gulf, C. & S. F. R. Co. v. Frost (1896) — Tex. Civ. App. —, 34 S. W. 167, it appeared that the cattle, when unloaded for feeding, were crowded into pens so small that they could not feed or rest; and it was held that, under such circumstances, the carrier was not relieved from liability for loss of weight and condition because the shipper had undertaken to feed and care for the stock en route.

In Gulf, C. & S. F. R. Co. v. York (1885) 2 Tex. App. Civ. Cas. (Willson) 718, the carrier was held liable for injury caused by the fact that the pens provided were so small that, when the shipment in question was attempted to be crowded into them, the cattle began to trample each other, and it was necessary to open the gates and let some out, by reason of which they were lost.

Where a carrier delivers cattle into union stockyards, for the purpose of transferring them to a connecting carrier, and crowds the pens to such an extent that they are unable to eat or drink, it will be liable for such injury as results from its failure to exercise ordinary care to maintain the yards in a suitable condition for the purpose for which it uses them, where it shares in the maintenance of them. *Texas & P. R. Co. v. Felker* (1905) 40 Tex. Civ. App. 604, 90 S. W. 530.

But a carrier is not liable for insufficiency in the size of its pens to receive a particular shipment, if its pens were large enough to handle any shipment which it might reasonably anticipate that it would probably receive. *Casey v. St. Louis Southwestern R. Co.* (1904) 37 Tex. Civ. App. 49, 83 S. W. 20. The court says: "The number of cattle shipped over any particular route depends upon the cattle industry of the country through which it runs, its relation to the cattle markets, etc., and what other roads do in that regard does not control unless the particular roads are so situated as reasonably to expect all or a part of such business. . . . A road is only required to anticipate and make reasonable provision for the volume of business that will be done by it, or that might be reasonably expected."

And in *Chicago, R. I. & P. R. Co. v. Crenshaw* (1910) 59 Tex. Civ. App. 238, 126 S. W. 602, the court instructed the jury that it was the duty of the carrier to keep stock in pens large enough so that they would not be damaged by being too closely crowded; and a failure to perform such duty would be negligence. The supreme court, however, held that, since no statute imposed such duty upon the carrier, the true test was whether the pens, under all the circumstances, were such as a person of ordinary prudence would have provided.

And in *Ft. Worth & R. G. R. Co. v. Cage Cattle Co.* (1906) — Tex. Civ. App. —, 95 S. W. 705, where cattle were alleged to have been injured by the fact that the pens were too small, and that they contained large mud holes, the court held that an instruc-

tion that, under the statute, each and every railway company is required to erect at each and every station suitable pens and inclosures to protect such cattle as may be delivered to such carrier for shipment, from injury by exposure to weather, stock, or otherwise, default in which would render it liable for injury caused thereby, was erroneous, as permitting the jury to infer that it was its duty to provide covered pens, if not warm stalls; but that the true rule was that the question whether the pens were such as a person of ordinary prudence would have provided, both as to size and condition, was one which should be submitted to the jury.

III. Insufficient inclosures.

a. Fences.

It is the duty of the carrier to keep its stock pens in a reasonably safe condition to hold the cattle placed in them, taking into consideration the ordinary conditions attending cattle in that situation, and their ordinary habits and propensities. Therefore, upon evidence that some of the posts of the fence were broken off and others pushed over, and that the posts were too small, the carrier may be held liable for loss through escape of cattle from the yard by breaking down the fence. *Hardesty v. Atchison, T. & S. F. R. Co.* (1915) — Mo. App. —, 179 S. W. 725.

In *St. Louis & S. F. R. Co. v. Beets* (1907) 75 Kan. 295, 10 L.R.A.(N.S.) 571, 89 Pac. 683, where plaintiff's cattle, when placed in the stock pen, preparatory to loading, pushed down a fence forming one side of the pen, which had become weakened by the rotting off of the posts, and escaped from the pen, to their injury, an instruction was approved as properly stating the law of the case, which stated: "Where a railroad company provides stockyards for the purpose of receiving stock to be shipped over its line, it is the duty of such company to see that said yards are kept and maintained in a reasonably safe condition, so that the same will retain and hold ordinary cattle under ordinary circumstances; and, if the company provides

such yards for a shipper of cattle, desiring to ship over its line, and permits him to place his cattle in such yards or corral for the purpose of shipping with the consent of the company, then, if said corral or stockyards is so defective as not to be reasonably safe under ordinary circumstances, such company would be liable to such shipper or stock owner for whatever damages, if any, he sustained, or were occasioned to said cattle by reason of the negligence of the defendant company, if any, in allowing said stockyards to be in a defective condition, such as not to be reasonably suitable and reasonably safe for the purpose of receiving and retaining such cattle." The court said that the fact that the posts were rotted off along one entire side of the yard, unexplained, justified the inference of negligence. That when common carriers of live stock provide pens, chutes, and other appliances for loading and unloading stock at their shipping stations, and invite and require shippers to use them, it is the duty of such carriers to keep such pens and loading appliances in a reasonably safe condition. It is not the duty of the shipper to discover defects therein, and notify the carrier thereof.

Where the fence was pushed away from the corner post, owing to its decayed condition, by horses frightened by a passing locomotive, the carrier was held liable for the injury, on the grounds that the fence was lower than required by statute, and that a low fence was more likely to be broken or pushed over than a high one, and that a cattle pen is made to hold stock, and that the planks should be nailed to the inside of the posts, so that they could not be pushed off by pressure from the inside. *Louisville & N. R. Co. v. Thompson* (1911) 144 Ky. 765, 139 S. W. 939.

In *Mason v. Missouri P. R. Co.* (1887) 25 Mo. App. 473, where it appeared that the posts of the fence of the pen were rotted off, so that the fence fell and permitted the cattle to escape, to their injury, the defense was that the shipper knew of the defective condition of the pen, and there-

fore assumed the risk; but the court said: It is a matter of common knowledge that the carriers provide stock pens as a means of receiving live stock for shipment, and that it is part of their transportation, and that the rule with respect to knowledge of defects in cars applies, so that the carrier cannot relieve itself from liability because of such knowledge.

Where the fence forming the pen in which a shipment of stock was placed gave way because of a rotten and defective condition, allowing the cattle to stampede and be injured, the court said that the carrier was in duty bound to keep the stockyards in a reasonably safe and secure condition for the purpose intended, and if it failed to do so, and its patrons or shippers were damaged in the manner alleged, then it was responsible. *Cooke v. Kansas City, Ft. S. & M. R. Co.* (1894) 57 Mo. App. 471.

In *Chapin v. Chicago, M. & St. P. R. Co.* (1890) 79 Iowa, 582, 44 N. W. 820, where cattle delayed by a storm were unloaded into pens from which some escaped and perished on the prairie, an instruction was approved which told the jury that, if the carrier, without consent of the shipper, unloaded cattle into pens insufficient in strength or size ordinarily to prevent cattle from escaping therefrom, and if they escaped therefrom, without any fault or negligence on the part of the shipper, and if, in placing the stock in the unsafe pens, the carrier did not exercise reasonable care and prudence, the carrier would be liable.

In *Missouri, K. & T. R. Co. v. Byrne* (1899) 3 Ind. Terr. 740, 49 S. W. 41, where plaintiff's cattle, which had been placed in defendant's stock pens for shipment, by reason of the defective condition of the fences thereof, escaped therefrom and caused the plaintiff trouble and expense in recovering them, and a number thereof were also killed by being run over by a locomotive engine belonging to the defendant, it was held that the defendant was liable therefor. But, upon an appeal to the United States circuit court of appeals in (1900) 40 C. C. A. 402, 100 Fed. 359, it was held that the

railway company would be liable only for the injury sustained by reason of the escape of the cattle, and not for those killed by the engine, as no negligence had been shown in the operation thereof, and the duty the defendant owed the plaintiff was that of ordinary care only; the court saying: "It is undoubtedly a sound legal proposition that a railway company which permits stock to be placed in the pens which it has prepared by the side of its tracks to facilitate loading and unloading it does not thereby receive it for shipment, or take possession or assume charge of it as a common carrier or keeper. The limit of its liability is for the exercise of ordinary care in the construction and maintenance of its pens."

In *Snyder v. King* (1917) 199 Mich. 345, 1 A.L.R. 893, 165 N. W. 840, the question of the negligence of the railroad was held to be for the jury where young horses were put into a pen with boards nailed to the outside of the stringers in the fence, where they had once pushed the boards off from the fence and escaped.

It is the duty of the carrier, in providing pens to hold hogs, to take notice of their propensity to root, and it will be liable for loss of hogs which, because of faulty construction, root out and escape. *Missouri, K. & T. R. Co. v. Rogers* (1911) — Tex. Civ. App. —, 141 S. W. 1011.

In *St. Louis, I. M. & S. R. Co. v. Keys* (1906) 2 Ind. Terr. 396, 98 S. W. 138, where the fences about the defendant's stock pens were insufficient to restrain the plaintiff's hogs, which he was about to ship on a very warm day, and he was obliged to crowd them into a chute used for loading stock into the cars, which caused the hogs to become so heated as to result in the death of a large number, it was held that it was a question for the jury to say whether defendant was negligent in failing to provide suitable stock pens for the reception of plaintiff's hogs while awaiting shipment.

In *Beckman v. Southern P. Co.* (1911) 39 Utah, 472, 118 Pac. 118, where lambs were put in a pen with a fence only 3½ or 4 feet high, and

in the morning many were dead, with evidence of having been bitten, and the rest were worn, as though having been chased by some animal, and the owner claimed that it was the duty of the carrier to furnish pens that would keep dogs and other animals out, or provide a watchman to protect the lambs, the court said: "Unless respondent is, by law, required to keep live stock free from all harm while the same are being fed and watered, under the statute, while in transit, then, in view of the evidence in this case, respondent cannot be held liable, for the following reasons: There is no evidence whatever that there were any vicious dogs or wild animals of any kind in or near Reno which might or probably would molest the lambs in question. Reno is a city, as the evidence shows, of 15,000 inhabitants, and is an old established place. Under such circumstances, no one would expect that either vicious dogs or wild animals would abound in large or any considerable numbers, if at all. True it is claimed that vicious dogs or some wild animals did injure and kill some of the sheep; and hence there were such dogs or animals there. It seems to us, however, that the material inquiry is, What was the prevailing condition in, or in the immediate vicinity of, Reno with regard to the prevalence of vicious dogs or wild animals whose natural propensities would lead them to attack and injure sheep? . . . Had such evidence been produced, then, no doubt, the respondent, through its agents and representatives at Reno, would have been bound to take notice of the prevailing condition in that regard, and, as we think, would have been required by law to make reasonable provision to protect the sheep. . . . If there were vicious dogs or wild animals in considerable numbers in or near the city of Reno, whose natural propensities were to injure sheep, and it was generally known that such animals and dogs were prevalent there, then anyone could infer that they might and probably would break into the pens when occupied by sheep, and, if so, would chase, worry, and injure them. If

such were the fact, then pens like those into which the sheep in question were unloaded at Reno were not sufficient, because not such as would afford proper rest for the sheep. So far as the evidence goes, however, it would seem that the occurrence at Reno was extraordinary. Is respondent required to meet every possible emergency that may arise, whereby a shipment of sheep may suffer injury from vicious dogs or wild animals when unloaded for feed, water, and rest? We think not. We are of the opinion that if the pens provided by the carrier are properly equipped, so that the sheep may be properly fed, watered, and rested, he has discharged his full duty, unless it is made to appear that the surrounding conditions were such that the carrier should have anticipated that the sheep would probably be molested, and thus not afforded proper rest."

In *Kansas City, P. & G. R. Co. v. Barnett* (1901) 69 Ark. 150, 61 S. W. 919, where the railway company's agent refused to issue a bill of lading until the plaintiff's cattle, which had been placed in defendant's stock pens, were loaded in the cars, but before they could be loaded, by reason of the defective condition of the stock pens, the fence being weak and partly rotten, the cattle escaped, and some were entirely lost to the plaintiff, and he was put to trouble and expense in recovering the remainder, it was held that the defendant was not liable as a common carrier, as that relation had not begun, but would be liable only as an ordinary depository or bailee.

In *Chicago, B. & Q. R. Co. v. Powers* (1905) 73 Neb. 816, 103 N. W. 678, where the plaintiff placed a herd of cattle in the stock pens at one of defendant's stations, to be shipped the following day, but intending to take the cattle from the stock pens on the following morning for the purpose of feeding and watering them, and, during the night, by reason of the alleged rottenness of the fence posts of the cattle pens, the cattle escaped therefrom, and the plaintiff incurred expense in recovering them, it was held that the defendant was not liable in

damages as a common carrier, as the cattle had not been delivered to or accepted by it for shipment; and a judgment for the plaintiff was reversed, the court saying: "We think the rule well established that, when a shipper surrenders the entire custody of his goods to a common carrier for immediate transportation, and the carrier so accepts them, the liability of the carrier as a practical insurer of the safe delivery of the goods at once attaches. . . . But we think it equally well settled that such liability does not attach until the goods are unconditionally surrendered by the shipper and accepted by the carrier. And, where a railroad company constructs yards by the side of its tracks to facilitate the loading and unloading of stock, it is not responsible as a common carrier for stock placed in such yards for the convenience of the owner, who intends to ship on a subsequent day, and reserves the privilege of taking the stock from the pens for the purpose of feeding and caring for them before the shipment is made. In such a case the liability of the company is no greater than that of an ordinary depository or bailee."

b. Gates.

Where horses escaped through an open gate of a cattle pen, the court says: "It was the duty of the railway company to use care in providing a safe pen, and the shipper had a right to rely on the pen being sufficient; and it was not his duty to inspect the premises." *El Paso & N. E. R. Co. v. Lumbley* (1909) 56 Tex. Civ. App. 418, 120 S. W. 1050.

In *Tracy v. Chicago & A. R. Co.* (1899) 80 Mo. App. 389, recovery was allowed for injury to cattle which broke out of the pen and were stampeded because of the insecurity of the gate. The court says: "The carrier invites its patrons to use its stockyards preparatory to loading; and when stock is placed in them, the shipper can hold it responsible for damages resulting from their insecurity."

A contract requiring the shipper to inspect the yards, and providing that

use of them without protest should be an acknowledgment that they are safe and suitable, does not relieve the carrier from liability for the escape of cattle by reason of the unsafe condition of the fastenings of the gate, which permits the gate to open under pressure, where the shipper, upon placing his stock in the yard at night, walked around it, and tried the gate, finding it fastened. The trial court ruled that the shipper had not complied with his contract, because he did not examine the inclosure sufficiently to notice apparent defects in it; that the defect in the gate could have been easily discovered, and that the shipper's duty was to make the discovery; and because he failed to perform that duty he could not hold the carrier liable for the loss. The supreme court, however, said: "If this provision of the contract is valid, it is so because it does not relieve the carrier of its common-law duty to furnish proper facilities for, and to safely transport, the appellants' property, and also because it is not an attempt to limit its common-law liability so as to exempt the carrier from the consequences of its own negligence, or that of its servants. 'The carrier is bound to furnish good and sufficient stock pens and yards at its depot for the shipment of cattle and other live stock, and such other facilities as may be necessary for the safe and convenient loading of the stock. The shipper is entitled to recover for all damages sustained by his property in consequence of a failure by the carrier to furnish such facilities, or to keep them safe, and the carrier cannot be relieved from such liability by showing that the shipper saw the stock pens, or knew of the defects in them.' . . . If the provision of the contract under consideration was intended to impose upon the shipper the duty of inspecting the cars and inclosures belonging to the railway company, which duty legally rests upon the carrier, the provision would be void. But, if we assume that the provision is not void because it does not attempt to evade the legal duty of the carrier, but is only an added precaution which the car-

rier imposed upon the shipper in order to secure greater safety in the shipment, then the shipper will be required to use reasonable diligence only, and his failure to observe and report visible defects would not take away his right to recovery, unless he was negligent, and loss was caused by such negligence." *Buck v. Oregon R. & Nav. Co.* (1909) 53 Wash. 113, 101 Pac. 491.

In *Flint v. Boston & M. R. Co.* (1905) 73 N. H. 141, 59 Atl. 938, where the plaintiff, who intended to ship cattle over the defendant's railway, placed them in the latter's cattle pens, but the defendant's agent, upon learning that the plaintiff did not possess a United States inspector's certificate, informed the plaintiff that this could be obtained and the cattle shipped the following day, and to leave the cattle in the cattle pens, but, during the night, by reason of a defective fastening of the gate of the stock pens, the cattle escaped therefrom, and, by reason of defendant's failure to maintain suitable cattle guards, a number of the cattle strayed upon the track and were killed, it was held that the defendant was liable therefor under a statute making a railway company liable for cattle killed by it, where the company fails to maintain suitable cattle guards and fences, and the cattle so killed were rightfully in the highway; although the defendant contended that the plaintiff's cattle were trespassers, and were not rightfully in the highway, and therefore the defendant could not be held liable; but the court said: "As . . . [an] incident of the defendants' business, they were authorized to hold temporarily in their shipping yards, for the convenience of themselves or the owner, animals received for transportation. Their authority in this respect as to animals does not differ from that as to merchandise. If they hold the animals or merchandise for their own convenience, they are under the obligations of a common carrier while so doing, the same as while transporting them; but, if they hold them for the convenience of the owner, their obligation is only that of a deposi-

tary." And the defendant could not assert that the cattle were trespassers, as it was by reason of the defendant's negligence in not maintaining secure cattle pens that the cattle escaped into the highway, and thence onto the defendant's tracks, and were killed.

In *Ft. Worth & D. C. R. Co. v. Waggoner Nat. Bank* (1904) 36 Tex. Civ. App. 293, 81 S. W. 1050, where a herd of cattle was delivered by the plaintiff to, and was accepted by, the defendant for shipment, and the latter's agent directed them to be placed in defendant's stock pens, and, by reason of the defective condition thereof, consisting of insecure fastenings of the gate to the supporting posts, of which defendant had knowledge, they escaped therefrom and sustained injuries, the defendant was held liable therefor.

In *Texas & P. R. Co. v. Turner* (1896) — Tex. Civ. App.—, 37 S. W. 643, where the defendant, in the nighttime, unloaded horses while en route, and placed them in its stock pens, from which they escaped and sustained injury, the defendant was held liable, even though no negligence on its part was shown; as, by statute, a railway company is liable as an insurer of live stock while in transit, against all loss from any cause except the act of God, the public enemy, the act of the owner, vicious propensities or proper vice of the animals; that being the common-law rule of which the statute is declaratory. It is not definitely shown what the defect was, but an application for continuance for absence of a witness indicated the defect was in the gate.

In *Houston & T. C. R. Co. v. Trammell* (1902) 28 Tex. Civ. App. 312, 68 S. W. 716, where a consignment of cattle arrived at its destination at midnight, the defendant immediately tendering them to the consignee and demanding payment of the freight, which the latter was unable to pay at that hour, and the defendant turned the cattle into its pens, and during the night a derailed car on the track of another railway company, built close to defendant's stock pen, broke down the gates of the pen and the cat-

tle escaped therefrom and sustained injuries, the defendant was held liable as a common carrier, as the tender of the cattle to the consignee at such an hour was not sufficient to terminate its liability as such and create that of a warehouseman. The court also said that, even though the escape of the cattle was caused by the derailment of a car on the track of another company, if the defendant erected the stock pens, with reference to the tracks of another road, so as to make them unsafe and insecure, it would be liable if a person of ordinary prudence would not have so erected the stock pens with reference thereto.

While it is the duty of the carrier to provide a gate so fastened that it cannot be opened by the stock themselves, it seems that the carrier need not provide protection against human marauders or intermeddlers, because it is held in the reported case (*LANE v. OREGON SHORT LINE R. CO.* ante, 197) that they need not provide a patented lock, which seems to mean a lock needing a key to open it.

IV. Condition of floors.

Where the railroad company permits water to overflow its troughs and render the pens muddy, so that colts cannot be separated from their mothers, for the purpose of shipping, on foot, in the ordinary way, but it is necessary to do so on horseback, which overheats the animals and injures them, the company may be liable for the injury. *Gulf, C. & S. F. R. Co. v. Culwell* (1919) — Tex. Civ. App. —, 216 S. W. 457.

Where the stock was injured by being placed in a pen with a hole in it, filled with water leaking from supply pipes, the court held that, it being the duty of the carrier to furnish a proper pen, the fact that the shipper knew of the hole did not prevent his holding the carrier liable for the injury. *Galveston, H. & S. A. R. Co. v. Jackson* (1896) — Tex. Civ. App. —, 37 S. W. 255.

A recovery was sustained against the carrier for injury to horses, *inter alia*, because of the muddy and boggy condition of the pens where they were

unloaded for feeding, and the absence of troughs and racks, which caused the food to be trampled into the mud, without benefit to the stock. *Missouri P. R. Co. v. Ivy* (1891) 79 Tex. 444, 15 S. W. 692.

Where the injury to the stock was caused by the muddy condition of the pens, the fact that the mud was caused by recent rains was no excuse for the carrier. In the case of *International & G. N. R. Co. v. McRae* (1891) 82 Tex. 614, 27 Am. St. Rep. 926, 18 S. W. 672, the court says: "It is the duty of the carrier to provide places where the stock can be cared for in every kind of weather without injury to the stock, so far as this can be done by the exercise of proper care."

A contract requiring the shipper to feed and care for his stock en route does not apply where the pens provided for that purpose are unsuitable because of mud, and the duty of feeding them devolves upon the carrier. *Gulf, C. & S. F. R. Co. v. Cunningham* (1908) 51 Tex. Civ. App. 368, 113 S. W. 767.

In *Red River, T. & S. R. Co. v. Eastin* (1905) 39 Tex. Civ. App. 579, 88 S. W. 530, the defendant was held liable for all natural and proximate damages arising from its wrongful refusal to accept a consignment of cattle from a connecting carrier, which were thereby caused to be confined in muddy stock pens, causing a depreciation in their value, as, by statute, the railway company was liable for all damages caused by its refusal to receive and transport property; and actual notice to it of the bad condition of the stock pens was unnecessary, as the law, under such circumstances, would impute knowledge of it.

In *Ft. Worth & R. G. R. Co. v. Glanton* (1907) 45 Tex. Civ. App. 67, 100 S. W. 166, where the plaintiff sought to recover damages from the defendant for its alleged negligence in permitting in its stock pens holes filled with water, whereby the plaintiff's cattle, which were placed therein for shipment, became so muddy as to depreciate them in value, it was held that the question of the defendant's

negligence in not providing suitable stock pens was a question for the determination of the jury.

In *Moses v. Port Townsend Southern R. Co.* (1893) 5 Wash. 595, 32 Pac. 488, it was held that the question of negligence in keeping horses on a plank floor after arrival at destination was for the jury; the contention being that, after the long journey on the floor of the cars, it was distinctly detrimental to the horses to be placed on plank floors instead of on the ground.

V. Contagious diseases in pens.

If, to the knowledge of the carrier, its stock pens through which cattle received by it must pass are infected with contagious disease, it will be liable for injury to stock placed in the pens without remedying the condition, if it accepted animals for shipment without allowing itself time to remedy the defect or provide facilities for handling the cattle elsewhere. *Nashville, C. & St. L. R. Co. v. Farell* (1915) 14 Ala. App. 380, 70 So. 986.

Pens which are to be used for fever-free cattle must not be permitted to become infected with Texas fever. *Hines v. Davis* (1920) — Tex. Civ. App. —, 225 S. W. 862.

Where cattle in transit were unloaded into pens infected with Texas fever, the court said it was the carrier's duty to furnish reasonably safe pens for cattle; and having failed to comply with this duty, it was liable for the resulting injury. *International & G. N. R. Co. v. McCullough* (1909) — Tex. Civ. App. —, 118 S. W. 558.

The question of the negligence of a carrier in separating the pens for susceptible cattle from those infected with Texas fever ticks, by a dead alley 10 feet wide, without maintaining a tight partition between them, is for the jury, where there is evidence tending to show that the ticks might travel across this space. The court holds that the carrier could not be held liable for the death of the cattle in the absence of negligence. *Baltimore & O. R. Co. v. Dever* (1910) 112 Md. 296, 26 L.R.A. (N.S.) 712, 75 Atl. 352, 21 Ann. Cas. 169.

Where a carrier transports hogs to the end of its line, and, upon refusal of the connecting carrier to receive them, places them in pens, its liability is that of a mere forwarding agent, and it is bound to exercise only ordinary care or reasonable diligence. So, in case the hogs contract a contagious disease from such pens, the owner, to recover, must prove that the carrier knew that the pens were infected, or, by the exercise of reasonable diligence, might have known such fact. *Larimore v. Chicago & A. R. Co.* (1896) 65 Mo. App. 167.

It was held in *Dorr Cattle Co. v. Chicago G. W. R. Co.* (1905) 128 Iowa, 359, 103 N. W. 1003, that a railway company would be liable for loss of profits sustained by plaintiff on a shipment of cattle which the defendant, upon arrival at their destination, placed in stock pens in which it had previously placed cattle transported by it in quarantine, which were infected with Texas fever; as it was the defendant's duty to exercise ordinary and reasonable care in the selection of a place for the keeping of the cattle after their arrival at their destination, and, if the defendant must have known, or by the exercise of reasonable care should have known, the infected condition of its cattle pens, it would be liable.

In *Texas & P. R. Co. v. Beal* (1906) 43 Tex. Civ. App. 588, 97 S. W. 329, where the complaint alleged that the defendant negligently permitted the plaintiff to place cattle for shipment in stock pens which were, to defendant's knowledge, infected with a contagious disease, it was held that the defendant would not be liable in damages where the evidence failed to show that the defendant had any knowledge whatever of the infected condition of its stock pens; and that the plaintiff could not recover on the ground that the defendant's ignorance of the condition of its stock pens was due to negligence, as the complaint did not set up that as a cause of action.

VI. *Dangerous substances in pens.*

A carrier which places salt, or knowingly permits it to be placed, in
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the feeding troughs of the stock pens, in such quantity as to be dangerous to cattle, will be liable for injury to cattle thereby. *Pecos & N. T. R. Co. v. Meyer* (1913) — Tex. Civ. App. —, 155 S. W. 309.

Where salt water was permitted to flow into stock pens from which plaintiff's lambs were shipped, and they drank thereof to their injury, the court said: "The company had not performed its legal duty to furnish and maintain suitable and safe facilities to shippers for receiving their stock for shipment. It was therefore guilty of negligence, and liable to plaintiffs for such loss as was caused by its negligence." *Norfolk & W. R. Co. v. Harman* (1895) 91 Va. 601, 44 L.R.A. 289, 50 Am. St. Rep. 855, 22 S. E. 490.

In *Chicago, R. I. & P. R. Co. v. Mitchell* (1905) — Tex. Civ. App. —, 85 S. W. 286, it appeared that the water furnished in the pens was alkaline, which injuriously affected cattle not used to it. The discussion involves the duty with respect to the food furnished, rather than the condition of the pens; but the court says: To give the cattle water that was injurious to them was *prima facie* negligence. It was the duty of the carrier, in furnishing water, to provide water suitable for the shipment; and they were not relieved from liability by showing that the unwholesome water furnished was the water of that section of country.

In *Shaw v. Great Southern & W. R. Co.* (1881) Ir. L. R. 8 C. L. 10, where hogs placed in pens for shipment were injured by some disinfecting material placed there under governmental orders, the carrier defended on the ground that it had merely carried out the orders it was bound to obey, and therefore was free from liability; but the court said: The proposition that the carrier was freed from liability merely because it was carrying out the order is far too wide, and cannot be maintained in point of law. The defendant admits that the pens in which the hogs were placed were improper pens for their reception. It further says: Defendant is aiming at

a defense which may raise a very serious question whether, if it was impossible to have a safer pen consistently with the order, it was not discharged; but that facts sufficient to raise that question have not been alleged.

VII. Absence of water.

It is the duty of the carrier to maintain a supply of water at its stock pens; and if it permits the supply to become unavailable, and unloads hogs into the pens on a hot day, in a thirsty condition, so that it is unsafe to leave them there until night or drive them to a place where water can be secured, it will be liable for the injury thereby caused. *Bilby v. Chicago, B. & Q. R. Co.* (1914) 184 Mo. App. 644, 171 S. W. 39.

It is the duty of a carrier to maintain its stock pens in a condition reasonably safe for the purpose intended; and therefore it may be liable for loss of hogs, due to the fact that it failed to provide water in the pens, and permitted weeds to grow around the fence, and ties to be piled against it, so as to shut off ventilation, and cause overheating of the hogs on a summer day. *Reading v. Chicago, B. & Q. R. Co.* (1912) 165 Mo. App. 123, 145 S. W. 1166. Followed on second appeal in (1915) 188 Mo. App. 41, 173 S. W. 451.

See also *Lackland v. Chicago & A. R. Co.* (1903) 101 Mo. App. 420, 74 S. W. 505, *infra*.

Although a railroad company is bound to provide ample facilities for watering stock, it is not bound to have water in every one of the pens at a certain station if it is possible to utilize the water in the pens where it is found, for cattle in the other pens. Therefore, if a shipper whose cattle have been unloaded into pens refuses to reload first from a pen with water in it, and then turn the cattle from another pen into it, he cannot hold the railroad company liable for failure to provide water in the pens. *Kirby v. Oregon Short Line R. Co.* (1921) — Mont. —, 197 Pac. 254.

Whether or not it is negligence, in the absence of statutory requirement,

for the carrier to fail to provide water in the pens, is a question for the jury. *San Antonio & A. P. R. Co. v. Broad-Davis Cattle Co.* (1911) — Tex. Civ. App. —, 140 S. W. 514.

VIII. Shelter and ventilation.

In *Feinberg v. Delaware, L. & W. R. Co.* (1890) 52 N. J. L. 451, 20 Atl. 33, it appeared that cattle which were delayed by a storm were put into cattle sheds which were open on one side to the weather, and were frozen, so that many died. The defense was that the carrier did the best it could; but the court said: "This is not entirely correct, for there was a large stable for horses, substantially built and covered, belonging to the company, not far from the sheds. Although this stable was intended to be used only for horses, it was not then required nor occupied for that purpose, and it might, in such an emergency as this, have been made the temporary covering and protection of these tender animals, which were so likely to be injured and killed by exposure."

In *Pruitt v. Hannibal & St. J. R. Co.* (1876) 62 Mo. 527, the injury was caused by confining hogs in an uncovered pen for twenty-five days, in the winter; and the liability of the carrier seems to have turned more on the delay in transportation than on the condition of the pens; but the court says: Whether the detention of the hogs in uncovered pens for that length of time in the winter might not ordinarily and reasonably be expected to result in considerable loss from exposure and smothering is a question which might have been left to the jury.

In *Lackland v. Chicago & A. R. Co.* (1903) 101 Mo. App. 420, 74 S. W. 505, where the defendant's stock pens were so located that an embankment of earth and rubbish, maintained by defendant, on which weeds and grasses grew to some height, cut off the wind from its stock pens, and the plaintiff, who wished to ship a large number of fat hogs, was instructed by defendant's agent to deliver the hogs and place them in the stock pens early in the morning, from which they were

not removed by the defendant until late in the evening of the same day, which was a hot summer day, and, by reason of the lack of shelter in the stock pens, as well as the absence of water with which to cool the hogs, many died, it was held that the defendant had accepted the hogs for shipment, and that it was a question for the jury to determine whether such hot weather might have been expected, and whether fat hogs could be safely kept awaiting shipment in such pens under the conditions shown; also that the plaintiff could not be held to have assumed the risk in using the stock pens provided by defendant for such purposes, as he was instructed by defendant's agent to place the hogs therein. See also *Reading v. Chicago, B. & Q. R. Co.* (1912) 165 Mo. App. 123, 145 S. W. 1166, supra.

IX. Racks and troughs.

The twenty-eight hour law of Congress, requiring the unloading of cattle for feed, water, and rest at intervals during the journey, does not require the pens to have permanent hayracks and water troughs from which the stock can be fed and watered. *United States v. St. Louis, I. M. & S. R. Co.* (1910) 101 C. C. A. 375, 177 Fed. 205.

If the feed racks are constructed so low that calves can get into them and injure themselves, or that cattle can be shoved or hooked into them by other cattle, the jury may find the carrier to be negligent and liable for injury thereby caused. *Gulf, C. & S. F. R. Co. v. Dunman* (1904) — *Tex. Civ. App.* —, 81 S. W. 789.

X. Chutes and runways.

Where the injury was caused by a horse, which the shipper was attempting to load from the stock pen, breaking through the floor of the chute leading to the car, the court said: The carrier was bound to provide a reasonably safe chute; and the delivery of the horse at the pen and on the chute provided as an appliance to be used in loading the car was a sufficient delivery, upon which the carrier would be charged, if it proved to be rotten and defective, and injury resulted therefrom. The shipper had a

right to rely upon the sufficiency of the chute which the carrier had provided. *McCullough v. Wabash Western R. Co.* (1889) 34 Mo. App. 23.

In *Louisville, C. & L. R. Co. v. Hedger* (1873) 9 Bush (Ky.) 645, 15 Am. Rep. 740, where the action was for injury to a horse by breaking its leg during an attempt to drive it through a lane or chute leading from the stock pens into the cars, the court said: "In the construction of stock pens and chutes, and in affording the means of transportation, the company should be held to that degree of care and diligence that a prudent and careful man would exercise in such matters. Although the stringency of the common-law rule does not apply by making it an insurer, still the character of the employment is not changed; and if live stock should be lost or injured while in the custody and care of the company or its agents for transportation, this should be prima facie evidence of negligence, and the burden of proof is on the carrier to rebut this presumption."

Where a horse was injured by breaking through a runway leading from the stock lot to the car, the court held that if the defect would, in any case, excuse the carrier from liability for injury to the animal, it would not do so in the absence of full diligence to discover the defect before exposing the horse to risk of injury. *East Tennessee, V. & G. R. Co. v. Herrman* (1893) 92 Ga. 384, 17 S. E. 344.

XI. Condition due to shipper personally.

In *Atchison, T. & S. F. R. Co. v. Allen* (1907) 75 Kan. 190, 10 L.R.A. (N.S.) 576, 88 Pac. 966, it was held that the duty of keeping the yards, with their approaches and walks, in reasonably safe condition, operated in favor of the persons accompanying the stock, so far as to render the corporation liable for injury to a person who, in the performance of his duty with respect to the stock, found it necessary to visit the yards, and was injured by a defect. The measure of care which the carrier was held bound to exercise was ordinary care and prudence to see that the persons who

rightfully visited the yards were not injured. The court says: "Allen had business in the yards, to inspect and look after his cattle, and it was a business of common interest and mutual advantage to shipper and carrier. The plank walks on the fences were intended for the use of those inspecting and caring for stock placed in the yards. Allen was using the walk for that purpose when he was injured. It is said that another and safer method of inspection would have been to have looked through the fence, or, if that was impracticable, to have gone into the pens. It appears that a full view of the feed boxes and water troughs could not be had from the outside; and it can hardly be said that it would have been a safer or a better plan to have gone inside of the pens among the cattle, some of which were wild, and where the bottom of the pens was covered with filth. An inspection from the plank walk was a common practice and a convenient method, and would have been a safe one, if the walk, provided in part for the purpose, had been in good condition. The walk was adapted to and commonly used for that purpose, and Allen and other caretakers of stock had a right to assume that it was in a reasonably safe condition for such use. The company, having invited him to the yards as one of its patrons, and having provided walks for his use while inspecting and caring for his cattle, assumed the obligation to keep the yards and walks in a reasonably safe condition for such use, and its failure in this respect makes it liable for the resulting injuries."

In *Kincaid v. Kansas City, C. & S. R. Co.* (1895) 62 Mo. App. 365, a shipper's leg was broken by the slipping

of cattle, which he was attempting to load by means of a chute provided by the carrier, because of the icy condition of its floor. It does not appear that the chute was a part of a stock pen, but the liability of the carrier would probably be the same whether it was or not. The defense was that there had been a storm of sleet and snow, and that the carrier could not be charged with responsibility for it. The court said it was the duty of the carrier to furnish a reasonably safe means of loading the cattle, and having provided the chute for the purpose, it was its duty to keep it in a reasonably safe condition. The accumulation of ice on the floor of the chute would authorize the jury to find it not to be reasonably safe for the purpose of loading cattle or like footed animals; and the court further held that it was not the shipper's duty to use sand or ashes on the floor of the chute, but that duty, if necessary, devolved on the carrier.

In *Texas & P. R. Co. v. Bigham* (1896) 90 Tex. 223, 38 S. W. 162, where a railway company had negligently permitted the fastenings of the gates to the stock pens to become defective, and, while a shipper, who had placed live stock therein, was attempting to secure the gates, the cattle, becoming frightened at a passing train, surged against the gates and broke from the pen, throwing the shipper some distance and injuring him, it was held that the railway company was not liable in damages therefor, as its negligence in permitting the fastenings of the gate to be and remain in a defective condition was not the proximate cause of the shipper's injury.

H. P. F.

JUDSON BASSETT

v.

AMERICAN BAPTIST PUBLICATION SOCIETY, Impleaded, etc., Appt.

Michigan Supreme Court — July 19, 1921.

(— Mich. —, 183 N. W. 747.)

Parent and child — right of parent to surrender control of child.

1. A father has a right to surrender the parental control of his child for its welfare.

[See note on this question beginning on page 223.]

Specific performance — contract to will property — who may enforce.

2. Where a seven-year-old boy consents to an agreement between his father and a relative that the latter shall take and rear him and leave him property at death, and he lives with the foster parent until death, he is a party to the contract and consideration, and the sole beneficiary, so as to be entitled to enforce the contract.

[See 25 R. C. L. 312, 313.]

Contract — to leave property — construction.

3. A promise by one taking a child to rear to leave him her property at death refers to the property possessed

at time of death, not to that possessed when the agreement was made.

— sufficiency of consideration.

4. The surrender of a child to a foster parent, and its living with her until her death, are a consideration for her promise to leave it property at her death.

— effect of Statute of Frauds.

5. The Statute of Frauds does not apply to a promise to leave property to a child at the death of the promisor, in consideration of his living with the promisor, where the consideration has been fully performed.

[See 25 R. C. L. 312.]

APPEAL by the defendant Society from a decree in Chancery of the Circuit Court for Newaygo County (Barton, J.) in favor of plaintiff in a suit brought to compel specific performance of a contract with a deceased relative to will property to him. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. White & Reber and Butterfield, Keeney, & Amberg, for appellant:

An agreement made between two persons for the benefit of a third, a stranger to the consideration, will not support an action by the latter, either at law or in equity.

Litchfield v. Garratt, 10 Mich. 426; Pipp v. Reynolds, 20 Mich. 88; Turner v. McCarty, 22 Mich. 265; Halsted v. Francis, 31 Mich. 113; Osborn v. Osborn, 36 Mich. 48; Hicks v. McGarry, 38 Mich. 667; Hunt v. Strew, 39 Mich. 368; Wood v. Truax, 39 Mich. 628; Hidden v. Chappel, 48 Mich. 527, 12 N. W. 687; Necker v. Harvey, 49 Mich. 517, 14 N. W. 503; Monaghan v. Agricultural F. Ins. Co. 53 Mich. 238, 18 N. W. 797; Edwards v. Clement, 81 Mich. 513, 45 N. W. 1107; Wheeler v. Stewart, 94 Mich. 445, 54 N. W. 172; Linne-man v. Moross, 98 Mich. 178, 39 Am. St. Rep. 528, 57 N. W. 103; Chase v.

Warner, 106 Mich. 695, 64 N. W. 730; Ebel v. Piehl, 134 Mich. 64, 95 N. W. 1004; Randall v. Detroit & N. W. R. Co. 134 Mich. 493, 96 N. W. 567; Knights of Modern Maccabees v. Sharp, 163 Mich. 449, 33 L.R.A.(N.S.) 780, 128 N. W. 786; Clay Lumber Co. v. Hart's Branch Coal Co. 174 Mich. 613, 140 N. W. 912; Edwards v. Thoman, 187 Mich. 361, 153 N. W. 806; Signs v. Bush, 199 Mich. 192, 165 N. W. 820.

Plaintiff has not alleged or proved a sufficiently definite, probable, or equitable agreement to entitle him to specific performance.

Millerd v. Ramsdell, Harr. Ch. (Mich.) 373; McMurtrie v. Bennette, Harr. Ch. (Mich.) 124; Kimball v. Batley, 174 Mich. 544, 140 N. W. 915; 36 Cyc. 689, 692; 25 R. C. L. 310; Ritson v. Dodge, 33 Mich. 463; Smith v. Lull, 152 Mich. 126, 115 N. W. 1002.

The alleged agreement was invalid and void under the Statute of Frauds.

Shahan v. Swan, 48 Ohio St. 25, 29 Am. St. Rep. 517, 26 N. E. 222; *Quirk v. Bank of Commerce & T. Co.* 157 C. C. A. 130, 244 Fed. 682; 20 Cyc. 682; *Browne, Stat. Fr.* § 140; *Scott v. Bush*, 26 Mich. 418, 12 Am. Rep. 311; *Peckham v. Balch*, 49 Mich. 179, 13 N. W. 506; *Kelsey v. McDonald*, 76 Mich. 188, 42 N. W. 1103; *Grindling v. Rehyl*, 149 Mich. 641, 15 L.R.A.(N.S.) 466, 113 N. W. 290; *McMurtrie v. Bennette, Harr. Ch. (Mich.)* 124; *Jones v. Tyler*, 6 Mich. 364; *Munsell v. Loree*, 21 Mich. 491; *Renz v. Drury*, 57 Kan. 84, 45 Pac. 71; *Kinney v. Murray*, 170 Mo. 674, 71 S. W. 197; *Wallace v. Long*, 105 Ind. 522, 55 Am. Rep. 222, 5 N. E. 666; *Cuddy v. Brown*, 78 Ill. 415; *Pond v. Sheean*, 132 Ill. 312, 8 L.R.A. 414, 23 N. E. 1018; *Fowler v. De Lance*, 146 Mich. 630, 110 N. W. 41; *Kimball v. Batley*, 174 Mich. 544, 140 N. W. 915.

Messrs. William J. Branstrom and Charles B. Cross, for appellee:

Plaintiff is entitled to specific performance of the agreement.

Preston v. Preston, 207 Mich. 682, 175 N. W. 266; *Bryson v. McCreary*, 102 Ind. 1, 1 N. E. 55; *Merchants' Ins. Co. v. Hill*, 86 Mo. 436; *Toffey v. Atcheson*, 42 N. J. Eq. 182, 6 Atl. 885; *State Assessors v. Morris & E. R. Co.* 49 N. J. L. 193, 7 Atl. 826; *State ex rel. Cramer v. Hager*, 91 Mo. 452, 3 S. W. 844; *Blount v. Windley*, 95 U. S. 173, 24 L. ed. 424; *Crawford v. Branch Bank*, 7 How. 279, 12 L. ed. 700; *Best v. Baumgardner*, 122 Pa. 17, 1 L.R.A. 356, 15 Atl. 691; *Peterson v. Bauer*, 83 Neb. 405, 119 N. W. 764; *Kofka v. Rosicky*, 41 Neb. 328, 25 L.R.A. 207, 43 Am. St. Rep. 685, 59 N. W. 788.

The contract in question was valid and enforceable in equity.

Preston v. Preston, 207 Mich. 682, 175 N. W. 266; *Schoonover v. Schoonover*, 86 Kan. 487, 38 L.R.A.(N.S.) 752, 121 Pac. 485; *Dalby v. Maxfield*, 244 Ill. 214, 135 Am. St. Rep. 312, 91 N. E. 420; *Reo Motor Car Co. v. Young*, 209 Mich. 578, 177 N. W. 249; *Hogan v. Hogan*, 187 Mich. 278, 153 N. W. 678; *Prendergast v. Prendergast*, 206 Mich. 525, 173 N. W. 377; *Oshkosh Waterworks Co. v. Oshkosh*, 109 Wis. 208, 95 Am. St. Rep. 870, 85 N. W. 376; *Von Hoffman v. Quincy*, 4 Wall. 553, 18 L. ed. 409; *State ex rel. National Bond & Secur. Co. v. Krahmer*, 105 Minn. 422, 21 L.R.A.(N.S.) 157, 117 N. W. 780; *Kirkman v. Bird*, 22 Utah, 100, 58 L.R.A. 669, 61 Pac. 338.

Plaintiff has the right to bring this suit independently of the statute.

Carmichael v. Carmichael, 72 Mich. 76, 1 L.R.A. 596, 16 Am. St. Rep. 528, 40 N. W. 173; *Seaver v. Ransom*, 224 N. Y. 233, 2 A.L.R. 1187, 120 N. E. 639; *Howe v. Benedict*, 176 Mich. 524, 142 N. W. 768.

Wiest, J., delivered the opinion of the court:

In 1868 plaintiff, then seven years of age, was living at home with his father, Edward Bassett, at Madison, Minnesota. At that time his cousin, Romanda S. Carpenter, then thirty years of age, was making her home temporarily in the family of Edward Bassett, and had been teaching school and doing housework there for about three years. The mother of plaintiff died in 1864. Miss Carpenter was a spinster and owned a 40-acre farm in Newaygo county in this state, and in 1868 she planned to return to Michigan, and wanted to have plaintiff return and live with her, and the proofs show that, after considerable talk between Miss Carpenter and plaintiff's father, it was agreed that she should take plaintiff and raise him as her own boy, and board, clothe, and educate him until he was of age, and give him everything she owned when she was through with it. The plaintiff was consulted, and, so far as a boy of such tender years could do so, he consented to the agreement. In pursuance of such agreement Miss Carpenter took plaintiff to her home in Michigan, and he lived with her until his marriage, and gave her the care and attention of a son up to the time of her death, in 1919. Miss Carpenter also fully performed her agreement so far as supplying plaintiff with board and clothes and an education, but not giving him her estate at her death.

In 1912 Miss Carpenter made her will, giving her sister a life estate in all her property and bequests of \$25 each to a nephew and a niece, and the residue of her estate to the American Baptist Publication Society of Philadelphia.

Miss Carpenter was never mar-

(— Mich. —, 188 N. W. 747.)

ried, and at the time of her death possessed real estate and personal property.

The will of Miss Carpenter having been admitted to probate, plaintiff filed the bill herein, asking for specific performance of the contract mentioned, and that he be decreed to be the owner of all real and personal property of which Miss Carpenter died seised or possessed, subject, however, to the payment of all just debts and funeral expenses.

The American Baptist Publication Society made answer to the bill, fully raising issues of fact and legal questions.

The defendant Henry McCarthy, executor of the estate, filed an answer averring want of knowledge of the claimed facts relative to an agreement, but denying performance by plaintiff, and also raised issues of law. The bill was taken as confessed by the other defendants.

The circuit judge found in favor of plaintiff, and decreed him to be the owner of all the property, real and personal, of which Romanda S. Carpenter died seised, subject, however, to her just debts and funeral expenses, and directed the probate court to make an order of assignment to such effect.

The case is brought here on appeal by the American Baptist Publication Society.

A careful reading of the record fully persuades us that the agreement was made as claimed by plaintiff and fully performed on his part. Was plaintiff a party to the contract and to the consideration, and the

Specific performance—contract to will property—who may enforce.

sole promisee thereof? Upon this record we must hold that he was. The testimony shows

that plaintiff was informed of the contemplated arrangement and asked to give his consent thereto, and did so. This was in accord with the common parental love and solicitude which would naturally lead a father about to part with his son, old enough to have some appreciation of leaving home, to lay the mat-

ter before the son and obtain his consent. It may be conceded that the father, in giving up the control, comfort, society, and education of his son, and the right to his earnings during minority, imparted to the contract a valuable consideration, but it cannot be said that such was the sole or even the principal consideration. The plaintiff contributed the moving and valuable and continuing consideration in giving Miss Carpenter the comfort, society, and service she expected of him. The father had a right to surrender the parental control for the welfare of plaintiff. Under the contract nothing

Parent and child—right of parent to surrender control of child.

was to be due the father of plaintiff at any time. The promise was to plaintiff, and he was made the sole beneficiary. The agreement was valid, and, upon performance by plaintiff, obligated Miss Carpenter to give plaintiff her property by last will and testament. *Carmichael v. Carmichael*, 72 Mich. 76, 86, 1 L.R.A. 596, 16 Am. St. Rep. 528, 40 N. W. 173, and cases there cited; *Bird v. Pope*, 73 Mich. 483, 41 N. W. 514; *Wright v. Wright*, 99 Mich. 170, 23 L.R.A. 196, 58 N. W. 54. There was such privity of contract between Miss Carpenter, plaintiff's father, and plaintiff as to entitle plaintiff to maintain this suit. *Preston v. Preston*, 207 Mich. 681, 175 N. W. 266.

The case does not fall within the rule barring an action by a third person upon a contract in which he is made beneficiary.

We cannot agree with counsel for defendant that the promise related only to property Miss Carpenter had at the time the agreement was made. Nothing was to be given until Miss Carpenter's death, and her estate at that time determined what was due plaintiff.

Contract—to leave property—construction.

We do not take up the legal question of the right of the plaintiff to file the bill for specific performance of the contract if it was made for his sole benefit by his father with

Miss Carpenter, without his being privy thereto, for the reason that we find he was a party to the contract. Upon that question, however, we call attention to the following cases: *Gardner v. Denison*, 217 Mass. 492, 51 L.R.A. (N.S.) 1108, 105 N. E. 359; *Starnes v. Hatcher*, 121 Tenn. 330, 117 S. W. 219; *Kofka v. Rosicky*, 41 Neb. 328, 25 L.R.A. 207, 43 Am. St. Rep. 685, 59 N. W. 788; *Winne v. Winne*, 166 N. Y. 263, 82 Am. St. Rep. 647, 59 N. E. 832; *Oles v. Wilson*, 57 Colo. 246, 141 Pac. 489; *Edmundson's Estate*, 259 Pa. 429, 2 A.L.R. 1150, 103 Atl. 277; *Babcock v. Chase*, 92 Hun, 264, 36 N. Y. Supp. 879; *Wright v. Wright*, supra.

Defendant contends that the transaction did not amount to a valid contract; there being no consideration for the alleged promise of deceased. This point was raised and answered in *Winne v. Winne*, supra. In that case, by the terms of the agreement Mrs. Winne was to have, and the mother of plaintiff was to surrender to her, the custody and control of the plaintiff. Mrs. Winne was to keep and maintain him as her own child, and at her death give him all her property and make him her sole heir. The court said of this contract: "It was a contract to be chiefly executed during the life of the decedent, with compensation to be made at her death. It was a method adopted to provide for the payment by her for the custody, control, and services of the plaintiff during his minority. It

may be observed in passing that the decedent, before her death, received the full consideration provided for by the agreement. The plaintiff was a considerable boy, discharging all the duties that a faithful son owes his parents. Not only during the years of his minority, but even after his marriage, he continued to provide for and exercise that care over her which a dutiful child should. The plaintiff's mother also surrendered up to the decedent the entire custody and management of her child, and 'had nothing more to do with him.' Thus both the plaintiff and his mother had fully performed the contract upon their part, so that as to them it is not executory, but has been fully executed. That there was a sufficient consideration for the agreement, we have no doubt."

We are in accord with that opinion. The agreement having been fully performed by plaintiff, the Statute of Frauds has no application. The plaintiff is entitled to specific performance, and the decree entered in the Circuit Court is affirmed, with costs.

NOTE.

The validity of an agreement by a parent for the surrender of the custody of a child in consideration of a promise to leave property to the child is considered in the annotation following *HOOKS v. BRIDGEWATER*, post, 223.

H. A. HOOKS, Admr., etc., of John W. Davis, Deceased, et al., Plffs. in Err.,
v.

BOB BRIDGEWATER.

Texas Supreme Court — April 13, 1921.

(— Tex. —, 229 S. W. 1114.)

Contract — to surrender child — validity.

1. A contract by a parent to surrender his child to another, in con-

sideration of the latter's promise to leave his property to the child at death, is void as against public policy.

[See note on this question beginning on page 223.]

— to convey land to child — Statute of Frauds.

2. A contract to convey land to a child in consideration of its surrender by the parents to the promisor is within the Statute of Frauds.

[See 25 R. C. L. 312.]

— what will take case out of statute.

3. To take a contract for sale of land out of the Statute of Frauds there must be payment of consideration, surrender of possession, and

making of permanent improvements.
[See 25 R. C. L. 543-545.]

— part performance — sufficiency.

4. The surrender of a child to one promising to convey real estate to him, and his living with and rendering services for the promisor until the latter's death, are not such part performance as will take the promise out of the Statute of Frauds.

[See 25 R. C. L. 312, 313.]

ERROR to the Court of Civil Appeals to review a judgment reversing a judgment of the District Court for Hardin County in defendants' favor in a suit brought to enforce a verbal agreement, alleged to have been entered into by plaintiff's father with defendants' intestate, to devise his property to plaintiff. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Smith, Crawford, & Mead, Singleton & Nall, and Leon Sonfield, for plaintiffs in error:

The alleged parol agreement by Davis to transfer or leave his property to plaintiff, consisting largely of real estate, being unaccompanied by possession or other physical evidence of ownership, is within the Statute of Frauds, and therefore void.

Bradley v. Owsley, 74 Tex. 69, 11 S. W. 1052; Wooldridge v. Hancock, 70 Tex. 18, 6 S. W. 818; Ann Berta Lodge v. Leverton, 42 Tex. 18; Eason v. Eason, 61 Tex. 225; Garner v. Stubbsfield, 5 Tex. 560; Dugan v. Colville, 8 Tex. 128; Johnson v. Portwood, 89 Tex. 235, 34 S. W. 596, 787; Sweet v. Lyon, 39 Tex. Civ. App. 450, 88 S. W. 384; Bone v. Cowan, 37 Tex. Civ. App. 519, 84 S. W. 385; Wells v. Davis, 77 Tex. 638, 14 S. W. 237; Wootters v. Hale, 83 Tex. 567, 19 S. W. 134; Bullock v. Sprowls, — Tex. Civ. App. —, 54 S. W. 658; Castleman v. Sherry, 42 Tex. 59; Ponce v. McWhorter, 50 Tex. 571; Hibbert v. Aylott, 52 Tex. 530; 26 Am. & Eng. Enc. Law, 58.

The contract alleged, in so far as the same pertains to real property, is within the Statute of Frauds, and the performance by plaintiff is only tantamount to the payment of the consideration, and does not take the contract without the statute, and, being obnoxious to the Statute of Frauds, the same cannot be specifically enforced.

Sprague v. Haines, 68 Tex. 216, 4 S. W. 3/1; Raycraft v. Johnston, 41 Tex. Civ. App. 466, 93 S. W. 237; Newcomb v. Cox, 27 Tex. Civ. App. 583, 66 S. W. 338; Terry v. Craft, — Tex. Civ. App. —, 87 S. W. 844; McCarty v. May, — Tex. Civ. App. —, 74 S. W. 804; Deitrich v. Heintz, 44 Tex. Civ. App. 602, 99 S. W. 417; Stevens v. Lee, 70 Tex. 279, 8 S. W. 40; Kessler's Estate, 87 Wis. 660, 41 Am. St. Rep. 74, 59 N. W. 129; Dicken v. McKinley, 163 Ill. 318, 54 Am. St. Rep. 471, 45 N. E. 134; Fuller v. Fuller, 219 Pa. 163, 68 Atl. 45; Goodloe v. Goodloe, 116 Tenn. 252, 6 L.R.A.(N.S.) 703, 92 S. W. 767, 8 Ann. Cas. 112; Wallace v. Long, 105 Ind. 522, 55 Am. Rep. 222, 5 N. E. 666; Ellis v. Cary, 74 Wis. 176, 4 L.R.A. 55, 17 Am. St. Rep. 125, 42 N. W. 252; Schoonover v. Vachon, 121 Ind. 3, 22 N. E. 777; Davis v. Jones, 94 Ky. 320, 42 Am. St. Rep. 360, 22 S. W. 331.

There being no evidence and no finding that plaintiff altered his position with reference to said alleged contract, in such a way as to injure him or to place him at a disadvantage from which he cannot recover, but rather that he benefited thereby, the alleged contract is not taken out of the Statute of Frauds, and is unenforceable by specific performance.

Terry v. Craft, — Tex. Civ. App. —, 87 S. W. 844; Morris v. Gaines, 82 Tex. 255, 17 S. W. 538; Rosenwald v. Middlebrook, 188 Mo. 58, 86 S. W. 200; Van Horn v. Demarest, 76 N. J. Eq.

386, 77 N. J. Eq. 264, 77 Atl. 354, 369; Cooper v. Colson, 66 N. J. Eq. 328, 105 Am. St. Rep. 660, 58 Atl. 337, 1 Ann. Cas. 997; Plunkett v. Bryant, 101 Va. 814, 45 S. E. 742; 36 Cyc. 645.

In order to take the alleged parol agreement sued upon out of the Statute of Frauds, it was necessary for plaintiff to show acts in performance thereof by him, unequivocally referable to and resulting from such agreement, and such as he would not have done unless on account of the agreement, and with a direct view to its performance.

Ponce v. McWhorter, 50 Tex. 572; Williams v. Morris, 95 U. S. 444, 24 L. ed. 362; Shahan v. Swan, 48 Ohio St. 25, 29 Am. St. Rep. 524, 26 N. E. 222; Collins v. Harrell, 219 Mo. 279, 118 S. W. 432; Plunkett v. Bryant, 101 Va. 814, 45 S. E. 742; Rosenwald v. Middlebrook, 188 Mo. 58, 86 S. W. 210; Van Horn v. Demarest, 76 N. J. Eq. 386, 77 N. J. Eq. 264, 77 Atl. 354, 369; Carter v. Jeffries, 110 Va. 735, 67 S. E. 284.

The court of civil appeals erred in holding that the requisite of possession and permanent improvements upon land does not apply in cases of bequests or devises covering generally all of the property which grantor or donor might own at the date of his death.

Altgelt v. Escalera, 51 Tex. Civ. App. 108, 110 S. W. 991; Baldwin v. Riley, 49 Tex. Civ. App. 557, 108 S. W. 1192; Hammond v. Hammond, 49 Tex. Civ. App. 482, 108 S. W. 1024; Hutcheson v. Chandler, 47 Tex. Civ. App. 124, 104 S. W. 434; Raycraft v. Johnston, 41 Tex. Civ. App. 466, 93 S. W. 237; Sullivan v. Dimmitt, 34 Tex. 124; Pond v. Sheean, 132 Ill. 312, 8 L.R.A. 414, 23 N. E. 1018; Dicken v. McKinley, 163 Ill. 318, 54 Am. St. Rep. 471, 45 N. E. 134; Wallace v. Long, 105 Ind. 522, 55 Am. Rep. 222, 5 N. E. 666; Ellis v. Cary, 74 Wis. 176, 4 L.R.A. 55, 17 Am. St. Rep. 125, 42 N. W. 252.

The alleged transfer and custody of plaintiff by his father to Davis was not a contract, and cannot be enforced as such, because a father cannot by contract divest himself of the care and custody of his children, and such relinquishment of the care and custody was no consideration for an agreement by Davis to leave his property at his death to plaintiff.

Legate v. Legate, 87 Tex. 248, 28 S. W. 281; Taylor v. Deseve, 81 Tex.

246, 16 S. W. 1008; Logan v. Lennix, 40 Tex. Civ. App. 62, 88 S. W. 364; State ex rel. Wood v. Deaton, 93 Tex. 243, 54 S. W. 901; Parker v. Wiggins, — Tex. Civ. App. —, 86 S. W. 788; Chapsky v. Wood, 26 Kan. 650, 40 Am. Rep. 321; Re Scarritt, 76 Mo. 565, 43 Am. Rep. 768; 29 Cyc. 1591; 9 Cyc. 326; Ide v. Brown, 178 N. Y. 26, 70 N. E. 101; Mahaney v. Carr, 175 N. Y. 454, 67 N. E. 903; 9 Cyc. 326.

Messrs. James A. Harrison, W. D. Gordon and Ralph Durham, for defendant in error.

Phillips, Ch. J., delivered the opinion of the court:

The plaintiff, Bob Bridgewater, brought the suit against the administrator of the estate of John W. Davis, deceased, and the heirs at law of Davis, to recover Davis's estate. The suit was in fact one to enforce a verbal agreement claimed to have been entered into by the plaintiff's father—at that time his only surviving parent, when the plaintiff was a child of nine years of age—and Davis, whereby the father contracted to surrender plaintiff's custody and control to Davis, and Davis—a single man who never married—agreed upon that consideration to rear the plaintiff, giving him the care and rights of a son, make him his heir, and leave to him at his death all of his property.

The trial court found that the evidence established the making of the parol agreement; that Davis took charge of the plaintiff under the agreement when he was thus a child, and plaintiff's father never thereafter exercised any control over him; that the plaintiff lived with Davis thereafter, giving him the affection and obedience of a son, and performing chores and services around his home as needed, for which he received no wages or money consideration. Davis failed to bequeath any of his property to plaintiff, dying intestate, leaving an estate of both real and personal property. Before his death he had not placed the plaintiff in possession of any of it.

Judgment for the defendants was rendered in the trial court. On the

appeal, this was reversed by the honorable court of civil appeals for the first district, and judgment rendered for the plaintiff.

As it affected the land belonging to Davis, the contract was plainly condemned by the Statute of Frauds. It was merely a parol agreement

Contract—to convey land to child—Statute of Frauds.

whereby, in consideration of the father's surrender of the custody of the plaintiff, and the latter's living with Davis as a son, Davis's lands owned at his death should become the plaintiff's property. It was in effect but a parol sale of Davis's lands to be performed by him in the future, and has no higher dignity than such a sale. The question presented by this feature of the case is whether the performance of the contract by the plaintiff relieves it from the operation of the Statute of Frauds, or, as more accurately stated, renders the contract enforceable in equity, notwithstanding the statute.

The court of civil appeals has held that it does, despite the fact that there was never any possession of the lands by the plaintiff in Davis's lifetime.

To sustain this holding, there must be created by judicial authority another exception to the operation of the Statute of Frauds, one unsanctioned by any previous decision of this court, and of larger consequence than any heretofore recognized by it. This is evident. For if it be the law that a contract of this kind may, under the circumstances here present, be enforced against a decedent's estate, the entire inheritances of families are, for the benefit of strangers to the blood, put at the mercy of parol evidence.

From an early time it has been the rule of this court, steadily adhered to, that to relieve a parol sale of land from the operation of the Statute of Frauds, three things were necessary: (1) Payment of the consideration, whether it be in money or services; (2) possession by the

vendee; and (3) the making by the vendee of valuable and permanent improvements upon the land with the consent of the

—what will take case out of statute.

vendor; or, without such improvements, the presence of such facts as would make the transaction a fraud upon the purchaser if it were not enforced. Payment of the consideration, though it be a payment in full, is not sufficient. This has been the law since *Garner v. Stubblefield*, 5 Tex. 552. Nor is possession of the premises by the vendee. *Ann Berta Lodge v. Leverton*, 42 Tex. 18. Each of these three elements is indispensable, and they must all exist.

Regardless of the disposition of other courts to ingraft other exceptions upon a plain and salutary statute which had its origin in the prolific frauds and perjuries with which parol contracts concerning lands abounded, this court has always refused to further relax the statute. We think the wisdom of its course has been justified.

Equity has no concern in such cases, except to prevent the perpetration of a fraud. That is the only ground that can justify its interference. Otherwise, the exercise of its jurisdiction for the practical annulment of the statute would be but bare usurpation. It is not to remedy a possible loss to the purchaser that it may intervene. It is the operation of a plain and valid statute that is to be relieved against. For this reason, eminent judges have doubted whether, under any circumstances, courts of equity had originally the power to enforce such parol agreements in open disregard of the statute, and have questioned the wisdom of departing from its certain rule, however plausible the pretext. The statute is valid; it is imperative; it is emphatic. Its simple requirement, that contracts for the transfer of lands be in writing, imposes no hardship. The effect of its relaxation in what seemed to the courts hard cases has produced

abuses almost as great as would have its rigorous enforcement, in the substitution of a doubtful state of the law for a rule that was plain and certain and easily capable of observance. In a noted early English case, the chancellor made the following observation on this trend of judicial decisions: "The statute was made for the purpose of preventing frauds and perjuries, and nothing can be more manifest to any person who has been in the habit of practising in the courts of equity, than that the relaxation of the statute has been the ground of much perjury and much fraud. If the statute had been rigorously observed, the result would probably have been that few instances of parol agreements would have occurred. Agreements would, from the necessity of the case, have been reduced to writing; whereas it is manifest that the decisions on the subject have opened a new door to fraud, and that under the pretense of part execution, if possession is had in any way whatever, means are frequently found to put a court of equity in such a situation that, without departing from its rule, it feels obliged to break through the statute."

Whatever may be the diversity of views upon the general subject, it is clear that to warrant equity's "breaking through the statute" to enforce such a parol contract, the case must be such that the nonenforcement of the contract—or the enforcement of the statute—would, itself, plainly amount to a fraud. This is the basis, and the only basis, for the jurisdiction which courts of equity have assumed, in their creation of exceptions to the statute. When it is considered that the exercise of that jurisdiction results, in any case, in practically setting the statute aside, certainly there should exist some positive rule which will insure its exercise for only the prevention of an actual fraud as distinguished from a mere wrong, and by which the question of whether a failure to enforce the contract

would result in such a fraud may be determined so surely as to leave the statute itself, through the exactness of the exception, with some definiteness of operation. The merit of the rule announced by this court in every decision where it has dealt with the subject is that it does this. By its requirement of payment of the consideration, adverse possession by the purchaser, and his making of valuable and permanent improvements in order for the contract to be exempt from the statute, it insures the application of the exemption only for the avoidance of actual fraud, and secures, as it should, the full operation of the statute in all other cases. Its purpose is both to prevent the perpetration of fraud and to safeguard the titles of lands. It is a rule founded in sound reason and common experience, and is fair and just.

There is no fraud in refusing to enforce the contract where only the consideration is paid. The value of the consideration may, in a law action, be recovered. Nor where only possession of the premises is given. In such case there is no performance by the purchaser of any obligation. Nor even where there is both payment of the consideration and possession, without valuable and permanent improvements made on the faith of contract, or their equivalent. Merely the transfer of the possession by the vendor could create no estoppel against him. A transfer of the possession of the soil affords no presumption of a sale of the fee. As said by Judge Moore in *Ann Berta Lodge v. Leverton*, 42 Tex. 18, to permit a person, who can show no other act done beyond the transfer of the possession of the soil from the owner to himself, to enforce an oral agreement for the sale of the fee, would practically repeal the Statute of Frauds and let in all the mischiefs it was intended to guard against. But where there is payment of the consideration, the surrender of possession, and the making of valuable and permanent

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improvements on the faith of the purchase, with the owner's knowledge or consent, there is created an estoppel against him, and it may fairly be said that a fraud upon the purchaser would result if the owner were permitted to repudiate the contract.

Not only can there be no fraud upon a purchaser in refusing to enforce a parol contract for the sale of land where there has been no performance beyond the payment of the consideration, but a further strong reason for the requirement of possession is that, without it, the existence of the contract rests altogether in parol evidence, which common experience has shown to be too unstable and uncertain to be permitted to work a divestiture of title to real property. If, however, the purchaser be let into possession, there is furnished, by an affirmative act of the owner himself, at least a corroborative fact that the contract was actually made.

At all events it is a positive requirement under the holding of this court. It is a part of the settled law, and is not now to be dispensed with.

In *Wooldridge v. Hancock*, 70 Tex. 18, 6 S. W. 818, this is said: "But it is necessary to the validity of a parol sale or gift of land in Texas, however the rule may be elsewhere, that possession be delivered and substantial and valuable improvements made, with the consent or knowledge of the vendor, upon the faith of such gift or sale." Citing *Ann Berta Lodge v. Leverton*, supra, and *Eason v. Eason*, 61 Tex. 227.

And in *Bradley v. Owsley*, 74 Tex. 69, 11 S. W. 1052, it is announced: "The rule in this state is well established that verbal contracts for the sale of land will not be enforced without proof of possession and valuable improvements permanent in character, or of other facts making the transaction a fraud on the purchaser if not enforced."

See also *Altgelt v. Escalera*, 51 Tex. Civ. App. 108, 110 S. W. 989,

and *Terry v. Craft*, — Tex. Civ. App. —, 87 S. W. 844.

With this the established, and in our opinion the sound, rule of decision in this state, there can be no occasion for enlarging it. When called upon, as here, to disregard it and ingraft a further exception upon the statute, we deem it appropriate to say, in the language of the opinion in *Ann Berta Lodge v. Leverton*: "The propriety of the enforcement of such contracts by courts of equity, under any circumstances, has always been a mooted question. And while it is not to be denied by us that it may be done in such cases as have heretofore been held by the court as authorizing it, we are unwilling to extend its limits beyond the boundaries defined by them."

For such contracts to be enforceable in this state, they must come fairly within the rule. If there has been no surrender of the possession of the land, the contract is not within the rule, and is incapable of enforcement. It is no answer to say that the rule does not fit the circumstances of the particular contract. That is no reason for making another rule. The rules of law are not thus to be disregarded or evaded. The rule is necessarily a general one, and intended for general application. If a particular case does not fall within it, the statute itself governs and condemns the contract on which the case rests.

The parol contract here has no basis for its enforcement, other than the plaintiff's performance by his assuming with Davis the relation, and rendering him the service, of a son. That was the consideration for Davis's agreement to make him the owner of his estate. The case, therefore, is simply one where the consideration for a parol agreement to transfer the title to land has —part performance—sufficiency. been paid, with no possession of the land surrendered, and no valuable and permanent improvements made by the purchaser on the faith of the agreement. In

no other character of case resting only upon the payment of the consideration, could such a contract be enforced in this state. If the consideration for Davis's agreement had been an amount of money, however large, and had been fully paid, without possession of the land and valuable and permanent improvements, the contract would be held incapable of enforcement. If the payment of the consideration is to be held insufficient in one case, it should be so held in all cases. The test is not the character of the consideration, nor the value of the bargain. Why should the nature of the consideration, or its exceptional value, alone determine the question, instead of the rule itself which, in addition to the payment of the consideration, whatever its character and value, requires possession of the land and valuable and permanent improvements? And why should there be allowed the enforcement of a parol contract for the sale of land, the consideration being of the nature paid in this case, and deny its enforcement where the consideration has been fully paid in money? No satisfactory answer can be given to these questions.

The holding of the court of civil appeals is that a distinction should be made in this case because the value of the plaintiff's services in his assumed relation as Davis's son could not be measured in money. The plaintiff's father, in the making of the contract and as its basis, as well as Davis, measured them in property.

The father calculated the money value of the plaintiff's filial relation to himself, what it would be worth to surrender that relation to Davis, and the value it would be to Davis, placed it all at the value of Davis's estate, and closed the bargain accordingly. The suit assumes that Davis was able to estimate the value of the relationship and services to himself, for it charges that he agreed to pay for them by the transfer of his estate. The entire case is one where the custody, the relationship, and the services of the plain-

tiff were dealt with as property; where it was agreed that they should be exchanged for property, showing that the parties estimated their value in property; and where now it is sought, as in any other pecuniary bargain, to compel payment of them in property. If the parties to the agreement were able to estimate their value in property, a court should be competent to value them in money. The value of a child's services to his parents, and of a husband's or wife's relation and affection, are every day the matter of assessment by courts. They are not held uncertain as a matter of judicial investigation. There would equally be no difficulty, we apprehend, in a similar determination of the value of the plaintiff's services and relationship to Davis.

Another reason given by the court of civil appeals, for holding inapplicable to this case the rule of this court upon the subject, is that the court could not have had such a case as this in mind in so declaring the rule. The opinion in *Wooldridge v. Hancock*, supra, discloses that the court had in mind those very situations where, as here, the parol agreement did not contemplate the surrender of the possession of the land in the lifetime of the owner; but it held that alone to be a sufficient reason for denying the enforcement of the agreement. The opinion declares that where an owner of land makes a verbal sale or gift of it, to take effect after his death, but retains the possession, no title is acquired, "for it is essential, in case of parol gift or sale of land, that possession should accompany or follow the gift or sale; and there being no intention to part with the title—as was true of Davis—until some indefinite time in the future, there could be no exclusive adverse possession as against the owner, which seems to be necessary in order" to ripen into a title.

Aside from the invalidity of the contract as to the land of the estate under the Statute of Frauds, and its being incapable of enforcement because there was no possession by

(— *Tes.* —, 229 S. W. 1114.)

the plaintiff of the land, it is a character of contract ^{to surrender child—validity.} which should be held void as a matter of public policy. A parent has no property interest in his child, and should not be permitted to deal with his child as property. It was so held in *Legate v. Legate*, 87 Tex. 248, 28 S. W. 281, but the proposition needs no authority for its support. The law should not encourage the relinquishment by parents of their children, and the renunciation of a sacred relation imposed by nature, merely for the children's enrichment, by placing the seal of validity upon a contract in which a parent in effect barters his child away for a property return. It is more concerned in fostering and maintaining that relation, and guarding its valuable and wholesome influences, than in promoting the child's financial prosperity. Let it be once held that a parent's contract of this kind is valid and may be enforced, and every parent will be free to transfer his children to anyone willing to pay them well for the bargain. We are unwilling to subscribe to such a doctrine. It tends to the destruction of one of the finest relations of human life, to the subversion of the family tie, and to the reversal of an ordering of nature which is essential to human happiness and the security of society. It reduces parental duty and the child's welfare to the sordid level of financial profit, and would license the easy surrender of that

duty for merely the child's financial advantage. The custody of a child is not a subject-matter of contract, and therefore can constitute no consideration for a contract. The attempted agreement here was therefore not a contract. *Ibid.* Davis could not have enforced it, because based upon a void consideration. If Davis could not have enforced it against the plaintiff, it is not enforceable in the plaintiff's favor.

True, contracts between two persons, upon a valuable consideration, that one will leave his property to the other, are enforceable where no statute is contravened. Such is the recognized law and was the holding in *Jordan v. Abney*, 97 Tex. 296, 78 S. W. 486. There, in addition to the contract made between the plaintiff's father and Mr. and Mrs. Ogle, there was a contract between the plaintiff herself and Mrs. Ogle, made after Ogle's death, confirming the previous contract, and by which Mrs. Ogle agreed to leave the plaintiff her property. Here, there was no contract between the plaintiff and Davis for the former's service. The contract was between the plaintiff's father and Davis, by which his custody and filial relation were attempted to be bargained away as though properly the subject-matter of contract. They could not form the basis of a contract under the express holding in *Legate v. Legate*.

The judgment of the honorable Court of Civil Appeals is reversed, and the judgment of the District Court is affirmed.

ANNOTATION.

Validity of agreement by parent to surrender custody of child in consideration of promise to leave property to child.

- I. Introductory, 223.
- II. In general, 224.
- III. Effect of public policy, 230.
- IV. Effect of change in family relations of foster parent, 232.
- V. Effect of laws as to descent, wills, or adoption, 233.

I. Introductory.

The discussion in this note is

limited to the validity of a contract to surrender the custody of a child in consideration of a promise to leave property to it, as affected by public policy and similar considerations. The effect of the Statute of Frauds, and the character of the evidence re-

quired to prove such a contract, are not considered.

In practically all of the cases in point, the question of the validity of the contract has been raised after the death of the foster parent, in an action to enforce property claims against his estate. Whether the contract is enforceable against the parent during the life of the other party, no doubt, depends chiefly on the fitness of the parent to have the child's custody, though the general welfare of the child is also to be considered. See 20 R. C. L. 603-606. See also a dictum to that effect in *Roberts v. Hall* (1882) 1 Ont. Rep. 388.

II. In general.

Although the decisions of the courts are not unanimous, an agreement by a foster parent to leave property to a child, in consideration of the surrender of the child's custody by a natural parent, is generally held to be valid and enforceable after the death of the foster parent.

California.—*Furman v. Craine* (1912) 18 Cal. App. 41, 121 Pac. 1007. See also *Owens v. McNally* (1896) 113 Cal. 444, 33 L.R.A. 369, 45 Pac. 710; *Steinberger v. Young* (1917) 175 Cal. 81, 165 Pac. 432.

Colorado.—*Oles v. Wilson* (1914) 57 Colo. 246, 141 Pac. 489.

Iowa.—*Chehak v. Battles* (1907) 133 Iowa, 107, 8 L.R.A.(N.S.) 1130, 110 N. W. 330, 12 Ann. Cas. 140; *Stiles v. Breed* (1911) 151 Iowa, 86, 130 N. W. 376; *Horner v. Maxwell* (1915) 171 Iowa, 660, 153 N. W. 331; *Sharpe v. Wilson* (1917) 181 Iowa, 753, 161 N. W. 35. See also *Finger v. Anken* (1912) 154 Iowa, 507, 131 N. W. 657.

Kentucky.—Compare *Davis v. Jones* (1893) 94 Ky. 320, 42 Am. St. Rep. 360, 22 S. W. 331; *Brewer v. Hieronymous* (1897) 19 Ky. L. Rep. 645, 41 S. W. 310.

Michigan.—*BASSETT v. AMERICAN BAPTIST PUB. SOC.* (reported herewith) ante, 213.

Minnesota.—*Laird v. Villa* (1904) 93 Minn. 45, 106 Am. St. Rep. 420, 100

N. W. 656; *Wold v. Wold* (1917) 138 Minn. 409, 165 N. W. 229.

Missouri.—*Sutton v. Hayden* (1876) 62 Mo. 101; *Sharkey v. McDermott* (1887) 91 Mo. 647, 60 Am. Rep. 270, 4 S. W. 107; *Healey v. Simpson* (1892) 118 Mo. 340, 20 S. W. 881; *Kinney v. Murray* (1902) 170 Mo. 674, 71 S. W. 197; *Asbury v. Hicklin* (1904) 181 Mo. 658, 81 S. W. 390; *Grantham v. Gossett* (1904) 182 Mo. 651, 81 S. W. 895.

Montana.—*Burns v. Smith* (1898) 21 Mont. 251, 69 Am. St. Rep. 653, 53 Pac. 742.

Nebraska.—*Parks v. Burney* (1919) 103 Neb. 572, 173 N. W. 478. See also *Teske v. Dittberner* (1903) 70 Neb. 544, 113 Am. St. Rep. 802, 98 N. W. 57; *Peterson v. Bauer* (1909) 83 Neb. 405, 119 N. W. 764.

New Jersey.—*Van Dyne v. Vreeland* (1857) 11 N. J. Eq. 370, affirmed in (1858) 12 N. J. Eq. 142; *Van Tine v. Van Tine* (1888) — N. J. Eq. —, 1 L.R.A. 155, 15 Atl. 249.

New York.—*Winne v. Winne* (1901) 166 N. Y. 263, 82 Am. St. Rep. 647, 59 N. E. 832; *Healy v. Healy* (1901) 166 N. Y. 624, 60 N. E. 1112; *Middleworth v. Ordway* (1908) 191 N. Y. 404, 84 N. E. 291; *Godine v. Kidd* (1892) 64 Hun, 585, 19 N. Y. Supp. 335.

Pennsylvania.—*Wall's Appeal* (1886) 111 Pa. 460, 56 Am. Rep. 288, 5 Atl. 220; *Enders v. Enders* (1894) 164 Pa. 266, 22 L.R.A. 56, 44 Am. St. Rep. 598, 30 Atl. 129.

Texas.—Compare *HOOKS v. BRIDGE-WATER* (reported herewith) ante, 216.

Utah.—*Brinton v. Van Cott* (1893) 8 Utah, 480, 33 Pac. 218.

England.—See *Hill v. Gomme* (1839) 5 Myl. & C. 250, 41 Eng. Reprint, 366, 9 L. J. Ch. N. S. 54, 4 Jur. 165.

Canada.—*Roberts v. Hall* (1882) 1 Ont. Rep. 388. See also *Chisholm v. Chisholm* (1908) 40 Can. S. C. 115, 11 Ann. Cas. 213.

The validity of the contract has been upheld, also, where the foster parent agreed to leave property to the child after the child was already in his possession, and in consideration of the natural parent's agreement permitting it to remain with him. *Wold v. Wold* (Minn.) supra.

Likewise, a contract with the step-father of a minor child, whereby it was agreed that, in consideration of his placing the child in the control and custody of the other contracting party, the latter would make the child her heir and leave to it all of her property, has been held to be valid. *Steinberger v. Young* (Cal.) *supra*. In that case the court said: "We see no force in the contention that the contract was invalid because made with the step-father, Halbert, who, it is claimed, had not legal control over the child. The contract was made primarily for the benefit of the child herself. She was, if not the formal party, the real party in interest, and Halbert stood in a relation which authorized him to act in her behalf."

In *Middleworth v. Ordway* (1905) 49 Misc. 74, 98 N. Y. Supp. 10, it was held that, where the wife of the foster parent was not a party to the contract, his agreement to give to the plaintiff the rights in his estate of a child by birth was void as against the wife, though valid as against collateral heirs.

The adequacy of the consideration has frequently been upheld by the courts, in determining, after the death of the promisor, the validity of a contract to leave property to a child in consideration of the surrender of its custody to the promisor by its parent.

California.—*Furman v. Craine* (1912) 18 Cal. App. 41, 121 Pac. 1007.

Colorado.—*Oles v. Wilson* (1914) 57 Colo. 246, 141 Pac. 489.

Iowa.—*Chehak v. Battles* (1907) 133 Iowa, 107, 8 L.R.A. (N.S.) 1130, 110 N. W. 330, 12 Ann. Cas. 140; *Stiles v. Breed* (1911) 151 Iowa, 86, 130 N. W. 376; *Finger v. Anken* (1912) 154 Iowa, 507, 131 N. W. 657; *Sharpe v. Wilson* (1917) 181 Iowa, 753, 161 N. W. 35.

Minnesota.—*Laird v. Villa* (1904) 93 Minn. 45, 106 Am. St. Rep. 420, 100 N. W. 656.

Missouri. — *Healey v. Simpson* (1892) 113 Mo. 340, 20 S. W. 881. See also *Grantham v. Gossett* (1904) 182 Mo. 651, 81 S. W. 895.

New York.—*Winne v. Winne* (1901) 166 N. Y. 263, 82 Am. St. Rep. 647, 59 N. E. 832.

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Utah.—*Brinton v. Van Cott* (1893) 8 Utah, 480, 33 Pac. 218.

On this point, the court said in *Healey v. Simpson* (Mo.) *supra*: "The surrender by the mother of all control of the child, and the services and companionship of the latter, constituted valuable considerations for the promise of Brewster and his wife that she should 'have and inherit from the estate of said parties . . . in the same manner and to the same extent that a child born of their union would inherit.' The influences of a child of tender years in the home circle are too sacred and holy to be estimated in dollars and cents. And when the mother sent her child to dwell in another family, in a distant state, she yielded much of affection and love, and Brewster by the same act gained the companionship of one who added much, no doubt, to his enjoyment of life. The sundering of natural ties, and the formation of artificial ones for the enjoyment and gratification of the party at whose instance this is done, are held, and ought to be held, to be such a consideration as the courts will recognize as valuable, where the other party has in good faith acted on and carried out the agreement on his part. This is upon the principle that the parties cannot be put in statu quo. In the very nature of things, nine years in the life of a child so change conditions that it is out of the power of an earthly tribunal to restore the parties to their original situation and environment, and the courts, therefore, compel them to stand upon and abide by the record they have made." See to the same effect, *Winne v. Winne* (N. Y.) and *Brinton v. Van Cott* (Utah) *supra*.

See also *Grantham v. Gossett* (Mo.) *supra*, wherein, however, it was held that the testimony introduced to prove the contract was insufficient.

In *Oles v. Wilson* (Colo.) *supra*, it appeared that a father agreed to surrender the custody of his child, in consideration of an agreement by the other party to the contract to care for and educate the child, and give to her by will at least one third of all the property of which he should be pos-

sessed at his death. After the death of the foster parent, leaving a will which made no provision for the child, it was held that the child was entitled to a one-third interest in his estate. In holding that the objection of inadequacy of consideration could not be successfully urged against her claim, the court said: "It is well to bear in mind that the contract obligates the promisor to leave property to a child, in consideration of her living with him as his child, rather than as compensation for services to be rendered by her, and that it has been fully performed by the latter. As no definite money value can be fixed for the society, companionship, and filial obedience of a child, or to a parent's sacrifice in giving up his child to another, which is the real consideration in such contracts, courts will not inquire into the adequacy of the consideration, when the promisor has fully received and enjoyed the benefits of the contract."

See to the same effect, *Laird v. Villa* (Minn.) *supra*.

In *Chehak v. Battles* (Iowa) *supra*, it appeared that the parties intended a written contract of the character herein considered to operate as a formal adoption, but that it did not have that effect, because not acknowledged by all the necessary parties, or recorded. In holding that the contract was valid and specifically enforceable, the court said: "The obligations of such a contract, as of others, are mutual, and the peculiarities of it such as emphasize the right of him who has faithfully performed his part of it, to that portion stipulated by the other party. It is impossible to estimate by any pecuniary standard the value to the parties receiving a child, nor is there ever any design of so measuring the service and solace bestowed. The nature of the contract necessarily precluded all thought of returning the consideration, and after the mother has yielded the possession of her child, with all that this means, and it has lived until majority as a dutiful and loving son or daughter with those who have promised to cherish him or her as

their own, and that he or she shall share their estate, it is beyond the power of the adoptive parents or the courts to place the mother or child in the situation in which they were before the agreement was entered into. There is no such thing, in cases like this, as placing the parties in statu quo, and the remedy must be by specifically enforcing the contract, or the denial of rights which have been fully earned, and in good conscience and justice ought to be enforced." That case was cited and followed in *Stiles v. Breed* (1911) 151 Iowa, 86, 130 N. W. 376, wherein the contract given effect was an oral one.

See to the same effect, *Finger v. Anken* (1912) 154 Iowa, 507, 131 N. W. 657, and *Sharpe v. Wilson* (1917) 181 Iowa, 753, 161 N. W. 35. In the latter case, however, it was held that there was not sufficient evidence of the alleged contract to leave property to the foster child.

In *Furman v. Craine* (1912) 18 Cal. App. 41, 121 Pac. 1007, it appeared that the defendant's intestate was given the custody of the plaintiff by her parents, in consideration of the intestate's agreement to adopt, educate, and make the plaintiff her heir at law so that she would inherit her property. In holding that the plaintiff, though not formally adopted, was entitled to the beneficial interest in the estate of the intestate, the court said: "The right of plaintiff to have specific enforcement of the alleged contract upon the facts found is supported by overwhelming authority. *Van Tine v. Van Tine* (1888) — N. J. Eq. —, 1 L.R.A. 155, 15 Atl. 249; *Healey v. Simpson* (1892) 113 Mo. 340, 20 S. W. 881; *Sharkey v. McDermott* (1887) 91 Mo. 647, 60 Am. Rep. 270, 4 S. W. 107; *Burns v. Smith* (1898) 21 Mont. 251, 69 Am. St. Rep. 653, 53 Pac. 742; *Johnson v. Hubbell* (1854) 10 N. J. Eq. 332, 66 Am. Dec. 773. While, in the case of *Owens v. McNally* (1896) 113 Cal. 444, 33 L.R.A. 369, 45 Pac. 710, specific performance was denied as against the widow of deceased, the ground therefor clearly distinguishing the case from this, it was there said, with reference to a like agreement,

that 'a court of equity will enforce such an agreement specifically, by treating the heirs as trustees and compelling them to convey the property in accordance with the terms of the contract.' That there was an adequate consideration for the promise fully appears, it being shown that when plaintiff was four years of age the relation existing by nature between plaintiff and her parents was severed, and in lieu thereof an artificial relation created for the purpose of satisfying the maternal cravings of this childless aunt. Plaintiff entered her household as her child, and she, her parents, and her aunt, upon sufficient grounds, thought and believed that she had been adopted as the child of Margaret E. Synnot, and thenceforward, for nearly twenty-four years, she was so recognized by Synnot. The surrender of their child on the part of the parents, the presumed detriment to the plaintiff due to the severing of the paternal ties, and the love, obedience, and companionship given the aunt, followed by the establishment of the artificial relation, cannot be measured in gold. 'There are things which money cannot buy; a thousand nameless and delicate services and attentions, incapable of being the subject of explicit contract, which money, with all its peculiar potency, is powerless to purchase. The law furnishes no standard whereby the value of such services can be estimated, and equity can only make an approximation in that direction by decreeing the specific execution of the contract.' *Sutton v. Hayden* (1876) 62 Mo. 101; *Healey v. Simpson* (1892) 113 Mo. 340, 20 S. W. 881."

The objection of lack of mutuality, it has been held, cannot be successfully urged against a contract by a foster parent to leave to a child a share in his estate, after the consideration for the surrender of the child by its natural parent has been executed, and the child has lived in the home of the foster parents for the full period designated in the contract. *Oles v. Wilson* (1914) 57 Colo. 246, 141 Pac. 489.

So, in *Sutton v. Hayden* (Mo.) *supra*,

the court said: "After a contract has been fully performed and acquiesced in, as in the present instance; after one contracting party has received all the anticipated benefits arising from a faithful performance, it must be apparent that it would be altogether inequitable to permit the heirs of such party, at this late period, when the law can afford no adequate redress, to raise any objection on the score of mutuality, even were such objection originally tenable."

A contract to leave property to a child in consideration of a surrender of its custody has been held not to be open to the objection that it is unjust and unfair. *Oles v. Wilson* (Colo.) *supra*. With respect to the objection of residuary legatees on that ground, the court said: "Contrary to the contention of defendants in error, we see nothing in the record to justify the conclusion that the contract is unjust and unfair. It does not appear to be oppressive, one-sided, unconscionable, or in any wise affected by inequitable features, nor can we discover that its enforcement would result in wrong or injustice. Men must be just, and honestly discharge their legal obligations, before they can be lawfully permitted to be generous. In equity, their actions are tested in the crucible of good faith and conscience, and decrees are molded so as to measure out justice to all concerned. As said in *Johnson v. Hubbell* (1854) 10 N. J. Eq. 338, 66 Am. Dec. 773: 'If A enters into an agreement, for which he receives a good consideration, with B, to give him his property by will, and in violation of his agreement he gives it, by his will, to C, the court will declare C a trustee for B. In doing this, it does C no wrong. A having undertaken to make to C a voluntary gift of that which he had no right in law so to dispose of, the court does C no injustice, and violates none of his rights, by declaring him a mere trustee. To permit C to hold the property against B, the court would sanction the fraud which A had committed in disposing of the property in violation of his agreement.'"

In *Winne v. Winne* (1901) 166 N. Y.

263, 82 Am. St. Rep. 647, 59 N. E. 832, the court said: "The contention of the appellants is that the agreement found by the court was not a legal or binding agreement in law, that it cannot be enforced against the estate of the decedent, and that the evidence was insufficient to establish a valid agreement which a court of equity can specifically perform. In discussing the first proposition, the appellants claim that the agreement was impossible of performance, because one person cannot make another his heir unless of his own blood. In a sense that may be true, but as the court found that the agreement by Mrs. Winne was to maintain the plaintiff as her own child, and at her death give him her property, the addition of the words 'and make him her sole heir,' does not detract from the other words of the agreement. Therefore, so far as the appellants' contention rests upon the proposition that one cannot make another, not of his own blood, his heir, it is of little moment. There are, however, cases where contracts in those words have been held valid, and specific performance enforced. In the further consideration of this question it must be assumed that this was an agreement upon the part of the intestate to take the custody and control of the plaintiff, to keep, maintain, and educate him as her own child, and at her death give him all her property. This agreement is clear, definite, certain, and was plainly understood, and the remedy sought is not for any reason unfair or inequitable. Under these circumstances, we are unable to discover any principle upon which it can be properly held that this contract was not binding in equity, or was not enforceable against her estate."

See to the same effect, *Healy v. Healy* (1901) 166 N. Y. 624, 60 N. E. 1112.

But it has been stated that the enforcement of the contract must appear to be inherently just, before it will be decreed by a court, where property of great value is to be left to a child, in consideration of the surrender of its custody to the promisor. *Kinney v. Murray* (1902) 170 Mo. 674, 71 S.

W. 197. The decision in that case was based chiefly on the inadequacy of the testimony introduced to prove the contract.

See to the same effect, *Asbury v. Hicklin* (1904) 181 Mo. 658, 81 S. W. 390.

An agreement is sufficiently definite to constitute a valid contract, if it provides that a foster child, to be placed by its parents in the custody and care of the promisor, is to be given a child's share in the promisor's estate. *Burns v. Smith* (1898) 21 Mont. 251, 69 Am. St. Rep. 653, 53 Pac. 742; *Parks v. Burney* (1919) 103 Neb. 572, 173 N. W. 478. In the case last cited the court said: "It is seriously contended that this evidence as to what he should have is too indefinite to amount to a contract. It is urged that a child has no share in his parents' property if the parents see fit to dispose of the property otherwise, and that, if Smith and his wife were then young people, it is very indefinite and uncertain as to what any particular child's share would be, if there should be other children. If, however, we apply the rule of construing this contract as the parties themselves then evidently understood it and intended, these objections are not well taken. If the agreement to treat this boy as their son, and give him a child's share of the property, would not prevent the Smiths from disposing of their property or a part thereof to others by will, it, at least, was equivalent to a contract to make him an heir, and, as such, he would inherit with other heirs, if any, such property as Smith owned, undisposed of, at his death. The evidence shows that Smith was very much attached to this boy, and that he was not on good terms with his brothers and sisters, but declared that none of them should ever have any part of his property. To treat him as his son, and give him a child's share in the property, means that the boy should inherit as though he was their own child, which is equivalent to a formal legal adoption, provided that the boy and his mother performed their part of the contract which the mother had made." However, in

Woods v. Evans (1885) 113 Ill. 186, 55 Am. Rep. 409, it was held that such a contract was too indefinite to be enforceable. And in *Wallace v. Rappley* (1882) 103 Ill. 229, it was held that an agreement to make a child an heir, in consideration of an agreement for the surrender of its custody, was too indefinite as to the amount the child was to receive to form a binding contract. The decisions in the two cases last cited, however, were based chiefly on other grounds. See *infra*, IV.

It has been held that an agreement by an elderly invalid to leave all of her property to a girl of sixteen, in consideration of her parents allowing her to live with the invalid and care for her as long as she lived, was sufficiently definite to be binding and specifically enforceable on the death of the invalid. *Brinton v. Van Cott* (1893) 8 Utah, 480, 33 Pac. 218.

It is immaterial that a foster parent, who agrees to leave property to a child in consideration of receiving its custody, does not state the mode by which the property is to be transferred. *Sutton v. Hayden* (1876) 62 Mo. 101; *Sharkey v. McDermott* (1887) 91 Mo. 647, 60 Am. Rep. 270, 4 S. W. 107; *Vanduyne v. Vreeland* (1858) 12 N. J. Eq. 142, affirming (1857) 11 N. J. Eq. 370. In *Sutton v. Hayden* (Mo.) *supra*, the court said: "Nor is it regarded as any substantial obstacle to the relief sought that the mode whereby the property was to be transferred was not specified. The intention to transfer the property was the chief thing; the method by which the intended result was to be attained, was wholly immaterial. The contract entered into might well have been discharged by deed or will." That case was cited and followed in *Sharkey v. McDermott* (1887) 91 Mo. 647, 60 Am. Rep. 270, 4 S. W. 107. See to the same effect, *Vanduyne v. Vreeland* (N. J.) *supra*, wherein the court said: "It is true the agreement does not state whether the property should be secured to the complainant by deed, so that he might enjoy it when they died, or whether it should be left him by will. It was argued that it would make a very ma-

terial difference whether they were bound to secure to him, by deed, all the property they might acquire, or merely, by testamentary disposition, give him what they left at their death. It was thought by counsel that in the former case it would restrict them from the use and disposal of their property during their lifetime. Now, I do not think there is the least difficulty as to the legal construction to be put upon the agreement, as it is stated in the bill. The complainant, during the lifetime of Vreeland and his wife, or either of them, could not make any demand for any part of their property, or for the execution of any deed or writing to secure to him its enjoyment after their death. It was upon their death that he was entitled to the property, and it mattered not to him whether he derived it by deed or by devise. The agreement put no restraint whatever upon the parties to the free and unrestricted enjoyment of their property. They might give it away while they lived, but they could not make a disposition of it to take effect at their death. What property they left at their death, they had agreed that the complainant should have."

In *Horner v. Maxwell* (1915) 171 Iowa, 660, 153 N. W. 331, an oral agreement by foster parents to leave all of their property to a child, in consideration of their being given its care and custody, was held to be valid and specifically enforceable after the death of the foster parents, though an unsuccessful attempt was made, at or about the time of the oral contract, to effect a formal adoption by an instrument which made no reference to the agreement to leave property to the child.

In *Hill v. Gomme* (1839) 5 Myl. & C. 250, 41 Eng. Reprint, 366, it appeared that a father agreed to transfer the custody of his son to another person, in consideration of the latter's agreement to support the boy, provide for his education, and leave to him all the property possessed by the foster parent at his death, subject, however, to a life estate to his wife. It also appeared that the contract was not fully performed on either side. The court

said: "If, indeed, the agreement had been so far acted upon as to have altered the status of the child, as it was observed by the master of the rolls, and that, by the act of Dean, Dean might have been precluded from disputing with the child his liability to perform his part of the agreement; but that would have been a new equity, though arising out of the agreement, and which the facts of this case exclude. Let it, however, be assumed that this court would permit him to sue upon such contract, it cannot be that such right, or the reservation of the benefit to him under the contract, should prevent the parties to the contract from dealing with each other relative to it. . . . I think the observations of the master of the rolls, upon the evidence addressed to this part of the case, are perfectly just, and that the evidence of the agreement having been acted upon at all is very insufficient to establish that fact; but that it is amply proved that both parties so far abandoned the contract, soon after it was made, that neither party derived the benefit from it which it purports to secure, so that, as between the two contracting parties, it would be impossible for the representatives of either to demand, in this court, a specific performance of it."

III. *Effect of public policy.*

In several cases the courts have decided that a contract to leave property to a child, in consideration of the surrender of its custody by its parent to the promisor, is not opposed to public policy, or void, where the parent is not in a position to furnish proper care for the child, and the promisor is able and fit to perform the obligation. *Van Dyne v. Vreeland* (1857) 11 N. J. Eq. 370, affirmed in (1858) 12 N. J. Eq. 142; *Van Tine v. Van Tine* (1888) — N. J. Eq. —, 1 L.R.A. 155, 15 Atl. 249; *Godine v. Kidd* (1892) 64 Hun, 585, 29 Abb. N. C. 36, 19 N. Y. Supp. 335; *Roberts v. Hall* (1882) 1 Ont. Rep. 388. See also *Owens v. McNally* (1896) 113 Cal. 444, 33 L.R.A. 396, 45 Pac. 710; *Enders v. Enders* (1894) 164 Pa. 266, 27 L.R.A. 56, 44 Am. St. Rep. 598, 30

Atl. 129; *Chisholm v. Chisholm* (1908) 40 Can. S. C. 115, 11 Ann. Cas. 213. Compare (*HOOKS v. BRIDGEWATER* (reported herewith) ante, 216.

In *Roberts v. Hall* (1882) 1 Ont. Rep. 388, a lower court held that a contract of the character considered herein was opposed to public policy, and illegal. The divisional court, however, on the ground that such a contract was not opposed to public policy, if it promoted the foster child's welfare, set aside the judgment of the lower court with the following comment: "Here the child transferred was one of a large family, and the uncle and aunt had no children, and they promised to leave her all they had at their death. The circumstances of the uncle were then somewhat better than those of the father, though both were poor. The chances of the child were very much better, in the father's judgment, by making the change than by having her at home. The father could have interfered at any moment, and put an end to the arrangement, if he found that it was being carried out disadvantageously to the child. The fact that he did not do so, and that the infant, when coming to the years of discretion, did not do so, is cogent evidence that the benefits of this compact commended themselves both to parent and child. I am not compelled by any of the authorities to hold such a transaction contrary to public policy; and to my mind it would be a contravention of the policy of the law to allow the plaintiff to go unrewarded for her many years of service in the family of the deceased. Besides, the child, being emancipated by the parent, would have the right to receive for her own use wages and earnings for personal service. Of all this the deceased, Hall, received the benefit, on the faith of the promise to leave her all his property."

With respect to an agreement to leave property to a child, in consideration of the surrender by its father of its custody and services, the court said in *Van Dyne v. Vreeland* (N. J.) supra: "It is said the character of the agreement is such that the court ought not to entertain a bill upon it. There

is no consideration of public policy which should forbid the courts countenancing such an agreement. Considering the situation of the parties, and their circumstances in life, it was beneficial to all parties, and cannot be considered as injudicious or unreasonable. The father made a beneficial arrangement for his offspring, and Vreeland's affections were satisfied by the adoption of a son. The agreement is alleged to have been unreasonable, because it deprived Vreeland of the free disposal of his property. But this is not so. It provided him with a son, and only obligated him, in the disposal of his property, to make such provision for the child of his adoption as might reasonably be expected from parental obligation and affection. There was nothing unnatural, situated as he was, in his assuming such an obligation, and in his making the complainant the object of his affections."

That case was cited and followed in *Van Tine v. Van Tine* (1888) — N. J. Eq., 1 L.R.A. 155, 15 Atl. 249, wherein the court said: "I cannot see how obligations so voluntarily assumed by a citizen, so affecting the highest welfare of an infant of the tenderest years, can be regarded as otherwise than the most sacred and binding." In the latter case the contract to leave property to the foster child was not specifically made by the parties, but was held to be implied from the promisor's agreement to take the child as her own, provide for her, and bring her up as her own.

Although a contract by a parent to surrender the custody of a child to another, in consideration of his promise to leave property to the child, may not be binding when made, because of the peculiar character of the duty and rights of the parent with respect to the child, it is binding on the other party after the parent and child have fully executed their part. *Godine v. Kidd* (1892) 64 Hun, 585, 29 Abb. N. C. 36, 19 N. Y. Supp. 335, wherein it was said: "The enforcement of the contract here will not result in injustice to any third persons, nor is it against public policy; but, in view of the literal way in which it has been

performed upon the part of the defendant's parents and her own, it would be an extreme hardship, and both inequitable and unjust, if she were now prevented, after all these years of performance on her part and that of her parents, from enforcing it. Even though we should assume, therefore, that none of the arrangements between the parties was of original binding obligation upon the defendant's parents, yet the subsequent performance and fulfilment thereof by defendant and her parents, so that thereby the Knapps actually got all they bargained for, would furnish a sufficient consideration to support their promises as effectually as if the agreement had been of original binding obligation. What the Knapps bargained for was, at the very least, forbearance by and on the part of defendant's parents of some of their rights, and was an adequate and sufficient consideration for their promises and undertakings. It has frequently been held that the consideration for a contract or promise need not be adequate in point of value. If there be any consideration, the court will not weigh the extent of it; it has no means of scrutinizing the varied hidden motives and reasons that may have influenced the parties, and induced them to enter into the contract, nor can it determine upon the prudence or propriety of the transaction. Where an offer is accepted by the party doing the act which forms the consideration, and when the promisor has had the benefit of the consideration for which he bargained, it is no answer, in an action brought for a performance of the agreement, to say that the promisee was not bound by the contract. It is enough if the promisee did it on the faith of the undertakings of the promisor, and upon showing that the latter got the benefit of it."

In *Chisholm v. Chisholm* (1908) 40 Can. S. C. 115, 11 Ann. Cas. 218, the court said, with respect to the appointment of a guardian under a contract between a widow and her father-in-law, which contained stipulations for the education of her daughter, provi-

sion for the daughter when her education was completed, and an allowance of \$500 per year to the widow: "The appointment of the appellant as guardian was made by the court in the exercise of its undoubted chancery jurisdiction, on the application of the respondent, an application which the Nova Scotia statute authorized her to make. There is no doubt that the court could, on cause shown, set aside the appointment, but I cannot understand how the appellant could succeed, in these proceedings, in obtaining a declaration to the effect that an appointment made by the court was void, as against public policy. I can find nothing in the agreement itself, or in its surrounding circumstances as brought out by the evidence, to justify the contention that the family agreement which is attacked was only a scheme to benefit the mother, or that she had any interest which conflicted, or could be in conflict, with that of her child. On the contrary, I believe that in contemplation of all the parties the contract had exclusively in view the benefit of the infant."

On the other hand, in *HOOKS v. BRIDGEWATER* (reported herewith) ante, 216, a contract which provides that one party shall make a child his heir, and leave to him his property in consideration of a transfer of the child's custody by his father, is held to be opposed to public policy and void.

IV. Effect of change in family relations of foster parent.

As against children born to the promisor after the date of the contract, the Illinois supreme court has held to be void an agreement to leave property to a child, in consideration of the surrender of its custody by a parent. *Wallace v. Rappleye* (1882) 103 Ill. 229; *Woods v. Evans* (1885) 113 Ill. 186, 55 Am. Rep. 409.

In *Wallace v. Rappleye* (Ill.) supra, an oral contract by the putative father of an illegitimate child to make it his heir, in consideration of the surrender of its custody by its mother, was held to be subject to the subsequent birth of legitimate heirs. The decision, however, denying the specific perform-

ance of the contract, was based chiefly on the want of clear proof of the contract, uncertainty as to the amount which the child was to receive, the Statute of Frauds, and a subsequent covenant for the disposition of the promisor's estate, in consideration of a release of dower by his wife. Similarly, in *Woods v. Evans* (Ill.) supra, it was held that, after the birth of children to the promisor, a contract which provided that he was to have the custody of an orphan child, and at his death leave to it a child's share in his estate, was not enforceable. The decision was based also on the ground of uncertainty as to what constituted a child's share.

As against a wife of the foster parent by a subsequent marriage, it has likewise been held that a contract which provides for the leaving of property to a minor, in consideration of the surrender of the minor's custody, is void. *Owens v. McNally* (1896) 113 Cal. 444, 33 L.R.A. 396, 45 Pac. 710. In that case it appeared that the defendant's intestate, when at the age of fifty-four and unmarried, contracted with the plaintiff, aged eighteen, and her parents, that if she would live with him and care for him he would leave to her all property owned by him at his death. The plaintiff entered the home of the defendant's intestate and cared for him until his marriage. After the death of the intestate the plaintiff brought an action for specific performance of the contract, against his administratrix. The court said: "While this contract was not void as against public policy at the time it was entered into, it must be held that the parties to it contracted in view of the fact that a subsequent marriage by Lawrence McNally might be consummated, and that the effect of this marriage would be to compel a court of equity, in justice to the widow or children, to deny specific performance. Or, viewed in another way, it must have been within the contemplation of the parties that Lawrence McNally might marry; for the contract could not have been designed as a restraint upon his marriage, or it would be void. If it was

within their contemplation, and the contract embraced the taking of the deceased's entire estate to the exclusion of any future wife or child, then we have no hesitation in saying that the contract was void as against public policy. The only permissible conclusion is, therefore, that the parties contracted in contemplation of that event. Upon its happening, the rights of innocent third parties intervened, and a decree of specific performance could not be awarded."

V. Effect of laws as to descent, wills, or adoption.

There is authority to the effect that the validity of a contract to leave property to a foster child, in consideration of its custody and control, is not affected by the lack, at the date of the contract, of a statute providing for adoption, or by a failure to comply with the terms of an Adoption Statute. *Godine v. Kidd* (1892) 64 Hun, 585, 29 Abb. N. C. 36, 19 N. Y. Supp. 335; *Burns v. Smith* (1898) 21 Mont. 251, 69 Am. St. Rep. 653, 53 Pac. 742.

But in *Davis v. Jones* (1893) 94 Ky. 320, 42 Am. St. Rep. 360, 22 S. W. 331, the court made the following statement, with respect to a contract to make a child an heir at law of the promisor, in consideration of its care and custody given to him by its mother: "Such agreements are against the policy of the common law; hence unauthorized, because heirship is controlled by the Law of Descents, having for its basis the degrees in blood, etc. And such agreements as that sued on in this case would put the estate in a different channel from that fixed by the Law of Descents. Such contracts being unauthorized by the common law, and as all common contracts in this state are generally either authorized by the common law or by statute, no contract in general is binding unless it is authorized by the common law or by statute; and as the same reason exists in this state for forbidding such contracts as exists at common law, they are unauthorized and not binding. But the legislature of this state has seen proper to au-

thorize certain parties to make persons not related to them their legal heirs, upon certain conditions, by petition to the county court having jurisdiction. And it has been settled by this court that the authority thus given is the only authority existing in this state, by which one person can make another his legal heir, and any agreement by one person to make another his legal heir, not in accordance with said statute, is not enforceable."

And see *Brewer v. Hieronymous* (1897) 19 Ky. L. Rep. 645, 41 S. W. 310, wherein *Davis v. Jones* (Ky.) supra, was cited with approval.

A contract to leave property to a child by one who is to receive its custody and control does not violate the Statute of Wills, since it is not a testamentary disposition. *Winne v. Winne* (1901) 166 N. Y. 263, 82 Am. St. Rep. 647, 59 N. E. 832. In that case the court said: "It has been suggested that such a contract might be in conflict with the statute relating to wills and to their manner of execution. This was not a contract in the nature of a testamentary disposition of the decedent's property. On the contrary, it was a contract to be chiefly executed during the life of the decedent, with compensation to be made at her death. It was a method adopted to provide for the payment by her for the custody, control, and services of the plaintiff during his minority."

So, in *Sharkey v. McDermott* (1887) 91 Mo. 647, 60 Am. Rep. 270, 4 S. W. 107, it was contended that the enforcement of a contract to leave property to a child in consideration of the transfer of its custody had the effect of making a will for the promisor. The court said: "The objection that, under the facts of this case, a decree for plaintiff would be in effect making a will for said Catherine, is not, we think, at all sound. This the court may not do, but it may, by its judgment under this state of facts, make effectual what the parties have themselves agreed upon, and that is the object and purpose of the petition."

W. S. R.

CHARLES R. FITCH
v.
BAY STATE STREET RAILWAY COMPANY.

CORA B. FITCH
v.
SAME.

Massachusetts Supreme Judicial Court — January 7, 1921.

(237 Mass. 65, 129 N. E. 423.)

Street railways — negligence in stopping automobile on car tracks.

1. The driver of an automobile may be found not to be negligent so as to deprive him of a right of action for injuries to his wife when the car is struck by a street car, although in order to discharge two invalid guests in front of their home he stops the automobile in the gutter adjacent to the sidewalk with a portion of it on the street car track which runs along the side of the road at a time when no street car is in sight, if the automobile traffic in the street makes such position safer and more convenient for the discharge of the guests than a position would be which was outside the car tracks.

[See note on this question beginning on page 236.]

—negligence in remaining in automobile on car track.

2. A woman riding in an automobile with her husband and guests may be found not to be negligent in remaining in the car when her husband stops it at a time when no street car is in sight, adjacent to the curb, with a portion of it on the street car tracks

which run along the side of the road, in order more easily to discharge his invalid guests, especially if she sees her son run back to stop a street car when it appears in sight, so as to permit her to hold the street car company liable for injuries inflicted upon her by colliding with the automobile.

[See 20 R. C. L. 134.]

EXCEPTIONS by defendant to rulings of the Superior Court for Plymouth County (Cox, J.) made during the trial of actions brought to recover damages for personal injuries for which defendant was alleged to be responsible, which resulted in a verdict for plaintiff in each case. *Overruled.*

The facts are stated in the opinion of the court.

Messrs. Asa P. French and Jonathan W. French, for defendant:

Plaintiff stopped the automobile and left it standing in a place of known and appreciated danger, without thereafter taking the slightest precaution for his own safety or that of Mrs. Fitch, and she took none for herself.

Lawrence v. Fitchburg & L. Street R. Co. 201 Mass. 489, 87 N. E. 898; Ferguson v. Old Colony Street R. Co. 204 Mass. 340, 90 N. E. 535; Pigeon v. Massachusetts Northeastern Street R. Co. 230 Mass. 392, 119 N. E. 762.

Upon their own testimony and con-

duct, both Mr. and Mrs. Fitch relied wholly upon the motorman's care, and upon their belief that he could and would stop the car before it came in contact with the automobile.

Duggan v. Bay State Street R. Co. 230 Mass. 370, L.R.A.1918E, 680, 119 N. E. 757; Kelly v. Boston Elev. R. Co. 197 Mass. 420, 15 L.R.A.(N.S.) 232, 83 N. E. 865; Tognazzi v. Milford & U. Street R. Co. 201 Mass. 7, 21 L.R.A.(N.S.) 309, 86 N. E. 799; Lawrence v. Fitchburg & L. Street R. Co. and Pigeon v. Massachusetts Northeastern Street R. Co. supra.

There was no presumption in Mrs. Fitch's favor of due care on the part of her husband.

Bullard v. Boston Elev. R. Co. 226 Mass. 262, 115 N. E. 294.

Messrs. H. D. McLellan and Edward A. MacMaster for plaintiffs.

Braley, J., delivered the opinion of the court:

It having been stipulated at the trial that if either plaintiff was negligent a verdict should be returned for the defendant, the cases were submitted to the jury under instructions to which no exceptions appear to have been taken. The jury having found for the plaintiffs, the cases are here on the defendant's exceptions to the denial of its motions for directed verdicts, and to the refusal of the trial judge to rule that upon all the evidence neither of the plaintiffs exercised due care. The jury would have been warranted in finding that the plaintiffs, who are husband and wife, accompanied by their son and daughter, and by a Mr. and Mrs. Snow, with their daughter, were riding in Main street, a public way in Bridgewater, in the husband's automobile, driven by himself. The defendant's car track ran along the easterly edge of the street, and a gutter from 9 to 10 inches deep with sloping sides intervened between the track and sidewalk. The Snows lived on that side of the street, and, Mrs. Snow being blind, and Mr. Snow a sufferer from paralysis, Mr. Fitch, for the purpose of enabling them to reach their home, to which there was no driveway, as easily and safely as possible, after looking for, but not seeing, any car coming, drove upon the track in front of the Snows' premises and stopped with the right-hand wheels in the gutter. A procession of automobiles was passing, and it could be found on his evidence that because of the crowded thoroughfare it was safer to stop where he did than to stop in the roadway outside of the track. The rear lamp of the automobile was lighted, and after applying the emergency brake, he left the engine running, stepped out of

the car, and with the aid of his son assisted Mr. Snow to alight, and lifted him over the sidewalk to the lawn. During the transfer, Mr. Snow dropped his cane. It was picked up by the plaintiff's son and handed to his father, who replaced it in Mr. Snow's hands, "and then I got him back a few steps just off the main sidewalk onto the private walk out of the way of pedestrians." While thus engaged Mr. Fitch observed the defendant's car coming around a curve in the track more than "600 feet" from the rear end of the automobile, in which Mrs. Snow and Mrs. Fitch had remained. Mr. Fitch at once left Mr. Snow and went to the assistance of Mrs. Snow and his wife, while his son ran back and endeavored to have the motor-man stop the car. But his efforts were of no avail. The car had slackened speed on entering, but in rounding the curve, its speed was necessarily accelerated. When Mr. Fitch realized that the car had not stopped, and the situation was becoming very dangerous, he started for the driver's seat, but the car was so close that any effort to start the automobile was wholly impracticable, and he was on the sidewalk when the collision occurred. Mrs. Fitch, from her position on the front seat, saw her son meet the car, which was then going very slowly, but upon observing that it was moving with increasing speed she endeavored to get out. It was, however, too late to escape, and she was injured.

It is plain that it could not be ruled as matter of law that either plaintiff acted heedlessly, or was willing to take the chance of being injured. The plaintiffs were lawfully using the street, and the conduct of Mr. Fitch, in stopping and in assisting the Snows to reach their home, the jury could say, was justifiable under the circumstances for the needs and welfare of his guests. Evensen v. Lexington &

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B. Street R. Co. 187 Mass. 77, 72 N. E. 355; Chaput v. Haverhill, G. & D. Street R. Co. 194 Mass. 218, 220, 80 N. E. 597. The present case is distinguishable from *Lawrence v. Fitchburg & L. Street R. Co.* 201 Mass. 489, 87 N. E. 898, where the plaintiff, knowing that a car was approaching, deliberately stopped his automobile on the track without taking any precautions whatever for the personal safety of his wife or of himself. Mrs. Fitch who had seen her son run back and meet the approaching car when it was quite a distance away, well may have had no reason to anticipate that the motorman would not see the auto-

mobile and avoid running into it. If, in the light of what happened, she overstayed, a "plaintiff is not to be charged with negligence because of a mere error of judgment, especially when the circumstances are such as to call for speedy decision and action." *Hennessey v. Taylor*, 189 Mass. 583, 3 L.R.A. (N.S.) 345, 76 N. E. 224, 4 Ann. Cas. 396, 19 Am. Neg. Rep. 285; *Hanley v. Boston Elev. R. Co.* 201 Mass. 55, 58, 87 N. E. 197. We are accordingly of opinion that the exceptions in each case should be overruled.

So ordered.

ANNOTATION.

Negligence in stopping automobile on street car track for purpose of taking on or letting off person.

There seem to be but two cases in addition to the reported case (*FITCH v. BAY STATE STREET R. Co.* ante, 234,) considering the question of the negligence of an automobile driver in stopping on a street car track for the purpose of taking on or discharging a person. The decisions seem to depend on the facts and circumstances surrounding each particular case. It will be noted that in the reported case the court holds that the plaintiff was not negligent to the extent of precluding a recovery, because under the conditions it was considered safer for the plaintiff to stop his car on the track than to leave it standing on the crowded thoroughfare, and that the plaintiff, while in the act of assisting his guest, was also using due diligence in watching for the approach of a street car, and, on seeing one approaching, made reasonable effort to avoid a collision.

In *King v. Grand Rapids R. Co.* (1913) 176 Mich. 645, 143 N. W. 36, it appeared that the plaintiff, on reaching the street, looked in both directions, and, seeing no street car in sight, stopped his automobile on the car track and turned his head in the opposite direction from which a car might approach, to watch a passenger

who was coming up to get into the automobile. As the passenger got aboard the plaintiff saw a street car coming which struck him before he was able to get the automobile out of the way. It was held that the plaintiff was guilty of negligence, but that as the motorman had an unobstructed view of the track for over 300 feet the plaintiff's negligence would not deprive him of the benefit of the last clear chance doctrine, and the negligence of the motorman should have been submitted to the jury.

In *Ayers v. Kansas City R. Co.* (1920) 108 Kan. 49, 193 Pac. 1069, it appeared that the plaintiff stopped his auto truck on a street car track for the purpose of taking on a passenger, and while in the act of starting, the truck was struck by one of the defendant's street cars. The plaintiff looked for a car before he stopped the truck, and no car could be seen for a distance of 400 feet. There was some evidence that the street car was being operated at an excessive rate of speed. The court held that the question of the contributory negligence of the plaintiff was properly submitted to the jury.

L. W. B.

LAWRENCE THIEDE, Plff. in Err.,
v.
STATE OF NEBRASKA.

Nebraska Supreme Court — April 11, 1921.

(— Neb. —, 182 N. W. 570.)

Homicide — intent — furnishing liquor.

1. The furnishing of intoxicating liquor to another, though prohibited by law, is not ordinarily such an unlawful act, within § 8583, Rev. Stat. 1913, as carries with it that intentional wrong toward another which will supply the place of the criminal intent necessary to prove criminal homicide and support the charge of involuntary manslaughter.

[See note on this question beginning on page 244.]

— dangerous potency.

2. But, where a person furnishes to another intoxicating liquor which, by reason of its extreme potency or poisonous ingredients, is dangerous to use as a beverage, and the party furnishing the liquor knows, or should have known, of the danger, the unlawful act of furnishing the liquor is so characterized by reckless conduct as to be sufficient to support a charge of involuntary manslaughter, where death results from the drinking.

Headnotes by FLANSBURG, J.

— voluntary drinking.

3. Where the defendant gave intoxicating liquor to another to drink, the fact that the other voluntarily drank it is only a concurring cause with that of the defendant, and, though such other party may have been guilty of contributory negligence, such negligence is not a defense in a criminal homicide.

Evidence — sufficiency.

4. Evidence examined, and held sufficient to sustain a submission of the case to the jury on the charge of involuntary manslaughter.

ERROR to the District Court for Adams County (Dungan, J.) to review a judgment convicting defendant of manslaughter. *Reversed.*

The facts are stated in the opinion of the court.

Mr. J. E. Willits, for plaintiff in error:

The death must be the natural and necessary result of the unlawful act.

Potter v. State, 162 Ind. 213, 64 L.R.A. 942, 102 Am. St. Rep. 198, 70 N. E. 129, 1 Ann. Cas. 32.

One voluntarily putting himself in condition to have no control over his actions must be held to intend the consequences.

Roberts v. People, 19 Mich. 417.

The mere fact that defendant furnished the deceased and his company with intoxicating liquor would not tend to show that the intoxication of deceased was involuntary.

State v. Sopher, 70 Iowa, 494, 30 N. W. 917.

The giving of intoxicating liquor to another with an invitation to drink, without more, is not the unlawful administering of same to deceased, but only an illegal disposition of said liquors.

Brinson v. State, 89 Ala. 105, 8 So. 527.

Where it is probable that death resulted from other causes than that of defendant, it is insufficient to sustain a verdict of guilty.

People v. Kerrigan, 84 Hun, 609, 32 N. Y. Supp. 367.

Defendant cannot be responsible for acts of deceased.

Persons v. State, 90 Tenn. 291, 16 S. W. 726; State v. Wright, 112 Iowa, 436, 84 N. W. 541; Pinder v. State, 27 Fla. 370, 26 Am. St. Rep. 75, 8 So. 837; Reynolds v. United States, 98 U. S. 145, 25 L. ed. 244; Rex v. Waters, 6 Car. & P. 328; Reg. v. Smith, 12 L. T. N. S. 608.

Evidence which is as consistent with innocence as with guilt will not sustain a conviction, and when this appears it is the duty of the appellate court to reverse a judgment of conviction.

Wright v. United States, 142 C. C. A. 379, 227 Fed. 855.

Where a statute makes a distinction, there can be no conviction of involuntary manslaughter on an indictment for voluntary.

1 Whart. Crim. Law, § 307.

The court is not at liberty to order a verdict of guilty on any of the issues, either directly or indirectly.

Sparf v. United States, 156 U. S. 51, 39 L. ed. 343, 15 Sup. Ct. Rep. 273, 1 Am. Crim. Rep. 168; Goldsberry v. State, 66 Neb. 312, 92 N. W. 906; Russell v. State, 77 Neb. 519, 110 N. W. 380, 15 Ann. Cas. 222; Williams v. State, 60 Neb. 526, 83 N. W. 681.

Messrs. Clarence A. Davis, Attorney General, and C. L. Dort, Assistant Attorney General, for the State:

Administration of liquor means furnishing or giving. Voluntary drinking by deceased of liquor unlawfully furnished constituted no defense.

State v. Jones, 4 Penn. (Del.) 109, 53 Atl. 858; McCaughey v. State, 156 Ind. 41, 59 N. E. 169; State v. Wilson, 71 Kan. 263, 80 Pac. 565; Burris v. State, 73 Ark. 453, 84 S. W. 723; People v. Quin, 50 Barb. 128; State v. Stapp, 246 Mo. 338, 151 S. W. 971; Bell v. Com. 88 Va. 365, 13 S. E. 742; Brown v. State, 88 Ga. 257, 14 S. E. 578; Blackburn v. State, 23 Ohio St. 146; LaBeau v. People, 34 N. Y. 223; State v. Morrow, 40 S. C. 221, 18 S. E. 853, 9 Am. Crim. Rep. 28; State v. Stafford, 145 Iowa, 285, 123 N. W. 167.

The intoxicating liquor furnished to and drunk by the deceased was the proximate cause of his death. The causal relation between his death and defendant's unlawful act is established.

21 Cyc. 695, et seq.; 13 R. C. L. 748; Blackburn v. State, 23 Ohio St. 146; Rex v. Chamberlain, 10 Cox, C. C. 486; Schultz v. State, 89 Neb. 34, 33 L.R.A. (N. S.) 403, 130 N. W. 972, Ann. Cas. 1912C, 495; State v. Campbell, 82 Conn. 671, 135 Am. St. Rep. 293, 74 Atl. 927, 18 Ann. Cas. 236; Ford v. State, 71 Neb. 246, 115 Am. St. Rep. 591, 98 N. W. 807.

Flansburg, J., delivered the opinion of the court:

Criminal prosecution for manslaughter, charged to have been committed by defendant through the unlawful act of giving deceased intoxicating liquor, which the deceased drank and which caused his death.

Defendant was found guilty and brings the case here for review.

It is his contention that the evidence introduced by the prosecution is insufficient upon which to base the charge.

The evidence in behalf of the state shows that the defendant, Thiede, and others, some weeks previously, had attempted to make intoxicating liquor on the Nelson farm; that they had a coil and a kettle and had distilled some liquor. Just what the nature of the liquor was and what quantity they made is not shown. On the day in question, defendant, with one Stromer and Forney, who were also originally charged with the commission of the offense in this case, went to the Nelson farm. Defendant dug up three jugs of white whisky which had been buried on the place, and he and Forney then went to the town of Prosser. In the course of an hour they returned with two girls. Stromer was found lying on the ground in a drunken stupor, with the jugs near him. At this time the farmer, Nelson, was present, and defendant gave him a drink from the jug. He testified that it tasted like hot acids and temporarily paralyzed him, and that, at the time of trial, he still felt the effects. The defendant Stromer and Forney drank of the liquor, and the girls each drank once from a coffee cup, containing a mixture of the liquor and grape juice. One of the girls testified that she had used whisky before, but that this was the first time she had taken too much.

That evening, at about 7:30, a party was made up with four young men from the town of Prosser, and these seven boys and the two girls went into the country. The four boys from Prosser by name were Lambrecht, Montey, Hendriks, and Kroll, the deceased. When the cars reached their destination, defendant produced one of the jugs and passed it around, with the statement that they might take what they wanted. All of the men then took one drink from the jug. The jug was then placed on the running board of one

of the cars, and the party separated, but remained in the near vicinity for from half to three quarters of an hour, at the end of which time they again all assembled at the cars. The party then seemed gay and hilarious. Defendant again passed the jug and all but one, Montey, took one more drink. The state's testimony shows that neither deceased nor any of the other Prosser boys took more than two drinks. They then drove to Prosser, a mile and a quarter distant. When they arrived, Lambrecht, Hendriks, and the deceased were very drunk. Lambrecht went into a picture show, and he testifies that the next he remembered was when he awoke at home the next morning. Hendriks, stupefied, remained in the seat of his car all night and went home at 6 o'clock the next morning. The deceased was unable to talk when he reached Prosser, and was utterly helpless. He began vomiting, and was taken home by his brother and placed upon the floor, where he remained unconscious. A doctor arrived at midnight and administered strychnine and atropin, and at 3 A. M. Kroll was dead. The doctor testified that death was the result of alcoholic poisoning.

Defendant the next morning, before he had heard of the death of Kroll, made a test of the liquor by touching a match to some that had been poured on the ground, and it was found to burn. A chemist testified that he made a gravity test and also an analysis by distilling the liquor, and found that it contained 57 per cent "pure alcohol," but that he made no analysis for the discovery of other ingredients.

The testimony in defendant's behalf conflicts in many material aspects with that just related, but, to determine the question presented, it is unnecessary to consider his version of the case.

Under our statutes, it is manslaughter to "unlawfully kill another without malice, . . . or unintentionally, while the slayer is in the

commission of some unlawful act." Rev. Stat. 1913, § 8583.

It is not questioned that the giving of liquor to the deceased, under the circumstances shown in this case, was in violation of the prohibitory law of this state, and that for the act the defendant was subject to fine and imprisonment. It is the defendant's contention, however, that the act of giving liquor is an act merely *malum prohibitum*, and is not in its nature such an unlawful act as carries with it that intentional wrong toward another which will supply the place of the criminal intent otherwise necessary to any criminal homicide.

In the commission of those unlawful acts which are criminal in their nature and which the law characterizes as *malum in se*, there is always found an intent on the part of the perpetrator of the offense to commit a wrong as against the person or property of another, and, though the wrong or injury committed may not be calculated nor intended to do great injury, nor to produce death, the person committing the act is not allowed to stop with the effect he intended to produce, but is held, in law, responsible for the full consequences of his act, and, where the result in such a case is death, a wrongful intent being present, the act is held to be involuntary manslaughter.

It is obvious, however, that there are acts prohibited by law which are not in their nature criminal, and in the commission of which the perpetrator of the act has no intent to do harm nor to injure another in his person or property. When such a wrongful intent is not present and the act is wrong only because prohibited, it is an act *malum prohibitum*, and, where, in the perpetration of such an act, death results, the law will not convert the act, innocently done and done with no intent to injure and with no disregard for the safety of another, into a criminal act and pronounce the act manslaughter. It is therefore necessary to look particularly to the nature of

the act committed in this case, in order to determine whether it is such an "unlawful act" as comes within the purview of the statute.

In the cases of *Ford v. State*, 71 Neb. 246, 115 Am. St. Rep. 591, 98 N. W. 807, *Lindsay v. State*, 46 Neb. 177, 64 N. W. 719, and *Schultz v. State*, 89 Neb. 34, 33 L.R.A. (N.S.) 403, 130 N. W. 972, Ann. Cas. 1912C, 495, the unlawful acts were held to be sufficient. In the *Ford Case* the defendant playfully pointed a pistol at another person, having some reason to believe that it was not loaded. The pistol was accidentally discharged and the person unintentionally killed. The court held, in accord with the general holding in other states on that question (note in 5 A.L.R. 611), that the intentional pointing of a pistol was a criminal assault, and, however unintentional might have been the act of shooting, the act of intentionally pointing the pistol was an act calculated to endanger the safety of the person pointed at, and was an act which might reasonably, by accident, result in death.

In the *Lindsay Case*, 46 Neb. 177, 64 N. W. 719, the defendant and another engaged in a prize fight, contrary to the statute. This was not only an unlawful act, but a mutual combat, tending to cause severe personal injuries to the combatants, and the killing of one during the fight was, therefore, held to be manslaughter.

In the *Schultz Case*, *supra*, defendant was convicted of manslaughter by reason of his having killed a person while driving his automobile at an unlawful rate of speed upon the streets of Omaha. The Speed Statute prohibited the driving of any vehicle at a greater rate of speed than was reasonable and proper, with regard to traffic, or "so as to endanger the life or limb of any person." Comp. Stat. 1909, chap. 78, § 147. It is apparent that to drive a car so as to endanger the life or limb of any person evidences such disregard for the safety of persons on the street as to supply

the intent to do wrong and to inflict injury. In that case it was argued that the violation of the Speed Statute was an act merely *malum prohibitum*, and was not criminal in its nature, and, therefore, not an unlawful act within the Manslaughter Law. To this the court said that, since it appeared the act was done with a careless disregard for the safety of others, it was sufficient, and that "there seems to be no conflict in the decisions where the defendant is violating some statute, and where his manner is negligent and careless. The courts in such cases uniformly say that he is guilty of manslaughter if the death of some other person is the result."

We believe the rule to be that, though the act, made unlawful by statute, is an act merely *malum prohibitum* and is ordinarily insufficient, still, when such an act is accompanied by negligence or further wrong, so as to be, in its nature, dangerous, or so as to manifest a reckless disregard for the safety of others, then it may be sufficient to supply the wrongful intent essential to criminal homicide, and, when such act results in the death of another, may constitute involuntary manslaughter.

Such an unlawful act alone, unaccompanied by negligence, is insufficient. *Potter v. State*, 162 Ind. 213, 64 L.R.A. 942, 102 Am. St. Rep. 198, 70 N. E. 129, 1 Ann. Cas. 32; *State v. Horton*, 139 N. C. 588, 1 L.R.A. (N.S.) 991, 111 Am. St. Rep. 818, 51 S. E. 945, 4 Ann. Cas. 797; *Estell v. State*, 51 N. J. L. 182, 17 Atl. 118, 8 Am. Crim. Rep. 514; *Com. v. Adams*, 114 Mass. 323, 19 Am. Rep. 362; *People v. Pearne*, 118 Cal. 154, 50 Pac. 376; *State v. Trollinger*, 162 N. C. 618, 77 S. E. 957.

In the case of *Potter v. State*, *supra*, the court held that the death of one of the participants in a friendly scuffle through the accidental discharge of a pistol, carried in the pocket of the other, contrary to the provisions of a statute, cannot be said to be caused in the performance of an unlawful act so as to

render the one carrying the pistol guilty of manslaughter, under provisions of a statute similar to the statute of our state. The court in that case said (162 Ind. on page 217): "As a general rule, the law has such a high regard for human life that it considers as unlawful all acts which are dangerous to the person against whom they are directed, no matter how innocently they may be performed. A person will not be permitted to do an act which jeopardizes the life and safety of another, and then, upon plea of accident, escape liability for a homicide involuntarily resulting from his reckless or careless act or conduct. . . . The case at bar does not fall within that class of cases where the homicide is the result of culpable carelessness or negligence of the accused party in using or handling a dangerous weapon."

In the case of *State v. Horton*, 139 N. C. 588, 1 L.R.A. (N.S.) 991, 111 Am. St. Rep. 818, 51 S. E. 945, 4 Ann. Cas. 797, the court held that the mere violation of the statute, making it unlawful to hunt on another's property without a permit, is not such an unlawful act as to render an accidental homicide, committed while so doing, a criminal offense.

In the case of *Estell v. State*, supra, the defendant attempted to drive a wagon through a tollgate, in violation of law, and the tollgate keeper ran in front of the horses to stop them and was run over and killed. There the court said (51 N. J. L. 185, 17 Atl. 119): "In this case the jury should have been told that the defendant was guilty as charged, if he did the unlawful act in question under conditions that were dangerous to the tollgate keeper; as, if he drove through the gate at a rapid pace, or urged his team of mules on after they had been seized by the deceased, . . . the criminality consisting of the two elements of the unlawfulness of the act and the unlawfulness and danger in the mode of its execution."

In the cases of *People v. Barnes*, 15 A.L.R.—16.

182 Mich. 179, 148 N. W. 400; *Com. v. Adams*, 114 Mass. 323, 19 Am. Rep. 362, and *People v. Pearne*, 118 Cal. 154, 50 Pac. 376, it was held that driving in excess of the specific number of miles an hour fixed by law, when not accompanied by carelessness, was insufficient; the court in the *Pearne* Case saying that it was not a sufficiently unlawful act "unless at the time of the accident he (the defendant) was driving in a 'dangerous manner.'"

On the other hand, where the act which is unlawful is *malum prohibitum* merely, but is accompanied by negligence and, in its performance, the safety of others is recklessly disregarded, it is held sufficient. *Sparks v. Com.* 3 Bush, 111, 96 Am. Dec. 196; *Brittain v. State*, 36 Tex. Crim. Rep. 406, 37 S. W. 758; *Silver v. State*, 13 Ga. App. 722, 79 S. E. 919; *State v. De Fonti*, 34 R. I. 51, 82 Atl. 722; *State v. Keever*, 177 N. C. 114, 97 S. E. 727.

In the case of *Sparks v. Com.* supra, a young man, walking along the streets of the town, drew a revolver and said, "Let us have a Christmas gun," inquired how much the fine was, and, wheeling half about and pointing the gun backwards over his shoulder, fired and killed a bystander. The law prohibited the discharge of firearms within the town. It was held manslaughter in the commission of an unlawful act, and, though the court declared the unlawful act was an offense *malum prohibitum*, it went on to point out that (3 Bush, 115): "Sparks drew his pistol with the avowed intent illegally to shoot it then and there in the town, along its streets, where he not only had the right to infer that people lived in close proximity and might be passing, but when he actually knew several then of his company were passing. His throwing it over his shoulder, with a half-face about, with the muzzle toward those in his rear, manifests such recklessness and want of caution as to indicate not only an entire absence of every precaution to prevent the pistol from firing, but impresses the

mind that he did recklessly and intentionally so fire it; and whether he intended thereby to wound or kill anyone, it was so highly disregardful of law, order, and the personal rights and safety of others, who may then have been in the streets, as to make him criminally responsible for its results."

In the case of *Brittain v. State*, supra, under a statute prohibiting the carrying of a pistol upon the person, a boy, in a party of young people, drew a revolver, and, when flourishing it about, it was discharged and another boy killed. The court said (36 Tex. Crim. Rep. 413, 37 S. W. 760): "We fail to see how the act of displaying the pistol on the occasion alluded to can be severed from the act of carrying a pistol on and about the person of the appellant; and if he was so displaying it, and such display was negligent, and in a manner calculated to endanger the lives of persons standing around, and it was discharged, and deceased was killed, it would constitute the act of negligent homicide of the second degree."

Under the Texas statute, a second degree homicide is homicide in the commission of an unlawful act.

In the case of *Silver v. State*, 13 Ga. App. 722, 79 S. E. 919, a person, not a physician and therefore in violation of a statute, administered, by means of a hypodermic, morphine to another in such quantity as to cause death, and was held guilty of manslaughter in the commission of an unlawful act. The court held that, though the act was merely *malum prohibitum*, it was sufficient to support the charge. The question of negligence was not, in that case, discussed, though the administration of such a potent drug by one unskilled in the use of it would seem to us to have justified the finding that such action was reckless conduct.

In the case of *State v. De Fonti*, supra, the defendant was charged with the unlawful sale of intoxicating liquor, in which wood alcohol had been negligently mixed and

mingled, and which the purchaser had drank and, as a result, died. The court held that the mere sale of liquor, in violation of the prohibitory law, was only *malum prohibitum* and not such an unlawful act as to be sufficient in itself to support the charge of manslaughter, but upon the matter of negligence, under a statute apparently not similar to our own, the court held that the defendant was sufficiently charged in the indictment with "negligent manslaughter," saying (34 R. I. 57, 82 Atl. 724): "Either the accused knew that he was delivering wood alcohol, a deadly poison, in place of whisky, or he negligently represented the liquid so delivered to be whisky without having any knowledge whether it was or was not the whisky which had been called for. So acting, in either event he must be held liable for the consequences of his act if it be proved at the trial."

A case somewhat similar to that is *State v. Keever*, supra, where intoxicating liquor had been unlawfully sold which contained 38 per cent of wood alcohol, and the drinking of which caused the death of the recipient. The court held that it was manslaughter in the commission of an unlawful act, saying (177 N. C. 117): "If the defendant put wood alcohol in the liquid to produce intoxication, without knowledge of its poisonous quality, and proceeded to sell such decoction, he was engaged in an unlawful as well as a reckless business, and if death ensued because of such poison he is guilty of manslaughter. . . . When the defendant sold this liquor to the deceased he was engaged in an unlawful act, and if the deceased died in consequence of the poison put in it by defendant, although innocent of any purpose to kill, he is guilty of manslaughter."

It is apparent that the decision in that case turned largely on the question of defendant's negligence, though the court declared that the unlawful act alone would have been sufficient.

Turning, then, to the case under

consideration, it is our opinion that the giving or furnishing of intoxicating liquors, unaccompanied by any negligent conduct, though unlawful, is but an act merely *malum prohibitum*. The person who treats his friend, even though the act be unlawful, has no intent to harm, nor is such an act calculated or intended to endanger the recipient of the liquor. We cannot go so far as to say that such an act, prompted, perhaps, by the spirit of good-fellowship, though prohibited by law, could ever, by any resulting consequence, be converted into the crime of manslaughter; but where the liquor, by reason of its extreme potency or poisonous ingredients, is dangerous to use as an intoxicating beverage, where the drinking of it is capable of producing direct physical injury, other than as an ordinary intoxicant, and of perhaps endangering life itself, the case is different, and the question of negligence enters; for, if the party furnishing the liquor knows, or was apprised of such facts that he should have known, of the danger, there then appears from his act a recklessness which is indifferent to results. Such recklessness in the furnishing of intoxicating liquors, in violation of law, may constitute such an unlawful act as, if it results in causing death, will constitute manslaughter.

Homicide—
intent—furnish-
ing liquor.

—dangerous
potency.

Evidence—
sufficiency.

The evidence here was sufficient, as we view it, to warrant a submission of the charge of manslaughter to the jury.

The defendant, it seems, distilled this liquor himself. It was at least home-made whisky. The danger of drinking such liquor, by reason of its extreme potency and its frequently containing poisonous ingredients, is commonly known. The defendant may have been dealing with an unknown quantity, but, as was said in the Keever Case, he was

handling a dangerous weapon. There is evidence to show that he knew this particular liquor was extremely powerful. He saw its effect on Chris Nelson and on Stroman in the morning; yet that evening he offered it to the Prosser boys and invited them to drink all they wanted. There is substantial proof that the liquor was dangerous. That two drinks of it should paralyze three men within a few minutes after drinking, and that one of these men, as a result, should die in a few hours, as happened in this case, sufficiently raised the issue of its dangerous character for the jury.

Defendant contends that the drinking of liquor by deceased was his voluntary act and served as an intervening cause, breaking the causal connection between the giving of the liquor by defendant and the resulting death. The drinking of the liquor, in consequence of defendant's act, was, however, what the defendant contemplated. Deceased, it is true, may have been negligent in drinking, but, where the defendant was negligent, then the contributory negligence of the deceased will be no defense in a criminal action. *Schultz v. State*, 89 Neb. 34, 33 L.R.A. (N.S.) 403, Ann. Cas. 1912C, 495, 130 N. W. 972; *State v. Weisengoff*, 85 W. Va. 271, 101 S. E. 450; 21 Cyc. 766. The act of the deceased, as we view it, was no more than a concurring cause.

Homicide
—voluntary
drinking.

Defendant complains of the court's instructions, which directed the jury that, if defendant furnished intoxicating liquor to deceased, and the liquor caused death, defendant was guilty, but failed to instruct upon the question of recklessness on the part of the defendant. We believe the instructions are erroneous in that regard and that the defendant is entitled to a new trial.

Reversed and remanded.

ANNOTATION.

Criminal responsibility of one unlawfully furnishing intoxicating liquor for death resulting from its use.

The general rule is, as is said in the reported case (*THIEDE v. STATE*, ante, 237), that though death results from an act which is *malum prohibitum*, it is not manslaughter unless such a result might reasonably have been anticipated from the nature of the act. Applying that rule, it is held in that case that the mere fact that a person unlawfully furnishes intoxicating liquor to another does not render him liable criminally for death resulting from drinking it, but that if he has notice that the liquor may be of a dangerous character he is guilty of manslaughter.

So in *State v. Reitze* (1914) 86 N. J. L. 407, 92 Atl. 576, it appeared that an innkeeper, in violation of law, sold liquor to a man who was visibly intoxicated, and that on leaving the premises the intoxicated man fell while trying to get into his wagon, fractured his spine, and died shortly thereafter. Reversing a conviction of manslaughter the court said: "We do not think that criminal liability on the part of the defendant for the death of Welsh can be predicated upon these facts. It is asserted by counsel for the state that, because the legislature has prohibited the further sale of liquor to a man who is already visibly under its influence, under pain of forfeiture of the vendor's license (Comp. Stat. p. 2907, § 83), an innkeeper who violates this prohibition, and so renders his customer less able to stand securely, is legally chargeable with manslaughter if the customer by reason of his intoxication falls and in his fall receives injuries from which he dies. We cannot agree to this proposition. The fact that a drunken man is more likely to fall than a sober one must be admitted; but that sudden death is the usual or even the probable result of overindulgence in intoxicating beverages must be denied. Common experience is to the contrary. If it shall ever become so, then excess in

the use of strong drink will largely cease, or a very great increase in the death rate may be naturally expected. It is only for the natural and probable result of a wrongful act that a wrongdoer is liable, even civilly. And this is so, at least so far as criminal responsibility is concerned, even if the act is prohibited by the legislature, provided it be merely *malum prohibitum*, and not *malum in se*, and is not dangerous in itself."

In *State v. DeFonti* (1912) 34 R. I. 51, 82 Atl. 722, an indictment for homicide by the unlawful sale of intoxicating liquor containing wood alcohol was held to be bad, except with respect to counts which alleged knowledge of the poisonous character of the beverage or negligent ignorance thereof.

But in *State v. Keever* (1919) 177 N. C. 117, 97 S. E. 727, wherein it appeared that the accused had sold soda water to which 38 per cent of wood alcohol had been added, and death resulted from the use thereof, the court said: "The state was not called upon to prove that defendant put the deadly poison in the otherwise harmless soda and ginger. That may be inferred by the jury from the circumstances that defendant was selling it. The burden is on the defendant to exculpate himself by satisfying the jury that he had no knowledge of the existence of the poison in the liquid. It is a known fact that cream soda and ginger in a normal state do not contain a deadly poison, and if the liquor he was dispensing contained it, as the undisputed evidence shows, it was incumbent on defendant to satisfy the jury that he did not put the poison in the liquid and did not know it was there when he sold it. This was a fact exclusively within his knowledge. . . . If the defendant put wood alcohol in the liquid to produce intoxication, without knowledge of its poisonous quality, and proceeded to sell such decoction, he was engaged in an unlawful as well

as a reckless business, and if death ensued because of such poison he is guilty of manslaughter. The sale of intoxicating liquor is now banned and condemned by the laws of the nation and most of the states, including North Carolina. To sell it is not only *malum in se*, but *malum prohibitum*. When the defendant sold this liquid to the deceased he was engaged in an unlawful act, and if the deceased died in consequence of the poison put in it by defendant, although innocent of any purpose to kill, he is guilty of manslaughter."

In *State v. Takano* (1916) 94 Wash. 119, 162 Pac. 35, the court affirmed a conviction of manslaughter on proof that a druggist sold liquor containing wood alcohol without labeling it "poison" as required by law, and that death resulted from the drinking thereof.

In *Reg. v. Packard* (1842) 1 Car. & M. (Eng.) 236, it appeared that a sheriff's officer in possession of goods drank to excess while in the company

of the owner of the goods and others. Baron Parke charged the jury as follows: "If you think that the three prisoners, or one of them, made him excessively drunk to enable the prisoner, John Richard Packard, to prevent the completion of the execution; or, if you are satisfied that the object of the prisoners, or any of them, was otherwise unlawful, and that the death of the deceased was caused in carrying their unlawful object into effect,—they must be found guilty. The simple fact of persons getting together to drink, or one pressing another to do so, is not an unlawful act, or, if death ensue, an offense that can be construed into manslaughter; and, if what took place in the present instance was really and solely for the purpose of good fellowship, for making merry, or causing the misfortunes of the elder Packard to be forgotten, though the act was attended with death, this will not be a case of manslaughter."

W. A. S.

W. H. STIVERS, Appt.,

v.

CLAY ALLEN, Respt.

Washington Supreme Court (Dept. No. 1)—March 25, 1921.

(— Wash. —, 196 Pac. 663.)

Libel — communication by one officer to another concerning alleged crime.

1. Words spoken by one government official to another concerning a supposed offense which both are under obligation to investigate, with no one else present or within hearing, are absolutely privileged, and will not sustain an action for slander by the one concerning whom they are spoken.

[See note on this question beginning on page 249.]

—words spoken to complainant —
when actionable.

have been slandered, with no one else
present or within hearing.

2. No action lies for defamatory
words spoken to the person alleged to

[See 17 R. C. L. 315.]

APPEAL by plaintiff from a judgment of the Superior Court for King County (Jurey, J.) dismissing an action brought to recover damages for an alleged slander. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. W. H. Stivers, in propria persona:

If the complainant's recital of circumstances makes it uncertain whether the language conveys a defamatory imputation, the question is one for the jury.

1 Cooley, Torts, 3d ed. p. 412; Newell, Slander & Libel, 3d ed. p. 377.

The complaint shows that the defamatory communication was made upon a conditionally or qualifiedly privileged occasion, having been made in the prosecution of an inquiry regarding a crime by one having a duty in relation thereto, in the presence of a third person having a like duty.

Newell, Slander & Libel, 3d ed. p. 602, 25 Cyc. 391; Stewart v. Major, 17 Wash. 238, 49 Pac. 503; Ecuyer v. New York L. Ins. Co. 107 Wash. 418, 181 Pac. 871, 186 Pac. 327; Eames v. Whitaker, 123 Mass. 342; 17 R. C. L. p. 335.

Defamatory communications made to public officers are qualifiedly privileged.

Shinglemeyer v. Wright, 124 Mich. 230, 50 L.R.A. 129, 82 N. W. 887; Belknap v. Ball, 83 Mich. 583, 11 L.R.A. 74, 21 Am. St. Rep. 622, 47 N. W. 674; De Arnaud v. Ainsworth, 5 L.R.A. (N.S.) 163, and note, 24 App. D. C. 167.

Messrs. Winter S. Martin and Arthur E. Carr, for respondent:

Innuendo as to words bearing on their face clear import and meaning is not permissible.

Velikanje v. Millichamp, 67 Wash. 138, 120 Pac. 876; Urban v. Helmick, 15 Wash. 155, 45 Pac. 747.

The statement as made was a privileged communication as to time, occasion, and as to the officer making it.

Houghton v. Humphries, 85 Wash. 50, L.R.A.1915E, 1051, 147 Pac. 641; Miller v. Gust, 71 Wash. 139, 127 Pac. 845; McClure v. Review Pub. Co. 38 Wash. 160, 80 Pac. 303; Abbott v. National Bank, 20 Wash. 552, 56 Pac. 376.

Parker, Ch. J., delivered the opinion of the court:

The plaintiff, Stivers, commenced this action in the superior court for King county, seeking recovery of damages alleged to have been suffered by him from slanderous words spoken of and concerning him by the defendant, Allen, in the presence of one Jarrell. The defendant's demurrer to the plaintiff's complaint being sustained by the trial court,

and the plaintiff electing to stand upon his complaint and not plead further, final judgment of dismissal of the case was rendered against him, from which he has appealed to this court.

The allegations of the complaint, in so far as we need here notice them, are as follows:

"I. That on the 27th day of June, 1917, the said defendant was the duly appointed, qualified, and acting United States district attorney for the northern division of the western district of Washington, and had an official duty in reference to the subject-matter of the defamatory communication set forth in paragraph III. hereof, and the third person mentioned in said paragraph had at said time a corresponding and like official duty, being then and there a secret service operative in the employ of the Treasury Department of the United States, assigned to duty at Seattle, Washington.

"II. That at all times herein mentioned the United States was at war with the Imperial German government, and that the 'no-conscription circular' mentioned in the defamatory communication set forth in paragraph III. hereof was and is the identical 'no-conscription circular' for issuing and propagating which, on or about the 11th day of May, 1917, Hulet M. Wells and Sam Sadler were thereafter convicted in the United States district court for the western district of Washington, northern division, of the crime of seditious conspiracy and sentenced to imprisonment at hard labor for two years.

"III. That on the 27th day of June, 1917, the said plaintiff personally appeared in the office of the said United States district attorney in the city of Seattle, Washington, in obedience to a telephoned and peremptory order from the said defendant, and that, after reminding and warning the said plaintiff that his admissions and responses might later be used against him in a criminal prosecution, the said defendant then and there, in the presence and

hearing of a third person, to wit, one William R. Jarrell, wrongfully and wantonly spoke of and concerning and to the said plaintiff the false and defamatory words following: 'About midnight of May 12 last, or early in the morning of May 13, you were on the fourth floor of the P.-I. Building with copies of the "no-conscription circular" in your possession. Now, I want to know where you got them.'

"IV. That, by uttering and publishing the false and defamatory words as aforesaid, the said defendant conveyed and intended to convey the meaning that the said plaintiff had committed a criminal offense against the United States and the crime of seditious conspiracy as defined and denounced in and by §§ six (6), thirty-seven (37), and three hundred thirty-two (332) of the Criminal Code of the United States.

"V. That the false imputation uttered and published by the said defendant as aforesaid was unnecessarily defamatory, and was in excess and in abuse of the privilege of the occasion.

"VI. That the false and defamatory words were maliciously uttered and published by the said defendant as aforesaid, without reasonable or probable cause for belief that the said defamatory words were true, and without any investigation as to the truth thereof, and in wanton disregard for and with reckless indifference to the truth of the matter and the rights, character, and reputation of the said plaintiff. . . ."

Had respondent said to Jarrell, the Federal secret service officer, neither appellant nor anyone else being present or within hearing, that "about midnight of May 12 last, or early in the morning of May 13, Stivers was on the fourth floor of the P.-I. Building, with copies of the 'no-conscription circular' in his possession," our problem would be exactly the same as that here presented; for it is elementary in the law of slander that "defamatory words, uttered only to the person

concerning whom they are spoken, no one else being present or within hearing, are not actionable, because it is necessary as an invariable rule that there be a publication of defamatory words to someone other than the person defamed, to render the same actionable." 17 R. C. L. 315.

Libel—words spoken to complainant—when actionable.

It seems plain, therefore, that we have here a case wherein one officer of the government used language in the presence of another officer of the government,—no one else being present or within hearing, in so far as we are concerned with the question of the publication of such language,—indicating his belief that appellant had in his possession a "no-conscription circular" under such circumstances as to suggest a violation of the Federal statutes providing for the punishment of seditious conspiracy; both officers acting together to a common end, and being then and there charged with the duty of investigating and bringing to justice persons who might be guilty of seditious conspiracy under the Federal statutes. We are only assuming, for argument's sake, that the words complained of are actionable as slanderous, or could be so regarded upon proper innuendo, pleading, and proof.

Viewing the alleged slanderous words as being spoken by respondent to Jarrell, the secret service officer, and no one else hearing them,—as for present purposes they must be viewed,—

we think they constitute an absolute privileged communication from respondent to Jarrell. They manifestly were not spoken with any thought that they should ever be given to the world, or that anyone else should ever learn of their utterance, other than appellant and Jarrell, the secret service officer. In *Shinglemeyer v. Wright*, 124 Mich. 230, 50 L.R.A. 129, 82 N. W. 887,

—communication by one officer to another concerning alleged crime.

we have a decision the reasoning of which we think is applicable to and controlling in favor of respondent here. That case involved a communication by Wright, a private citizen, to an officer, looking to the recovery of his bicycle, which he suspected of being stolen, in which communication he named Shinglemeyer as the suspected thief. Shinglemeyer sued Wright for damages for alleged slander and false imprisonment in connection therewith. Disposing of the branch of the case relating to the alleged slander by the communication of Wright to the officer, Justice Long, speaking for the court said: "The court was in error in admitting the above letter and the statements made by defendant to the two detectives, High and Larkins, in regard to the larceny of his wheel. These were privileged communications. They were introduced and admitted for the purpose of showing malice. The trial judge was in doubt as to their competency, but finally admitted them. Privileged communications cannot be used for that purpose. Defendant's property was stolen, and it was not only his privilege and right, but his duty, to give to the detectives, who, in this case, were specially appointed for the purpose, all information he had, and, if he had suspicions of any person, to state who the person was and the reasons for suspecting him. Such communications are made in the strictest confidence, and are as sacred, in the eye of the law, as the communications between client and lawyer, or patient and physician. To be evidence of malice, these communications must, in themselves, have been malicious, and would therefore form the basis themselves for an action for slander. If this be the law, no person would be safe from prosecution in communicating to police officers, whose duty it is to examine into the case and hunt for the criminal, his suspicions, or statements which might tend to implicate a person. Public policy forbids the adoption of such a rule. These detectives were under

legal, as well as moral, obligations to keep these communications secret. They were not made for publication, and the officers had no right to divulge them to others. It is very doubtful if these detectives could be compelled to disclose in court such privileged communications. Such officers, especially in large cities, are entitled to know from the citizen against whom a crime has been committed all his suspicions and knowledge, both in regard to the person suspected and also in regard to his character and habits. The defendant did not make these statements for repetition. He made them for the exclusive use and benefit of the trusted and sworn officers of the law. They should have been forever locked in their breasts, and never disclosed; otherwise, few persons would dare to disclose to an officer the name of a suspect, or anything they had learned about his character."

There can be found decisions of the courts somewhat out of harmony with the views there expressed, but in so far as our attention has been called to such decisions, and in so far as we have been able to discover by an independent investigation, they all relate to communications made by private citizens to officers, touching the question of the guilt of some person of an offense. No decision has come to our notice—and we think there are none—wherein it has ever been held that the expressions of opinion by one officer to or in the sole presence of another, as in this case, are actionable slander under any circumstances. We think the above-quoted observations made by the learned justice in speaking for the Michigan court are more peculiarly applicable to a case of the nature we here have, even than to communications made by a private citizen to an officer. The following decisions, while not directly in point, contain observations in harmony with the conclusion we here reach: *Kimble v. Kimble*, 14 Wash. 869, 44 Pac. 866; *Stewart v. Major*,

17 Wash. 238, 49 Pac. 503; Gardner v. Anderson, Fed. Cas. No. 5,220; Beshiers v. Allen, 46 Okla. 331, L.R.A.1915E, 413, 148 Pac. 141.

In view of the circumstances alleged in the complaint under which the alleged slanderous words were spoken, we must presume that, but for appellant himself giving them to the world when he brought this action, no one but he and Jarrell

would ever have known of their utterance. As spoken to him, the words were not actionable. As spoken to or in the presence of Jarrell, the words were absolutely privileged.

The judgment is affirmed.

Holcomb, Fullerton, Bridges, and Mackintosh, JJ., concur.

Petition for rehearing denied May 13, 1921.

ANNOTATION.

Libel and slander: privilege of statement or communication by official charged with prosecution or detection of crime.

There appears to be no doubt that a defamatory statement bearing on the prosecution or detection of a crime, and made by an official charged with its prosecution or detection, is to be treated differently from a defamatory statement made by a private citizen. It is not clear, however, whether the privilege accorded to such a statement by an official is an absolute or merely a qualified privilege.

In the reported case (STIVERS v. ALLEN, ante, 245) the privilege is said to be absolute. In that case it is held that a statement by a United States district attorney to the plaintiff, in the presence of a Federal secret service officer, to the effect that the plaintiff, on a certain date had a seditious circular in his possession, was an absolutely privileged communication. The decision in Griffith v. Slinkard (1896) 146 Ind. 117, 44 N. E. 1001, appears to be to the same effect. In that case it was held that a prosecuting attorney was not liable for reading in open court an indictment falsely accusing the plaintiff of a crime. Although the complaint alleged that the attorney inserted the name of the plaintiff in the indictment as a joint defendant, without the knowledge of the grand jury, and after that body had voted not to return an indictment against him, the court held that a demurrer to the complaint was properly sustained.

The courts, on the other hand, have

frequently regarded the privilege of the official as a qualified one. In each of the following cases it was held that a statement bearing on the prosecution or detection of a crime, and made by an official, or quasi official, charged with its prosecution or detection, was privileged in the absence of actual malice: Craig v. Burris (1902) 4 Penn. (Del.) 156, 55 Atl. 353; Lester v. Thurmond (1874) 51 Ga. 118; Mayo v. Sample (1865) 18 Iowa, 306; Hoar v. Wood (1841) 3 Met. (Mass.) 193; Davis v. McNees (1847) 8 Humph. (Tenn.) 40; Dewe v. Waterbury (1881) 6 Can. S. C. 143. See also Bradley v. Heath (1831) 12 Pick. (Mass.) 163, 22 Am. Dec. 418.

In Lester v. Thurmond (1874) 51 Ga. 118, supra, it appeared that an attorney, in prosecuting an action for malicious mischief before a justice, accused the plaintiff of helping the defendant in that suit to kill certain hogs. It was held that the prosecutor's statement, in the absence of any showing of express malice, was privileged. The court said: "No action can be maintained against an attorney at law for words spoken to a jury, as in this case, without proof of actual malice, and it is incumbent on the plaintiff to furnish such proof; whereas, when actionable words are spoken in private conversation, the law implies that the words were spoken maliciously, and it is not incumbent on the plaintiff to prove malice. The attorney at law is protected by his privilege, on

account of words spoken in the discharge of his duty in the regular course of judicial proceedings in the courts, unless express malice is proved. If, however, an attorney at law avails himself of his position as an advocate maliciously to slander another by uttering words wholly unjustifiable, then he would be liable to an action, but not otherwise. There not having been any evidence that the words alleged to have been spoken by the defendant to the jury in relation to the plaintiff, in the regular course of judicial proceedings, were spoken maliciously, the plaintiff was not entitled to recover on his own evidence."

In *Craig v. Burris* (1902) 4 Penn. (Del.) 156, 55 Atl. 353, it was held that the defendant, as attorney for the prosecuting witness, was privileged in accusing the plaintiff, in the presence of several persons, of collecting money by false pretenses, where it appeared that a warrant had been issued by a justice of the peace charging the plaintiff with that offense, and the slanderous words were spoken outside and in front of the office of the justice. The court said: "From the undisputed evidence on the part of the plaintiff, it appears that there was a criminal action then in progress, and that the alleged libelous utterances took place at or near the office of the justice of the peace. It is also apparent from the evidence that the subject of conversation was in relation to this same matter, that it was pertinent to the charge then before the court, or pending in the case. It further appears that Mr. Burris was there rightfully as an attorney in that proceeding. Taking the utterances which are claimed to be libelous, and giving to them their most extended meaning connected with the circumstances, they do not appear to us as being outside of his privilege as an attorney. The evidence distinctly negatives express malice."

In *Hoar v. Wood* (1841) 3 Met. (Mass.) 193, the court considered the privilege of a prosecuting witness who conducted a criminal proceeding be-

fore a justice of the peace and made a defamatory statement concerning the plaintiff while examining him as a witness. The court held that a prosecuting witness, under such circumstances, was entitled to the same privilege as a party or counsel in other judicial proceedings, and defined the extent of that privilege as follows: "The question . . . in such cases is not whether the words spoken are true, not whether they are actionable in themselves, but whether they were spoken in the course of judicial proceedings, and whether they were relevant and pertinent to the cause or subject of inquiry. And in determining what is pertinent, much latitude must be allowed to the judgment and discretion of those who are intrusted with the conduct of a cause in court, and a much larger allowance made for the ardent and excited feelings with which a party, or counsel, who naturally and almost necessarily identifies himself with his client, may become animated, by constantly regarding one side only of an interesting and animated controversy, in which the dearest rights of such party may become involved. And if these feelings sometimes manifest themselves in strong invectives or exaggerated expressions, beyond what the occasion would strictly justify, it is to be recollected that this is said to a judge who hears both sides, in whose mind the exaggerated statement may be at once controlled and met by evidence and arguments of a contrary tendency, from the other party, and who, from the impartiality of his position, will naturally give to an exaggerated assertion, not warranted by the occasion, no more weight than it deserves. Still, this privilege must be restrained by some limit; and we consider that limit to be this,—that a party or counsel shall not avail himself of his situation to gratify private malice, by uttering slanderous expressions either against a party, witness, or third person, which have no relation to the cause or subject-matter of the inquiry. Subject to this restriction, it is, on the whole, for the public interest, and best cal-

culated to subserve the purposes of justice, to allow counsel full freedom of speech in conducting the causes, and advocating and sustaining the rights of their constituents; and this freedom of discussion ought not to be impaired by numerous and refined distinctions."

In *Davis v. McNees* (1847) 8 Humph. (Tenn.) 40, it appeared that an action for perjury before justices of the peace terminated in favor of the accused, because the alleged perjured statement was not material to the issue. On being informed that he would have to pay the costs, the prosecutor stated that he did not know how he could be compelled to do that, that the plaintiff had sworn falsely and he had proved it. In an action for slander brought by the plaintiff, the question whether the defamatory words were spoken before or after the judicial proceeding was ended was left to the jury. This was held to be error, the court saying: "It must be perceived that his Honor intended to exclude the idea that anything said after the judgement in the original case was announced, was in the discharge of the official duties of the prosecutor, and consequently that, for such words, he was liable. It may be very true that the judgment had been pronounced when the words were spoken, but it does not follow that they were actionable. A party in any cause may suggest reasons to the court for the reconsideration of the opinion and change of the judgment,—and much more may he be permitted to do so in such a case as the one under consideration. The intimation of the opinion of the justices that they were about to tax him with the costs was the first notice he had that a case against himself existed at all,—and surely he was at liberty to expostulate against the contemplated decision, and to urge arguments wherefore it should not be made. Whether the words that were spoken, were used in the legitimate defense of himself or were employed maliciously, as a means of abuse and slander of McNees, should have been left to the jury. But we are clearly of opinion

that the prosecutor in the case had a right to urge arguments respectfully and legitimately, wherefore the justices should not tax him with the costs."

In *Mayo v. Sample* (1865) 18 Iowa, 306, a mayor as ex officio head of a city police department was held, in the absence of express malice, not to be liable for accusing the plaintiff, in the presence of a third person, of purchasing stolen goods which he knew to be stolen. The court said: "Bona fide efforts made by public officers, in the line of their duty, acting upon information received from others, and without malice, with a view to discover offenders or obtain stolen property, are justifiable and proper. And a charge of crime, in connection with such efforts, where no bad motive exists, and where 'the party acted in good faith, and took no advantage of the occasion to injure the plaintiff's character or standing,' by a malicious attack, is not regarded as slanderous, without proof of malice in fact."

In *Dewe v. Waterbury* (1881) 6 Can. S. C. 143, it was held that, in the absence of actual malice, a postoffice inspector was not liable for stating to a subordinate that he had accused an employee of abstracting letters and had discharged him. The court said: "I think the law is very clear on this subject. It is for the judge to rule whether the occasion creates privilege. It is clear that defendant was de facto, and I think de jure, in the discharge of a public duty, and the words were spoken while in the discharge of that duty and in reference thereto, to a subordinate officer having a corresponding duty, and therefore were privileged; that being so, it is equally clear that the burden of proof was on the plaintiff to show actual malice."

It has been held that a statement by a selectman at a town meeting, that the plaintiff put in two votes at an election, was not actionable, in the absence of express malice. *Bradley v. Heath* (1831) 12 Pick. (Mass.) 163, 22 Am. Dec. 418.

But the fact that one believes that

he is in the performance of an official duty to detect a crime has been held to be insufficient to establish a privilege for repeating defamatory rumors. *Trafton v. Deschene* (1917) 44 N. B. 552, 36 D. L. R. 433, wherein the court said: "Constables by statute are appointed from year to year, and the defendant cannot have been very much impressed by the importance of his position, as, by the evidence, he did not perform one official act during the time he was a constable, and, while his appointment was made in 1913, he had never been notified of re-appointment, nor had he acted in the capacity of constable, or been called upon to do so. But had the defendant been a constable duly appointed and acting, he could not, in my opinion, justify his course in this case, as he was not authorized by law to investigate the rumors, and he was not acting under orders from a justice of the peace or some higher authority. I am therefore of the opinion there was a misdirection on the part of the learned judge to the jury when he told that as a matter of law, 'whether the defendant was not in fact a constable and honestly believed he was pursuing his duty when he was making inquiries, then whether he was a constable or not makes no difference, and that, if believing he was a constable and acting in what he conceived to be the public interest, in the discharge of his duty as an officer of the law, he went around and made inquiries of the people whom he thought would be likely to know whether the rumors were true or not, with a view, if they were true, of bringing the plaintiff to justice, and if he did it in a discreet and honest way, and did not wantonly and unnecessarily promulgate, repeat, and publish these rumors to the world, then I tell you as a matter of law, the defendant is blameless, he did no

more than was his right and was his duty.'"

A defamatory statement by a district attorney engaged in the prosecution of a crime has been held not to be privileged if the statement is immaterial to the issue in the case. *Carpenter v. Ashley* (1906) 148 Cal. 422, 83 Pac. 444, 7 Ann. Cas. 601. See also *Viosca v. Landfried* (1916) 140 La. 609, 73 So. 698, Ann. Cas. 1918C, 1193; *Hoar v. Wood* (1841) 3 Met. (Mass.) 193, set out *supra* in this note. In *Carpenter v. Ashley* (Cal.) *supra*, it appeared that the defendant as district attorney prosecuted a criminal action against a client of the plaintiff. During the progress of the trial the plaintiff accused the defendant of going beyond the legitimate means of conducting the prosecution, whereupon the defendant charged the plaintiff with perjury and subornation of perjury. The charge did not appear to be in any way material or pertinent to the case which was being tried. The supreme court held that the statement by the defendant was therefore not privileged, and that, since the facts were not disputed, it was error for the lower court to leave the question of privilege to the jury.

In *Viosca v. Landfried* (La.) *supra*, it appeared that a prosecuting attorney in the presence of a large crowd of bystanders, including court officials, accused the plaintiff, an attorney for a poor negro, of attempting to "bleed" his client by demanding \$15 to prosecute an appeal from a conviction of petty larceny, when the plaintiff knew that the conviction could not be reversed. It was held that since the statement was not made in the course of a judicial proceeding it was not privileged.

The privilege of a statement by a grand juror or by a coroner is not discussed in this note. W. S. R.

PEOPLE OF THE STATE OF MICHIGAN
v.

FREDERICK H. CLUM, Plff. in Err.

Michigan Supreme Court — March 30, 1921.

(— Mich. —, 182 N. W. 136.)

Corporation — Blue Sky Laws — common-law trust.

1. Shares of a common-law trust are within the operation of a statute prescribing certain conditions for the sale of stock of any corporation, company, or association.

[See note on this question beginning on page 262.]

Indictment — amendment at trial — date of offense.

2. It is not error to permit the amendment, at the trial, of an indictment charging the sale of stock without a license, on, to wit, a specified date, so as to charge that the sales were on the date specified and divers other days.

[See note in 7 A.L.R. 1531, 1543.]

Appeal — submission of question to jury.

3. One convicted of selling stock without complying with the requirements of the Blue Sky Law cannot

complain that the court submitted to the jury the question whether or not he was a dealer within the meaning of the act, upon evidence that he made continued and successive sales which, under the statute, would make him a dealer.

Corporation — sale of stock — person acting in trust capacity.

4. The secretary of a common-law trust does not, in disposing of its stock, act in a trust capacity created by law within the meaning of an exception of sales by such persons from the penalties of the Blue Sky Law.

ERROR to the Recorder's Court of the City of Detroit (Keidan, J.) to review a judgment convicting defendant of violating the Blue Sky Law. Affirmed.

The facts are stated in the opinion of the court.

Messrs. Grece & McDonald, for plaintiff in error:

The amendment of the information should not have been allowed.

Byrnes v. People, 37 Mich. 515; Bickford v. People, 39 Mich. 209; People v. Behee, 90 Mich. 356, 51 N. W. 515; People v. Vogt, 156 Mich. 594, 121 N. W. 293.

Defendant and his associates were proceeding, as they believed, in a legal manner.

Smith v. Anderson, L. R. 15 Ch. Div. 247, 50 L. J. Ch. N. S. 39, 43 L. T. N. S. 336, 29 Week. Rep. 22; Elliot v. Freeman, 220 U. S. 178, 55 L. ed. 424, 31 Sup. Ct. Rep. 360; Geer v. Morton, 159 Mass. 259, 34 N. E. 269; Howe v. Morse, 174 Mass. 491, 55 N. E. 213; Wemyss v. White, 159 Mass. 484, 34 N. E. 713; Hussey v. Arnold, 185 Mass. 202, 70 N. E. 87; Reichert v. Missouri & I. Coal Co. 231 Ill. 238, 121 Am. St. Rep. 307, 83 N. E. 166; Harwood v.

Tracy, 118 Mo. 631, 24 S. W. 214; Lake v. Brown, 116 Ill. 83, 4 N. E. 773; Shaw v. Paine, 12 Allen, 293; People ex rel. Darrow v. Coleman, 119 N. Y. 137, 7 L.R.A. 407, 23 N. E. 488; Anthony v. Caswell, 15 R. I. 159, 1 Atl. 290; Williams v. Boston, 208 Mass. 497, 94 N. E. 808; Roby v. Smith, 131 Ind. 342, 15 L.R.A. 792, 31 Am. St. Rep. 439, 30 N. E. 1093; Farmers Loan & T. Co. v. Chicago & A. R. Co. 27 Fed. 146; Shirk v. La Fayette, 52 Fed. 857.

Messrs. Alexander J. Groesbeck, Attorney General, Matthew H. Bishop, and Collins B. Scott, for defendant in error:

The prosecutor was wholly within his rights in making the amendment at the beginning of the trial and before any testimony was taken.

22 Cyc. 451; 14 R. C. L. 180; Keator v. People, 32 Mich. 484; Turner v. People, 33 Mich. 363; People v. Nichols, 159 Mich. 357, 124 N. W. 25.

Clark, J., delivered the opinion of the court:

Respondent has appealed from a conviction in recorder's court at Detroit, Wayne county, for a violation of Act No. 46, Session Laws of 1915 (chapter 230, Comp. Laws of 1915), known as the Blue Sky Law. The information charged: That respondent, with another, "heretofore, to wit, on the 31st day of May, A. D. 1920, at the city of Detroit, in the county aforesaid, was then and there a dealer within the meaning of Act No. 46 of the Public Acts of the state of Michigan for the year 1915, and did then and there offer for sale to Richard C. O'Donnell and Annie M. Clark and to divers other persons the stocks of a certain company known and designated as the National Business Men's Protective Association of Detroit, said company being then and there an investment company within the meaning of Act No. 46 of the Public Acts of the state of Michigan for the year 1915, and then and there selling, negotiating for the sale of its stock by itself and through others."

The information then negated the exceptions contained in § 3 of the act. It recited that there had not been a filing with Michigan Securities Commission of the statements, plans, prospectus, proposed advertising, copy of articles of incorporation, constitution and by-laws, or other papers pertaining to the organization, as required by the act; and it continued: "And it, the said investment company, not having paid any filing fee whatsoever, and the said Frederick H. Clum and John O. Carter offering said stocks as aforesaid of the said National Business Men's Protective Association of Detroit, in the course of continued successive transactions of a similar nature, and not being then and there the issuer of said stocks, and they, the said Frederick H. Clum and the said John O. Carter, then and there offering said stock for sale in quantities less than the entire issue thereof, and not having made application to the said Michi-

gan Securities Commission for a certificate of approval of the said stocks, and such application not having been made by any other dealer or dealers whatsoever, or by any other persons, and said Michigan Securities Commission not having approved the sale of such securities, the stock of said National Business Men's Protective Association of Detroit, and not having issued a certificate of such approval, in accordance with the provisions of Act No. 46 of the Public Acts of the state of Michigan for the year 1915, contrary to the form of the statute in such case made and provided.

At the opening of the trial the prosecution was permitted, counsel for respondent objecting, to amend the information to read, "on the 31st day of May and divers other days and dates."

The certificates for preferred stock issued to said persons, names and dates omitted, were in this form:

Organized Under the Common Law.

Number _____ Shares.

National Business Men's Protective Association.

Preferred Shares, \$25,000. Common Shares, 7,500 Without Par Value.

Capital Shares.

This certifies that _____ is the holder of _____ shares of the par value of \$10 each in the preferred capital stock of the National Business Men's Protective Association, fully paid and nonassessable, subject to declaration of trust in favor of said association, dated May 7, 1919, and recorded with register of deeds in Wayne county, Michigan, No. 471,840, and transferable only on the books of the association by holder hereof in person or by attorney upon surrender of this certificate properly indorsed.

The holder of this preferred-share certificate shall be entitled to receive cumulative, semiannually paid dividends at the rate of 7 per cent per annum, and no more, and,

in event of liquidation of the association, shall be entitled to be paid in full both the par amount of their shares and the unpaid dividends accrued thereon, before any amount shall be paid to the holder of the common shares.

Witness the seal of the association and the signatures of its duly authorized officers this ——— day of ———, A. D. 1919.

[Signed] J. O. Carter, President.

[Signed] F. H. Clum, Secretary.

Shares \$10 each.

The certificates for common stock issued to said persons, names and dates omitted, were in this form:

Organized Under the Common Law.
Number ———. ——— Shares.

National Business Men's Protective Association.

Preferred Shares, \$25,000. Common Shares, 7,500, Without Par Value.

Capital Shares 10,000.

This certifies that ——— is the holder of ——— shares of the capital stock of National Business Men's Protective Association, subject to declaration of trust in favor of said association, dated May 7, A. D. 1919, and recorded with register of deeds, Wayne county, Michigan, No. 471,840, and transferable only on the books of the association by holder hereof in person or by attorney, upon surrender of this certificate properly indorsed.

In witness whereof the said association has caused this certificate to be signed by its duly authorized officers and to be sealed with the seal of the association this ——— day of ———, A. D. 1919.

[Signed] J. O. Carter, President.

[Signed] F. H. Clum, Secretary.

The purpose of the association was said to be the collection, for a consideration, of "slowpay" accounts of business men, members of the association, who were to pay to the association a membership fee.

Several reasons for setting aside the conviction are urged:

(1) That Act 369, Session Laws of 1919, relating to municipal courts, is invalid. This question as here raised was disposed of in the case of *Gildemeister v. Lindsay*, 212 Mich. 299, 180 N. W. 633.

(2) That the court erred in permitting the amendment of the information. Time is not the essence of the offense. The information charged an offense under the statute. The several transactions might all have occurred on May 31st. The amendment under which the prosecution showed the transactions of May 31st, June 2d, and June 10th with Richard C. O'Donnell and

Indictment—
amendment at
trial—date of
offense.

Annie M. Clark, was properly allowed. See Comp. Laws 1915, §§ 15,746–15,749; *People v. Hoffman*, 142 Mich. 542, 105 N. W. 838; *People v. Nichols*, 159 Mich. 355, 124 N. W. 25; *People v. Hamilton*, 76 Mich. 212, 42 N. W. 1131; *Cole v. People*, 37 Mich. 544. And there is no claim that the amendment necessitated a continuance to enable the respondent to go to trial safely. See *People v. Perriman*, 72 Mich. 184, 40 N. W. 425.

(3) That the association was not incorporated under the laws of this or any other state, but was organized under the common law, having a declaration of trust in favor of the association recorded in the office of the register of deeds of the county, and the so-called stock was not, therefore, stock within the meaning of the act. The sections of the act here important are:

"Sec. 2. Every person, corporation, copartnership, company, or association (except those exempt under the provisions of this act) organized, or which shall hereafter be organized in this state, whether incorporated or unincorporated, which shall either himself, themselves or itself, or by or through others, sell or negotiate for the sale of any stocks, bonds or other securities issued by him, them or it within the state of Michigan, shall be known for the

purposes of this act as a domestic investment company. Every such person, corporation, copartnership or association resident of or organized in any other state, territory or government, shall be known for the purposes of this act as a foreign investment company."

"Sec. 10. Any person, firm, copartnership, corporation or association whether domestic or foreign, not the issuer, who shall in this state sell or offer for sale any of the stocks, bonds or other securities issued by any foreign or domestic investment company, except the securities specifically exempted in this act, or who shall by advertisement or otherwise profess to engage in the business of selling or offering for sale such securities, shall be deemed to be a 'dealer' in such securities within the meaning of this act, and no dealer within the meaning of this act shall sell or offer for sale any such securities or profess the business of selling or offering for sale such securities unless and until he shall have filed a list of the same in the office of the Michigan Securities Commission as in this act provided. The term 'dealer' shall not include an owner not issuer, of such securities so owned by him when such sale is not made in the course of continued and successive transactions of a similar nature, nor one who in a trust capacity created by law lawfully sells any securities embraced within such trust."

The association was an investment company within the meaning of § 2. The respondent was not an issuer of stock. The association

was the issuer. The shares into which the capital of this association was divided, and for which certificates were issued as stated, were stock within the meaning of the act, the selling and offering for sale of which were forbidden except as provided by the act.

*Corporation—
Blue Sky Laws—
common-law
trust.*

There was evidence connecting respondent, as stated, with sales "made in the course of continued and successive transactions of a similar nature." Whether he was a dealer within the meaning of the section quoted was treated by the court as a question of fact, and submitted to the jury. Of this respondent may not complain. See *Edward v. Ioor*, 205 Mich. at page 622, *infra*, 172 N. W. 620.

*Appeal—sub-
mission of
question to jury.*

There is no exception in favor of respondent in the concluding clause of § 10. He was not acting in a trust capacity "created by law." Other questions discussed briefly by counsel have been considered. We find no reversible error. The conviction and judgment are affirmed.

*Corporation—
sale of stock—
person acting in
trust capacity.*

The late Justice Brooke took no part in this decision.

NOTE.

The validity, interpretation, and effect of Blue Sky Laws are the subject of the annotation following *EDWARD v. IOOR*, post, 262.

WILLIAM S. EDWARD, Plff. in Err.,

v.

WALTER IOOR et al.

Michigan Supreme Court—May 29, 1919.

(205 Mich. 617, 172 N. W. 620.)

Corporation — sale by owner of shares of stock — validity.

1. A sale, by an owner, of a few shares of his own stock, does not require

consent of the corporation commission, where the statute provides that the term "dealer" to whom the statute is made applicable shall not include an owner not issuer of the securities, when such sale is not made in the course of continued and successive transactions of a similar nature.

[See note on this question beginning on page 262.]

—foreign—doing business and selling stock — compliance with statute.

2. Only the statute applicable to the transaction in which a foreign corporation desires to engage need be complied with, where one statute requires consent of the corporation commission to enable a foreign corporation to sell its stock in the state, and another requires compliance with certain requirements to be entitled to do business in the state.

—exchange of stock as sale.

3. The exchange by a holding corporation of its stock for the stock of the corporation which it is organized to take over, with the holders of such stock, is a sale within the meaning of a statute requiring foreign corporations to secure the consent of the corporation commission before selling their stock within the state.

Rescission — sale of stock without authority — in pari delicto.

4. One having a single transaction in exchanging corporate stock owned by him with a foreign corporation which has not obtained the consent of the corporation commission to sell its stock within the state, and is not therefore entitled to do so, is not, in case he acted under the bona fide belief that the corporation was so authorized, in pari delicto, so as to be prevented from rescinding the contract.

—purchase of stock from foreign corporation not authorized to sell.

5. One exchanging corporate stock with a foreign corporation which has not obtained the consent of the corporation commission to sell its stock within the state, and its transactions are therefore forbidden by the statute under penalty, may rescind the transaction and recover the stock delivered by him.

Estoppel — purchase of stock of foreign corporation — executing proxy.

6. One who has purchased stock of a foreign corporation not authorized to sell its stock in the state is not estopped from rescinding the purchase by executing a proxy for representation at an annual meeting of the corporation.

Action — form — to recover consideration paid for stock.

7. An action at law may be maintained to recover the consideration paid for stock sold by a foreign corporation without authority, after the purchaser has rescinded the contract and tendered the stock received.

Rescission — effect of mistake in form of demand.

8. That one who exchanged corporate stock for stock illegally sold in the state by a foreign corporation, demanded the value of the stock with which he parted upon rescission of the contract, instead of a mere return of his stock, will not defeat his action to recover the consideration, if the refusal was based not on the form of the demand, but upon denial of the right to rescind.

Joint debtors — participants in illegal transaction — exoneration of individual.

9. The court cannot say as matter of law that, where several corporations are engaged in consummating an illegal transaction in forming a holding corporation for others and disposing of its stock in the state without the requisite authority, some of them should be exonerated from liability to return the consideration paid by purchasers of the stock who have rescinded the transaction and tendered back what was received by them.

ERROR to the Circuit Court for Kent County (McDonald, J.) to review a judgment in favor of defendants in an action brought to recover an amount alleged to have been paid for stock in two of the defendant corporations, and also for alleged fraud and conspiracy of defendants. *Reversed.*

Statement by Fellows, J.:

Plaintiff is a resident of Sault Ste. Marie, and defendants have a common office in the city of Grand Rapids. Defendant United Vending Company is a corporation organized under the laws of the state of Arizona. It had been authorized to sell its stock in this state by the Michigan Securities Commission pursuant to the provisions of Act 46, Public Acts 1915, hereafter called the Commission Act, but had not complied with the provisions of Act 206, Public Acts 1901, as amended by Act 310, Public Acts 1907, hereafter called the Foreign Corporation Act. Defendant National Piano Manufacturing Company of Illinois, hereafter called the Illinois Piano Company, had complied with the Foreign Corporation Act, but had not complied with the Commission Act. Defendant National Piano Manufacturing Company of Arizona, hereafter called the Arizona Piano Company, had complied with neither act. Defendant Michigan Securities Corporation is a Michigan corporation, and it seems has been licensed as a dealer under the provisions of the Commission Act. The status of the Sparta Manufacturing Company and of the National Automatic Music Company, both of which are mentioned in the record, but neither of which is made defendant, does not clearly appear, nor is it important. The companies seem to possess interlocking directorates, and defendant Ioor is president or secretary of some, if not all, of them, and appears to be the dominant factor in them all.

Plaintiff purchased through the Michigan Securities Corporation 500 shares of stock of the United Vending Company, paying therefor \$5,000 in cash. He also purchased from defendant Ioor twenty-seven shares of stock in the Illinois Piano Company, paying therefor \$6,750 in cash. Both of these stocks paid dividends, and there is no evidence tending to show that they were not worth what he paid for them. It should also be stated that Sarah

Tyndall purchased stock of the United Vending Company to the amount of \$450 and plaintiff's son to the amount of \$225.

Some time after the purchase of these stocks by plaintiff, the directors of the United Vending Company, the Sparta Manufacturing Company, and the Illinois Piano Company conceived the organization of the Arizona Piano Company to take over the stock of these companies, issuing stock in the new company in payment therefor. Plaintiff and other stockholders seem to have been informed of this plan. After correspondence, some of which was with the Michigan Securities Corporation, in which the advantages of carrying out such plan were impressed on plaintiff, he acquiesced in this transaction, sent his old stock to defendant Michigan Securities Corporation, and received stock in the new Arizona Piano Company. Mrs. Tyndall and plaintiff's son did the same.

Prior to the bringing of this action, Mrs. Tyndall and plaintiff's son assigned their stock in the Arizona Piano Company in blank, and delivered it to plaintiff, who paid them the amount they had invested. There is testimony in the case that all the stock was tendered back before suit was brought by a representative of plaintiff's counsel, the tender being made to defendant Ioor, and there is testimony that in declining the tender he told the representative making it to "tell them to go to hell;" there is testimony that the representative demanded \$12,425, the amount invested in the original stocks; and there is testimony that neither the original stocks nor their value were ever delivered or paid to plaintiff. To review a judgment for defendants upon a directed verdict this writ of error issued.

Messrs. C. G. Turner and Ellis & Ellis for plaintiff in error.

Messrs. Hatch, McAllister, & Raymond for defendant in error National Piano Company.

Messrs. Joseph Renihan and Charles A. Watt, also for defendants in error:

If all of the parties were acting in good faith in bringing about this consolidation and plaintiff assented thereto, and it turned out that the proceedings to bring about the consolidation were void, the plaintiff's only remedy would be in equity to restrain such consolidation and to set aside the proceedings.

Hays v. Ottawa, O. & F. R. Valley R. Co. 61 Ill. 422; Central Pl. Road Co. v. Clemens, 16 Mo. 360; Ottawa, O. & F. R. Valley R. Co. v. Black, 79 Ill. 262; Mississippi, O. & R. River R. Co. v. Cross, 20 Ark. 452; Danbury & N. R. Co. v. Wilson, 22 Conn. 435; International & G. N. R. Co. v. Bremond, 53 Tex. 117; Marcoux v. Reardon, 203 Mich. 525, 169 N. W. 893.

The charge of fraud on the part of defendants was unsupported by the evidence.

Brown v. Weeks, 195 Mich. 38, 161 N. W. 945; Kimble v. Gillard, 177 Mich. 250, 143 N. W. 79; Hastings Industrial Co. v. Moran, 143 Mich. 679, 107 N. W. 706; Kuennan v. United States Fidelity & G. Co. 159 Mich. 123, 123 N. W. 799.

Fellows, J., delivered the opinion of the court:

In disposing of the case the following questions will be considered:

(1) Is a foreign corporation required to comply with both the Foreign Corporation Act and the Commission Act before offering its stock for sale in this state?

(2) Did the sale to plaintiff by the defendant Ioor of the twenty-seven shares of stock in the Illinois Piano Company offend the Commission Act?

(3) Did the exchange of the Arizona Piano Company stock for the stock of the other companies constitute a sale within the meaning of the Commission Act?

(4) If so, may the plaintiff rescind the sale and recover the consideration paid?

(5) Estoppel.

(6) Other questions.

1. Under the provisions of the Foreign Corporation Act (2 Comp. Laws 1915, §§ 9063 et seq.), a foreign corporation is required to com-

ply with its provisions in order to "carry on its business in this state."

Under the provisions of the Commission Act (3 Comp. Laws 1915, §§ 11,945 et seq.), a foreign corporation, for the purposes of the act, is known as a "foreign investment company," and before selling, offering for sale, taking subscriptions for, or negotiating for, the sale in any manner of its stocks or securities in this state, such foreign corporation must secure permission from the Michigan Securities Commission. Compliance with the Corporation Act permits a foreign corporation to "carry on its business," the business for which it is organized in the state; compliance with the Commission Act permits it to sell its stock and other securities. One is not in any way dependent upon the other. One foreign corporation may desire to carry on its business in the state, but may not desire to sell stock; another may desire to sell stock, but may not desire to carry on its business in the state. If a foreign corporation desires to carry on its business and also sell its stock in the state, it is obvious that it must comply with both acts. It is equally obvious that if it desires to do but one of these things, it is required to comply only with the provisions of the appropriate act.

Corporation—foreign—doing business and selling stock—compliance with statute.

2. The record discloses that defendant Ioor was the owner of 100 shares of stock of the Illinois Piano Company. He sold twenty-seven of these shares to the plaintiff. He sold no other shares of stock of this company. Section 10 of the Commission Act (3 Comp. Laws 1915, § 11,954) defines the term "dealer," and so far as important here provides: "The term 'dealer' shall not include an owner not issuer of such securities so owned by him, when such sale is not made in the course of continued and successive transactions of a similar nature."

This provision was thought important by the framers of this act

to remove the question of unconstitutionality, and preserve the constitutional right of the individual to sell his own stock, but, by prohibiting "continued and successive transactions of a similar nature," prevented the abuse of that right and its exercise in a manner contrary to the spirit of the act.

—sale by owner
of shares of
stock—validity.

Mr. Ioor had the right to sell this stock to plaintiff.

He did not, by continued and successive transactions of a similar nature, become a dealer. He was acting within his constitutional rights, and by this sale to plaintiff did not violate the act. No liability can be predicated on this transaction.

3. The plan contemplated by these defendants provided for the organization of a corporation under the laws of Arizona to take over and hold the stock in the other companies, giving its own stock in varying proportions in exchange therefor. It was to be largely a holding corporation. Did the exchange of its stock for that of the other companies constitute a sale within the meaning of the Commission Act? This court has defined a sale as follows: "A sale is a parting with one's interest in a thing for a valuable consideration." *Western Massachusetts Ins. Co. v. Riker*, 10 Mich. 279. "But every transfer of property for an equivalent is practically and essentially a sale, and the deed of bargain and sale is almost universally used to convey land so transferred. Money's worth is a valuable consideration, as much as money itself." *Huff v. Hall*, 56 Mich. 456, 23 N. W. 88. *Bouvier* defines a sale as: "An agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price." 3 *Bouvier's Law Dict.* 2983.

This definition has been adopted by the legislature of this state in the Uniform Sales Act (Act 100, Public Acts 1913, Comp. Laws 1915, §§ 11,832 et seq.).

We must assume that the legislature had in mind this well-under-

stood meaning of the word "sale" when the Commission Act was passed. If the act is not so construed, as was suggested upon the argument, one may exchange worthless stock for government bonds and escape with impunity. We are impressed that when the Arizona Piano Company exchanged its stock —exchange of stock as sale. for that of other

companies it was a sale of its stock within the meaning of the Commission Act.

4. Section 14 of the Commission Act (3 Comp. Laws 1915, § 11,958) provides in part as follows: "It shall be unlawful for any investment company or dealer, or representative thereof, either directly or indirectly, to sell or cause to be sold, offer for sale, take subscriptions for, or negotiate for the sale in any manner whatever in this state, any stocks, bonds, or other securities (except as expressly exempted herein), unless and until said commission has approved thereof and issued its certificate in accordance with the provisions of this act."

Section 23 of the act (3 Comp. Laws 1915, § 11,967) provides: "Any person or persons who shall violate any of the provisions of this act shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not more than \$1,000, or shall be imprisoned in the county jail for not more than one year, or both such fine and imprisonment in the discretion of the court."

It is admitted that the Arizona Piano Company had not, at the time of this transaction, been authorized by the Michigan Securities Commission to sell its stock in Michigan. Under the provisions of the Commission Act it was a foreign investment company. It could not lawfully sell its stock without being authorized so to do by the commission. Under the evidence in the case it was selling its stock, not only to plaintiff, but also to many others. It was engaged in the business of disposing of its stock by continued and successive transactions. The

sale (and it was a sale, as we have seen) of its stock to plaintiff and others, was in violation of the act, and submitted all connected therewith as vendors to the penalties for its violation. The sale of stock without approval by a public board or commission was not bad at common law, is not *malum in se*, but by the terms of the act it is *malum prohibitum*. The act in question was passed under the police powers of the state (see *Merrick v. N. W. Halsey & Co.* 242 U. S. 568, 61 L. ed. 498, 37 Sup. Ct. Rep. 227), to prevent fraud in the sale of stocks, and to safeguard the public from exploitation at the hands of the promoter. It was passed to protect and for the benefit of the purchaser. It laid penalties upon the seller, not upon the buyer. As remarked by Lord Mansfield in *Browning v. Morris*, Cowp. pt. 2, p. 790, 98 Eng. Rep. 1364: "And it is very material that the statute itself, by the distinction it makes, has marked the criminal; for the penalties are all on one side."

And, as we have shown under 2, the sale by an owner of his own stock, except by continued and successive transactions, does not offend the act. The plaintiff therefore violated no law when he sold and transferred his own stock to the Arizona Piano Company, was not in *pari delicto*, and, as we shall presently see, he supposed defendants were proceeding in a regular and legal manner, and such acts as were done by him were done at the request of the defendants, or some of them.

This sale to plaintiff of the stock of the Arizona Piano Company was in conflict with the terms of a penal statute, *malum prohibitum*, and void, although not expressly declared so to be by the statute. *Loranger v. Jardine*, 56 Mich. 518, 23 N. W. 203; *Niagara Falls Brewing Co. v. Wall*, 98 Mich. 158, 57 N. W. 99; *Re Reidy*, 164 Mich. 167, 129 N. W. 196; *Ferle v. Lansing*, 189 Mich.

501, L.R.A.1917C, 1096, 155 N. W. 591; *Cashin v. Pliter*, 168 Mich. 386, 134 N. W. 482, Ann. Cas. 1913C, 697; *Maurer v. Grenning Nursery Co.* 199 Mich. 522, 165 N. W. 861, 168 N. W. 448.

Some of these cases are so recent and they so fully consider the authorities and the principles involved that we forego further discussion of the subject. When plaintiff's stock in the Arizona Piano Company, received on this void contract, was tendered back, he was entitled to the stocks he had assigned in payment therefor. The transaction had been rescinded, and upon its rescission he was entitled to be restored to what he had parted with. Failure to restore to him what he had parted with entitled him to its value.

5. After this suit was instituted the plaintiff executed a proxy to defendant Ioor for the annual meeting of the Arizona Piano Company. We discover nothing in this to estop plaintiff from pursuing this remedy. The stock upon the books

—purchase of stock from foreign corporation not authorized to sell.
Estoppel—purchase of stock of foreign corporation—executing proxy.

of the company stood in his name; he, through his attorney, had tendered it back to Mr. Ioor. By executing this proxy Mr. Ioor was permitted to vote this stock as he desired. A dividend partly in stock and partly in cash was paid after the suit was brought. Plaintiff's counsel offered that this might be offset against plaintiff's claim. There is no evidence in the case that any of the acts of plaintiff led defendants to take any steps or do any act in reliance thereon. Mr. Edward lived at Sault Ste. Marie, and the defendants were in Grand Rapids. It is quite doubtful upon this record if plaintiff personally fully understood the workings of these corporations until he came to Grand Rapids for the trial. He testified that he supposed that the transactions were all legal; that they were legally transacting the

Rescission—sale of stock without authority—in *pari delicto*.

business. The letters written him gave no hint otherwise. We discover no estoppel as matter of law.

6. As we have already stated, this case is brought to recover upon the rescission of a contract made, so far as defendants are concerned, in violation of the terms of a penal statute. It is in no

Action—form—to recover consideration paid for stock.

way analogous to a proceeding instituted by a stockholder for mismanagement of company affairs, which should be in equity. Plaintiff has sought the proper forum.

When the representative of plaintiff's counsel tendered back the stock of the Arizona Piano Company he demanded the amount of money invested in the original stocks. This plaintiff was not entitled to. Plaintiff was entitled to what he had paid on the void contract, which payment was made in stock. He was therefore entitled to the return of the stocks. But the contract was void, and no demand under the circumstances necessary. Defendant

Iloor, by the language attributed to him, plainly indicated that his refusal to accept the

Rescission—effect of mistake in form of demand.

tendered stock was in no way based on the form of the demand. Had defendants returned to plaintiff the stocks he was entitled to, his claim would have been satisfied and extinguished; not having done so, he is entitled to their value.

The defendants appeared by separate counsel, and upon the argument it was strenuously urged that there was no liability as to some of them. But the record discloses they were engaged in a common enterprise, in consummating a transaction in face of, and contrary to, the terms of a penal statute. Under such circumstances, we cannot say as matter of law that any of them should be exonerated from liability.

Joint debtors—participants in illegal transaction—exoneration of individual.

For the reasons stated, the judgment is reversed, and a new trial ordered. Plaintiff will recover his costs in this court.

ANNOTATION.

Blue Sky Laws.

Validity.

The type of legislation known generally as "Blue Sky Laws" has been adopted in several jurisdictions, and has received attention from the National Conference of Commissioners on Uniform State Laws. While the statutes thus far enacted differ widely in detail, the general theory of the legislation is to forbid the flotation of stocks or corporate securities until evidence of the soundness of the investment has been submitted to a public officer or board, and official permission to put the stock or securities on sale obtained.

The validity of such legislation was, at first, rather a mooted question. In two Federal cases Blue Sky Laws were held to be invalid as a taking of property without due process of law, and

as an attempt by state legislation to burden unwarrantably interstate commerce. *Alabama & N. O. Transp. Co. v. Doyle* (1914) 210 Fed. 173 (Michigan act); *William R. Compton Co. v. Allen* (1914) 216 Fed. 537 (Iowa act).

In *Standard Home Co. v. Davis* (1914) 217 Fed. 904, the Arkansas act was sustained, it being held that interstate commerce was not burdened, and that the act, so far as it was applicable to foreign corporations, was valid as an exercise of the power to regulate corporate acts. See to the same effect, *Ex parte Taylor* (1914) 68 Fla. 61, 66 So. 292, Ann. Cas. 1916A, 701, sustaining the Florida act.

In *Bracey v. Darst* (1914) 218 Fed. 482, the same principle was recognized, but the West Virginia act, being applicable to individuals as well as

corporations, was held to be unconstitutional.

All question as to the validity of legislation of this kind, however, so far as the provisions of the Federal Constitution are concerned, has been put at rest by three decisions of the United States Supreme Court,—*Hall v. Geiger-Jones Co.* (1917) 242 U. S. 539, 61 L. ed. 480, L.R.A.1917F, 514, 37 Sup. Ct. Rep. 217, Ann. Cas. 1917C, 643, reversing (1916) 230 Fed. 233 (Ohio act); *Caldwell v. Sioux Falls Stock Yards Co.* (1917) 242 U. S. 559, 61 L. ed. 493, 37 Sup. Ct. Rep. 224 (South Dakota act); *Merrick v. N. W. Halsey & Co.* (1917) 242 U. S. 568, 61 L. ed. 498, 37 Sup. Ct. Rep. 227, reversing (1915) 228 Fed. 805 (Michigan act).

In holding that such legislation is a reasonable exercise of the police power, the court said in *Merrick v. N. W. Halsey & Co.* (U. S.) supra: "We think the statute under review is within the power of the state. It burdens honest business, it is true, but burdens it only that, under its forms, dishonest business may not be done. This manifestly cannot be accomplished by mere declaration; there must be conditions imposed and provision made for their performance. Expense may thereby be caused and inconvenience, but to arrest the power of the state by such considerations would make it impotent to discharge its function. It costs something to be governed. But counsel say that the conditions imposed either are not adequate to such purpose, or transcend what is necessary for it. Indeed, it is asserted that the statute has not that purpose, 'but rather to prevent financial loss.' The assertion is against the declaration of the title of the statute and against the words of its body, and cannot be justified by assigning to it the purpose of the law which it amends; nor can we assent to the contention that such purpose must be inferred from § 8 or other provisions, which point, it is said, to the probability of financial loss, not fraud. The act must be considered from its declared purpose as a whole, not from detached portions which can

be easily overwhelmed when assigned a false character."

Answering the contention that interstate commerce was sought to be regulated by the act, the court in *Hall v. Geiger-Jones Co.* (U. S.) supra, said: "The provisions of the law, it will be observed, apply to dispositions of securities within the state, and, while information of those issued in other states and foreign countries is required to be filed (§§ 6373-9) they are only affected by the requirement of a license of one who deals in them within the state. Upon their transportation into the state there is no impediment,—no regulation of them or interference with them after they get there. There is the exaction only that he who disposes of them there shall be licensed to do so, and this only that they may not appear in false character and impose an appearance of a value which they may not possess,—and this certainly is only an indirect burden upon them as objects of interstate commerce, if they may be regarded as such. It is a police regulation strictly, not affecting them until there is an attempt to make disposition of them within the state. To give them more immunity than this is to give them more immunity than more tangible articles are given, they having no exemption from regulations the purpose of which is to prevent fraud or deception. Such regulations affect interstate commerce in them only incidentally."

In each of three other cases wherein it was sought to have the validity of a Blue Sky Law reviewed, the court refused to consider the question, holding in *National Mercantile Co. v. Keating* (1914) 218 Fed. 477, that it would not be passed on at the instance of a corporation seeking to carry out a plan of operations which was obviously fraudulent; in *National Mercantile Co. v. Watson* (1914) 215 Fed. 929, that it would not be passed on at the instance of a foreign corporation not entitled to do business in the state whose law it sought to attack; and in *McKinney v. Watson* (1914) 74 Or. 220, 145 Pac. 266, that a taxpayer had no right to raise the question, since

the license fees imposed by the act were adequate to meet the expense of its administration.

In *Albuquerque v. Ranger-Desdemona Oil Co.* (1920) — N. M. —, 194 Pac. 598, the court held to be invalid a city ordinance imposing a license tax on oil stock salesmen. The ordinance was, however, said to be a revenue, and not a police measure, and was deemed to be invalid because the amount of the tax was not proportioned to the volume of business transacted.

Interpretation and effect.

The Blue Sky Law was designed to regulate the sale of corporate securities, and its purpose is to protect investors, not to regulate the ordinary business of corporations, domestic or foreign, within the state. *Goodyear v. Meux* (1921) 143 Tenn. 287, 228 S. W. 57.

A corporation organized in another state which undertakes to establish a wholesale drug business in Tennessee is one of the kind whose business, and the sale of whose securities, the Blue Sky Law was designed to regulate. *Ibid.*

An owner of corporate stock selling his own shares is not ordinarily a "dealer" in corporate stocks within a Blue Sky Law. *Dows v. Schuh* (1919) 206 Mich. 133, 172 N. W. 418; *Dursum v. Benedict* (1920) 209 Mich. 115, 176 N. W. 459. However, repeated and continuous transactions may make it otherwise. See the reported case (*EDWARD v. IOOR*, ante, 256).

A person selling stock for a corporation is its agent, and the corporation is estopped to defend against his claim for commissions, on the ground that he is a "dealer," and has not complied with the Blue Sky Law. *De Hoop v. Peninsular L. Ins. Co.* (1916) 193 Mich. 380, 159 N. W. 500; *Lovering v. Duplex Power Car Co.* (1916) 204 Mich. 658, 171 N. W. 374.

A "sale" of shares within such a law includes an agreement to sell. *Rex v. Malcom* (1918) 13 Alberta L. R. 511, 42 D. L. R. 90, 2 West. Week. Rep. 1081, and likewise includes an exchange for other stock. See the reported case (*EDWARD v. IOOR*).

Shares of a common-law trust are within the operation of a Blue Sky Law in relation to stock of any corporation, company, or association. *PEOPLE v. CLUM* (reported herewith) ante, 253.

The secretary of a common-law trust does not, in disposing of its shares, act in a trust capacity within the exception in the Blue Sky Law. *PEOPLE v. CLUM*.

In reversing the revocation of a license to sell investment certificates issued under the Blue Sky Law of Minnesota, the court, in the case of *Re Investors' Syndicate* (1920) — Minn. —, 179 N. W. 1001, said: "The instalment certificate promises that, upon the making of specified payments in advance for ten years, the syndicate will pay the purchaser \$1,000. This is the amount of the payments made, with interest at 6 per cent compounded annually. There is a surrender value after two annual payments. The surrender value for each of the first five years is less than the instalments paid. From the sixth year on it exceeds the principal amounts paid. Experience shows that a large number of the certificate purchasers allow their certificates to lapse within a few years. This means a loss to them. It means a gain, measured by book values, to the syndicate. The objection of the commission is based upon the constant lapsing of the certificates. The commission licenses the sale of a ten-year single payment certificate producing the same interest return. The real objection to the instalment certificate comes from the fact that the purchaser may not carry out his contract, and therefore loses when he takes the surrender value. In short, to many of the investors the investment is an improvident one. This is not because of the fault of the syndicate. The commission says: 'No bad faith is imputed by the commission to the company or those in active management of its affairs. They are recognized as men of good repute and in good standing in the community in which they live. Furthermore, the company is in sound condition financially, and there would be no need, on

those grounds, to suspend the license.' The commission does not view the savings contracts as of such nature that the syndicate will be unable to perform them. If it performs them the purchaser will get what is promised. The investment contract is often an unprofitable one to the purchaser. It is so when he fails to make his payments. We do not inquire as to the limits of the right of the statute to supervise investment contracts of the general nature of the one before us. It is enough to say that the investment certificate does not work a fraud upon purchasers within the meaning of the statute."

In *United Grain Growers Case* [1918] 3 West. Week. Rep. (Can.) 92, the local government board of Saskatchewan refused to grant a certificate for the sale of debentures "secured by a floating charge upon all the assets of the company excepting uncalled capital stock." The reason given by the board was that a specific charge might be created against the assets which would take priority over the floating charge.

In *Home Lumber Co. v. Hopkins* (1920) 107 Kan. 153, 10 A.L.R. 879, 190 Pac. 601, it was held that the sale of securities by a foreign "business trust" was not a doing of business in the state, and that the trust was entitled to mandamus to compel the state charter board to examine into its solvency, and the fairness and equity of its plan of business, on an application made to the board for a permit under the Blue Sky Law.

In *State ex rel. Rossen v. Welch* (1919) — N. D. —, 172 N. W. 234, the court in holding certain securities to be "speculative" within the North Dakota act, said: "The statute expressly declares that the term 'speculative securities,' as used therein, shall be taken to mean all stock certificates, shares, bonds, debentures, certificates of participation, contracts, contracts or bonds for the sale and conveyance of land on deferred payments or instalment plan, or other instruments in this nature by whatsoever name known or called, into the par value of which the element of chance, speculative profit, or possible loss equal or

predominate over the elements of reasonable certainty, safety, and investment, or the value of which materially depends on proposed or promised future promotion or development, rather than on present tangible assets and conditions. The certificate which the relator sold for \$100 is to be issued in the future. It is to be issued by a corporation to be organized in the future. The mines from which coal is to be sold are to be developed in the future. It seems too clear for argument that the transaction falls squarely within the terms of the statute. The value of the certificate which the relator sold is manifestly dependent upon the future promotion and development of the mines. It also seems entirely clear that reasonable men would be entirely justified in finding that the element of chance, speculative profit or possible loss, equals or predominates over the elements of certainty, safety, and investment."

A subscription contract to the stock of a corporation within the Blue Sky Law is unenforceable where at the time it was taken the corporation was in default with reference to the statements exacted of it by that law, and the agents who sold the stock were not registered as required by the law, it being expressly provided that the statute shall be complied with before any attempt to sell stock or do any other business in the state is made, and that anyone undertaking to sell the securities of companies which have not complied with the statute, and that any such companies which undertake to do business in the state without compliance therewith, shall be guilty of a misdemeanor, punishable by penalties set out. *Goodyear v. Meux* (1921) 143 Tenn. 287, 228 S. W. 57.

One convicted under the Blue Sky Law cannot complain because the question whether he was a dealer within the act was treated by the court as one of fact, and submitted to the jury upon evidence connecting him with sales made in the course of continued and successive transactions of a similar nature. *PEOPLE v. CLUM* (reported herewith) ante, 253. W. A. S.

VALLEY SPRING HOG RANCH COMPANY, Appt.,

v.

FRED PLAGMANN et al., Respts.

Missouri Supreme Court (In Banc) — March 15, 1920.

(282 Mo. 1, 220 S. W. 1.)

Constitutional law — property rights — garbage monopoly.

1. No unconstitutional interference with private property rights is effected by forbidding collection of garbage by other than a licensed collector.

[See note on this question beginning on page 287.]

Garbage — necessity of license to collect.

2. One engaged only a small part of the time in collecting garbage for private use is within the operation of an ordinance making it unlawful for any person to engage in the business of collecting garbage within the municipality without a license.

Municipal corporation — charter authority — regulation of collection of garbage.

3. Broad charter grants of police power to municipal corporations, in its relation to public health and general welfare, authorize the forbidding of the collection of garbage by other than licensed persons.

[See 19 R. C. L. 23, 824, 971.]

Evidence — judicial knowledge — things generally known.

4. The court takes judicial notice of things scientific or otherwise which are generally known.

[See 15 R. C. L. 1057, 1127.]

Monopoly — exclusive grant of garbage collecting rights.

5. An ordinance is not void as creating a monopoly because it limits the collection of garbage to licensed contractors.

[See 19 R. C. L. 971.]

Municipal corporation — ordinance — reasonableness — garbage monopoly.

6. A municipal ordinance, limiting the right to collect garbage in the municipality to licensed contractors, is not void for unreasonableness.

[See 19 R. C. L. 960.]

APPEAL by plaintiff from a judgment of the Circuit Court for Barton County (Thurman, J.) in favor of defendants in an action brought to enjoin defendants from collecting garbage and from interfering in any manner with plaintiff's operation in connection with its rights. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. John J. Wolfe and Mercer Arnold, for appellant:

The disposition of garbage is not a taking within the constitutional provision forbidding such taking, but is a proper and salutary police regulation.

Atlantic City v. Abbott, 73 N. J. L. 281, 62 Atl. 999; Re Vandine, 6 Pick. 187, 17 Am. Dec. 351; State v. Payssan, 47 La. Ann. 1029, 49 Am. St. Rep. 390, 17 So. 481; Walker v. Jameson, 140 Ind. 603, 28 L.R.A. 679, 49 Am. St. Rep. 222, 37 N. E. 402, 39 N. E. 869; Louisville v. Wible, 84 Ky. 290, 1 S. W. 605; Re Zhizhuzza, 147 Cal. 328, 81 Pac. 955; Dupont v. District of Columbia, 20 App. D. C. 477; State v. Orr, 68 Conn. 101, 34 L.R.A. 279, 35 Atl.

770; Coombs v. MacDonald, 43 Neb. 682, 62 N. W. 41; State v. Robb, 100 Me. 180, 60 Atl. 874, 4 Ann. Cas. 275; Sanitary Reduction Works v. California Reduction Co. 94 Fed. 693, 61 C. C. A. 91, 126 Fed. 29, 199 U. S. 306, 50 L. ed. 204, 26 Sup. Ct. Rep. 100; Cumberland Grocery Co. v. Baugh, 151 Ky. 641, 43 L.R.A. (N.S.) 1037, 152 S. W. 565, Ann. Cas. 1915A, 130; Gardner v. Michigan, 199 U. S. 325, 50 L. ed. 212, 26 Sup. Ct. Rep. 106; Grand Rapids v. DeVries, 123 Mich. 570, 82 N. W. 269; Board of Health v. Vink, 184 Mich. 688, 151 N. W. 673; Dreyfus v. Boone, 88 Ark. 353, 114 S. W. 718; Rochester v. Gutberlett, 211 N. Y. 309, L.R.A. 1915D, 209, 105 N. E. 548, Ann.

Cas. 1915C, 483; *Smith v. Spokane*, 55 Wash. 219, 104 Pac. 249, 19 Ann. Cas. 1221; *Ex parte Howell*, 71 Tex. Crim. Rep. 71, 158 S. W. 533; *Ex parte London*, 73 Tex. Crim. Rep. 208, 163 S. W. 968; *Schultz v. State*, 112 Md. 211, 76 Atl. 592; *Devita v. Loprete*, 77 N. J. Eq. 533, 77 Atl. 536, Ann. Cas. 1912A, 362; *Nash v. District of Columbia*, 28 App. D. C. 598, 8 Ann. Cas. 815; *O'Neal v. Harrison*, 96 Kan. 339, L.R.A.1915F, 1069, 150 Pac. 551; *Kirkey v. Wichita*, 103 Kan. 761, 175 Pac. 974.

A municipality may, in the exercise of the police power, control the manner of collection and disposition of garbage, as it is obviously for the interest of the whole public that such offensive offal should be collected by persons under the immediate control of the municipal authorities.

Board of Health v. Vink, 184 Mich. 688, 151 N. W. 672; *State v. Robb*, 100 Me. 180, 60 Atl. 874, 4 Ann. Cas. 275; *Gardner v. Michigan*, 199 U. S. 325, 50 L. ed. 212, 26 Sup. Ct. Rep. 106; *Rochester v. Gutberlett*, 211 N. Y. 309, L.R.A.1915D, 209, 105 N. E. 548, Ann. Cas. 1915C, 483; *California Reduction Co. v. Sanitary Reduction Works*, 199 U. S. 306, 50 L. ed. 204, 26 Sup. Ct. Rep. 100; *Grand Rapids v. De Vries*, 123 Mich. 570, 82 N. W. 269; *Kirkey v. Wichita*, 103 Kan. 761, 175 Pac. 974.

Mr. H. S. Miller for respondents.

Graves, J., delivered the opinion of the court:

Plaintiff is the successor to the original garbage contractor of the city of Joplin, a city of the second class. The city passed an ordinance providing for the care, removal, and disposal of the garbage of the city, and further providing for making a contract by which it could give a person the exclusive right of collecting and disposing of the garbage of the city. Pursuant to such ordinance the city entered into a contract with one A. A. Wright (exclusive in terms) by which he was made the garbage man of the city. He complied with the terms of the ordinance, gave the required bond, and entered upon the discharge of his duties. Said Wright incorporated the plaintiff, and transferred his contract rights to it. The defendants are parties who have been gathering and hauling garbage from

the city, but with no contract or license so to do. The case was tried in Barton county, and the learned chancellor found the following facts, and stated the following conclusions of law:

"The court finds that the garbage ordinance read in evidence was duly passed and approved; that under the authority of this ordinance the plaintiff was given the exclusive authority to gather and remove garbage in the city of Joplin, a city of the second class, by contract duly entered into by the plaintiff with the city of Joplin, in the manner provided by said ordinance; that plaintiff executed a bond to the city for the faithful performance of the contract, as required by the ordinance, which was accepted and approved by the city, and entered upon the performance of its duties under the contract and ordinance, and expended a large amount of money in the preparation for and in the performance of its duties under the contract and ordinance, and was and is engaged in complying with the terms and conditions of same; that defendants were at the time of filing the bill, and are now, engaged in removing garbage in violation of the ordinance, as either agents or employees or owners of garbage, by agreements to purchase or to share the profits when fed to hogs; that garbage so removed by defendants is of some value for the purpose of feeding hogs and chickens, and not offensive or detrimental to health at the time removed by defendants, but liable to become so, unless promptly removed.

"The law is clear that injunction is the proper remedy, and that this ordinance and contract is not a monopoly, as understood by that term; and the only question left for determination is as to whether or not this ordinance is void as being violative of § 20 of article 2 of the Constitution of Missouri, which prohibits the taking of private property for private use, etc.

"The great weight of authority in the United States is that such tak-

ing of private property as a sanitary precaution is not violative of such constitutional inhibition. It is held by numerous authorities that such ordinances, under modern conditions, are a necessary precaution to prevent the spread of disease; that it is the only way the health of the inhabitants of a city can be protected from decaying matter and disease-producing germs; that the value of property interest in such property as garbage is so small that the sanitary precaution more than compensates for the property loss in such cases, and so strongly do these authorities, and the reason upon which they are based, appeal to me, that this court hesitates not to follow them; but, after much consideration, I am of the opinion the doctrine of the *River Rendering Co. v. Behr*, 77 Mo. 91, 46 Am. Rep. 6, is in conflict with the rule so stated and the modern authorities in the United States. While the decision in that case was rendered more than thirty-six years ago, when the necessity for proper sanitation was not as fully appreciated as in recent years, this court feels bound by it; and, following that case, as construed by this court, it feels bound to find against the plaintiff's contention; and the bill is dismissed and judgment against the plaintiff for costs.

"The importance of this question to all the cities the size of Joplin, and larger, is so important that this court begs pardon for exceeding jurisdiction to the extent of urging counsel to move the supreme court to advance this case, to the end that we may have an early decision in the light of present conditions and modern authorities."

From an adverse judgment the plaintiff appealed, and this court advanced the cause upon our docket. Additional facts, if required, may well be left to the opinion.

I. We have examined the evidence with the view of determining the correctness of the chancellor's findings of fact, as we are interested

more in these than in his conclusions of law. These findings are fully justified by the evidence, so that the case is one purely of the applicatory law to such facts. The court finds: (1) That the ordinance relied upon by plaintiff was duly enacted; (2) that plaintiff was, by contract, duly made the only party authorized to remove and dispose of the city garbage; (3) that plaintiff had gone to much expense in fitting up a hog ranch for the disposition of the garbage obtained under their contract; (4) that such garbage was of value to plaintiff for the purpose used; (5) that defendants and each of them were removing garbage in violation of the ordinance and to the detriment and damage of plaintiff under the contract; (6) that defendants were removing it as either agents or employees or owners of garbage; and (7) that such garbage would become offensive and detrimental to health "unless promptly removed." As to these facts, and applicatory law, we have raised several questions. Of these in order.

II. It is urged that defendants were not engaged in the business of handling garbage, and hence were not within the terms of the ordinance. It is true that these parties were not exclusively engaged in garbage hauling. Further it is true that but a small part of their time was devoted to the handling of garbage. In their brief it is suggested that they were only so

engaged for about one hour per day. This, we think, suffices to make their acts violative of the ordinance. By § 1 of the ordinance the citizen is prohibited from throwing garbage or household refuse into the streets or alleys or other public places of the city, and are required to put all such garbage in air-tight metallic receptacles. "Garbage" and "household refuse" are duly defined in this section. Then § 2 of the ordinance reads: "It shall be unlawful for any person, firm or corporation to engage in, pursue or carry on the business or

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license to
collect.

occupation of the collecting of garbage in the city of Joplin, Missouri, without first procuring a contract from the city of Joplin so to do, and the city of Joplin may, for the benefit of the public health, contract with a suitable person, firm or corporation, for the exclusive right to dispose of the garbage in the city of Joplin."

Section 3 provides for the garbage contractor's bond, § 4 for the times of the collection of the garbage and household refuse, and the manner of handling it, and §§ 5 and 6 read thus:

"Sec. 5. Manner of handling garbage.—Every cart or vehicle used to cart garbage and other household refuse in or about or along any street, alley, highway or thoroughfare of this city shall be fitted with a good substantial metal box thereon, the sides and ends of which shall not be less than 24 inches high, so that no portion of such garbage shall be scattered, thrown or dropped into such street, alley, highway, or thoroughfare; and all other carts and vehicles used in hauling such offensive matter shall have the box thereon closely covered with sufficient covering and so tightly fitted as to prevent the escape of any of the contents of effluvia therefrom.

"Sec. 6. Garbage required to be removed.—Every person required by § 1 of this ordinance to keep and use the receptacle therein provided for shall cause the contents to be removed therefrom as provided in § 4 of this ordinance: Provided that when there is a garbage collector who has a contract with the city of Joplin, then it shall be the duty of such collector to remove all garbage as provided in this ordinance."

Section 7 provides the penalty for violating any terms of the ordinance, and § 8 is the emergency clause, in which it is alleged that an emergency exists because of "the above ordinance being necessary for the preservation of the public health."

It will be seen that the ordinance not only empowers the city to make an exclusive contract for the disposal of the city garbage and household refuse, as provided for by § 2 thereof, but, by § 6, such garbage collector, having the city contract, is compelled to remove the garbage under terms of the ordinance. Not only so, but the character of the vehicle upon which it is to be removed is prescribed, showing the clear intent of the city legislative body. That intent was to have a city garbage collector, with properly fitted vehicles, in order that pestilence and disease might not follow the wake of the scavenger. Not only so, but that such collector should be under bond for the faithful performance of the work. The ordinance, after the making of the contract, does not contemplate the removal of garbage by other parties, and, if such other parties do remove it (whether they be owner or agent), they violate the ordinance. The ordinance is one in the exercise of the police power, which has for one of its purposes the protection of the public health. But of this later. For this point suffice it to say that the ordinance is broad enough to cover the acts of the defendants, and to make them violators of such ordinance. Its validity is the vital question.

III. The powers of a city of the second class are very broad. Vide Laws of 1913, pp. 420 et seq. This act is the charter of cities such as Joplin. Section 8 subds. 20 and 45, of the act relating to the public health and general welfare of such cities, are broad grants of the police power, in so far as the public health is concerned. The legislative spirit has kept abreast with scientific discoveries as to the cause for the spread of disease. The paramount idea is the protection of public health, and this charter of cities of the second class fully authorizes the passage of an ordi-

Municipal corporation—charter authority—regulation of collection of garbage.

nance such as we have before us in the instant case. We take judicial notice of things, scientific or otherwise, which are generally known. In these modern days the child in the public school is taught the lessons of hygiene gathered by the scientific investigators. In this country the knowledge of the school child is the knowledge of the public, as well as the knowledge of the legislator or jurist. The laws of hygiene are of common knowledge. That decomposing animal and vegetable matter is detrimental to public health is common knowledge. That such matter coming from the household, or hotel kitchen, will shortly decay and affect the public health, is a matter of common knowledge. That the common house fly will spread the death-dealing germs from such decomposing matter is a matter of common knowledge.

The ordinance in question seeks to protect the health of the city in that: (1) It compels the citizens to use air-tight metallic receptacles for garbage; (2) it prescribes safe instruments of conveyance for such garbage from these receptacles to the place of disposal; and (3) it places the collection of such garbage in the hands of a bonded person, who must use vehicles of conveyance as prescribed by the ordinance.

The whole scheme is one calculated to reduce to a minimum the spread of disease, and to have a strict supervision by the municipality. The air-tight can of garbage on the kitchen porch is safe from the inroads of the pestiferous fly. The vehicle for the conveyance of the garbage through the public thoroughfares of the city is required to have a metal box thereon for receipt of such garbage, and this box must be so constructed that neither particles of garbage nor the "effluvia therefrom" can escape. And last, but not least, a bonded agent of the city is required to handle and dispose of such garbage. To our mind the

ordinance is but the fair exercise of the police power lodged in cities of the class here involved. We take the contentions of defendants next.

IV. It is first suggested that the ordinance is void because it authorizes the city to make an exclusive contract for the removal and disposition of garbage. We are cited to no Missouri case as covering the proposition. It has, however, been passed upon elsewhere, with singular unanimity. Thus, in *State v. Robb*, 100 Me. loc. cit. 188, 60 Atl. 877, 4 Ann. Cas. 275, it is said:

"The respondent says that such an ordinance as this, even if it does not offend against express constitutional safeguards of property rights, is, under general common-law rules, void as creating a monopoly and as in restraint of trade. The question may be viewed in two aspects, so far as this respondent is concerned: First, as respecting the prohibition, which the ordinance in effect is, against the collection as vendee or agent of others of house offal, and the carrying of it through the streets of the city, that is, the prohibition of the business of scavenging house offal by anyone except the appointee of the sanitary committee; and, secondly, the prohibition against the owner's carrying through the streets the offal made by himself.

"1. Upon the first point by far the greater weight of authority supports the ordinance. In the *Slaughter-House Cases*, 16 Wall. 36, 21 L. ed. 394, it was held that the grant of an exclusive right or privilege in pursuance of the exercise of the police power of the state, in the promotion of health and comfort, was not only not forbidden by the 14th Amendment of the Constitution, but was clearly within the power of a state legislature, and was not a monopoly at common law. The prohibition of the common law against monopolies extended only to such franchises and agreements as tended to restrict trade, and had no application to mere police regulations in the interest of public health or

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morality. 20 Am. & Eng. Enc. Law, 851, and cases cited."

In the case of *Grand Rapids v. De Vries*, 123 Mich. loc. cit. 582, 82 N. W. 273, Long, J., said: "The gathering of garbage is not a trade, business, or occupation in any proper sense, and such employment does not come under the doctrine in reference to monopolies, or in reference to legislation in restraint of trade. It is a matter in which the public agencies are authorized to pursue the best means to protect the public health. The charter provisions recognize the fact that certain matter may be deleterious to public health, and dangerous to persons or property, and thus become a public nuisance, and the charter makes it the duty of the common council to declare any place, thing, or matter which may be deleterious to public health, or dangerous to persons or property, a public nuisance, and the council is given power to abate such nuisance. The ordinance treats garbage or offal as deleterious to public health, and directs the manner of its disposition for the benefit of the public health. It is one of the police regulations of the city for the benefit of the public health."

So, too, in *California Reduction Co. v. Sanitary Reduction Works*, 199 U. S. loc. cit. 317, 50 L. ed. 204, 26 Sup. Ct. Rep. 102, it is said: "The exclusive right granted to Sharon, his associates, and assigns, was certainly a privilege, and the board of supervisors had power to grant it in order to protect the public health. But, independently of the above statutes, the board had power, under the Constitution of the state, to make such sanitary regulations as were not inconsistent with the general laws, and that broad power carried with it the power, by contract and ordinance, to guard the public health in all reasonable ways. The defendants criticize the ordinances because they give the exclusive privileges in question for a period of fifty years. But whether the period during which

such privileges might be exercised should be long or short was a matter in the wise discretion of the board and determinable wholly upon grounds of public policy. It may be that grants by public authority of privileges to be exercised for the benefit or in behalf of the public ought never to be for long periods. But it suffices to say that no such consideration can control the action of the judiciary."

In *State v. Orr*, 68 Conn. loc. cit. 110, 34 L.R.A. 279, 35 Atl. 771, the court says: "Under these provisions, and the authority of the Special Act of 1895, the board of health might contract with a single person to collect and remove garbage from the entire city, or with several persons to collect and remove it from as many different portions of the city. It might also make such contracts with respect to part of the city or to certain buildings in part of the city, and leave the collection and removal of garbage from other places open to those who obtained from its clerk a proper permit, and provided proper means of transportation. By neither method of procedure would any monopoly be created by which the common rights of citizenship would be infringed upon. *Slaughter-House Cases*, 16 Wall. 36, 21 L. ed. 394; *Alpers v. San Francisco* [C. C.] 32 Fed. 503; *National Fertilizer Co. v. Lambert* [C. C.] 48 Fed. 458."

Other cases might be cited, but the foregoing, and the cases cited therein, will suffice. They all go to the one thought that the municipality is exercising its police power in the interest of the public, and is not establishing a business monopolistic in character. Whether the city has one or more agents commissioned for the purpose is wholly immaterial. The municipality may provide for one bonded agent or contractor, or it may provide for more. It is not in either event establishing a monopoly, because dealing solely in the exercise of the po-

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of garbage
collecting
rights.

lice power in the interest of public health, and is not undertaking to run, establish, or license a business of any kind.

The fact that this ordinance gives the city the right to make an exclusive contract for the collection and disposal of garbage does not render the ordinance bad.

V. It is next urged that the ordinance is destructive of property rights. It is true that there may be an ownership of garbage from the kitchen, but the value of the owner's rights therein is so inconsequential that they are absorbed and lost in the greater rights of the state to protect such owner and the public at large from the dire effects of improper methods in the handling and disposition of the same. Garbage, if allowed to accumulate and decompose, becomes a public nuisance, and the court's finding in this case so shows. But a short time is required to convert the harmless table scrap into a pestilence-breeding nuisance, when it is intermingled with other refuse from the kitchen.

The answer of defendants in this case invokes article 2, §§ 20, 21, and 30, of the Missouri Constitution. The first relates to the taking of private property for private use. No such question is involved in this case. Here the city, through its authorized agent, is protecting its citizenship from a continuing public nuisance detrimental to the public health. The city would even have the power to compel the citizen to dispose of his garbage at his own

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expense, in order to avoid and abate the nuisance. But all these constitutional questions are well answered in *State v. Robb*, 100 Me. loc. cit. 185, 60 Atl. 876, 4 Ann. Cas. 275, wherein it is said:

"The constitutional guaranties that no person shall be deprived of life, liberty, or property without due process of law, and that no state shall deny to any person within its jurisdiction the equal protection of the laws, were not intended to limit

the subjects upon which the police power of a state may lawfully be exerted. *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 26, 32 L. ed. 585, 9 Sup. Ct. Rep. 207; *Jones v. Brim*, 165 U. S. 180, 41 L. ed. 677, 17 Sup. Ct. Rep. 282, 1 Am. Neg. Rep. 547. In *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357, the court used this language: 'But neither the Amendment [14th],—broad as it is,—nor any other amendment, was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people.' See *Slaughter-House Cases*, supra. Proper police regulations, 'though they may disturb the enjoyment of individual rights, are not unconstitutional, though no provision is made for compensation for such disturbances. They do not appropriate private property for public use, but simply regulate its use and enjoyment by the owner. If he suffers injury, it is either *damnum absque injuria*, or, in the theory of the law, he is compensated for it by sharing in the general benefits which the regulations are intended and calculated to secure. The citizen owns his property absolutely, it is true; it cannot be taken from him for any private use whatever, without his consent, nor for any public use without compensation; still he owns it subject to this restriction, namely, that it must be so used as not to injure others, and that the sovereign authority may, by police regulations, so direct the use of it that it shall not prove pernicious to his neighbors, or the citizens generally.' 1 Dill. Mun. Corp. § 141. To the same effect are the decisions of this court in *Wadleigh v. Gilman*, 12 Me. 403, 28 Am. Dec. 188, and *Boston & M. R. Co. v. York County*, 79 Me. 386, 10 Atl. 113, in the latter of which cases this whole question is fully discussed. See also *Preston v. Drew*, 33 Me. 558, 54 Am. Dec. 639; *State v. Gurney*, 37 Me. 156, 58 Am. Dec. 782. Injurious

property may be seized and confiscated. *Fisher v. McGirr*, 1 Gray, 1, 61 Am. Dec. 381; *Train v. Boston Disinfecting Co.* 144 Mass. 523, 59 Am. Rep. 113, 11 N. E. 929.

"The preservation of the health of the inhabitants is one of the most important purposes of municipal governments; so important that in England reasonable by-laws in relation thereto have always been sustained as within the incidental authority of municipal corporations to ordain. 1 Dill. Mun. Corp. § 369. And reasonable regulations for the purpose of promoting the health of the citizens are clearly within the police power of the state. Such is the law everywhere. See 1 Dill. Mun. Corp. §§ 144, 369; cases cited in 22 Am. & Eng. Enc. Law, 922; *Cooley*, Const. Lim. 244. It may therefore be regarded as settled that reasonable municipal health regulations, under the authority of the state, are not void as taking private property without due process of law, or as a taking of private property without just compensation."

To like effect is *California Reduction Co. v. Sanitary Reduction Works*, 199 U. S. loc. cit. 323, 50 L. ed. 211, 26 Sup. Ct. Rep. 105:

"Be all this as it may, the cremation and destruction of garbage and house refuse, under the authority of the municipal authorities, proceeding upon reasonable grounds, and at a place designated by law, as a means for the protection of the public health, cannot be properly regarded, within the meaning of the Constitution, as a taking of private property for public use without compensation, simply because such garbage and house refuse may have had, at the time of its destruction, some element of value for certain purposes. With the knowledge of the householder the scavenger receives the garbage and refuse matter, that which, if separated, might have value, being mingled with that which is, in itself, noxious and worthless. The entire mass goes into the same covered wagon, and the authorities are not bound, before its destruction

at the crematory, to cause the good to be separated from the bad, but could require, as the ordinances in question did, that the substances be promptly conveyed to the designated crematory and destroyed by fire. Such a disposition of the contents cannot be regarded as a taking of private property for public use without compensation.

"This court has said that 'the possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order, and morals of the community. Even liberty itself, the greatest of all rights, is not an unrestricted license to act according to one's own will.' *Crowley v. Christensen*, 137 U. S. 86, 89, 34 L. ed. 620, 621, 11 Sup. Ct. Rep. 13, 15. In *Mugler v. Kansas*, 123 U. S. 623, 669, 31 L. ed. 205, 213, 8 Sup. Ct. Rep. 273, it appeared that certain distillery property in Kansas was purchased at a time when it was lawful in that state to manufacture and sell spirituous liquors, but which property, by reason of the subsequent prohibition of such manufacture and sale, had become of no value, or had materially diminished in value. The owner insisted that by the necessary operation of the prohibitory statute his property was, in whole or in part, taken for public use without compensation. But this court said: 'The power which the states have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not—and, consistently with the existence and safety of organized society, cannot be—burdened with the condition that the state must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community. The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use

in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law. In the one case a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner.' In Sedgwick's Treatise on Statutory & Constitutional Law the author says that "the clause prohibiting the taking of private property without compensation is not intended as a limitation of those police powers which are necessary to the tranquillity of any well-ordered community, nor of that general power over private property which is necessary for the orderly exercise of all governments. It has always been held that the legislature may make police regulations, although they may interfere with the full enjoyment of private property, and though no compensation is made." Pages 434, 435.

"Without further discussion, we hold, for the reasons stated, that the circuit court and circuit court of appeals properly refused to adjudge that these ordinances were invalid."

The Robb Case, *supra*, reviews a long line of cases covering both of the vital questions in this case, and where that case is unofficially reported, in 4 Ann. Cas. 275, will be found a case note giving further citations.

Of course, every ordinance in the exercise of the police power must

**Municipal
corporation—
ordinance—
reasonableness
—garbage
monopoly.**

be reasonable, but, as shown above, there is nothing in this Joplin ordinance which is unreasonable. The city had the right to contract with either one or more than one person to collect and dispose of its garbage. Nor is the value of garbage such as precludes the exercise of the police power for its destruction or otherwise disposal.

We are, however, cited to the case of *River Rendering Co. v. Behr*, 77 Mo. 91, 46 Am. Rep. 6. This case reached this court by appeal from the St. Louis court of appeals, and the opinion of that court is found in

7 Mo. App. 345. Many of the courts draw a distinction between garbage (which is concededly of small value even during the time between its creation and the time of its decay or decomposition) and dead animals, which for certain purposes have some substantial value. In some cases it is held that a reasonable time (short time) should be given the owner to get what value there was in the carcass. We might distinguish the instant case from the *Behr* Case, *supra*, on the theory of there being substantial value to the carcass, but we deem that case out of harmony with the great weight of authority. The opinion of the court of appeals is more in line with modern authority on the subject.

The ever-present house fly and other flies will reach the carcasses of dead animals as quickly as they reach the open garbage can. Germs of disease may be thus spread in thickly populated communities. Even the additional value of carcasses should not curb the police power in regulating their removal and disposition.

This case, in my judgment, should be overruled, to the end that we may get in line with the great trend of modern authority.

The right of plaintiff to an injunction is not otherwise questioned in the brief of respondents. The judgment nisi should be reversed, and the cause remanded, with directions to grant to plaintiff the injunction prayed.

It is so ordered.

All concur.

Petition for rehearing denied April 1, 1920.

NOTE.

The validity of statutory or municipal regulations as to garbage is the subject of the annotation following. *PANTLIND v. GRAND RAPIDS*, post, 287. Statutory or municipal regulation of ashes, or removal of ashes or other rubbish, is treated in the annotation to *Baltimore v. Hampton Court Co.* post, 309.

JOSEPH WHEELER
v.
CITY OF BOSTON et al.

JAMES F. KIMBALL
v.
WILLIAM C. WOODWARD, Health Commissioner, et al.

Massachusetts Supreme Judicial Court — June 25, 1919.

(233 Mass. 275, 123 N. E. 684.)

Constitutional law — garbage monopoly — property rights.

1. Forbidding the transportation of garbage through the streets of a municipality by other than a duly appointed contractor does not unconstitutionally interfere with property rights.

[See note on this question beginning on page 287.]

Municipal corporation — ordinance — reasonableness — garbage monopoly. the city streets by other than a duly appointed garbage contractor is not void for unreasonableness.

2. A municipal ordinance forbidding the transportation of garbage through

[See 19 R. C. L. 960.]

REPORT by the Supreme Judicial Court for Suffolk County (Braley, J.) for determination by the full court of consolidated petitions filed for writs of mandamus to compel the granting and approving of permits to petitioners to convey garbage through the streets of Boston. *Petitions dismissed.*

The facts are stated in the opinion of the court.

Messrs. C. P. Sampson and Clarence F. Eldredge, for petitioners:

The power to enact ordinances is limited to such as are reasonable, and an ordinance and its application, to be valid, must be reasonable.

Com. v. Wilkins, 121 Mass. 356.

The court is to determine whether an ordinance is reasonable.

Com. v. Worcester, 3 Pick. 462; Com. v. Robertson, 5 Cush. 438.

The test of reasonableness is the true test.

Watuppa Reservoir Co. v. McKenzie, 132 Mass. 71; Bent v. Emery, 173 Mass. 495, 53 N. E. 910; Belmont v. New England Brick Co. 190 Mass. 442, 77 N. E. 504; Durgin v. Minot, 203 Mass. 26, 24 L.R.A. (N.S.) 241, 133 Am. St. Rep. 276, 89 N. E. 144; State v. Speyer, 67 Vt. 502, 29 L.R.A. 573, 48 Am. St. Rep. 832, 32 Atl. 476.

The regulation at bar destroyed equality before the law and created special privilege.

Opinion of Justices, 211 Mass. 618, 96 N. E. 337; Com. v. Libbey, 216

Mass. 358, 49 L.R.A. (N.S.) 879, 103 N. E. 923, Ann. Cas. 1915B, 659; Bogni v. Perotti, 224 Mass. 157, L.R.A. 1916F, 831, 112 N. E. 853; Dobbins v. Los Angeles, 195 U. S. 223, 49 L. ed. 169, 25 Sup. Ct. Rep. 18; Re Jacobs, 98 N. Y. 110, 50 Am. Rep. 636.

The courts do not surrender their control as to the necessity or appropriateness of a health measure, and the restraint on the use of property must not be disproportionate to the danger to the public health.

Freund, Pol. Power, §§ 144, 150; Toledo, W. & W. R. Co. v. Jacksonville, 67 Ill. 37, 16 Am. Rep. 611.

If the real purposes of the regulation are other than police measures, which, to be valid, must be reasonable, and not invade property rights under the guise of police regulations for the protection of public health, the courts will interfere.

Durgin v. Minot, 203 Mass. 26, 24 L.R.A. (N.S.) 241, 133 Am. St. Rep. 276, 89 N. E. 144; Com. v. Maletsky, 203 Mass. 241, 24 L.R.A. (N.S.) 1168, 89

N. E. 245; *Com. v. Drew*, 208 Mass. 493, 33 L.R.A.(N.S.) 401, 94 N. E. 682; *Burke v. Board of Health*, 219 Mass. 221, 106 N. E. 976.

The regulation of the board of health is open to the fundamental objection of needlessly creating monopoly.

Smith v. Texas, 233 U. S. 630, 58 L. ed. 1129, L.R.A.1915D, 677, 34 Sup. Ct. Rep. 681, Ann. Cas. 1915D, 420; *Landberg v. Chicago*, 237 Ill. 112, 21 L.R.A.(N.S.) 830, 127 Am. St. Rep. 319, 86 N. E. 638; *Grand Rapids v. DeVries*, 123 Mich. 570, 82 N. W. 269; *People v. Gordon*, 81 Mich. 306, 21 Am. St. Rep. 524, 45 N. W. 658; *State v. Orr*, 68 Conn. 110, 34 L.R.A. 279, 35 Atl. 770; *Re Lowe*, 54 Kan. 765, 27 L.R.A. 545, 39 Pac. 710; *Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 756, 23 L. ed. 590, 4 Sup. Ct. Rep. 652.

Mr. Joseph P. Lyons, for respondents Sullivan et al.:

The city, by its respective agencies, had the right to regulate and restrict, for the benefit of the health of its citizens, the collection and disposal of swill and garbage.

Re Vandine, 6 Pick. 187, 17 Am. Dec. 351; *Haley v. Boston*, 191 Mass. 291, 5 L.R.A.(N.S.) 1005, 77 N. E. 888; *State v. Orr*, 68 Conn. 101, 34 L.R.A. 279, 35 Atl. 770; *Walker v. Jameson*, 140 Ind. 591, 28 L.R.A. 679, 49 Am. St. Rep. 222, 37 N. E. 402, 39 N. E. 869; *Kilvington v. Superior*, 83 Wis. 222, 18 L.R.A. 45, 53 N. W. 487; *Louisville v. Wible*, 84 Ky. 290, 1 S. W. 605; *Rochester v. Gutberlett*, 211 N. Y. 309, L.R.A.1915D, 209, 105 N. E. 548, Ann. Cas. 1915C, 483; *Atlantic City v. Abbott*, 73 N. J. L. 281, 62 Atl. 999; *Grand Rapids v. De Vries*, 123 Mich. 582, 82 N. W. 269; *River Rendering Co. v. Behr*, 7 Mo. App. 356; *State v. Payssan*, 47 La. Ann. 1029, 49 Am. St. Rep. 390, 17 So. 481; *Smiley v. McDonald*, 42 Neb. 5, 27 L.R.A. 540, 47 Am. St. Rep. 684, 60 N. W. 355; *O'Neal v. Harrison*, 96 Kan. 339, L.R.A.1915F, 1069, 150 Pac. 551; *Ex parte Howell*, 71 Tex. Crim. Rep. 71, 158 S. W. 535; *Schultz v. State*, 112 Md. 211, 76 Atl. 592; *Smith v. Spokane*, 55 Wash. 219, 140 Pac. 241, 19 Ann. Cas. 1220.

Mr. John A. Sullivan, for respondent company:

If any of the modes of disposal of garbage are selected to the detriment of the householder or his vendee, involving loss of property or profits to either, that fact does not render the

act of the public authorities invalid, or give the injured parties a right to relief from the courts.

Slaughter-House Cases, 16 Wall. 36, 21 L. ed. 394; *California Reduction Co. v. Sanitary Reduction Works*, 199 U. S. 306, 50 L. ed. 204, 26 Sup. Ct. Rep. 100; *Gardner v. Michigan*, 199 U. S. 325, 50 L. ed. 212, 26 Sup. Ct. Rep. 106; *Dupont v. District of Columbia*, 20 App. D. C. 477; *Clarke v. Fall River*, 219 Mass. 580, 107 N. E. 419; *Re Vandine*, 6 Pick. 187, 17 Am. Dec. 351; *State v. Orr*, 68 Conn. 101, 34 L.R.A. 279, 35 Atl. 770; *Walker v. Jameson*, 140 Ind. 591, 28 L.R.A. 679, 49 Am. St. Rep. 222, 37 N. E. 402, 39 N. E. 869; *Kilvington v. Superior*, 83 Wis. 222, 18 L.R.A. 45, 53 N. W. 487; *Louisville v. Wible*, 84 Ky. 290, 1 S. W. 605; *Rochester v. Gutberlett*, 211 N. Y. 309, L.R.A.1915D, 209, 105 N. E. 548, Ann. Cas. 1915C, 483; *Atlantic City v. Abbott*, 73 N. J. L. 281, 62 Atl. 999; *Grand Rapids v. DeVries*, 123 Mich. 582, 82 N. W. 269; *River Rendering Co. v. Behr*, 7 Mo. App. 356; *State v. Payssan*, 47 La. Ann. 1029, 49 Am. St. Rep. 390, 17 So. 481; *Smiley v. McDonald*, 42 Neb. 5, 27 L.R.A. 540, 47 Am. St. Rep. 684, 60 N. W. 355; *O'Neal v. Harrison*, 96 Kan. 339, L.R.A.1915F, 1069, 150 Pac. 551; *Re Lowe*, 54 Kan. 757, 27 L.R.A. 545, 39 Pac. 710; *Ex parte Howell*, 71 Tex. Crim. Rep. 71, 158 S. W. 535; *Schultz v. State*, 112 Md. 211, 76 Atl. 592; *Smith v. Spokane*, 55 Wash. 219, 104 Pac. 249, 19 Ann. Cas. 1220.

The subject-matter of the regulation was clearly within the jurisdiction of the board of health; and, in the absence of proof to the contrary, it must be assumed that the regulation was made in good faith, in the discharge of the duties of the members of the board, acting as public officers.

Kineen v. Board of Health, 214 Mass. 587, 102 N. E. 352; *Re Vandine*, 6 Pick. 187, 17 Am. Dec. 351; *Com. v. Patch*, 97 Mass. 221.

Rugg, Ch. J., delivered the opinion of the court:

These are petitions for writs of mandamus. They are brought to compel the appropriate public officers of the city of Boston to grant and approve permits to the petitioners, who are farmers doing business in neighboring towns, to convey garbage through the streets of Boston on its way to their farms, there to be fed to swine. The

pertinent facts are, that the petitioners have for the collection and transportation of garbage modern and sanitary appliances, which are kept clean and wholesome, and that they have been accustomed for several years to do this work in a careful and entirely satisfactory manner without offense to the senses or harm to the health of the community. They have made mutually advantageous arrangements for the collection of their garbage with the proprietors of certain large hotels and restaurants in Boston, who desire to have the petitioners continue to do this work. The petitioners have been granted permits from the municipal officers of Boston for several years. Their methods in the use of the permits have always been approved by the health authorities. In 1912 the city of Boston made a contract with the Boston Development & Sanitary Company, one of the defendants, wherein it agreed to collect garbage from the part of Boston wherein are located hotels and restaurants from which the petitioners have been collecting garbage, and to deliver it to that company at designated stations. This contract is still in force. In 1914 the city of Boston made a contract with the same company for the collection of hotel and restaurant garbage within the same area. That company has a reduction plant at Spectacle island in Boston harbor, and declines to permit the petitioners to collect garbage under its patronage.

By Rev. Laws, chap. 25, § 14, a city may make contracts "for the disposal of its garbage." Rev. Laws, chap. 26, § 2; *Clarke v. Fall River*, 219 Mass. 580, 583, 107 N. E. 419.

It is provided by the Revised Ordinances of Boston of 1914, chap. 40, § 14, that "no person other than employees of the city . . . shall in any street carry . . . house offal or other refuse matter . . . except in accordance with a permit from the commissioner of public

works approved by the board of health."

In 1914 the board of health of Boston passed this regulation: "At a meeting of the board of health held this day, it was voted to adopt the following regulations: Whereas, kitchen swill and garbage in the city of Boston are a source of filth and are capable of containing and of conveying contagion and of creating sickness, thereby endangering the public health and safety; and, whereas, in the opinion of the board, municipal collection and removal of the entire mass of kitchen swill and garbage in the city of Boston is necessary to preserve the public health and safety: Ordered, that no person, firm or corporation, other than the city of Boston or the city contractors or their agents, shall carry, convey or transport through the alleys, streets or public places of the city of Boston any kitchen swill or garbage consisting of any refuse accumulation of meat, fish, fowl, fruit or vegetable matter."

This regulation was adopted for the reasons therein set forth as a health measure, because of the difficulty experienced in placing responsibility for nuisances created by failure of persons theretofore holding permits, other than the petitioners, to collect garbage regularly and in a sanitary manner, but who were irregular, slovenly, and offensive in their methods. After the passage of this regulation the commissioner of public works refused to issue permits to the petitioners, not because they did not or were not able to comply with all proper rules respecting the collection of garbage, and not because of any complaint against their methods, but because he refused longer to issue any permits to any such persons. The board of health refuses to act in behalf of the petitioners. No permits to transport garbage through the streets of Boston have been granted since the adoption of the regulation by the board of health.

The situation, as summarized by the auditor, is this: "There is little controversy as to the facts. The city, having the responsibility of removing or causing to be removed offal and garbage that may be a menace to the public health, has adopted a system both of removal and disposal employing as its agencies its own employees, its contractors, and the Boston Development & Sanitary Company, and as its agent for disposal it has adopted the Boston Development & Sanitary Company, under a contract. In order to carry out and make effective its policy, it has undertaken to refuse permission to anybody except one of its own agencies to transport garbage through the streets. The Boston Development & Sanitary Company has erected a large reduction plant on Spectacle island, and furnished scows for the transportation of garbage from the water-front stations to the island. At the island it treats all the garbage by a 'reduction' process, and extracts from it grease, oil, and other products of commercial value. The garbage is therefore of value to it."

There is nothing in the record which requires the inference that there is any bad faith in any of the conduct of the city officers. The natural import of all the facts is that the regulation has been passed and enforced in an honest effort to conserve the public health and promote the general welfare.

The petitioners denounce the action of the commissioner of public works and of the board of health in refusing to grant them permits as unreasonable, and the enforcement of the regulation of the board of health as an unauthorized exercise of the police power.

The regulation of the board of health was passed under the authority conferred by Rev. Laws, chap. 75, § 65, which requires that the board of health "shall examine into all nuisances, sources of filth and causes of sickness within its own town, . . . which may in its opin-

ion be injurious to the public health, . . . and shall make regulations for the public health and safety relative thereto and relative to articles which are capable of containing or conveying infection or contagion or of creating sickness which are brought into or conveyed from its town."

This section has been treated as applying to the board of health of Boston. *Train v. Boston Disinfecting Co.* 144 Mass. 523, 59 Am. Rep. 113, 11 N. E. 929; *Com. v. Drew*, 208 Mass. 493, 33 L.R.A. (N.S.) 401, 94 N. E. 682. See *Lynn v. Essex County*, 153 Mass. 40, 26 N. E. 409.

It was held in *Re Vandine*, 6 Pick. 187, 17 Am. Dec. 351, that a by-law forbidding the removal of house dirt and offal from Boston, except by those duly licensed, was a valid exercise of the police power in the interest of the public health. Much the same arguments there were considered and disposed of as have been urged by the present petitioners. That case goes far toward the decision of the case at bar. To the same effect is *Schultz v. State*, 112 Md. 211, 76 Atl. 592. The precise question here presented has never arisen in this commonwealth. It has been decided, however, in numerous other jurisdictions. An exactly similar case in principle, and one remarkably like it in all its salient facts, is *Gardner v. Michigan*, 199 U. S. 325, 331, 50 L. ed. 212, 216, 26 Sup. Ct. Rep. 106, 108. It there was said: "The court may well take judicial notice that table refuse, when dumped into receptacles kept for that purpose, will speedily ferment and emit noisome odors, calculated to affect the public health. . . . The defendant insists that it is part of the common knowledge of the country that the refuse from kitchens, tables, hotels, and restaurants is valuable as food for swine, and is property within the meaning of the constitutional provision which forbids the taking by any state of private property for

public use without compensation. Of course, all know that such a use of refuse is not uncommon in some localities. . . . Looking at the matter in a practical light, we are unable to say that the means devised by the city council, and indicated by its action, were plainly unreasonable or unnecessary, or did not have a real, substantial relation to the protection of the public."

It has been found by the auditor that title to the garbage vested in the petitioners. So far as concerns the property rights of the petitioners in the garbage after they had taken it from the hotel and restaurant keepers, it may be disposed of by what was said in the same opinion (199 U. S. at page 333): "If it be said that the city might have adequately guarded the public health and at the same time saved the property rights of its owner, on whose premises garbage and refuse were found, the answer is that the city evidently thought otherwise, and we cannot confidently say that its constituted authorities went beyond the necessities of the case and exceeded their proper functions when they passed the ordinance in question."

This decision was rested in part upon *California Reduction Co. v. Sanitary Reduction Works*, 199 U. S. 306, at page 322, 50 L. ed. 204, 211, 26 Sup. Ct. Rep. 100, 105, where it was said respecting the rights of the collector of garbage: "Still less has the licensed scavenger a right to complain; for his right to convey garbage and refuse through the public streets, in covered wagons, was derived from the public, and he was subject to such regulations as the constituted authorities, in their exercise of the police power, might adopt."

The exact point here presented was decided in *Rochester v. Gutberlett*, 211 N. Y. 309, L.R.A.1915D, 209, 105 N. E. 548, Ann. Cas. 1915C, 483, after a full discussion, in favor of the validity of the ordinance. The underlying principle upon which

were decided the *Slaughter-House Cases*, 16 Wall. 36, 21 L. ed. 394, supports the validity of the present regulation. Other decisions upon facts almost identical with those at bar, and which uphold the reasonableness of the regulation, are *Dupont v. District of Columbia*, 20 App. D. C. 477; *State v. Orr*, 68 Conn. 101, 110, 34 L.R.A. 279, 35 Atl. 770; *Walker v. Jameson*, 140 Ind. 591, 28 L.R.A. 679, 683, 49 Am. St. Rep. 222, 37 N. E. 402, 39 N. E. 869; *Atlantic City v. Abbott*, 73 N. J. L. 281, 62 Atl. 999; *Grand Rapids v. De Vries*, 123 Mich. 570, 82 N. W. 269; *O'Neal v. Harrison*, 96 Kan. 339, L.R.A.1915F, 1609, 150 Pac. 551; *Smiley v. MacDonald*, 42 Neb. 5, 27 L.R.A. 540, 47 Am. St. Rep. 684, 60 N. W. 355; *Smith v. Spokane*, 55 Wash. 219, 104 Pac. 249, 19 Ann. Cas. 1220; *Ex parte Howell*, 71 Tex. Crim. Rep. 71, 158 S. W. 535. So far as we are aware, there are no contrary decisions. These decisions rest in general upon the idea that garbage is widely regarded as an actual and potential source of disease or detriment to the public health, and that therefore it is within the well-recognized limits of the police power, for the municipality, acting for the common good of all, either to take over itself or to confine to a single person or corporation the collection, transportation through the streets, and final disposition of a commodity which so easily may become a nuisance. Private interests must yield to that which is established for the general benefit of all. *Com. v. Alger*, 7 Cush. 53; *Com. v. Wheeler*, 205 Mass. 384, 137 Am. St. Rep. 456, 91 N. E. 415, 18 Ann. Cas. 319; *Com. v. Titcomb*, 229 Mass. 18, 118 N. E. 328. Of course, police regulations must be reasonable, both as to the ends sought and the means employed. But, in view of this great weight of authority in support of the validity of the regulation here assailed, it does not seem necessary to dis-

Constitutional
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monopoly—
property rights.

cuss the matter further, or to review and distinguish cases where

Municipal corporation—ordinance—reasonableness—garbage monopoly.

the exercise of police power as to other objects has been held to transcend constitutional limitations. Let the entry in each case be:

Petition dismissed.

NOTE.

The validity of statutory or municipal regulation as to garbage is discussed in the annotation following *PANTLIND v. GRAND RAPIDS*, post, 287. Statutory or municipal regulation of the removal of ashes or other rubbish is the subject of the annotation following *Baltimore v. Hampton Court Co.* post, 309.

J. BOYD PANTLIND et al.,

v.

CITY OF GRAND RAPIDS, Appt.

Michigan Supreme Court—April 10, 1920.

(210 Mich. 18, 177 N. W. 302.)

Constitutional law — forbidding transportation of garbage — deprivation of property.

1. Forbidding a person to convey through the streets of a city refuse from his kitchen and tables, for use upon his own property elsewhere, does not unconstitutionally deprive him of any property without compensation or due process of law.

[See note on this question beginning on page 287.]

Nuisance — refuse from hotel.

2. A municipal corporation in the exercise of its police power has a right to treat as a nuisance all refuse from the preparation of food in an

hotel or restaurant and the scrapings from the plates in such institutions.

[See 19 R. C. L. 824; 20 R. C. L. 424.]

APPEAL by defendant from a decree of the Superior Court of Grand Rapids, in Chancery (Dunham, J.), in favor of plaintiffs in a suit brought to enjoin defendant from interfering with him in the conveyance of garbage through its streets, and from violating the garbage ordinance. *Reversed.*

The facts are stated in the opinion of the court.

Mr. Charles A. Watt for appellant. Messrs. Swarthout & Master and Frank I. Blake, for appellees:

The garbage collection cases and cases that affirm the power of the city to let a monopolistic contract for garbage collection and disposal, and cases that establish the right of the city to clean up a nuisance on private property, are not controlling.

California Reduction Co. v. Sanitary Reduction Works, 199 U. S. 306, 50 L. ed. 204, 26 Sup. Ct. Rep. 100; *People v. Gardner*, 136 Mich. 698, 100 N. W. 126, 143 Mich. 104, 106 N. W.

541; *Gardner v. Michigan*, 199 U. S. 325, 50 L. ed. 212, 26 Sup. Ct. Rep. 106; *Dupont v. District of Columbia*, 20 App. D. C. 477; *People v. Gordon*, 81 Mich. 306, 21 Am. St. Rep. 524, 45 N. W. 658; *Grand Rapids v. De Vries*, 123 Mich. 570, 82 N. W. 269; *River Rendering Co. v. Behr*, 7 Mo. App. 345, reversed in 77 Mo. 91, 46 Am. Rep. 6; *Board of Health v. Vink*, 184 Mich. 688, 151 N. W. 672.

The present case is governed in principle by the *Dead Animal Cases*.

Underwood v. Green, 42 N. Y. 140; *River Rendering Co. v. Behr*, 77 Mo.

(210 Mich. 18, 177 N. W. 302.)

91, 46 Am. Rep. 6; *Campbell v. District of Columbia*, 19 App. D. C. 131; *State v. Morris*, 47 La. Ann. 1660, 18 So. 710; *Schoen Bros. v. Atlanta*, 97 Ga. 697, 33 L.R.A. 804, 25 S. E. 380; *Knauer v. Louisville*, 20 Ky. L. Rep. 193, 41 L.R.A. 219, 45 S. W. 510, 46 S. W. 701; *Whelen v. Daniels*, 94 Neb. 642, 48 L.R.A.(N.S.) 979, 143 N. W. 929; *Dill. Mun. Corp.* 5th ed. § 679; *Freund, Pol. Power*, § 522.

The city's power to step in and direct the removal, abatement, or destruction of garbage by some proper officer of the city may only be invoked "in case of the neglect or refusal of the owner or occupant of such premises to remove and abate the same."

Landberg v. Chicago, 237 Ill. 112, 21 L.R.A.(N.S.) 830, 127 Am. St. Rep. 319, 86 N. E. 638; *People v. Gibbs*, 186 Mich. 127, 152 N. W. 1053, Ann. Cas. 1917B, 830; *People v. Armstrong*, 73 Mich. 288, 2 L.R.A. 721, 16 Am. St. Rep. 578, 41 N. W. 275; *Re Frazee*, 63 Mich. 396, 6 Am. St. Rep. 310, 30 N. W. 72; *Lawton v. Steele*, 152 U. S. 133, 137, 38 L. ed. 385, 388, 14 Sup. Ct. Rep. 499; *Gardner v. Michigan*, 199 U. S. 332, 50 L. ed. 212, 26 Sup. Ct. Rep. 106; *Rochester v. Gutberlett*, 211 N. Y. 309, L.R.A.1915D, 213, 105 N. E. 548, Ann. Cas. 1915C, 483; *Yee Gee v. San Francisco*, 235 Fed. 757; *State v. Sheridan*, 25 Wyo. 347, 1 A.L.R. 955, 170 Pac. 1; *Dobbins v. Los Angeles*, 195 U. S. 223, 49 L. ed. 169, 25 Sup. Ct. Rep. 18; 6 R. C. L. 266; *Lawton v. Steele*, 152 U. S. 133-137, 38 L. ed. 385-388, 14 Sup. Ct. Rep. 499.

Clark, J., delivered the opinion of the court:

We quote from an ordinance of the defendant city:

An Ordinance Providing for the Regulation, Collection, Removal, and Cremation of Garbage, Offal, Dead Animals, and Other Refuse Matter, and for the Regulation of the Crematory in the City of Grand Rapids.

Sec. 2. It shall be unlawful for any person residing within the limits of the city of Grand Rapids or elsewhere to deposit, throw, or place any garbage, offal, or dead animals in any lane, alley, street, or other public place within the city of Grand Rapids; nor shall any person place any garbage, offal, dead animals, or

other refuse matter upon any private property, whether owned by such person or not, unless the same shall be inclosed in proper vessels or tanks; such vessels or tanks to be perfectly water-tight and so kept, with tightly-fitting covers, which covers shall not be removed except when absolutely necessary; and such vessels or tanks shall be kept in the rear of the house or in the basement, area, or passageway so as to be readily accessible for collection, and never upon the street, alley, sidewalk, or other public place; and all such tanks or vessels shall be promptly delivered to the collector when called for, and shall be returned by him to said place or places without unnecessary delay; and no person, except for such purpose, shall in any manner interfere with said vessels or tanks, or with the contents thereof; provided, however, that this section shall not apply to any person who immediately destroys by cremation or otherwise, satisfactory to the board of health, such garbage, offal, and refuse matter.

Sec. 3. The words "garbage" and "offal" as used in this ordinance shall be held to include every refuse accumulation of animal, fruit, or vegetable matter, liquid or otherwise, that attends the preparation, use, cooking, dealing in or storing of meat, fish, fowl, fruit, or vegetables. And it shall be unlawful for any person to place in said vessels or tanks any ashes or soil.

Sec. 4. Said board of health is hereby authorized and empowered to enter into a contract with a suitable person or persons for the purpose of furnishing proper vessels or tanks for the reception of garbage, offal, and all other unsanitary matter, and for furnishing the necessary vehicles for collecting and removing the same in the manner directed by said board of the city of Grand Rapids, or said board of health, under the rules and regulations of said board, may collect the garbage, offal, and all other unsanitary matter, or collect and dispose

of such substances. Such board of health shall have the power to make such rules, regulations, and requirements as said board may from time to time deem for the best interests of the city; and said board may also divide said city into garbage districts, and shall have power to regulate the gathering of night soil and the collecting and conveying of dead animals, garbage, slop, and offal to the crematory or other place or places as may be directed by the said board. The person entering into a contract for the collection of and removal of such garbage, offal, dead animals, and other unsanitary matter, as hereinbefore stated, shall, upon the recommendation of the said board of health, receive a license for that purpose, issued by the mayor of said city, and no license shall be issued to any other person, firm, or corporation for the gathering of such garbage; such person so licensed shall give a bond to the city of Grand Rapids, with sufficient sureties and in such amount as may be required by said board of health. The condition of such bond shall be that said person so licensed shall in all things carry out the provisions of the contract thus entered into between himself and the board of health, acting for the city, and such rules and regulations as may from time to time be made by said board of health. The word "offal" whenever used in this ordinance shall not apply to the by-products of butchers and meat markets.

No person, firm, or corporation excepting the city of Grand Rapids, shall collect or convey through the streets of said city any garbage, offal, dead animals, or other unsanitary matter, unless he, they, or it shall have first received a license therefor issued by said city, and execute a bond as required by this ordinance.

The ordinance is not given in full in the record, but it is said that § 7 provides a penalty for failure to comply with its provisions. Various arrangements have been made by

defendant city from time to time for collection and disposal of garbage. On January 2, 1917, the city undertook for a consideration to collect and deliver to one Hartman all garbage of the city. In August, 1917, the person to whom Hartman had disposed of the garbage complained that plaintiffs were not delivering all of their garbage to the licensed collector of the city.

Plaintiff Pantlind was the proprietor of two hotels in the city. He also owned a farm several miles from the city upon which were fed to hogs and poultry the garbage, offal, refuse accumulation of animal, fruit, and vegetable matter, and other materials from the hotels. In each hotel after the dishes had been used in the dining room they were taken to the pantry, and the waste and table leavings scraped off into large metal cans. Into these cans were also put peels, rinds, offal from fish and fowl, and the general food waste of the hotel. Dishwater was not taken. A part of this accumulation was taken by the city, for which it furnished metal cans. Bread ends and other bread waste from the pantry were kept separately in a barrel. At times the better parts of the meat waste were also separately kept. Mr. Pantlind gave much of this bread and meat to charitable institutions and to the poor. Green cabbage leaves and lettuce were also kept separately in a box. Some vegetable parings were kept separately in a barrel. This cabbage and lettuce, parings, a part of the bread and meat accumulations, and a part of the general garbage, were taken by a Pantlind employee through the city streets to the Pantlind farm daily (except Sundays for a part of the year) by motor truck, the garbage cans being covered by metal tops and by a tarpaulin. The city received in its metal cans the rest of the garbage from these hotels. In dividing this garbage a steward of the hotels was of the opinion that plaintiff Pantlind received the better portion. Mr. Pantlind said: "I don't know as there is any particular

difference. In a way, probably I get a little the best of it."

Carl Thor, who took the garbage from the hotels to the Pantlind farm, said:

There is a difference between my garbage and the city garbage. My garbage is the very best of it, the bread and table refuse; and the poorer garbage the city takes. The stuff in the cans I get from the Morton and Pantlind is bread crumbs, pieces of meat, orange peelings, grapefruit peelings, what they scrape off the plates, selected for us, and that and the dry bread is kept separate. We take the bread out in a barrel. I am familiar with the contents of these cans, both when I get them and when I dump them out on the farm.

Once in a while you get some broken plates or glasses. Occasionally, I find oyster shells, coffee grounds, tea leaves. I get most of the melon rinds because it comes right off the plates, all the things they take off the plates, melon rinds, mashed potatoes, scraps of meat, etc. Very seldom get any liquid in mine.

Q. The whole moisture is a moisture of these things together?

A. No, the garbage is drained before it comes up to the sidewalk.

Q. All these things together make a composite mass?

A. The cans, we keep them dry and keep out the best; there isn't much liquid.

Q. I thought you said you put the bread mostly in a barrel?

A. They do from the pantry where they make toast, have a barrel standing on the side; what comes back from the table goes in the cans.

Q. Fish and all things of that sort?

A. Well, there's quite a lot.

Plaintiff Lawrence conducted a restaurant in the city and also owned a farm beyond the city limits, upon which he fed to hogs the garbage from his restaurant. The city got none of this garbage. It was sent by Mr. Lawrence through the

city streets by horse and wagon to his farm, in metal cans with metal covers, the cans covered by canvas.

Mr. Lawrence said:

Whatever is left on the tables or counters goes into those tubs, thence into the garbage cans, and out to the farm. The coffee grounds are in a separate tub. No dishwater goes into the garbage cans.

It might be meat; might be mashed potatoes and gravy; might be bread ends. We cut each end of the loaf of bread every day, and we use that on Friday for dressing. That is thrown in a cupboard, and after Friday that goes into the tubs and goes out to the farm with the garbage. Whatever is on the plate, if half a cup of coffee, in the plates, in the teacups, goes.

Q. You say any leavings in the coffee or teacups are poured right in?

A. Yes, sir; isn't very often left, but if it is it goes in. Any milk left goes in too. If there is any soup left, it goes in the can.

Q. All things from your tables, whatever they are, go into your cans?

A. Yes, sir; potato peelings, all those things from the kitchen goes in those cans. Also, any entrails from the fish or fowls, and any trimmings and melon rinds, cabbage, and all that stuff.

Plaintiff Hannaford was the proprietor of a cafeteria in the city and also owned a farm near the city. His garbage was sent by him to his farm by motorcar, the method being similar to that of the other plaintiffs. The city got none of this garbage. Mr. Hannaford said: "Every bit of the garbage is fed out on the farm. The garbage isn't decayed very much, only been in the cans from twelve to fifteen hours. It is loaded and hauled every day. We don't haul Sundays unless it's absolutely necessary. We do in hot weather. It is carried away in iron cans, that is, the wet garbage; the dry is put in barrels. I mean lettuce leaves, vegetables, and potato peel-

ings. Anything that is liquid is in the iron cans. There's pieces of bread that goes into the dry cans or dry barrels that is fed to the chickens or hogs."

And his steward said: "The garbage is come-back from the tables. The cans set under the dish tables, and it's just scraped in. As the meals are finished, the dishes are loaded in a little truck and brought back from the dining room, laid on this table, and the dishes scraped into these cans. The cans hold 20 gallons, galvanized iron with covers. No vegetable refuse goes into these cans; potato peelings and stuff go into sugar barrels or sacks. The moist garbage is carried in galvanized iron cans."

Cleanliness characterized the keeping and handling of this garbage by all of the plaintiffs. None of the plaintiffs collected or conveyed through the streets of the city any garbage but his own. On August 24, 1917, the city notified plaintiffs to discontinue forthwith the practice of disposing and collecting garbage and conveying the same through the streets of the city. On August 31, 1917, plaintiffs Pantlind and Lawrence filed their bill of complaint in the superior court of Grand Rapids, alleging, among other things, that the city was about to proceed against them under the ordinance, to take their property, the so-called garbage, from them without compensation, to their irreparable injury, and to subject them to daily arrests, prosecutions, and multiplicity of suits, and praying a temporary order and a perpetual injunction restraining the city from proceeding against them under the ordinance, and from interfering with them in their transporting and conveying from their respective hotels and restaurants to their farms in the country, their so-called garbage. A temporary restraining order was allowed. Plaintiff Hannaford was permitted to intervene without objection of record. Defendant answered, and, by cross bill, asked affirmative relief: That the

plaintiffs be required to account to the city for the garbage which had been taken to their farms, and that they be enjoined from transporting through the streets of the city any garbage, and from in any way violating the provisions of the city ordinance relating thereto. After a hearing, the trial court decreed to plaintiffs the relief prayed. Defendant has appealed.

Because of what was said in *Board of Health v. Vink*, 184 Mich. 688, 151 N. W. 672, and *Grand Rapids v. De Vries*, 123 Mich. 570, 82 N. W. 269, we consider but the following: Was the material conveyed by plaintiffs through the streets garbage within the meaning of the ordinance, and had the city the right to control the disposition of it? That the matter conveyed through the streets of the city by the plaintiffs to their farms was almost wholly garbage within the meaning of § 3 of the ordinance, above quoted, we have no doubt. It was "a refuse accumulation of animal, fruit, and vegetable matter" attending the preparation, cooking, and use of food in these enterprises. *Century Dictionary* defines "refuse:" "That which is refused or rejected; waste or useless matter; the worst or meanest part." See *Gardner v. Michigan*, 199 U. S. 325, 50 L. ed. 212, 26 Sup. Ct. Rep. 106.

"In the case last cited [*Grand Rapids v. De Vries*, *supra*], it was quite plainly implied that the common council, in the exercise of the police power, had the right to treat as a nuisance all such refuse as is unfit for human food. The court may well take judicial notice that table refuse, when dumped into receptacles kept for that purpose, will speedily ferment and emit noisome odors calculated to affect the public health." *People v. Gardner*, 136 Mich. 693, 100 N. W. 126.

See *Iler v. Ross*, 64 Neb. 710, 57 L.R.A. 895, 97 Am. St. Rep. 676, 90 N. W. 869; *State v. Robb*, 100 Me. 180, 60 Atl. 874, 4 Ann. Cas. 275.

As to the right of plaintiffs to those wholesome substances, leav-

ings of the kitchen or table, which are fit for food, we quote from the city of Grand Rapids v. De Vries, supra: "It may be said that the ordinance does not attempt to regulate in any manner whatever the disposition of wholesome substances by the householder. It is aimed only at refuse; that is, discarded, worthless matter—matter unfit for food. The householder has perfect liberty, under the ordinance, to consume, or to sell or give away, all the leavings of his table or kitchen that are fit for food."

The above language plainly implies that the city in the exercise of its police power had the right to treat as a nuisance all such refuse as is unfit for human food. People v. Gardner, supra. Wholesome substances may be distinguished from garbage upon the facts of a given case; but, generally speaking, they may include broken bread, meat trimmings, vegetable parts, specked apples, and the like, if fit for food. See State v. Orr, 68 Conn. 101, 34 L.R.A. 279, 35 Atl. 770. But when such matter is mingled with garbage it becomes subject to public control. Dupont v. District of Columbia, 20 App. D. C. 477.

"All authorities agree in holding that garbage in and of itself is a nuisance." Board of Health v. Vink, supra.

Gatherers, collectors, and purchasers of garbage who conveyed the same through city streets have been held to be violators of such ordinances (cases above cited). Urbach v. Omaha, 101 Neb. 314, L.R.A. 1917E, 1163, 163 N. W. 307; People v. Gordon, 81 Mich. 306, 21 Am. St. Rep. 524, 45 N. W. 658.

But it is urged that a person who has produced garbage upon his own premises has a right to dispose of it and to convey it through the streets, because it is property of value, and that as to him the ordinance is wanting in the due process of law required by the Constitution. Upon this point several dead animal cases,

so-called, are cited, but these are not controlling. It is not competent to declare a dead animal to be a nuisance immediately after death. People v. Gardner, supra. Dead animals are not nuisances per se, and the city in its ordinances must pay a proper regard for the rights of the owner in such property. River Rendering Co. v. Behr, 77 Mo. 91, 46 Am. Rep. 6. Garbage cases precisely in point are not cited. But we again quote from People v. Gardner, 136 Mich. 696, 100 N. W. 127: "The court may well take judicial notice that table refuse, when dumped into receptacles kept for that purpose, will speedily ferment and emit noisome odors calculated to affect the public health. If, in providing against such a nuisance, the owner of such material suffers some slight loss, the inconvenience or loss is presumed to be compensated in the common benefit secured by regulation. Horr & B. Mun. Pol. Ord. § 220."

The ordinance in the Gardner Case, supra, including the definition of garbage, is substantially the same as in the case at bar. In Gardner v. Michigan, 199 U. S. 331, 50 L. ed. 216, 26 Sup. Ct. Rep. 108, the language above quoted is approved, and the court said:

"The defendant insists that it is part of the common knowledge of the country that the refuse from kitchens, tables, hotels, and restaurants is valuable as food for swine, and is property within the meaning of the constitutional provision which forbids the taking, by any state, of private property for public use without compensation. . . .

"Looking at the matter in a practical light, we are unable to say that the means devised by the city council and indicated by its action were plainly unreasonable or unnecessary, or did not have a real substantial relation to the protection of the public.

"Touching the suggestion that garbage and refuse are valuable for the manufacture of merchantable grease and other products, it is suf-

ficient, in view of what we have said in the other case, to remark that it was a controlling obligation of the city, which it could not properly ignore, to protect the health of its people in all lawful ways having relation to that object; and if, in its judgment, fairly and reasonably exercised, the presence of garbage and refuse in the city, on the premises of householders and otherwise, would endanger the public health, by causing the spread of disease, then it could rightfully require such garbage and refuse to be removed and disposed of, even if it contained some elements of value. In such circumstances, the property rights of individuals in the noxious materials described in the ordinance must be subordinated to the general good. If it be said that the city might have adequately guarded the public health and at the same time saved the property rights of its owner on whose premises garbage and refuse were found, the answer is that the city evidently thought otherwise, and we cannot confidently say that its constituted authorities went beyond the necessities of the case and exceeded their proper functions when they passed the ordinance in question. Those ordinances cannot, therefore, according to well-settled principles, be held to be wanting in the due process of law required by the Constitution."

We quote from *State v. Robb*, supra:

"It may therefore be regarded as settled that reasonable municipal health regulations, under the authority of the state, are not void as taking private property without due process of law, or as a taking of private property without just compensation. . . .

"That some regulation of the collection and removal of refuse and offal in thickly populated cities [is necessary] is not denied. It needs no argument to show that if the disposal of matter of that sort, already decayed or which will forthwith decay, be left to the will or whim or

negligence or ignorance of its owner, or of those to whom the owner may commit it for removal, the health, to say nothing of the comfort, of the public, will be seriously endangered. Ordinances or other regulations with respect to the collection and disposal of offal and garbage have frequently been before the courts, and in no case have the power and propriety of regulation been questioned, though in some cases objectionable features in the method of regulation have been discovered.

"The question now reverts to whether the regulation adopted in this case was reasonable and lawful. By its terms it gives the exclusive privilege of collecting and removing all refuse matter constituting house offal or swill, within the city of Portland, to a person or persons specially appointed, and prohibits all other persons from engaging in that business. It even prohibits the owners upon whose premises the refuse is made, from carrying it through the streets—no matter how carefully and safely—to uses of their own outside of the city. That house offal has some appreciable value, we think, may be assumed, but as we have already seen, that fact does not save it from police regulation, if it is already noxious, or is in such condition as to require prompt intervention to prevent its becoming noxious and dangerous to health. *Harrington v. Providence*, 20 R. I. 233, 38 L.R.A. 305, 38 Atl. 1. The state may even direct its destruction. *Lawton v. Steele*, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499." *Iler v. Ross*, supra; 2 Dill. Mun. Corp. 5th ed. § 678; *State v. Paysan*, 47 La. Ann. 1030, 49 Am. St. Rep. 390, 17 So. 481; *Re Zhizhuzza*, 147 Cal. 328, 81 Pac. 955; *North American Cold Storage Co. v. Chicago*, 211 U. S. 306, 53 L. ed. 195, 29 Sup. Ct. Rep. 101, 15 Ann. Cas. 276.

The rights of plaintiffs in this garbage must be subordinated to the general good. They are compen-

sated in the common benefits secured by the ordinance. The city

Constitutional
law—prohibiting
transportation
of garbage—
deprivation of
property.

has the right to control the disposition of this garbage agreeably to the provisions of the ordinance. The request of the defendant for an accounting, which is not discussed in its brief, and which is not supported by competent evidence, and which was seemingly

abandoned upon the hearing, will be denied.

The decree of the lower court is reversed, and one will be entered dismissing the bill of complaint and enjoining plaintiffs from conveying garbage through the streets of the city and from in any manner violating the ordinance of the defendant city with reference to garbage or removal thereof. No costs will be awarded.

ANNOTATION.

Validity of statutory or municipal regulation as to garbage.

- I. Introductory, 287.
- II. Statutory regulation, 288.
- III. Municipal regulation:
 - a. Generally, 289.
 - b. Removal of garbage:
 - 1. Character of receptacle, 291.
 - 2. Character of vehicle, 291.

I. Introductory.

This note discusses and reviews only the cases passing on the validity of statutory or municipal regulations as to garbage. Cases involving merely the construction of a particular statute or ordinance dealing with that subject, wherein no mention is made of its validity, are excluded. Likewise cases involving the validity of regulations as to ashes, cinders, manure, unsewered privies, and dead animals, are not included, although the particular subjects mentioned are often included in a statute or ordinance regulating garbage. Statutory or municipal regulation of removal of ashes or other rubbish is the subject of the annotation following *Baltimore v. Hampton Court Co.* post, 309. The power of a municipality to designate a place for the dumping of garbage, or to license or maintain a plant for the incineration of garbage, under such circumstances as to create a nuisance, is not discussed. As to injunction to prevent the establishment or maintenance of a plant for the destruction of garbage, see the note in 5 A.L.R., beginning at page 920.

The liability of a municipality for

III. b—continued.

- 3. Expense of removal, 292.
- 4. Designation of scavenger, 293.
- c. Disposal of garbage:
 - 1. Destruction, 301.
 - 2. Other methods, 304.

the act of an employee engaged in removing garbage or rubbish is considered in the annotation in 14 A.L.R. 1473.

In the *Century Dictionary* (cited in *St. Louis v. Robinson* (1896) 135 Mo. 460, 37 S. W. 110), garbage is defined as follows: "(1) Originally, the entrails of fowls, and afterwards of any animal; now, offal or refuse organic matter in general; especially the refuse animal and vegetable matter from a kitchen. (2) Any worthless, offensive matter: Offal is defined as follows: '(1) That which falls off, as a chip or chips in dressing wood or stone; that which is suffered to fall off as of little value or use. (2) Waste meat; the parts of a butchered animal which are rejected as unfit for use. (3) Refuse of any kind; rubbish.'" Webster (cited in *Dupont v. District of Columbia* (1902) 20 App. D. C. 486) defines garbage as "properly that which is purged or cleansed away; the bowels of an animal; refuse parts of flesh; offal; hence, the refuse animal and vegetable matter from a kitchen."

Garbage regulations usually prescribe what is to be included in the term "garbage" or "offal." Thus, the

ordinance under consideration in *Grand Rapids v. De Vries* (1900) 123 Mich. 570, 82 N. W. 269, and also in *PANTLIND v. GRAND RAPIDS* (reported herewith, ante, 280), defined the words "garbage" and "offal" to include "every refuse accumulation of animal, fruit, or vegetable matter, liquid or otherwise, that attends the preparation, use, cooking, dealing in, or storing of meat, fish, fowl, fruit, or vegetables." And in *State v. Orr* (1896) 68 Conn. 101, 34 L.R.A. 279, 35 Atl. 770, the ordinance considered expressly limited the term "garbage and offal" to mean "only such refuse matter as accumulates in the preparation of food for the table," and was held to extend to matter which was in fact noisome, or which had been refused or rejected by the owner.

While garbage is usually very offensive, particularly to the sense of smell, and carries with it the idea of filth, it is not necessary that fermentation shall have commenced before any particular refuse can be held to be garbage. *Rochester v. Gutberlett* (1911) 73 Misc. 607, 183 N. Y. Supp. 541, affirmed in (1914) 211 N. Y. 309, L.R.A.1915D, 209, 105 N. E. 548, Ann. Cas. 1915C, 483.

II. Statutory regulation.

Apparently but two cases have passed on the validity of a statute regulating the removal or destruction of garbage.

The case of *New York Sanitary Utilization Co. v. Health Dept.* (1901) 61 App. Div. 106, 70 N. Y. Supp. 510, affirming (1900) 32 Misc. 577, 67 N. Y. Supp. 324, involved the constitutionality of an act amending the charter of the city of New York with respect to the regulation of offensive trades, which was passed without acceptance by the city. The act made it unlawful "for any person or persons, incorporated or unincorporated, or any corporation or corporations, to carry on, establish, prosecute or continue within the borough of Brooklyn the occupation or trade or business of rendering or treating with steam or boiling garbage, swill, or offal, and requiring any such establishment or establishments

or place of such business existing within the said boroughs respectively to be forthwith removed out of said boroughs, and such trade, occupation or business to be forthwith abated and discontinued," regardless of its being, in fact, a nuisance. Holding the act to be unconstitutional as an unreasonable exercise of the police power, and also as depriving the owner of his property without due process of law and without just compensation, the court said: "By the interposition of the demurrer the allegations of fact contained in the complaint are admitted. It stands conceded that the plaintiff's business as carried on not only does not constitute a nuisance, but that it is not detrimental to the public health; that it is carried on at the most appropriate place for that purpose within the territory of the city of New York; that the process employed by it in disposing of the garbage and refuse of a great city is the best and most convenient that has been devised; and that the manner in which that process is used is in no way prejudicial to the comfort of the inhabitants of the city, and is carried on to the entire satisfaction of the city and state officials. Those are allegations which, upon an issue of fact, would be provable as facts, and therefore stand fully admitted. . . . It is not an act for the general regulation of a business which might be conducted so as to impair the public health, or seriously to interfere with the convenience and comfort of the people of a great city. We are of the opinion that the court at special term was right in holding that the act is in violation of the constitutional rights of the plaintiff, and particularly because, as affecting it, it would deprive it of its property, and of its right to continue or carry on its business, without due process of law, and without making compensation; and because it also impairs the obligation of its contracts with the former cities of New York and Brooklyn, which obligation is transferred by the Greater New York charter to the present city of New York; and also because it appears upon its

face not to be an act properly regulating, within the limits of the police power of the state, a business which has heretofore been considered as legitimate and authorized and necessary to the welfare of the community."

In *Koeffler v. State* (1914) 157 Wis. 434, 147 N. W. 639, a statute requiring the owner of every apartment house, tenement house, lodging or boarding house, to furnish suitable covered receptacles for garbage, ashes, and rubbish, was held to be a valid exercise of the police power. The court said: "Garbage is often temporarily stored outside of buildings until it is carted away. It is generally offensive and forms a breeding place for flies, and we do not understand that it is claimed that the city might not properly require that garbage be stored in inclosed receptacles. Whether it is or not, we do not think there is any doubt about the right of the state to require that it be so kept. The real objection to the law is that it is made the duty of the landlord to provide the receptacle, instead of the duty of the tenant who creates the garbage. Uncovered garbage is just as likely to affect the health and comfort of the occupants of adjacent premises as it is that of the tenant who is responsible for it. It is not unreasonable to require the owner of a parcel of land to see that his premises are so used as not to constitute a nuisance as to the occupants of adjacent premises. This refuse must, of necessity, be stored some place if only for a short time, and we do not think the provision requiring the landlord to furnish the storage receptacle is so far without the bounds of reason as to warrant the court in holding it void. It would hardly be said that the owner of such a building as is described in the statute could be required by law to provide suitable water-closets for the use of his tenants, and yet as far as the general public health is involved the difference between these two conveniences is one of degree only. Concerning the indefiniteness of the law, little need be said. Almost any water-tight receptacle that has a well-fitting cover will answer the purpose of the

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law. The legislature could not well go into details as to the dimensions of the receptacle or material out of which it should be made. Its size must depend in a large degree on the quantity of garbage that is to be stored. This depends on the character of the occupancy of the building and the number of tenants who use a single receptacle. We think anyone making an honest effort to comply with the law in the way of securing a suitable receptacle will not encounter very much difficulty in doing so. We suppose that garbage cans are commonly kept for sale in hardware stores in cities. Cans sufficiently large for the accommodation of the garbage accumulations from a large apartment house or boarding house may not be kept in stock by hardware dealers, but they can be readily made."

III. Municipal regulation.

a. Generally.

Within the general principle that a city in the exercise of the police power granted to it by the state may, by reasonable ordinance, regulate the collection and disposal of substances within the city which are nuisances per se, or which may become nuisances, it is unquestioned that a city may adopt necessary and reasonable regulations for the collection, removal, and disposal of garbage accumulating within its limits.

United States.—*California Reduction Co. v. Sanitary Reduction Works* (1905) 199 U. S. 306, 50 L. ed. 204, 26 Sup. Ct. Rep. 100, affirming (1903) 61 C. C. A. 91, 126 Fed. 29, which affirms (1899) 94 Fed. 693; *Gardner v. Michigan* (1905) 199 U. S. 325, 50 L. ed. 212, 26 Sup. Ct. Rep. 106.

California.—*Re Zhizhuzza* (1905) 147 Cal. 328, 81 Pac. 955; *Ex parte Casinello* (1881) 62 Cal. 538.

Colorado.—*Ouray v. Corson* (1900) 14 Colo. App. 345, 59 Pac. 876.

Connecticut.—*State v. Orr* (1896) 68 Conn. 101, 34 L.R.A. 279, 35 Atl. 770.

District of Columbia.—*Nash v. District of Columbia* (1906) 28 App. D. C. 598, 8 Ann. Cas. 815; *Dupont v.*

District of Columbia (1902) 20 App. D. C. 477.

Indiana.—Walker v. Jameson (1894) 140 Ind. 591, 28 L.R.A. 679, 49 Am. St. Rep. 222, 37 N. E. 403, 39 N. E. 869.

Kansas.—O'Neal v. Harrison (1915) 96 Kan. 339, L.R.A.1915F, 1069, 150 Pac. 551, overruling Re Lowe (1895) 54 Kan. 757, 27 L.R.A. 545, 39 Pac. 710; Kirksey v. Wichita (1918) 103 Kan. 761, 175 Pac. 974; Blakeman v. Wichita (1918) 103 Kan. 763, 175 Pac. 975.

Louisiana.—See State v. Payssan (1895) 47 La. Ann. 1029, 49 Am. St. Rep. 390, 17 So. 481.

Maine.—State v. Robb (1905) 100 Me. 180, 60 Atl. 874, 4 Ann. Cas. 275.

Maryland.—Schultz v. State (1910) 112 Md. 211, 76 Atl. 592.

Massachusetts.—Re Vandine (1828) 6 Pick. 192, 17 Am. Dec. 351; WHEELER v. BOSTON (reported herewith) ante, 275.

Michigan.—People v. Gardner (1904) 136 Mich. 693, 100 N. W. 126, affirmed in (1905) 199 U. S. 325, 50 L. ed. 212, 26 Sup. Ct. Rep. 106; People v. Gardner (1906) 143 Mich. 104, 106 N. W. 541; Grand Rapids v. De Vries (1900) 123 Mich. 570, 82 N. W. 269; People v. Gordon (1890) 81 Mich. 306, 21 Am. St. Rep. 524, 45 N. W. 658. See also Board of Health v. Vink (1915) 184 Mich. 688, 151 N. W. 672. And see PANTLIND v. GRAND RAPIDS (reported herewith) ante, 280.

Missouri.—VALLEY SPRING HOG RANCH CO. v. PLAGMANN (reported herewith) ante, 266.

Nebraska.—Urbach v. Omaha (1917) 101 Neb. 314, L.R.A.1917E, 1163, 163 N. W. 307; Iler v. Ross (1902) 64 Neb. 710, 57 L.R.A. 895, 97 Am. St. Rep. 676, 90 N. W. 869; Coombs v. MacDonald (1895) 43 Neb. 632, 62 N. W. 41; Smiley v. MacDonald (1894) 42 Neb. 5, 27 L.R.A. 540, 47 Am. St. Rep. 684, 60 N. W. 355.

New Jersey.—Atlantic City v. Abbott (1906) 73 N. J. L. 281, 62 Atl. 999.

New York.—Rochester v. Gutberlett (1914) 211 N. Y. 309, L.R.A.1915D, 209, 105 N. E. 548, Ann. Cas. 1915C, 483, affirming (1912) 151 App. Div. 900, 135 N. Y. Supp. 1104, which affirms

(1911) 73 Misc. 607, 133 N. Y. Supp. 541; Newton v. Lyons (1896) 11 App. Div. 105, 42 N. Y. Supp. 241; Eddy v. Buffalo (1920) 193 App. Div. 246, 184 N. Y. Supp. 51.

Ohio.—See Bauer v. Casey (1904) 26 Ohio C. C. 598.

Pennsylvania.—Marple v. Pfanner (1911) 21 Pa. Dist. R. 847, 851; Harrisburg v. Martin (1910) 20 Pa. Dist. R. 325; Butler v. Logan (1910) 19 Pa. Dist. R. 952. See also Kussel v. Erie (1898) 8 Pa. Dist. R. 105.

Texas.—Ex parte London (1914) 73 Tex. Crim. Rep. 208, 163 S. W. 968; Ex parte Howell (1913) 71 Tex. Crim. Rep. 71, 158 S. W. 535; Ex parte Anderson (1908) 53 Tex. Crim. Rep. 243, 109 S. W. 193.

Washington.—Smith v. Spokane (1909) 55 Wash. 219, 104 Pac. 249, 19 Ann. Cas. 1220.

The fact that a number of articles which are fit for human food may be picked out of a quantity of garbage does not affect the power of the municipality absolutely to control its disposition. Kirksey v. Wichita (1918) 103 Kan. 761, 175 Pac. 974; Schultz v. State (1910) 112 Md. 211, 76 Atl. 592. In the latter case the court said: "The fact that this accumulation contains fresh scraps of animal and vegetable matter does not prevent the extension of the police power of the city over the whole subject, as this ordinance does. To admit the right of the appellant, independent of the city's control, to select and haul from hotels, clubs, and apartment houses such scraps, would very greatly weaken the effective control of the municipality over the subject. It would result to a very great extent in the substitution of individual judgment in a matter of vital concern to the city, for the judgment of the municipal authorities. It is evident that the recognition of such an uncontrolled right would be fraught with great danger to the public health."

So it was said in State v. Orr. (1896) 68 Conn. 101, 34 L.R.A. 279, 35 Atl. 770: "There is so much of this kind of matter that is offensive and dangerous to the health of the community,

that it all may be properly made subject to public regulation and control."

b. Removal of garbage.

1. Character of receptacle.

Under its police power, a municipality may lawfully designate the kind of receptacle in which garbage may be placed for collection by the scavenger. *Walker v. Jameson* (1894) 140 Ind. 591, 28 L.R.A. 679, 49 Am. St. Rep. 222, 37 N. E. 403, 39 N. E. 869. *VALLEY SPRING HOG RANCH CO. v. PLAGMANN* (reported herewith) ante, 266; *Ex parte Anderson* (1908) 53 Tex. Crim. Rep. 243, 109 S. W. 193.

Thus, in *Walker v. Jameson* (Ind.) supra, an ordinance requiring householders to place all garbage, not destroyed by them on the premises, in proper receptacles convenient for removal by a public contractor, was held to be a valid exercise of the police power.

And in *VALLEY SPRING HOG RANCH v. PLAGMANN* (reported herewith) ante, 266, an ordinance requiring the use of air-tight metallic receptacles for garbage was held to constitute a fair exercise of the police power calculated to reduce to a minimum the spread of disease.

It has also been held that an ordinance, passed under charter authority, providing that "all swill, dish-water, slops, or other garbage of a watery kind shall be removed in water-tight vessels or receptacles, with tight covering preventing the escape of same or offensive odors therefrom," is a reasonable exercise of the police power. *Ex parte Anderson* (Tex.) supra.

In each of the following cases, while the point was not presented for adjudication, the court upheld an ordinance designating a particular kind of receptacle for the collection of garbage: *Re Zhizhuzza* (1905) 147 Cal. 328, 81 Pac. 955 (receptacles furnished by city); *State v. Orr* (1896) 68 Conn. 101, 34 L.R.A. 279, 35 Atl. 770 (suitable covered vessels, not larger than a half barrel); *Kirksey v. Wichita* (1918) 103 Kan. 761, 175 Pac. 974 (cans required to be drained of surplus water and liquids,

and free from all deleterious matter, such as glass, tin cans, papers, ashes, poison, or other matter injurious to animal life).

In *PANTLIND v. GRAND RAPIDS* (reported herewith) ante, 280, the ordinance, which is upheld, requires householders to place all garbage in proper vessels or tanks to be kept water-tight, with tightly fitting covers not to be removed except when absolutely necessary.

2. Character of vehicle.

A municipality, under its police power, may enact reasonable regulations as to the character of the vehicles to be used in transporting garbage through the streets. *Dupont v. District of Columbia* (1906) 20 App. D. C. 477; *People v. Gordon* (1890) 81 Mich. 306, 21 Am. St. Rep. 524, 45 N. W. 658; *Grand Rapids v. De Vries* (1900) 123 Mich. 570, 82 N. W. 269; *VALLEY SPRING HOG RANCH CO. v. PLAGMANN* (reported herewith) ante, 266.

Thus, an ordinance, passed under express statutory authority, requiring that "each cart or other vehicle used for the purpose of removing garbage shall have the word 'garbage' and the number of the wagon in large white letters on a black ground, plainly painted or attached to each side of the wagon bed, which shall be of metal, water-tight, and provided with tight-fitting covers, and be approved by the superintendent of street cleaning," has been held to be a valid police regulation. *Dupont v. District of Columbia* (D. C.) supra, wherein the court said: "If the removal of garbage were left free to householders and their private contractors and vendees, the requirement that it shall be transported in wagons of a certain construction, designation, and number would not be an unreasonable one. Wagons delivering milk and other articles that are subject to inspection in the interest of the public health are often required to be marked so that they may be of ready identification, and numbers are generally required to be borne by all public vehicles for the transportation of persons or parcels.

It is quite reasonable that wagons engaged in hauling garbage along the public streets shall be constructed so as to prevent, as far as may be practicable, the escape of any of its particles and effluvia. The conspicuous mark indicating the uses of the wagon is doubtless intended to enable the police and health inspectors the more easily to identify it and keep it under the constant supervision which the public safety and comfort demand."

Likewise, the requirement that garbage shall be removed in water-tight, closed carts or wagons, and that the same shall be marked "garbage," has been held to be a reasonable exercise of the police power. *People v. Gordon* (1890) 81 Mich. 306, 21 Am. St. Rep. 524, 45 N. W. 658, wherein the court said: "That the vehicle of transportation of this filth should be water-tight, closed, and marked so that it will be known, is, in our opinion, not only a reasonable regulation, but a judicious one, as affecting the public health."

To the same effect, see *Grand Rapids v. De Vries* (1900) 123 Mich. 570, 82 N. W. 269.

In *VALLEY SPRING HOG RANCH CO. v. PLAGMANN* (reported herewith) ante, 266, the following ordinance was sustained: "Every cart or vehicle used to cart garbage and other household refuse in or about or along any street, alley, highway, or thoroughfare of this city shall be fitted with a good substantial metal box thereon, the sides and ends of which shall not be less than 24 inches high, so that no portion of such garbage shall be scattered, thrown or dropped into such street, alley, highway, or thoroughfare, and all other carts and vehicles used in hauling such offensive matter shall have the box thereon closely covered with sufficient covering and so tightly fitted as to prevent the escape of any of the contents or effluvia therefrom."

8. Expense of removal.

A city, in the exercise of its police power and as incident to its garbage regulations, may exact a fee from householders for the removal of garbage. *Walker v. Jameson* (1894)

140 Ind. 591, 28 L.R.A. 679, 49 Am. St. Rep. 222, 37 N. E. 403, 39 N. E. 869; *Re Zhizhuzza* (1905) 147 Cal. 328, 81 Pac. 955.

Thus, in *Walker v. Jameson* (Ind.) supra, it was held that a contract for the removal of garbage entered into by a municipal council with express authority "to prevent the deposit of any unwholesome substances, either on private or public property; compel its removal to designated points, and to require slops, garbage, ashes, waste or other material to be removed to designated points, or to require the occupants of premises to place them conveniently for removal," which contained a provision for payment by the householder for the removal of his garbage, was held not to be invalid on the ground that the fee for the removal of the garbage was an assessment against him or his property. The court said: "An assessment is a charge laid upon individual property, because the property upon which the burden is imposed receives a special benefit which is different from the general one which the owner enjoys in common with others as a citizen. In this case there is nothing of the kind. No householder is required to have garbage removed or to pay for its removal. Every householder may destroy all his garbage on his own premises, taking care not to create a nuisance in so doing. If he do not destroy all, he may reduce it to a minimum. This ordinance and contract simply provide that if he does produce garbage which has to be carted through the streets, the city or its agent, the contractor, shall do the work at his expense. Whatever else it may be, it is certainly not an assessment. The provision for the removal of the garbage at the expense of the property holder is an extreme exercise of this power, but is an incident to its existence."

The fact that the fees for the removal of garbage are determined by the place from which it is removed, and are not based on the quantity taken, does not render an ordinance invalid as an unfair or unreasonable way of determining such matter. *Re*

Zhizhuzza (Cal.) *supra*, wherein the court said: "It is also contended on behalf of petitioner that the fees for the removal of garbage must be based on quantity, and not determined by the place from which the garbage is removed. The authority for the ordinance is found in § 11, article 11, of the state Constitution, granting a power to municipal corporations, such as cities and towns, to make and enforce within her limits all such local police, sanitary, and other regulations as are not in conflict with general laws. Putting hotels, shops, and boarding houses into one class and private dwellings into another, it would seem, is based upon the relative quantity of garbage produced by them; and it cannot be said to be an unfair or unreasonable way to determine such matter."

The requirement that garbage shall be delivered at the crematory or place of destruction, at the expense of the person, company, or corporation conveying the same, does not deprive the owner of property of value without compensation. *California Reduction Co. v. Sanitary Reduction Works* (1905) 199 U. S. 306, 50 L. ed. 204, 26 Sup. Ct. Rep. 100, affirming (1903) 61 C. C. A. 91, 126 Fed. 29, which affirms (1899) 94 Fed. 693, wherein the court said: "It is the duty, primarily, of a person on whose premises are garbage and refuse material, to see to it, by proper diligence, that no nuisance arises therefrom which endangers the public health. The householder may be compelled to submit even to an inspection of his premises, at his own expense, and forbidden to keep them or allow them to be kept in such condition as to create disease. He may, therefore, have been required, at his own expense, to make, from time to time, such disposition of obnoxious substances originating on premises occupied by him as would be necessary in order to guard the public health. If the householder himself removed them from his premises, it must have been at his own expense, and the scavenger who took to the crematory the material from the premises of origin, under

some arrangement with the householder, was, in effect, the representative, in that matter, of the householder, and was performing a duty resting upon the householder. So that, if the requirement that the person conveying the material should pay a given price for having it cremated or destroyed, in effect, put some expense on the householder, that gave him no ground for complaint; for it was his duty to see to the removal of garbage and house refuse having its origin on his premises."

In *Kelly v. Broadwell* (1902) 3 Neb. (Unof.) 617, 92 N. W. 643, wherein it appeared that "there was no valid ordinance in force in the city by means of which owners of private property could be compelled to remove refuse and garbage from their premises, and that the cost of such removal could not be made a charge against their property," it was held that the city had the power "to contract with the garbage master to remove the refuse, filth, and garbage from both public and private premises within the city limits, and pay him a reasonable compensation therefor, before attempting to collect the cost thereof from the owners of the property from which such offal was removed."

4. *Designation of scavenger.*

It is well settled that a municipality may lawfully grant to an individual the exclusive right to remove garbage accumulating within its limits.

United States.—*California Reduction Co. v. Sanitary Reduction Works* (1905) 199 U. S. 306, 50 L. ed. 204, 26 Sup. Ct. Rep. 100, affirming (1903) 61 C. C. A. 91, 126 Fed. 29, which affirms (1899) 94 Fed. 693.

Colorado.—*Ouray v. Corson* (1900) 14 Colo. App. 345, 59 Pac. 876.

Connecticut.—*State v. Orr* (1896) 68 Conn. 101, 34 L.R.A. 279, 35 Atl. 770.

District of Columbia.—See *Nash v. District of Columbia* (1906) 28 App. D. C. 598, 8 Ann. Cas. 815.

Indiana.—*Walker v. Jameson* (1894) 140 Ind. 591, 28 L.R.A. 679, 49 Am. St. Rep. 222, 37 N. E. 403, 39 N. E. 869.

Kansas.—*O'Neal v. Harrison* (1915)

96 Kan. 339, L.R.A.1915F, 1069, 150 Pac. 551, overruling *Re Lowe* (1895) 54 Kan. 757, 27 L.R.A. 545, 39 Pac. 710; *Kirksey v. Wichita* (1918) 103 Kan. 761, 175 Pac. 974; *Blakeman v. Wichita* (1918) 103 Kan. 763, 175 Pac. 975.

Louisiana.—See *State v. Payssan* (1895) 47 La. Ann. 1029, 49 Am. St. Rep. 390, 17 So. 481.

Maine.—*State v. Robb* (1905) 100 Me. 180, 60 Atl. 874, 4 Ann. Cas. 275.

Massachusetts.—*Re Vandine* (1828) 6 Pick. 187, 17 Am. Dec. 351; *WHEELER v. BOSTON* (reported herewith) ante, 275.

Michigan.—*People v. Gardner* (1906) 143 Mich. 104, 106 N. W. 541; *Grand Rapids v. De Vries* (1900) 123 Mich. 570, 82 N. W. 269.

Missouri.—*VALLEY SPRING HOG RANCH Co. v. PLAGMANN* (reported herewith) ante, 266. See also *St. Louis v. Weitzel* (1895) 130 Mo. 600, 31 S. W. 1045.

Nebraska.—*Iler v. Ross* (1902) 64 Neb. 710, 57 L.R.A. 895, 97 Am. St. Rep. 676, 90 N. W. 869; *Smiley v. MacDonald* (1894) 42 Neb. 5, 27 L.R.A. 540, 47 Am. St. Rep. 684, 60 N. W. 355; *Coombs v. MacDonald* (1895) 43 Neb. 632, 62 N. W. 41.

New Jersey.—*Atlantic City v. Abbott* (1906) 73 N. J. L. 281, 62 Atl. 999. Compare *Conover v. Long Branch Commission* (1900) 65 N. J. L. 167, 47 Atl. 222.

New York.—*Rochester v. Gutberlett* (1914) 211 N. Y. 309, L.R.A.1915D, 209, 105 N. E. 548, Ann. Cas. 1915C, 483, affirming (1912) 151 App. Div. 900, 135 N. Y. Supp. 1104, which affirms (1911) 73 Misc. 607, 133 N. Y. Supp. 541. Compare *Buffalo Fertilizer Co. v. Cheektowaga* (1909) 61 Misc. 404, 113 N. Y. Supp. 901.

Pennsylvania.—*Marpel v. Pfanner* (1911) 21 Pa. Dist. R. 847, 851; *Harrisburg v. Martin* (1910) 20 Pa. Dist. R. 325. See also *Butler v. Logan* (1910) 19 Pa. Dist. R. 952. Compare *Kussel v. Erie* (1898) 8 Pa. Dist. R. 105.

Texas.—*Ex parte London* (1914) 73 Tex. Crim. Rep. 208, 163 S. W. 968. See also *Ex parte Howell* (1913) 71 Tex. Crim. Rep. 71, 158 S. W. 535.

Washington.—*Smith v. Spokane*

(1909) 55 Wash. 219, 104 Pac. 249, 19 Ann. Cas. 1220.

Likewise, a municipality has the power to reserve to itself the exclusive right, through its own selected agents, to collect and remove garbage which is, or by delay in removal may become, a public nuisance. *Re Zhizhuzza* (1905) 147 Cal. 328, 81 Pac. 755; *Schultz v. State* (1910) 112 Md. 211, 76 Atl. 592.

"These decisions rest in general upon the idea that garbage is widely regarded as an actual and potential source of disease or detriment to the public health, and that therefore it is within the well-recognized limits of the police power, for the municipality, acting for the common good of all, either to take over itself, or to confine to a single person or corporation, the collection, transportation through the streets, and final disposition, of a commodity which so easily may become a nuisance. Private interests must yield to that which is established for the general benefit of all. *WHEELER v. BOSTON* (reported herewith) ante, 275.

The rule was stated in *State v. Robb* (1905) 100 Me. 180, 60 Atl. 874, 4 Ann. Cas. 275, as follows: "A city in the exercise of the police power granted to it by the state, may, by reasonable ordinance, regulate the collection and disposal of substances within the city, which are of such a condition and of such a character as to be nuisances per se, and deleterious to the public health or comfort, or which are liable to become nuisances and noxious and deleterious, unless immediate care is taken to prevent their becoming so. We think that a city may prevent conditions injurious to health as well as abate them. It does not create an unlawful monopoly, or unlawfully restrain trade, to commit the business of collecting and disposing of such substances to one person, and to exclude all others from such business."

In *Re Vandine* (1828) 6 Pick. (Mass.) 192, 17 Am. Dec. 351, it was said: "The great object of the city is to preserve the health of the inhabitants. To attain that, they wisely disregard any expense which is deemed

to be requisite. They might probably have these offensive substances carried out of the city without any expense, if they would permit the people from the country to take them away at such times and in such manner as would best accommodate them. Everyone will see that if this business were thus managed there would be continual moving nuisances at all times, and in all the streets of the city, breaking up the streets by their weight and poisoning the air with their effluvia. It is obvious that the object and interest of the city, and those of the carmen, in this concern, are extremely different. . . . It seems to us that the city authority has judged well in this matter. They prefer to employ men over whom they have an entire control by night and by day, whose services may be always had, and who will be able, from habit, to do this work in the best possible way and time. Practically we think the main object of the city government will be better accomplished by the arrangement they have adopted, than by relying upon the labor of others, against whom the government would have no other remedy than by a suit for a breach of contract. The sources of contagion and disease will be speedily removed in small loads, which will not injure the pavements, nor annoy the inhabitants. We are all satisfied that the law is reasonable, and not only within the power of the government to prescribe, but well adapted to preserve the health of the city."

A municipal ordinance, enacted under charter authority, is not open to the objection that it creates a monopoly, simply because it grants the exclusive right of collecting and removing garbage to a single individual. *Rochester v. Gutberlett* (1912) 211 N. Y. 309, L.R.A.1915D, 209, 105 N. E. 548, Ann. Cas. 1915C, 483, affirming (1912) 151 App. Div. 900, 135 N. Y. Supp. 1104, which affirms (1911) 73 Misc. 607, 133 N. Y. Supp. 541, wherein the court said: "All the garbage, bones, and kitchen refuse collected by the defendant had been discarded as

lected by the defendant and mentioned in the ordinance are wholly worthless except as they have a nominal value when removed to some point without the city limits where they can, with safety to the public health, be fed to hogs. If they are not an existing menace to the public health when first placed in the receptacles provided for them, they must necessarily soon become such. Whether they become an existing menace to public health depends upon the care with which they are kept in the receptacles in which they are placed, and in the frequency with which the contents of such receptacles are removed without the boundaries of the municipality and away from human habitation. The city is not required, in a case where danger is constantly to be apprehended, to wait until a nuisance actually exists before taking action to safeguard the public health. The duty of the city includes such supervision and direction as will prevent the danger to public health, which will necessarily and surely arise if the things mentioned in the ordinance are not only properly cared for, but promptly removed. The specific things mentioned which are so discarded for human food and for all use within the municipality demand constant vigilance and oversight on the part of the health department of the municipality. Experience has shown that when there are many collectors of garbage within a municipality acting independently although under license, it is difficult to maintain the supervision necessary to preserve the public health; while, with one contractor acting under a contract pursuant to which he is paid and for the faithful performance of which he is required to give a bond with sureties, the public health can be and is better and more surely protected."

In *Eddy v. Buffalo* (1920) 193 App. Div. 246, 184 N. Y. Supp. 51, the opinion was expressed that the power of the state to regulate the collection of garbage in cities is broad enough to prevent the owner from drawing his own garbage through the street in violation of an ordinance, notwithstanding the statement in the opinion

in the Rochester Case just referred to, that the ordinance there in question did not undertake to forbid that. It was unnecessary to decide the point in the Eddy Case, however, as the person who had contracted with plaintiff (a restaurant keeper) to remove the garbage and return any silver or tableware found therein, paying the plaintiff \$3 a month, was an independent contractor, and not an employee.

So, under a charter provision authorizing a municipal council to enact ordinances "to prevent the deposit of any unwholesome substances, either on private or public property; compel its removal to designated points; and to require slops, garbage, ashes, waste, or other material to be removed to designated points, or to require the occupants of premises to place them conveniently for removal,"—a contract by the city, clothing the contractor with the exclusive right and obligation to remove the garbage from the premises of all persons in the city, cannot be considered as an attempt to create a monopoly. *Walker v. Jameson* (1894) 140 Ind. 591, 28 L.R.A. 679, 49 Am. St. Rep. 222, 37 N. E. 403, 39 N. E. 869.

Under a statute giving it the power to make regulations to secure the general health, to prevent and remove nuisances, and to compel and regulate the removal of garbage beyond the city limits, a municipality may grant an exclusive right to the highest bidder to remove all garbage. *O'Neal v. Harrison* (1915) 96 Kan. 339, L.R.A. 1915F, 1069, 150 Pac. 551, overruling *Re Lowe* (1895) 54 Kan. 757, 27 L.R.A. 545, 39 Pac. 710, wherein the court said: "It is conceded that the city may regulate the disposition of garbage, and impose rigorous rules as to the time and manner in which it shall be moved, because of the offensive and unwholesome odors arising from it. But it is argued that anyone has a right, of which he cannot lawfully be deprived, to haul it through the streets, so long as he conforms to the prescribed regulations,—that the conferring of a monopoly in that respect is not necessary to enforce them, that it sustains no relation to their enforce-

ment, and is not reasonably adapted to promote that end. But manifestly, obedience to the rules laid down for the handling of garbage may be more easily compelled,—the method adopted may be made more efficient, if it is all handled by one concern. . . . The principle being admitted or established that the creation of a monopoly is a device reasonably adapted to the enforcement of sanitary regulations, the question whether in a particular case it shall be employed is for the determination of the body charged with the control of such matters. Monopolies, or any restraints on trade, are against public policy, but this is a rule of the common law and does not tie the hands of the legislature."

To the same effect, and following *O'Neal v. Harrison* (Kan.) *supra*, see *Kirksey v. Wichita* (1918) 103 Kan. 761, 175 Pac. 974, and *Blakeman v. Wichita* (1918) 103 Kan. 763, 175 Pac. 975. See also *State v. Payssan* (1895) 47 La. Ann. 1029, 49 Am. St. Rep. 390, 17 So. 481.

An ordinance authorized by charter, which regulates the collection of garbage and offal, and which empowers the board of health to take such measures as it may deem effectual for its removal from the whole city or any portion of it, and to that end to employ or make contracts with one or more persons, through the medium of licenses and permits, is a valid exercise of the police power. *State v. Orr* (1896) 68 Conn. 101, 34 L.R.A. 279, 35 Atl. 770, wherein the court said: "The board of health might contract with a single person to collect and remove garbage from the entire city, or with several persons to collect and remove it from as many different portions of the city. It might also make such contracts with respect to part of the city, or to certain buildings in part of the city, and leave the collection and removal of garbage from other places open to those who obtained from its clerk a proper permit, and provided proper means of transportation. By neither method of procedure would any monopoly be created, by which the common rights

of citizenship would be infringed upon."

See also *Nash v. District of Columbia* (1906) 28 App. D. C. 598, 8 Ann. Cas. 815.

In *Grand Rapids v. De Vries* (1900) 123 Mich. 570, 28 N. W. 269, an ordinance empowering the board of health to enter into a contract for the exclusive right to remove garbage was held not to create a monopoly, for the reason that the gathering of garbage was not a trade, business, or occupation in any proper sense, and hence did not come under the doctrine applicable to monopolies, or to legislation in restraint of trade. Said the court: "It is a matter in which the public agencies are authorized to pursue the best means to protect the public health. The charter provisions recognize the fact that certain matter may be deleterious to public health, and dangerous to persons or property, and thus become a public nuisance; and the charter makes it the duty of the common council to declare any place, thing, or matter which may be deleterious to public health, or dangerous to persons or property, a public nuisance, and the council is given power to abate such nuisance. The ordinance treats garbage or offal as deleterious to public health, and directs the manner of its disposition for the benefit of the public health. It is one of the police regulations of the city for the benefit of the public health." The foregoing statement was criticized in the *Nebraska* case of *Iler v. Ross* (1902) 64 Neb. 710, 57 L.R.A. 895, 97 Am. St. Rep. 676, 90 N. W. 869, wherein the court said: "It cannot, we think, be said, as was said in the *Michigan* case,—*Grand Rapids v. De Vries* (Mich.) *supra*,—that the removal and hauling of such substances is not a trade or occupation recognized by law. It may well be doubted whether the reason given in that case for holding the exclusive privilege granted not a monopoly is a valid one. We are all cognizant of the fact that scavenger work has a well-accepted and defined meaning, and the occupation or business, lowly though it be, has existed and been rec-

ognized and regulated for ages. Certainly, hauling refuse from barns,—ashes, rubbish, and other waste matter—is a legitimate calling, and engaged in, whenever opportunity affords, by many, as one of the means of acquiring a livelihood. "It will be observed, however, that in the *Michigan* case the court was considering an ordinance defining the words "garbage" and "offal" to include "every refuse accumulation of animal, fruit, or vegetable matter, liquid or otherwise, that attends the preparation, use, cooking, dealing in, or storing of, meat, fish, fruit, or vegetables," and remarked that "these matters, in and of themselves, are regarded as nuisances; that is, the ordinary and accepted meaning of the words 'garbage' and 'offal' is, such refuse matters that in and of themselves are nuisances;" whereas the *Nebraska* court was dealing with an ordinance regulating the collection of "dead animals, garbage, manure, ashes, filth, offal, night soil, and other refuse matter"—substances some of which, noticeably ashes, cinders, and stable manure, might be regarded as having some utility to the owner, and not in themselves nuisances, when not permitted to accumulate in unreasonable quantities.

The only difference between the two cases last cited with respect to the question of the power of a city to grant an exclusive privilege for the removal of garbage is that the *Michigan* case impliedly limits the power to include only garbage in its ordinary sense, that is, matter deleterious to the public health, whereas the *Nebraska* case expressly makes such limitation. In the latter case the court said: "The principle on which rests the right of a city to grant an exclusive privilege to collect and remove those noxious and unwholesome substances which menace the public health and endanger the welfare of the citizens seems to be that not only the prevention and abatement of those accumulations of substances which are in themselves nuisances and dangerous to the health of a community are necessary and essential for the preservation of

health; but also because of their unwholesome and noxious character the proper and safe removal and disposition of such substances must, for the benefit of the public welfare, be in such manner and methods, at such times, and over such particular routes of travel, as will best subserve the public interests; and that this may best be accomplished when such removal is under the direct control and immediate supervision of the city authorities, or with an agency of its own selection, with whom it may contract for such purpose. It is as necessary that the abatement or removal of the nuisance shall be accomplished speedily, in a particular manner, and by certain fixed agencies, ever ready to act, and at all times under the control of the municipality, as it is that such nuisance shall not be permitted to exist in the first instance. It would, therefore, seem that as to those things which are calculated to menace the public health if not promptly and in a particular manner disposed of, and are in their nature regarded as nuisances within themselves, it is within the power of a city, for the benefit of the public health, and as a police regulation, not only to provide for the removal of such substances, but also, and as incident to the power of regulation, to grant an exclusive privilege to an individual or corporation, by contract entered into for that purpose, to perform the work of removal in such manner and methods as will best accomplish the desired result. It appears reasonably clear that such results can be obtained more satisfactorily and with less danger and inconvenience to the health and comfort of the inhabitants by the employment of one who shall at all times be subject to the control and direction of the city, and be held directly responsible to it for any failure to perform in the proper manner and promptly all that shall be necessary to effectuate the desired object."

An ordinance empowering the board of health to enter into a contract with any suitable person for the collection and transportation of garbage is not unreasonable and invalid as creating

a monopoly, though the charter of the city does not in express terms empower the council to grant an exclusive contract. *Grand Rapids v. De Vries* (Mich.) *supra*.

In *VALLEY SPRING HOG RANCH CO. v. PLAGMANN* (reported herewith) ante, 266, an ordinance granting the exclusive privilege of removing garbage was held not to establish a monopoly, since it was passed solely in the interest of the public health.

An ordinance cannot be attacked on the ground that it was passed for the purpose of giving to a certain person a monopoly in the right to remove garbage. Neither the motives of the members of the common council nor the influences under which they acted can be shown to nullify an ordinance duly passed in legal form, within the scope of their corporate charter. *People v. Gardner* (1906) 143 Mich. 104, 106 N. W. 541.

An ordinance passed under charter authority, defining garbage to include "refuse from animal and vegetable matter and foodstuffs, after it has been used as foods, except night soil, and all refuse, animal, and vegetable matter which was intended to be so used, and refuse from the markets, house and store rubbish, floor sweepings, kitchen and table waste of animal or vegetable nature, vegetables, meats, fish, bones, fat, and all offal," and authorizing an exclusive contract for its removal, is not invalid as being in restraint of trade or as lacking the due process of law requisite under the Constitution. *Harrisburg v. Martin* (1910) 20 Pa. Dist. R. 325.

Under a city charter granting to the municipality the power to exercise within the city limits all power commonly known as the police power, to the same extent that the state has or could exercise within said limits, and granting the municipality power to pass such ordinances as it may deem expedient in maintaining the health and welfare of the city, an ordinance is valid that prohibits the removal of garbage except by employees of the city. *Schultz v. State* (1910) 112 Md. 211, 76 Atl. 592.

A municipal ordinance creating the office of city scavenger, and prohibiting others from engaging in that work without first procuring a license, is not invalid as operating to create a monopoly, and imposing oppressive burdens on others desiring to engage in the same line of work, by giving the scavenger and persons procuring the necessary license the exclusive right to remove injurious and offensive substances, without subjecting them to the control of the city authorities, or to regulations having in view the health or convenience of the public. *Ouray v. Corson* (1900) 14 Colo. App. 345, 54 Pac. 876.

In *Re Zhizhuzza* (1905) 147 Cal. 328, 81 Pac. 955, a municipal ordinance, passed under constitutional and charter authority, providing that "the city, . . . its duly authorized agents, servants, or employees, shall have the exclusive right to gather and collect garbage within said city, and it shall be unlawful for any person, firm, or corporation, except as otherwise provided in this ordinance, to collect or gather garbage within said city," was held to be a valid exercise of the police power.

The power to regulate the collection and removal of garbage has been held to be derived from a charter designating as one of the municipal officers a "city scavenger," and authorizing the municipal council to prescribe the duties of all officers appointed by them. *Ex parte Howell* (1913) 71 Tex. Crim. Rep. 71, 158 S. W. 535.

In *Ex parte London* (1914) 73 Tex. Crim. Rep. 208, 163 S. W. 968, the court said: "The second objection is that the ordinance is void in that it creates perpetuities and monopolies, as well as other matters, and this renders it violative of article 1, § 26, of the Constitution, which prohibits the creation of perpetuities and monopolies. If this were sound, it would be violative of this provision to create the office of tax collector, who must collect all the taxes, or any other officer whose duties are made exclusive by law, and this law has so often been decided contrary to appellant's contention, it is useless to cite authorities. The city could

create any officer under its charter it deemed necessary to the performance of the duties it was legitimately authorized to perform. Requiring an officer to perform some governmental function to the exclusion of all others is not the creation of a monopoly or perpetuity within the meaning of the Constitution."

In *Marple v. Pfanner* (1911) 21 Pa. Dist. R. 851, the court said: "Under the police powers vested in a municipality, the borough of Ambler had the authority to give to one or more persons the exclusive right to collect and remove the garbage from the borough. This was the exercise of a sanitary regulation, a power that is inherent in a municipality and a necessary attribute thereof. Every householder must submit to such regulation so long as it is a reasonable one. He cannot refuse to give up his garbage to the duly appointed collector and plead as an excuse for his conduct that the borough has no right to take private property without compensation." To the same effect, see *Butler v. Logan* (1910) 19 Pa. Dist. R. 952.

An ordinance, passed under statutory and charter authority, conferring the exclusive right to collect garbage, is not unlawful for the reason that it denies an individual, other than the licensed scavenger, the right to engage in a lawful occupation to earn a livelihood for himself and family. *Smith v. Spokane* (1909) 55 Wash. 219, 104 Pac. 249, 19 Ann. Cas. 1220.

An ordinance, passed under statutory authority, granting an exclusive privilege for the removal of garbage, has been held not to contravene a constitutional provision prohibiting the "granting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever." *Smiley v. MacDonald* (1894) 42 Neb. 5, 27 L.R.A. 540, 47 Am. St. Rep. 684, 60 N. W. 355. In *Coombs v. MacDonald* (1895) 43 Neb. 632, 62 N. W. 41, following *Smiley v. MacDonald* (Neb.) *supra*, the court said: "The choice between sanitary measures is a function of the legislative department of the govern-

ment, which the courts will not assume to control. The test, . . . where a particular measure is called in question, is whether it has some relation to the public welfare, and whether such is in fact the end sought to be attained."

An ordinance, enacted under the authority of a statute, granting an exclusive right to remove garbage, is not prohibited by a statute forbidding the granting of contracts or franchises for the use of the streets, except under certain conditions. *O'Neal v. Harrison* (1915) 96 Kan. 339, L.R.A.1915F, 1069, 150 Pac. 551, wherein the court said: "We regard that statute, however, as referring only to the public utilities specifically named, or to those of a similar nature. The ordinance in question forbids the streets to be used for hauling garbage by anyone not designated for the purpose by the city authorities, but it does not grant a right to use the streets, in the sense in which that phrase is employed in the statute. It forbids unauthorized persons to haul garbage on the streets, as a means to place that business in the control of a single concern."

In *Re Vandine* (1828) 6 Pick. (Mass.) 187, 17 Am. Dec. 351, it was held that a by-law forbidding the removal of house dirt and offal, except by those duly licensed, was a valid exercise of the police power in the interest of the public health.

The length of time for which the exclusive privilege to remove garbage may be exercised is a matter in the discretion of the municipal authorities, and is determinable wholly on grounds of public policy. *California Reduction Co. v. Sanitary Reduction Works* (1905) 199 U. S. 306, 50 L. ed. 204, 26 Sup. Ct. Rep. 100, wherein the court, sustaining a grant for fifty years, said: "The defendants criticize the ordinances because they give the exclusive privileges in question for a period of fifty years. But whether the period during which such privileges might be exercised should be long or short was a matter in the wise discretion of the board, and determinable

wholly upon grounds of public policy. It may be that grants by public authority, of privileges to be exercised for the benefit or in behalf of the public, ought never to be for long periods. But it suffices to say that no such consideration can control the action of the judiciary."

The objection that an ordinance granting the exclusive right to remove garbage fails to prescribe the manner in which the scavenger work shall be done is untenable. *Ouray v. Corson* (1900) 14 Colo. App. 345, 59 Pac. 876.

An ordinance regulating the collection and disposal of garbage and requiring the payment of an annual license fee by garbage collectors is not invalid as a delegation of the taxing power to the board of health. *St. Louis v. Weitzel* (1895) 130 Mo. 600, 31 S. W. 1045.

However, it has been held that an ordinance requiring any person desiring to carry garbage through the streets, to procure a license from a certain named officer, but not fixing the terms and conditions on which such license would be granted, was void. *Buffalo Fertilizer Co. v. Cheektowaga* (1909) 61 Misc. 404, 113 N. Y. Supp. 901, wherein the court said: "The provisions of the regulation in question are subject to the . . . criticism that this regulation does not prescribe the terms and conditions upon which a consent or license shall be given or withheld, but commits to the commissioner of highways of the town . . . the unlimited and absolute power to grant or withhold his consent, as he may himself determine. All regulations of this character should be uniform in their provisions, and any regulation which vests in an officer the power to act arbitrarily—power to give a license to one and to refuse his consent to another similarly situated—will be deemed invalid."

And it has been held that a resolution, passed without legislative authority, granting "to certain individuals an exclusive franchise, for twenty years, for the collection and cremation of garbage, etc., and to award a contract accordingly, on cer-

tain remuneration to the municipality and at prescribed rates of service to citizens, the contractors to establish a crematory in a satisfactory location," was ultra vires and void. *Conover v. Long Branch Commission* (1900) 65 N. J. L. 167, 47 Atl. 222, wherein the court said: "That they are without legal authority is unquestionable. Nothing in the subsisting organic law under which the Long Branch commission exists (Pamph. Laws 1875, p. 477), or in any general statute, warrants an exclusive franchise of the character sought to be conferred. Without legislative authority a municipal corporation cannot create a monopoly."

In *Kussel v. Erie* (1898) 8 Pa. Dist. R. 105, the court held to be invalid an ordinance directing "certain officials on behalf of the city to enter into a contract or contracts with one or more persons, whoever may make the most favorable proposition, for the collection and disposal of all the garbage produced by housekeepers, boarding-house keepers, and certain other designated parties in the city of Erie, and to charge and collect from the owners certain fixed prices therefor," and also prohibiting, under penalty, all persons not having such contract with the city, from engaging in such business, saying: "The city has the undoubted right to make all proper and necessary rules looking to the disposal of garbage, so as to prevent nuisances and annoyance to the public. It can regulate the times when it shall be collected. It can specify that it shall only be carried through the streets at certain hours and in closed water-tight wagons. I believe it can require all persons engaged in the business of collecting and disposing of garbage to take out a license, so that the cost of such license be reasonable. But upon what legal principle can it enact that all but one person shall be excluded from engaging in the business? Certainly such enactment arbitrarily excludes the citizen from a lawful business. The numerous cases cited on behalf of plaintiff in error clearly show that

this cannot be done. . . . On the question as to garbage being property, I desire to quote from the opinion of Judge Gunnison in the case of *Fratus v. Erie* (Pa.) No. 24, September term, 1894, in this court, as follows: 'Garbage, especially when produced in large quantities, has value. It is a legitimate subject of barter. The hotel proprietor had a property in that produced upon his premises, which he had a right to enjoy by either feeding his own animals or selling it to others for money. If he fed it himself, he had the right to transport it to the place of consumption. If he sold it, the purchaser, who then became the owner, had the right to transport his own private property to the place where he could make use of it.' I have no doubt of the correctness of the above. 'Property is everything which has an exchangeable value.' Why, then, does not the ordinance which attempts not only to take such property from the citizen, but also to make him pay an arbitrary price for its removal, deprive the citizen of his property without due process of law?"

c. Disposal of garbage.

1. Destruction.

In spite of the fact that garbage, after it has been discarded as food for human consumption, has a certain value as food for hogs or for rendering purposes, its value for such purposes is so slight, as compared with the danger to the public health if the owner is allowed to dispose of it without restriction, that the courts have unanimously held that a requirement of the destruction of garbage cannot be regarded as a taking of private property for public use without compensation.

United States v. California Reduction Co. v. Sanitary Reduction Works (1905) 199 U. S. 306, 50 L. ed. 204, 26 Sup. Ct. Rep. 100, affirming (1903) 61 C. C. A. 91, 126 Fed. 29, which affirms (1899) 94 Fed. 693; *Gardner v. Michigan* (1905) 199 U. S. 325, 50 L. ed. 212, 26 Sup. Ct. Rep. 106, affirming (1904) 136 Mich. 693, 100 N. W. 126.

District of Columbia.—*Nash v. District of Columbia* (1906) 28 App. D. C. 598, 8 Ann. Cas. 815; *Dupont v. District of Columbia* (1902) 20 App. D. C. 477.

Michigan.—See *PANTLIND v. GRAND RAPIDS* (reported herewith) ante, 280.

Missouri.—*VALLEY SPRING HOG RANCH Co. v. PLAGMANN* (reported herewith) ante, 266.

Nebraska.—*Urbach v. Omaha* (1917) 101 Neb. 314, L.R.A.1917E, 1163, 163 N. W. 307.

New Jersey.—*Atlantic City v. Abbott* (1906) 73 N. J. L. 281, 62 Atl. 999.

Pennsylvania.—*Butler v. Logan* (1910) 19 Pa. Dist. R. 952.

In *California Reduction Co. v. Sanitary Reduction Works* (1905) 199 U. S. 306, 50 L. ed. 204, 26 Sup. Ct. Rep. 100, affirming (1903) 61 C. C. A. 91, 126 Fed. 39, which affirms (1899) 94 Fed. 693, the court said: "The cremation and destruction of garbage and house refuse, under the authority of the municipal authorities, proceeding upon reasonable grounds, and at a place designated by law, as a means for the protection of the public health, cannot be properly regarded within the meaning of the Constitution, as a taking of private property for public use without compensation, simply because such garbage and house refuse may have had, at the time of its destruction, some element of value for certain purposes. With the knowledge of the householder the scavenger receives the garbage and refuse matter, that which, if separated, might have value, being mingled with that which is in itself noxious and worthless. The entire mass goes into the same covered wagon, and the authorities are not bound, before its destruction at the crematory, to cause the good to be separated from the bad, but could require, as the ordinances in question did, that the substances be promptly conveyed to the designated crematory and destroyed by fire. Such a disposition of the contents cannot be regarded as a taking of private property for public use without compensation."

The foregoing case was followed in

Gardner v. Michigan (1905) 199 U. S. 325, 50 L. ed. 212, 26 Sup. Ct. Rep. 106, affirming (1904) 136 Mich. 693, 100 N. W. 126, as to the power of a municipality to regulate the disposition of garbage. The court said: "If it be said that the city might have adequately guarded the public health and at the same time saved the property rights of its owner on whose premises garbage and refuse were found, the answer is that the city evidently thought otherwise, and we cannot confidently say that its constituted authorities went beyond the necessities of the case and exceeded their proper functions when they passed the ordinance in question. Those ordinances cannot, therefore, according to well-settled principles, be held to be wanting in the due process of law required by the Constitution."

In *Nash v. District of Columbia* (1906) 28 App. D. C. 598, 8 Ann. Cas. 815, the court, sustaining the right of a municipality, in the exercise of its police power, to require the destruction of garbage, even though part of it might have had some value, said: "The cremation of garbage as a means for the protection of the public health, when proceeding upon reasonable grounds, cannot be regarded as the taking of private property for public use without compensation, simply because such garbage and house refuse may have had at the time some element of value for certain purposes. The scavenger receives that which, if separated, might have value and be harmless, mingled with that which is in itself not only worthless, but noxious. The commingled substances could not be separated by the authorities, which promptly and properly convey them away to be destroyed by fire. It is a controlling obligation of the . . . authorities, which they could not properly ignore, to protect the health of its people in all lawful ways; and in the fair and reasonable exercise of the police power they may rightfully require the destruction of garbage and refuse, even when containing some elements of value."

And in *Dupont v. District of Colum-*

bia (1902) 20 App. D. C. 477, the court, holding that an ordinance requiring all garbage to be disposed of by a reduction or consumption process within forty-eight hours was a valid police regulation, said: "The mere fact that the defendant was willing to buy garbage and use it for those purposes is not sufficient to remove it from the category of nuisances, and settle its character as property. Whilst money value is evidence, and sometimes very strong evidence to that end, it is not of itself sufficient to make a case of unreasonableness or oppression against the law and the regulations under consideration. Some members of the community may be willing to expose their own health to danger through the use of noisome manures, and to eat the flesh of animals fed upon garbage, or to sell such flesh for food to others who may be unaware of its character, but their practices cannot make a rule of community observance. It is against the ignorance, the indifference, the selfishness, the avarice, the wilful disregard of just and intelligent public opinion, that the police power must be constantly invoked on behalf of the common safety and advantage. . . . Garbage . . . is necessarily composed largely of matter noisome even before its deposit in the receptacles provided for it, and other matter mingled with it must necessarily partake of its offensive character. Moreover it is a thing of almost hourly accumulation in every occupied house of a large city, and is therefore a constant menace to the health and comfort of thousands of people. These conditions amply justify the application of a . . . rule as regards its collection, removal, and final disposition."

So, in *VALLEY SPRING HOG RANCH Co. v. PLAGMANN* (reported herewith) ante, 266, the court, in answer to the contention that an ordinance requiring garbage to be destroyed was destructive of the property rights of the owner, said: "It is true that there may be an ownership of garbage from the kitchen, but the value of the owner's rights therein is so inconsequen-

tial that they are absorbed and lost in the greater rights of the state to protect such owner and the public at large from the dire effects of improper methods in the handling and disposition of the same. Garbage, if allowed to accumulate and decompose, becomes a public nuisance, and the court's finding in this case so shows. But a short time is required to convert the harmless table scrap into a pestilence-breeding nuisance, when it is intermingled with other refuse from the kitchen."

An ordinance which directs that all garbage shall be removed by a certain authorized contractor, and which prescribes the method of removal and place of disposal of the garbage, is not invalid on the ground that it takes private property without compensation because it deprives the owner of the privilege of selling the garbage and the purchaser of the privilege of using it. *Atlantic City v. Abbott* (1906) 73 N. J. L. 281, 62 Atl. 999.

In *Urbach v. Omaha* (1917) 101 Neb. 314, L.R.A.1917E, 1163, 163 N. W. 307, it was held that an ordinance which prohibited the owner from selling garbage produced by himself did not deprive him of his property without due process of law, or take his property for public use without just compensation.

An ordinance, duly passed under statutory authority, providing for the removal of garbage to the borough furnace to be consumed, does not deprive an owner of his property without due process of law. *Butler v. Logan* (1910) 19 Pa. Dist. R. 952, wherein the court said: "The . . . contention that the ordinance deprives the residents of the borough of their property without due process of law cannot be sustained. The first section of the ordinance, after enumerating the things which shall constitute garbage within its meaning, adds the language, 'and other worthless putrescible matter.' These modifying words, as we take it, apply to all those things before mentioned in the section as garbage, so that it is only when they are 'worthless or putrescible' that they come within the meaning

and operation of the ordinance. If they are 'worthless,' then evidently they are without property value, and their removal would not violate any constitutional right. If they are putrescible, then, with or without value, they are subject to municipal control and removal as being prejudicial in fact or in their tendency to the public health and comfort."

In *PANTLIND v. GRAND RAPIDS* (reported herewith) ante, 280, it is held that an ordinance which prohibits the removal and disposition of garbage by the person who produces it on his own premises is not wanting in the due process of law required by the Constitution, because it is property of value.

2. Other methods.

A municipality may, in the exercise of its police power, prescribe a "dumping place" or place of deposit for garbage, and prohibit its being thrown or deposited in any place other than that designated in the ordinance. Thus, in *Ex parte Casinello* (1881) 62 Cal. 538, an order of the board of supervisors of a county, passed under statutory authority, prohibiting the deposit of garbage except in a place designated for that purpose by the superintendent of highways, was held to be a wise and salutary one, calculated to promote the welfare and best interests of the city, and

to be in its nature and purpose a salutary police regulation, designed to protect the safety and health of the inhabitants, and not arbitrary, unreasonable, or unjust. The court said: "The objections that the order is oppressive, unjust, and unreasonable are, in my opinion, not well taken. That dirt, rubbish, garbage, and filth are, in their nature, nuisances, is too plain to admit of controversy; and that glass and broken ware can be very easily converted into nuisances if thrown about promiscuously is equally plain."

Likewise, a municipality may reasonably regulate the rendering of garbage. Thus in *Newtown v. Lyons* (1896) 11 App. Div. 105, 42 N. Y. Supp. 241, an ordinance, enacted under statutory authority, prohibiting the "boiling or cooking at any place within the town any garbage or refuse vegetable or animal matter 'in any open vat, kettle, or caldron, or in any manner so as to permit the vapors or exhalations from such boiling or cooking to escape into the surrounding air,'" was held to be a valid exercise of the police power.

And it has been held that a city may, by an ordinance permitting the authorized scavenger to use the garbage collected by him for his own benefit, give away the garbage of a householder. *Marple v. Pfanner* (1911) 21 Pa. Dist. R. 847, 851.

A. S. M.

MAYOR AND CITY COUNCIL OF BALTIMORE et al., Appts.,

v.

HAMPTON COURT COMPANY et al.

Maryland Court of Appeals — April 6, 1921.

(— Md. —, 113 Atl. 850.)

Municipal corporation — provision for removal of ashes — discrimination — validity.

An ordinance limiting the quantity of ashes to be removed per week from each dwelling, apartment house, and tenement house is not unreasonable or void because it fails to provide for the accumulation in large apartment houses and requires the owners of such apartments to provide other

means for removing the ashes, although paying their proportionate share of the taxes.

[See note on this question beginning on page 309.]

APPEAL by defendants from an order of the Circuit Court No. 2 of Baltimore City (Dawkins, J.) overruling a demurrer to a bill filed to contest the validity of an ordinance relating to the collection and removal of ashes from dwelling and apartment houses. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Roland R. Marchant, George Eckhardt, Jr., and Simon E. Sobeloff, for appellants:

The mayor and city council of Baltimore have the power to regulate by ordinance the removal of ashes.

Baltimore v. Hampton Court Co. 126 Md. 347, 94 Atl. 1018; Schultz v. State, 112 Md. 211, 76 Atl. 592; Rossberg v. State, 111 Md. 394, 134 Am. St. Rep. 626, 74 Atl. 581; Haley v. Boston, 191 Mass. 291, 5 L.R.A.(N.S.) 1005, 77 N. E. 888.

Inasmuch as the city has the right to regulate the removal of ashes by ordinance, the ordinance in question is not void because it requires the commissioner of street cleaning to remove 15 bushels and no more from each dwelling or apartment house.

California Reduction Co. v. Sanitary Reduction Works, 199 U. S. 306, 50 L. ed. 204, 26 Sup. Ct. Rep. 100; Etchison v. Frederick, 123 Md. 283, L.R.A. 1916C, 561, 91 Atl. 161; Richmond, F. & P. Co. v. Richmond, 96 U. S. 521, 24 L. ed. 734; Ivins v. Trenton, 68 N. J. L. 501, 53 Atl. 202; Baltimore v. Wollman, 123 Md. 310, 91 Atl. 339; Alexander v. Baltimore, 5 Gill, 384, 46 Am. Dec. 630; Methodist Protestant Church v. Baltimore, 6 Gill, 391, 48 Am. Dec. 540; State v. Mott, 61 Md. 304, 48 Am. Rep. 105; Storck v. Baltimore, 101 Md. 476, 61 Atl. 330; Rossberg v. State, 111 Md. 394, 134 Am. St. Rep. 626, 74 Atl. 581; Gould v. Baltimore, 120 Md. 534, 87 Atl. 818; New Orleans Waterworks Co. v. New Orleans, 164 U. S. 471, 41 L. ed. 518, 17 Sup. Ct. Rep. 161; Olympia v. Mann, 1 Wash. 389, 12 L.R.A. 150, 25 Pac. 337; State ex rel. Kellogg v. Currens, 111 Wis. 431, 56 L.R.A. 252, 87 N. W. 561; Ex parte Zhizhuzza, 147 Cal. 328, 81 Pac. 955.

Messrs. Enoch Harlan, R. Lee Slingluff, Robert W. Williams, and Janney, Stuart, & Ober, for appellees:

The ordinance in question is unreasonable and discriminatory in its application and operation, and is void.

15 A.L.R.—20.

Baltimore v. Hampton Court Co. 126 Md. 348, 94 Atl. 1018; California Reduction Co. v. Sanitary Reduction Works, 199 U. S. 306, 50 L. ed. 204, 26 Sup. Ct. Rep. 100; Walker v. Jameson, 140 Ind. 591, 28 L.R.A. 679, 49 Am. St. Rep. 222, 37 N. E. 402, 39 N. E. 869; Re Zhizhuzza, 147 Cal. 328, 81 Pac. 955; Consolidated Apartment House Co. v. Baltimore, 131 Md. 523, L.R.A. 1918C, 1181, 102 Atl. 920; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; Slaughter-House Cases, 16 Wall. 36, 21 L. ed. 394; State v. Gurry, 121 Md. 534, 47 L.R.A. (N.S.) 1087, 88 Atl. 546, Ann. Cas. 1915B, 957; Buchanan v. Warley, 245 U. S. 60, 62 L. ed. 149, L.R.A. 1918C, 210, 38 Sup. Ct. Rep. 16, Ann. Cas. 1918C, 1201; Re Blois, 179 Cal. 291, 176 Pac. 449; Mildner v. Cincinnati, 13 Ohio C. C. N. S. 88.

Adkins, J., delivered the opinion of the court:

The single question in this case is the validity of ordinance No. 55 of the mayor and city council of Baltimore, approved December 20, 1915, which is as follows:

An Ordinance to Add a New Section to Article 36 of the Baltimore City Code of 1905, to Be Known as Section 2-A, Defining the Duties of the Commissioners of Street Cleaning with Reference to the Collection and Removal of Ashes, and Repealing All Inconsistent Ordinances.

Section 1. Be it ordained by the mayor and city council of Baltimore, that a new section is hereby added to article 36 of the Baltimore City Code of 1906, to be known as section 2-A, to follow section 2, and to read as follows:

2-A. It shall be the duty of the

commissioner of street cleaning to remove all ashes from dwelling houses, apartment houses, and tenement houses, not exceeding 15 bushels per week from each dwelling house, apartment house, or tenement house, but it shall not be the duty of said commissioner of street cleaning to remove more than 15 bushels per week of ashes from any dwelling house, apartment house, or tenement house, and it shall not be his duty to remove any ashes from any place other than a dwelling house, apartment house, or tenement house.

Sec. 2. And be it further ordained, that all ordinances and parts of ordinances inconsistent herewith are hereby repealed, to the extent of such inconsistency, and that this ordinance shall take effect from the date of its passage.

Approved December 20, 1915.

[Signed] James H. Preston,
Mayor.

The question is raised by demurrer to the bill of complaint of appellees. The bill sets out a number of ordinances under which it was made the duty of the commissioner of street cleaning to remove all ashes produced in Baltimore city, without regard to where they were produced or the quantity; that plaintiffs are the owners of large apartment houses in which many families reside, and which produce more than 15 bushels of ashes per week, but that notwithstanding appellees are large taxpayers and pay taxes in proportion to the value of their properties, and notwithstanding money has been appropriated yearly for the purpose of removing ashes, more than sufficient to enable the commissioner of street cleaning to remove all the ashes from their apartment houses and all others of like character, defendants have refused, and still refuse, to remove more than 15 bushels per week from the large apartment houses, and plaintiffs have found it necessary to remove all of their own ashes and household and miscellaneous refuse therefrom.

The prayer of the bill is that said ordinance be adjudged and declared to be unreasonably and unlawfully discriminatory, beyond the powers of the mayor and city council of Baltimore to ordain and enforce, and to be null and void; and that the defendants be enjoined and restrained from unlawfully discriminating against plaintiffs and other owners of apartment houses producing more than 15 bushels of ashes per week, and from refusing to collect and remove the ashes and household and miscellaneous refuse from apartment houses in Baltimore city, and particularly from plaintiffs' apartment houses; that a decree may be passed in favor of plaintiffs against the defendants in the amount of expense incurred by plaintiffs in collecting and removing the ashes, and household and miscellaneous refuse from their several apartment houses during the years 1916, 1917, 1918, and 1919, and for further relief.

It appears from the averments of the bill that prior to 1913 all ashes were collected and removed by the city either by its own employees or by contractors. In the spring of that year the board of estimates directed the commissioner of street cleaning to discontinue collecting and removing ashes and household and miscellaneous refuse and offal (other than garbage) from apartment houses in Baltimore city, and on the 5th day of June, 1913, the said board of estimates adopted the following resolution, and directed the said commissioner to comply therewith, viz.: "Houses not more than four stories in height and not having an elevator, used for dwelling purposes, even though they may be occupied by more than one family, should be classed as dwellings, and the commissioner of street cleaning should take the ashes therefrom. Houses more than four stories in height used for dwelling purposes, and occupied by more than one family, should be classed as apartment houses."

This court in the case of Balti-

more v. Hampton Court Co. 126 Md. 341, 94 Atl. 1018, decided that the board of estimates had no authority to pass such a resolution in conflict with existing ordinances, and also that the resolution attempted to enforce an arbitrary discrimination. But the court in that case said: "There can be no question but what the municipality, the mayor and city council of Baltimore, had the power by ordinance to regulate the removal of ashes, in the exercise of its police power. *Schultz v. State*, 112 Md. 211, 76 Atl. 592; *Haley v. Boston*, 191 Mass. 291, 5 L.R.A. (N.S.) 1005, 77 N. E. 888; *Rossberg v. State*, 111 Md. 394, 134 Am. St. Rep. 626, 74 Atl. 581. It could amend, alter, or repeal the existing ordinances on the subject, and, subject to the limitation that such ordinances must be reasonable in their provisions, could classify the buildings from which such removal should be made at the public expense. By way of illustration, there are many and cogent reasons why the cost of the removal of manufacturing and commercial waste from factories and department stores should not be borne by the public at large, or even the refuse from hotels, which are without force in the case of the ordinary householders, and a number of cities have enacted regulations which recognize that distinction. But such classification is a power to be exercised by the municipal corporation as such through its legislative branch of government, not one resting in any board or commission of the municipality."

Shortly after the above decision was handed down, ordinance No. 55 was enacted, and the bill in this case was filed to test the validity of said ordinance:

The defendants demurred to the bill, and from the order of the learned court below overruling the demurrer this appeal was taken.

Appellees concede that the mayor and city council of Baltimore have the power under the charter to regulate the removal of ashes, and

even to compel the removal of all ashes by the owners of dwellings and other buildings, but they strenuously urge that the enactment and enforcement of the ordinance in question was an arbitrary and discriminatory exercise of power, and therefore justifies the interference of a court of equity. With this contention we do not agree.

The argument in support of the charge of discrimination seems to be based on the theory that the removal of ashes by the city is undertaken as a matter of favor to householders, and on that theory it is contended that either all or none should be removed at public expense, because the work is paid for out of a common fund contributed by taxpayers, and therefore it is unjust to limit the number of bushels of ashes removed from a large apartment house, on which heavy taxes are paid, to that removed from a private dwelling, bearing a much lighter burden of taxation. It is also argued that if sixty families elect to live in one house large enough to accommodate them, it is unreasonable to deny them the right to have all their ashes removed at public expense, while their neighbors who do not live in apartment houses, or in houses large enough to produce more than 15 bushels of ashes, are relieved of the expense and trouble of providing for the removal of any part of such refuse.

The answer to both these arguments is that the partial removal of ashes by the city, as provided for in this ordinance, is not undertaken primarily as a matter of favor to individuals or to serve their convenience. If it were, the man who used gas or electricity instead of coal or wood might justly complain that he was being taxed to help pay for services rendered by the city to his neighbor who used ash-producing fuel; and the family living at a hotel might insist that it was being discriminated against.

As a practical proposition, however, the total amount paid annual-

ly by the appellees for the removal of ashes, as shown by the record, is too small, when considered in relation to the number of families occupying the apartment, to be reflected in the rents paid by the tenants, and it is not believed they are substantially interested in the controversy.

The only justification for the use of public money at all in an enterprise of this sort is that it serves a public purpose. It is necessary that ashes be removed from time to time to protect the public from the nuisance which their accumulation would occasion, not to the householders as such, but to the public generally using the streets of the city. How this shall be done is for the municipal authorities, and not for the courts, to determine.

It does not seem to be any more unreasonable to require owners of large apartment houses to provide for the removal of their ashes in excess of the amount produced by the owners of large dwellings, than to require hotels, factories, and department stores producing large quantities, to remove the same, as we said in *Baltimore v. Hampton Court Co.* supra, they could be compelled to do.

As was said in *Harrison v. Baltimore*, 1 Gill, 264, and approved in *Baltimore v. Radecke*, 49 Md. 217, 33 Am. Rep. 239, referring to the exercise by the city of its powers: "The selection of the means and manner (contributory to the end) of exercising the powers which they may deem requisite to the accomplishment of the objects of which they are made the guardians is committed to their sound discretion."

In *State v. Gurry*, 121 Md. 534, 47 L.R.A.(N.S.) 1087, 88 Atl. 546, Ann. Cas. 1915B, 957, this court said: "In determining the constitutionality of an ordinance passed under the exercise of the police power, courts must take into consideration

the reasonableness of their provisions, and determine whether or not they are so reasonable or oppressive as to cause the assumption that the legislature did not intend to empower the municipality to enact them."

See also *Radecke Case*, supra; *Yick Wo v. Hopkins*, 118 U. S. 373, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 359.

In the last-mentioned case, where protection of the 14th Amendment was invoked, it is said: "Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the Amendment." We said in *Baltimore v. Wollman*, 123 Md. 310, 91 Atl. 339: "The necessity and reasonableness of an ordinance when passed in pursuance of the charter powers of a municipality is primarily committed to the council, and unless the ordinance is purely arbitrary, oppressive, or capricious, the courts will not interfere to prevent its enforcement."

See also *Etchison v. Frederick*, 123 Md. 283, L.R.A.1916C, 561, 91 Atl. 161.

We have examined carefully the cases cited by appellees. Their facts are entirely different from those in the case at bar.

We find nothing in the ordinance under consideration which the court can say is either

capricious, oppressive, unreasonable, or discriminating, to such an extent, at any rate, as to invite or permit judicial interference.

We must therefore reverse the order overruling the demurrer to the bill of complaints.

Order reversed and bill dismissed, with costs to appellants.

Municipal corporation—provision for removal of ashes—discrimination—validity.

ANNOTATION.

Statutory or municipal regulation of removal of ashes or other rubbish.

- I. Scope of note, 309.
- II. Validity, 309.
- III. Construction, 312.

I. Scope of note.

The cases dealing with the validity of statutory or municipal regulations as to garbage are collated in the annotation to *Pantlind v. Grand Rapids*, ante, 287. In that annotation that class only of garbage which consists of animal or vegetable matter, i. e., organic matter, is included. The present annotation is concerned only with municipal or statutory regulations as to the removal of garbage or refuse, used in its inorganic sense, as including ashes, cinders, paper, and the like. Manure, night soil, and the contents of unsewered privies have been excluded, as has the liability of a municipal corporation for injuries resulting from the negligence of city employees in the removal of ashes, garbage, or rubbish. For a discussion of the latter subject, see the annotation in 14 A.L.R. 1473.

II. Validity.

A municipality may make reasonable regulations governing the removal of ashes or other rubbish from private premises. "The right of reasonable regulation for the prevention of nuisances of every kind, and the method of removal through and over the streets of a city of all accumulations of refuse matter, rubbish, and other waste material for the purpose of sanitation and in the interest of the general health and comfort of the inhabitants, should be and is fully recognized. It is but the exercise of an authority properly appertaining to a municipality in the interest of the public, and to promote and preserve the welfare and convenience of all the people." *Iler v. Ross* (1902) 64 Neb. 710, 57 L.R.A. 895, 97 Am. St. Rep. 676, 90 N. W. 869 (dictum).

It is held in the reported case (*BALTIMORE v. HAMPTON COURT Co.* ante, 304) that an ordinance making

it the duty of the department of street cleaning to remove all ashes from dwelling houses, apartment houses, and tenement houses, not exceeding 15 bushels per week, is neither unreasonable nor discriminating, the contention against the ordinance being that since the work is paid for by general taxation it is unjust to limit the number of bushels of ashes removed from a large apartment house, on which heavy taxes are paid, to the amount that will be removed from a private dwelling, bearing a much lighter burden of taxation.

In *Ex parte Casinello* (1881) 62 Cal. 538, an ordinance prohibiting the throwing or depositing "upon any public street, highway, or grounds, or upon any private premises, or anywhere except in such a place as may be designated for that purpose by the superintendent of public streets and highways, any glass, broken ware, dirt, rubbish, garbage, or filth," was held to be a reasonable exercise of a power to make "local police, sanitary, and other regulations." The court said: "The regulation in this case, instead of being arbitrary, unreasonable, or unjust, was a wise and salutary one, calculated to promote the welfare and best interests of the city, and was, in its nature and purpose, a salutary police regulation, designed to protect the safety and health of the inhabitants."

But a regulation concerning the removal of ashes or other rubbish must be reasonable. Thus, in *Goodland v. Popejoy* (1916) 98 Kan. 183, 157 Pac. 410, an ordinance making it unlawful for any person "to deposit, put, throw, place, or allow to remain on any lot or lots owned or occupied by such person, or persons, at any place in said city, any tin cans, manure, ashes, garbage, slops, swill, refuse, filth, offal, unwholesome substance, vegetable matter, or animal matter, or any rubbish whatever," was held to be void. The court said:

"Presumably the ordinance was enacted under the authority given cities of the second class to secure the general health and to prevent and remove nuisances. Gen. Stat. 1909, § 1405, as amended by Laws 1911, chap. 116. The ordinance is not directed against depositing tin cans, manure, ashes, garbage, and refuse on private property under conditions which render them offensive to others or detrimental to the public health, and is not directed against allowing the enumerated articles and substances to remain on private property under conditions which make them offensive or harmful. No distinction is made between nocuous and innocuous, reasonable and unreasonable. The offense is complete if any of the things mentioned be deposited or allowed to remain, whatever the quantity, circumstances, or length of time. Ashes from the furnace or stove cannot be deposited or kept even in a safe receptacle, and refuse from the kitchen cannot be deposited or kept even in a garbage can until the garbage collector can be called. . . . Having undertaken without qualification to make things nuisances which are not so in fact, and which become nuisances only under conditions which are not recognized, § 2 of the ordinance is void."

A like conclusion was reached in *Iler v. Ross* (Neb.) *supra*, a leading case on the subject, with respect to an ordinance which provided that "any person who shall collect or remove any dead animals, garbage, ashes, filth, offal, night soil, or other refuse matter, . . . not having a contract with said city to do so, shall be deemed guilty of misdemeanor, and upon conviction thereof shall be fined." After recognizing the power to prohibit the accumulation of rubbish in such manner as to constitute a nuisance and to create an official agency for its removal, the court said: "Can the city, merely by its fiat, declare all and every substance of the kind mentioned nuisances, and direct their abatement and removal through the agency of an exclusive contractor? . . . By the provisions of the ordinance under con-

sideration, neither the owner or occupant of the premises, nor a person employed for that purpose, can haul or transport within the corporate limits of the city any of the substances included in the ordinance, even though such material might be utilized for some beneficial purpose. He is prevented from disposing of it in any manner, and must submit to its collection and removal by the city contractor in the manner and by the means pointed out in the ordinance. . . . Cinders and ashes may be and are regarded as useful for many purposes. Many other substances coming within the meaning of the language of the ordinance in the nature of *débris*, rubbish, and other waste material which might be specifically mentioned, could probably be used for some beneficial purpose, and many others having no utility like those referred to are not within themselves nuisances and a menace to the health of the public. It is quite true their accumulation in unreasonable quantities and for an unreasonable length of time would render them nuisances, and to prevent which all reasonable regulations may be imposed. These are all classed in the ordinance in the general category of dead animals, garbage, and other unwholesome and noxious substances, and made the subject of the same regulation under the provisions of the ordinance, and the right to collect and to remove all such material and substances given exclusively to the city garbage contractor. Such attempted regulation is, in our judgment, unreasonable, oppressive, and contrary to a sound public policy. The ordinance not only grants a monopoly, always odious in the eye of the law, without justification or necessity therefor as a sanitary measure for the protection and preservation of the public health, comfort, and welfare, but is also an unwarranted invasion of the natural rights of the inhabitants of the city."

It has also been decided that a board of estimate has no authority to pass a resolution regulating the removal of ashes which is in conflict with existing ordinances on the same

subject. See *Baltimore v. Hampton Court Co.* (1915) 126 Md. 341, 94 Atl. 1018. In that case it appeared that the duty was imposed by the ordinance on the commissioner of street cleaning, to remove ashes and other rubbish from all dwellings and other places in the city. It further appeared that the board of estimate passed a resolution declaring that "houses not more than four stories in height, and not having an elevator, used for dwelling purposes, even though they may be occupied by more than one family, should be classed as dwellings, and the commissioner of street cleaning should take the ashes therefrom;" and that "houses more than four stories in height, used for dwelling purposes, occupied by more than one family, should be classed as apartment houses." Thereafter the commissioner of street cleaning discontinued and refused to remove ashes from certain apartment houses, from which he had theretofore been collecting and removing the same. It was held that the board acted *ultra vires* in so far as the resolution was intended to operate as a modification of existing ordinances, and that the resolution was void and of no effect. The reasoning of the court is sufficiently set out in that part of the opinion quoted in the reported case (*BALTIMORE v. HAMPTON COURT CO.* ante, 304).

Since the duty of removing ashes rests primarily on the owner or occupant of the premises where they originate, he is not in a position to question the validity of an ordinance whereby the municipality assumes the removal of ashes at public expense from certain classes of buildings only. *People ex rel. Webster v. Chicago* (1917) 277 Ill. 394, 115 N. E. 570, affirming (1916) 200 Ill. App. 35 (for opinion previously rendered by the supreme court in transferring the case to the appellate court, see (1916) 272 Ill. 451, 112 N. E. 280). In that case the plaintiff filed his petition for mandamus against the city to compel it to remove ashes and other waste material from his property without cost to him. The ordinance in question made it "the duty of every

person, firm, or corporation occupying, operating, or controlling any building or portion thereof in the city of Chicago which is heated by steam, hot air, or hot water, or in or about which combustibles are used or ashes produced, to keep in or about such building all ashes, cinders and other waste arising from combustion and produced therein, and to remove or cause to be removed the same from said premises at his, her or its own expense," at such times and in such manner as the commissioner of public works might direct, "provided, this section shall not apply . . . to any building containing less than five flats." It appeared that the city had been removing ashes, garbage, cinders, and waste from all steam-heated buildings within the city containing less than five apartments each, and from all stove-heated buildings without regard to the number of flats or apartments in any one building, at the cost and expense of the city, out of the tax levied and collected on and from all the property in the city. It was contended that the removal of garbage from all buildings, but the ashes from only a certain class of buildings, violated a legal duty the city owed the owners of buildings containing more than five flats, from which it refused to remove the ashes at public expense. The court said: "It is not controverted that the duty of removing ashes from buildings where they are produced rests primarily upon the owner or occupant. While the city may, we think, by appropriate legislation, voluntarily assume that duty and relieve the owner of the burden, it cannot be compelled to do so. The city council of the city of Chicago has legislated upon this subject by ordinance, the sections of which having any bearing on this case are set out in our former opinion. That ordinance did not specifically state that the city should remove ashes from any building, but buildings containing less than five flats were exempted from the requirement of § 1000, that the owner of 'any building' in the city of Chicago, heated by steam, hot air, or hot water, should

at his own expense remove the ashes therefrom. It appears to have been the intent of the council in passing the ordinance that ashes should be removed from apartment buildings containing less than five flats, by the city at its expense, but that the ashes produced in flat buildings of five or more apartments should be removed by the owner, and, according to the averments of the petition, the city has been removing the ashes from buildings of less than five flats, and paying the expense out of a tax levied and collected for that purpose. Appellant's building is a six-flat or apartment building heated by steam, and is not excepted from the requirement of the ordinance that the owner shall remove the ashes. Whether the ordinance is valid or invalid, it does not purport to relieve appellant from the duty of removing his ashes at his own expense. The city has never assumed the duty of removing ashes from buildings of the class of appellant's, but has required that duty to be performed by the owners. Because the council has appropriated money to pay the expense of removing ashes from buildings it has assumed by ordinance to serve in that manner does not entitle the owner of a building not included in the ordinance to a writ of mandamus to compel the municipality to give him the same service; and this is true even if the ordinance were invalid because of discrimination or for some other reason. The city has never voluntarily assumed the duty of removing ashes from buildings of the class of appellant's, and it is immaterial to a decision of this case whether, in passing the ordinance referred to, the council acted legally or illegally. Presumably the appropriations made and taxes collected for the removal of ashes were for the performance of that service for buildings to which the ordinance was intended to apply, and even if the exemption of buildings of less than five flats from the requirement of § 1000 was void, as alleged in the petition, that would not entitle appellant to the writ."

To the same effect, see *People ex*

rel. Williams v. Chicago (1917) 209 Ill. App. 142.

III. Construction.

In *Lyndon v. Standbridge* (1857) 2 Hurlst. & N. 45, 157 Eng. Reprint, 19, 26 L. J. Exch. N. S. 386, 5 Week. Rep. 590, which arose under § 87 of the Towns Improvement Clauses Act of 1847 (10 & 11 Vict. chap. 34), requiring the commissioners to cause "all the dust, ashes, and rubbish to be carried away from the houses and tenements," it was held that the provision did not extend to the dust and ashes produced by manufactories, the court saying it was manifest that what was intended was house rubbish.

It was held in *Law v. Dodd* (1848) 1 Exch. 845, 154 Eng. Reprint, 361, that the sale of the refuse of an ash pit containing a considerable portion of metal, which fell into the pit and became mixed with the ashes during the process of casting brass, was not a violation of the Metropolitan Paving Act, 57 Geo. III. chap. 29, which provided that, "if any person or persons, other than the scavengers, rakers, or cleansers of any parochial or other district, or the other person or persons employed or appointed by or contracting with the said commissioners, or trustees, or other persons as aforesaid, to collect and retain the dust, cinders, or ashes, within their respective parochial or other district, or those employed by or under such person or persons, shall, on any pretense whatsoever, go about to collect or gather, or ask for, receive, or carry away, any dust, cinders, or ashes, it shall and may be lawful for any justice of the peace for the city, borough, or county within which such parochial or other district may be situate, upon complaint to him made, to grant a warrant to bring before him such offender or offenders." The court said: "The refuse of the ash pit was not 'ashes, cinders, dust, or rubbish,' within the meaning of the act of Parliament, but an article of commerce used in the process of manufacture."

The Metropolitan Management Act of 1855 (18 & 19 Vict. chap. 120) em-

powered every vestry and district board to contract for the removal of all ashes and other rubbish, and further provided as follows: "Sec. 127. All dirt, dust, night soil, ashes, and rubbish collected as aforesaid shall be the property of such vestry or board, and such vestry or board shall have full power to sell and dispose of the same for the purposes of this act as they shall think proper. Sec. 128. In case any scavenger be required by the owner or occupier of any house or land to remove the refuse of any trade, manufacture, or business, or of any building materials, such owner or occupier shall pay to the scavenger a reasonable sum for such removal, such sum in case of dispute to be settled by two justices. Sec. 129. If any dispute or difference of opinion arise between the owner or occupier of any such house or land and the scavengers required to remove such refuse, as to what shall be considered refuse, it shall be lawful for any two justices, upon application made to them by either of the parties in difference, to determine whether the subject-matter is or is not refuse of trade, manufacture, or business, or of any building materials, and in every such case the decision of such justices shall be final and conclusive." Under the foregoing act, ashes from a steam engine, used for the purposes of the defendant's business of manufacturing pianos, have been held to be the refuse of a trade, manufacture, or business. *Gay v. Cadby* (1877) L. R. 2 C. P. Div. (Eng.) 391. Wherein the court said: "My notion of the object of the act is that the ordinary refuse of towns and districts is to be removed by the contractors without expense to the persons whose refuse it is, but that persons who, in carrying on a trade, manufacture, or business for their own profit, create refuse independent and in excess of the ordinary domestic refuse, shall not impose upon the scavenger the burden of removing such refuse, but shall pay a reasonable sum for its removal. The word 'refuse' in § 128, I think, comprehends all ashes and other refuse created by the carrying on the

trade or business, as distinguished from ordinary domestic or house refuse. The only question is whether that covers that which is not a residuum of the article produced in the manufacture, but the refuse of the material used in the course of the producing of the thing manufactured. I cannot see why 'refuse' should be less applicable to the thing produced in the operation of the manufacture than to the residuum of the thing produced by the operation. Both should equally be removed at the expense of the manufacturer. Here, the coals are consumed for the generation of the power by means of which the manufacture is carried on; and the ashes or refuse from those coals are, in my opinion, refuse of the trade, manufacture, or business carried on by the respondent. I therefore think the payment was properly required by the contractor, and that the respondent was bound to make it. Difficult questions of degree may be suggested; and the case finds that the refuse from bakers' furnaces is removed by the contractor without payment. It is enough to say that that question is not now before us, and that the ashes in question are clearly refuse which the contractor was not bound to remove without payment. The appellant must have judgment, with costs."

In *St. Martins v. Gordon* [1891] 1 Q. B. (Eng.) 61, it was held that clinkers produced in the furnaces of a hotel were not the refuse of a trade, manufacture, or business within the same act, so that the scavengers were not entitled to extra payment for their removal. The court said: "The question in this case is whether certain clinkers are 'refuse of any trade, manufacture, or business,' within the meaning of § 128 of the Metropolis Local Management Act 1855. The facts are set out in the special case. To determine the question raised it is necessary to consider the scheme of certain sections in the act, beginning with § 125, and ending with § 129 (being the sections relating to scavengers), and the meaning of those sections. The scheme of the sections appears to be twofold:—With regard

to certain things of no value, and which the owner or occupier of the house would wish to get rid of, as being of no value and inconvenient to retain, to compel the vestry to remove them, subjecting those responsible for the nonremoval, whether the vestry or its scavengers, and the occupier of the house, if he obstructs their removal, to a penalty; but in the case of any refuse of a trade, manufacture, or business, there is no such compulsion; there must be a request by the owner or occupier, and a reasonable sum paid for removal, on the ground, I presume, that such refuse may have some commercial value, and on that account the owner or occupier may not desire its removal, and requiring a payment because the removal is rather for his convenience than for any sanitary requirement. These clinkers are ashes in a vitrified form; they are the unconsumed portions of the coal used for the purpose of producing heat and light in aid of the business carried on in the hotel, but not refuse of the business, and fall within § 125 just as much as any other ashes. Fire is kept for the purpose of almost every trade, manufacture, and business. If we were to hold these clinkers to be refuse of a

trade or business, I cannot see how any ashes produced in aid of any trade, manufacture, or business would be removable without payment; and this would be to limit the meaning of the word 'ashes' in § 125 to an extent which I cannot think was contemplated. It is difficult to give an exhaustive definition of 'refuse of any trade, manufacture, or business;' but the definition I am about to give describes what I think those words mean. It is what is discarded after the rest has been utilized for the purpose of working the trade, manufacture, or business,—refuse which is the immediate and direct result of the trade, manufacture, or business; not a kind of refuse which would arise as much if there was no trade, manufacture, or business, and is only increased in quantity by reason of the trade, manufacture, or business."

Under the act last mentioned, if the vestry wrongfully refuses to remove ashes or other rubbish, the owner or occupant may remove them and recover from the vestry any expense that he may have incurred in their removal. *Holborn Union v. St. Leonard* (1876) L. R. 2 Q. B. Div. (Eng.) 145, 46 L. J. Q. B. N. S. 36, 35 L. T. N. S. 400, 25 Week. Rep. 40. A. S. M.

NEW YORK LIFE INSURANCE COMPANY, Appt.,

v.

W. H. ALEXANDER, Admr., etc., Julius A. Alexander, Deceased.

Mississippi Supreme Court (In Banc)—June 28, 1920.

(122 Miss. 813, 85 So. 93.)

Insurance — default in premium — forfeiture.

When a life insurance policy provides for a forfeiture of the insurance in case of a failure to pay premium, the policy, in case of failure to pay, is forfeited, and sickness or insanity will not avoid the forfeiture.

[See note on this question beginning on page 318.]

Headnote by COOK, J.

APPEAL by defendant from a judgment of the Circuit Court for Jasper County (Hughes, J.) in favor of plaintiff in an action brought to recover the amount alleged to be due on a life insurance policy. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Deavours, Hilbun, & Deavours, for appellant:

The disability of the insured is no excuse for failure to pay the premium, unless, in contracts similar to the one at issue in this cause, due and sufficient proof of the disability of the insured has been made and filed, in strict accordance with the terms of the policy.

14 R. C. L. 996; Hipp v. Fidelity Mut. L. Ins. Co. 128 Ga. 491, 12 L.R.A. (N.S.) 319, 57 S. E. 892; Wheeler v. Connecticut Mut. L. Ins. Co. 82 N. Y. 543, 37 Am. Rep. 596; Klein v. New York L. Ins. Co. 104 U. S. 88, 26 L. ed. 662; Thompson v. Knickerbocker L. Ins. Co. 104 U. S. 252, 26 L. ed. 765; Howell v. Knickerbocker L. Ins. Co. 44 N. Y. 276, 4 Am. Rep. 675; Ruse v. Mutual Ben. L. Ins. Co. 23 N. Y. 516; Smith v. Penn L. Ins. Co. 11 W. N. C. 295; Gaterman v. American L. Ins. Co. 1 Mo. App. 300; Carpenter v. Central Mut. Life Asso. 68 Iowa, 453, 56 Am. Rep. 855, 27 N. W. 456; Hawkshaw v. Supreme Lodge, K. H. 29 Fed. 770; Grand Lodge, A. O. U. W. v. Jesse, 50 Ill. App. 101; Ingram v. Supreme Council, A. L. H. 28 N. Y. Week. Dig. 320, 14 N. Y. S. R. 600; Sheridan v. Modern Woodmen, 44 Wash. 230, 7 L.R.A. (N.S.) 793, 120 Am. St. Rep. 987, 87 Pac. 127; McElhone v. Massachusetts Benev. Asso. 2 App. D. C. 397; Sleight v. Supreme Council M. T. 121 Iowa, 724, 96 N. W. 1100; Yoe v. Benjamin C. Howard Masonic Mut. Benev. Asso. 63 Md. 86; Curtin v. Grand Lodge, A. O. U. W. 65 Mo. App. 294; 2 Bacon, Ben. Soc. 885.

Incapacitating sickness was also no excuse for the insured's failure to comply with the conditions of the policy, entitling him to a waiver of the premium.

Whiteside v. North American Acci. Ins. Co. 200 N. Y. 320, 35 L.R.A. (N.S.) 696, 93 N. E. 948; Wick v. Western Union L. Ins. Co. 104 Wash. 129, 175 Pac. 953; Sterling v. Head Camp, P. J. W. W. 28 Utah, 505, 80 Pac. 375; Bost v. Supreme Council, R. A. 87 Minn. 417, 92 N. W. 337.

Messrs. J. A. McFarland, C. W. Thigpen, and T. J. Wills for appellee.

Cook, J., delivered the opinion of the court:

On the 5th day of June, 1917,

appellant, New York Life Insurance Company, issued its policy for \$2,000 to one Julius A. Alexander. On page 1 of said policy the following provision occurs: "This contract made in consideration of the payment in advance of the sum of \$23.96, the receipt of which is hereby acknowledged, constituting the first premium and maintaining this policy to the 8th day of August, 1917, and a like sum on said date and every three calendar months thereafter during the life of the insured."

Under the heading, "Payment of Premiums," the following provision occurs: "The payment of the premium shall not maintain the policy in force beyond the date when the next premium shall be due, except as to the benefits provided herein after default in premium payment."

The policy, under the heading "Surrender Values" on the second page, provides that there would be no nonforfeiture benefits available under the policy, upon its lapse for nonpayment of premiums, until after three full years' premiums had been paid. It is admitted that in this case three full years' premiums had not been paid before default in the payment of the premium, and therefore it necessarily follows, according to the contract, that upon the lapse of the policy in question all insurance benefits thereunder ceased.

All the premiums on said policy were paid when due, as provided therein, down to the premium of \$23.96, due August 8, 1918, but the August 8, 1918, premium never was paid or tendered to the company, nor was any premium on said policy paid, or tendered to the company, that became due after May 8, 1918.

The policy contains also the following provisions:

"Whenever the company receives due proof, before default in the payment of premium, that the insured, before the anniversary of the policy

on which the insured's age at nearest birthday is sixty years, and subsequent to the delivery hereof, has become wholly disabled by bodily injury or disease, so that he is and will be presumably, thereby permanently and continuously prevented from engaging in any occupation whatsoever for remuneration or profit, and that such disability has then existed for not less than sixty days—the permanent loss of the sight of both eyes, or the severance of both hands or both feet, or of one entire hand and one entire foot, to be considered as a total and permanent disability without prejudice to other causes of disability—then,

"1. Waiver of Premium.—Commencing with the anniversary of the policy next succeeding the receipt of such proof, the company will, on each anniversary, waive payment of the premium for the ensuing insurance year, and, in any settlement of the policy, the company will not deduct the premium so waived. The loan and surrender values provided for under §§ 3 and 4 shall be calculated on the basis employed in said sections, the same as if the waived premiums had been paid as they became due.

3. Recovery from Disability.—The company may at any time, and from time to time, but not oftener than once a year, demand due proof of such continued disability; and upon failure to furnish such proof, or, if it appears that the insured is no longer wholly disabled as aforesaid nor further premiums shall be waived, nor income payments made."

About the 1st of June, 1918, the insured, Mr. Alexander, was stricken with apoplexy, and remained unconscious for about forty-eight hours. Shortly thereafter he was taken to the sanitarium at Newton, Mississippi, where he remained for about thirty days. His condition while at the sanitarium can be best described by quoting from the evidence given by Dr. W. G. Gill, a witness for the plaintiff:

Q. Was his mind clear and lucid during the time?

A. Only at times; at times he was, and at times he was not.

Q. So he at times could understand things, appreciate things, just like the average man, Doctor?

A. Yes, at times he could answer questions, and ask questions and ask what he wanted; at times, yes.

Q. Or he could have mentioned a simple business matter,—not a complicated matter; I mean an ordinary business matter,—he could have done that, could he not?

A. Well, I suppose he could.

It appears sometime in June, 1918, Mr. Alexander left the Newton Sanitarium, and returned home, at Montrose, Mississippi. From that time until his death on September 22, 1918, he was in such physical condition that he could walk around, talk with the members of his family and his friends about the ordinary affairs of life; at times his mind would appear clear and his conversation would be rational and intelligent, and at other times not. However, he never regained his physical or mental strength sufficiently to engage in business.

The record shows that a premium on said policy was due on August 8, 1918, and that this premium was never paid or tendered to the company; that the policy provided for thirty days of grace within which to pay said premium; that said premium was never paid, or tendered to the company during said period of grace, or at any other time.

It was further shown that on July 13, 1918, the Jackson office of the New York Life Insurance Company mailed to the insured, Julius A. Alexander, at Montrose, Mississippi, the usual and customary notice of premium due on August 8, 1918, on the policy in question.

On August 31, 1918, the following letter was received at the Jackson, Mississippi, branch office of the New York Life Insurance Company:

Montrose, Mississippi. 8-29-18.
Gentlemen:—

Have you mailed me a statement of my policy of third payment 1918

(No. 6,150,580). If you have, I have never received the same.

Yours very truly,
J. A. Alexander.

On the same day the following letter was written and mailed to Mr. Alexander, in reply to the above:

August 31, 1918.

Mr. Julius A. Alexander,
Montrose, Mississippi.

Dear Sir:—

Re Policy No. 6,150,580. Replying to your letter of the 29th instant, I beg to advise that a quarterly premium of \$23.96 was due under your above-numbered policy on August 8, 1918. If your check is mailed on or before September 8th, it will be accepted.

Yours very truly,
H. H. Graham, Cashier.

To explain this letter the plaintiff introduced as a witness Dewitt Alexander, a young man about twenty-one years of age, the son of Julius A. Alexander, deceased, the insured. This young man testified that the letter purporting to have been written by J. A. Alexander, set out above, was in fact written by the witness, Dewitt Alexander; that in writing the letter he had the policy of insurance in his possession, and referred to the policy when writing the letter, in order to ascertain the number of the same, which, it will be observed, he sets out in his letter; that notwithstanding the fact that he could read and write, and was a young man of fair intelligence, he made no further attempt to ascertain when the premium was due, or to pay the same when due. It is further shown that he failed altogether to inform the company of his father's condition, or to make any proof of his alleged disability.

It was further shown that appellant, New York Life Insurance Company, had no notice or knowledge of any kind of the alleged disability of the insured, until several days after the death of the insured; that no proof of any kind of the alleged disability of the insured was ever

made or furnished to the company; and that the first knowledge the company had of the alleged disability of the insured was after the death of the insured, when the brother of the insured called at the Jackson office of the company, and asked for blanks to make proof of his brother's death.

The court rendered a judgment in favor of the plaintiff, for the amount sued for, and the defendant has appealed.

The authorities seem to be against the view adopted by the trial court. The policy sued on was and is the contract between the company and the insured. The company agreed to pay a certain sum upon the reception of the proof provided for by the contract of insurance. As was said by the supreme court of New York in *Wheeler v. Connecticut Mut. Ins. Co.* 82 N. Y. 550, 37 Am. Rep. 597: "While as a general rule, where the performance of a duty created by law is prevented by inevitable accident, without the fault of a party, the default will be excused, yet when a person by express contract engages absolutely to do an act not impossible or unlawful at the time, neither inevitable accident, nor other unforeseen contingency not within his control, will excuse him, for the reason that he might have provided against them by his contract."

The Supreme Court of the United States in *Thompson v. Knickerbocker L. Ins. Co.* 104 U. S. 252, 26 L. ed. 765, had this to say: "In the second replication the excuse set up is that, before the note fell due, Thompson became sick and mentally and physically incapable of attending to business until his death on the 3d day of November, 1874, and that the plaintiff was ignorant of the outstanding note. We have lately held, in the case of *Klein v. New York L. Ins. Co.* 104 U. S. 88, 26 L. ed. 662, that sickness or incapacity is no ground for avoiding the forfeiture of a life policy, or for granting relief

Insurance—
default in
premium—
forfeiture.

in equity against forfeiture. The rule may, in many cases, be a hard one; but it strictly follows from the position that the time of payment of premium is material in this contract, as was decided in the case of *New York L. Ins. Co. v. Statham*, 93 U. S. 24, 23 L. ed. 789, 19 Am. Rep. 512. Prompt payment and regular interest constitute the life and soul of the life insurance business; and the sentiment long prevailed that it could not be carried on without the ability to impose stringent conditions for delinquency. More liberal views have obtained on this subject in recent years, and a wiser policy now often provides ex-

press modes of avoiding the odious result of forfeiture. The law, however, has not been changed, and if a forfeiture is provided for in case of nonpayment at the day, the courts cannot grant relief against it. The insurer may waive it, or may by his conduct lose his right to enforce it; but that is all."

Cases might be multiplied holding that the contract controls. It is our opinion that the verdict was in direct opposition to the provisions of the terms of the contract. The proof of disability was never made, and the judgment of the court below will be reversed, and the cause dismissed.

ANNOTATION.

Life insurance: forfeiture for nonpayment of premiums or assessments as affected by physical or mental disability.

I. Rule in general, 318.

II. Illustrations:

a. Old line policies in general, 319.

b. Mutual benefit insurance:

1. Generally, 321.

2. Notice, 324.

I. Rule in general.

The rule appears to be well settled that insanity or incapacitating sickness of the insured, because of which he fails to pay, when due, a premium or assessment on an insurance policy, will not excuse such failure so as to prevent a forfeiture, termination, or suspension of his rights, where the policy or the rules of the company expressly provide for such forfeiture, termination, or suspension in the event of nonpayment.

United States.—*Klein v. New York L. Ins. Co.* (1881) 104 U. S. 88, 26 L. ed. 662; *Thompson v. Knickerbocker L. Ins. Co.* (1881) 104 U. S. 252, 26 L. ed. 765; *Hawkshaw v. Supreme Lodge, K. H.* (1887) 29 Fed. 770.

Connecticut.—*Pitts v. Hartford Life & Annuity Ins. Co.* (1895) 66 Conn. 376, 50 Am. St. Rep. 96, 34 Atl. 95.

District of Columbia.—*McElphone v. Massachusetts Ben. Asso.* (1894) 2 App. D. C. 397.

Georgia.—*Hipp v. Fidelity Mut. L.*

Ins. Co. (1907) 128 Ga. 491, 12 L.R.A. (N.S.) 319, 57 S. E. 892.

Illinois.—*Grand Lodge, A. O. U. W. v. Jesse* (1892) 50 Ill. App. 101; *Scheiber v. Protected Home Circle* (1909) 146 Ill. App. 574.

Iowa.—*Carpenter v. Centennial Mut. Life Asso.* (1886) 68 Iowa, 453, 56 Am. Rep. 855, 27 N. W. 456; *Sleight v. Supreme Council, M. T.* (1903) 121 Iowa, 724, 96 N. W. 1100.

Maryland.—*Yoe v. Benjamin C. Howard Masonic Mut. Benev. Asso.* (1884) 63 Md. 86; *McCann v. Supreme Conclave, I. R. H.* (1913) 119 Md. 655, 46 L.R.A. (N.S.) 537, 87 Atl. 383.

Massachusetts.—*Rocci v. Massachusetts Acci. Co.* (1916) 222 Mass. 336, 110 N. E. 972, Ann. Cas. 1918C, 529.

Minnesota.—*Bost v. Supreme Council, R. A.* (1902) 87 Minn. 417, 92 N. W. 337.

Mississippi.—*NEW YORK L. INS. CO. v. ALEXANDER* (reported herewith) ante, 314.

Missouri.—*Smith v. Sovereign Camp, W. W.* (1903) 179 Mo. 119, 77 S. W. 862; *Gateman v. American L. Ins. Co.* (1876) 1 Mo. App. 300; *Curtin v. Grand Lodge, A. O. U. W.* (1895) 65 Mo. App. 294.

New York.—*Ingram v. Supreme*

Council, A. L. H. (1888) 28 N. Y. Week. Dig. 320, 14 N. Y. S. R. 600; Howell v. Knickerbocker L. Ins. Co. (1871) 44 N. Y. 276, 4 Am. Rep. 675; Wheeler v. Connecticut Mut. L. Ins. Co. (1880) 82 N. Y. 543, 37 Am. Rep. 594. See also Whiteside v. North American Acci. Ins. Co. (1911) 200 N. Y. 320, 35 L.R.A.(N.S.) 696, 93 N. E. 948 (health policy).

Pennsylvania.—Buchanan v. Supreme Conclave, I. O. H. (1896) 178 Pa. 465, 34 L.R.A. 436, 56 Am. St. Rep. 774, 35 Atl. 873; Smith v. Penn Mut. L. Ins. Co. (1882) 11 W. N. C. 295.

Tennessee.—Thompson v. Fidelity Mut. L. Ins. Co. (1906) 116 Tenn. 557, 6 L.R.A.(N.S.) 1039, 115 Am. St. Rep. 823, 92 S. W. 1098.

Texas.—Brotherhood of Railroad Trainmen v. Dee (1908) 101 Tex. 597, 111 S. W. 396.

Utah.—See Sterling v. Head Camp, P. J. W. W. (1905) 28 Utah, 505, 80 Pac. 375.

Washington.—Sheridan v. Modern Woodmen (1906) 44 Wash. 230, 7 L.R.A.(N.S.) 973, 120 Am. St. Rep. 987, 87 Pac. 127.

Canada.—McCuaig v. Independent Order of Foresters (1909) 14 Ont. Week. Rep. 935.

Among possibly other cases not involving life insurance, see Home Ins. Co. v. Wood (1903) 139 Ky. 657, 72 S. W. 15, Ann. Cas. 1912B, 373, holding that violent illness, which renders one unable to attend to any business matters, is no excuse for his failure to pay an instalment of the premium on a fire insurance policy when the same becomes due.

In the above cases, the courts have applied the general doctrine, which is well established, that nonperformance of a contract which does not require or contemplate performance by the promisor personally is not excused by his sickness, or other physical disability, which renders him unable to perform it. See, for example, as illustrative of this general rule: Cassidy v. Clark (1846) 7 Ark. 123; West Chicago Park Comrs. v. Carmody (1908) 139 Ill. App. 635; Brewer v. Tysor (1855) 48 N. C. (3 Jones, L.) 180. In other words, the courts have

taken the position that, since payment of premiums and assessments may be made by others, and need not be made by the insured personally, his insanity or sickness should not relieve against the effect of nonpayment. This position seems clearly correct, unless there is something in the nature of insurance contracts which should distinguish them, and prevent the application of the general doctrine above indicated. And the courts have not pointed out any reasons why this class of cases should constitute an exception.

In the great majority of the above cases it appears that the policy, or the rules of the order, expressly provided for a forfeiture or suspension. There are several cases in which the report does not show that there was such a provision. But in view of the general rule that a failure to pay the premium on a life insurance policy will not, of itself, avoid the policy, unless the policy so provides, it would seem that in general the question under annotation presupposes the existence of such a provision in the policy.

II. Illustrations.

a. Old line policies in general.

The rule above stated, that insanity or incapacitating sickness of the insured will not excuse a failure to pay insurance premiums at the required time, is supported by many cases involving straight life insurance policies, which, in general, have expressly provided for a forfeiture or a lapsing of the policy on a failure to pay the premium when due.

United States.—Klein v. New York L. Ins. Co. (1881) 104 U. S. 88, 26 L. ed. 662; Thompson v. Knickerbocker L. Ins. Co. (1881) 104 U. S. 252, 26 L. ed. 765.

Georgia.—Hipp v. Fidelity Mut. L. Ins. Co. (1907) 128 Ga. 491, 12 L.R.A.(N.S.) 319, 57 S. E. 892.

Massachusetts.—Rocci v. Massachusetts Acci. Co. (1916) 222 Mass. 336, 110 N. E. 972, Ann. Cas. 1918C, 529 (health and accident insurance).

Mississippi.—NEW YORK L. INS. CO. v. ALEXANDER (reported herewith) ante, 314.

Missouri.—*Gateman v. American L. Ins. Co.* (1876) 1 Mo. App. 300.

New York.—*Howell v. Knickerbocker L. Ins. Co.* (1871) 44 N. Y. 276, 4 Am. Rep. 675; *Wheeler v. Connecticut Mut. L. Ins. Co.* (1880) 82 N. Y. 543, 37 Am. Rep. 594.

Pennsylvania.—*Smith v. Penn Mut. L. Ins. Co.* (1882) 11 W. N. C. 295.

Tennessee.—See *Thompson v. Fidelity Mut. L. Ins. Co.* (1906) 116 Tenn. 557, 6 L.R.A.(N.S.) 1039, 115 Am. St. Rep. 823, 92 S. W. 1098 (obiter recognition of rule).

In *Wheeler v. Connecticut Mut. L. Ins. Co.* (1880) 82 N. Y. 543, 37 Am. Rep. 594, *supra*, it appeared that the insured failed to pay the fourth annual premium because, prior to the day it became due and payable, he became insane, and so continued until his death, about five days after the premium became due, and in consequence of such insanity did not know or remember that the premium was then due, or that he had agreed to pay the same. In an action brought to recover on the policy, it was held that this was no excuse for the nonpayment. The court further said: "While a court of equity will interpose its power to relieve against forfeitures for a breach of a condition subsequent, caused by unavoidable accident, by fraud, surprise, or ignorance, in many cases, that power has never been extended so as to excuse a breach of a contract of this description, arising from the disability of a party caused by sickness or insanity."

And in *Hipp v. Fidelity Mut. L. Ins. Co.* (1907) 128 Ga. 491, 12 L.R.A. (N.S.) 319, 57 S. E. 892, *supra*, it was said: "It is contended that the sickness of the insured when the note fell due was an excuse for nonpayment, and prevented a forfeiture or termination of the policy. Where personal services are contracted for, sickness rendering their performance impossible may furnish an excuse for non-performance. . . . Our Code declares that if performance is impossible, and becomes so by act of God, such impossibility is itself a defense equivalent to performance. . . . In the absence of statutory provision, the

general rule is that, where a person creates a charge or obligation upon himself by express contract, he will not be permitted to excuse himself therefrom by pleading an act of God rendering performance impracticable, if there is no provision in the contract for such a contingency. . . . The policy and the notes expressly provided that the former should terminate and become void upon nonpayment at maturity of any of the latter. To hold that this should not be the case if the insured were sick when one of the notes fell due would have the effect to continue the contract of insurance by sickness, not by payment, in spite of the express contract of the parties."

And although, at the time when a premium note fell due, the insured was sick and unable to attend to business, and so remained until he died, it was held in *Hipp v. Fidelity Mut. L. Ins. Co.* (Ga.) *supra*, that these facts would not prevent the policy from being forfeited for nonpayment, where the policy and the premium note expressly provided that the former should terminate and become void upon nonpayment at maturity of any of the notes.

Although somewhat beyond the scope of the annotation, attention is called, also, to the holding in *Hipp v. Fidelity Mut. L. Ins. Co.* (Ga.) *supra*, that the fact that the insured was sick with typhoid fever when one of the premium notes fell due, and that he so remained until his death some weeks thereafter, was not alone sufficient to render effective an option by which, upon acceptance by the company of satisfactory proof that the insured had become permanently incapacitated, the premiums payable for the remaining years should cease, or be remitted during the continuance of the incapacity, and the insurance should be paid as an endowment at the age of eighty, or at death, if before that age.

In *Klein v. New York L. Ins. Co.* (1881) 104 U. S. 88, 26 L. ed. 662, *supra*, it was held that failure to pay the premium when due, because of sickness of the insured causing de-

rangement of the mind and incapacity to attend to business, was no ground for avoiding a forfeiture of the policy according to its terms, or for granting relief in equity against forfeiture, although the beneficiary did not know that the policy was in existence, and was ignorant of its terms or conditions, until after the death of the insured. See, in this connection, *Carpenter v. Centennial Mut. Life Assn.* (Iowa) under II. b. 1, *infra*.

And in *Thompson v. Knickerbocker L. Ins. Co.* (1881) 104 U. S. 252, 26 L. ed. 765; *supra*, an action at law on the policy by the beneficiary, her right of recovery was denied because the insured failed to pay a note given for an annual premium, which note provided that the "policy is to be void in case this note is not paid at maturity, according to contract in said policy;" although it appeared that he had the money in hand and was ready and willing to pay the note, but, before its maturity, he was taken violently ill and was non compos mentis until he died, ten days after maturity of the note, and the existence of the note was not known to the beneficiary.

In *Thompson v. Knickerbocker L. Ins. Co.* (U. S.) *supra*, the Federal Supreme Court, citing the *Klein Case* (U. S.) *supra*, said: "We lately held . . . that sickness or incapacity is no ground for avoiding the forfeiture of a life policy, or for granting relief in equity against forfeiture. The rule may, in many cases, be a hard one; but it strictly follows from the position that the time of payment of premium is material in this contract. . . . Prompt payment and regular interest constitute the life and soul of the life insurance business; and the sentiment long prevailed that it could not be carried on without the ability to impose stringent conditions for delinquency. More liberal views have obtained on this subject in recent years, and a wiser policy now often provides express modes of avoiding the odious result of forfeiture. The law, however, has not been changed, and, if a forfeiture is provided for in case of nonpayment at the day, the courts cannot grant relief

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against it. The insurer may waive it, or may by his conduct lose his right to enforce it; but that is all."

In *Howell v. Knickerbocker L. Ins. Co.* (1870) 44 N. Y. 276, 4 Am. Rep. 675, *supra*, it appeared that the insured, while on his way to pay the tenth annual premium, about two hours before the expiration of the period when the same was due and payable, was stricken with apoplexy which rendered him helpless and speechless, and he remained in a dying condition until the next day, when he died. The policy was a straight life policy, and provided that it might be continued in force from year to year if the assured paid a fixed sum annually on a fixed date. It was held that these facts, of themselves, would not excuse the nonpayment of the premium, since this was an act which could have been performed by any other person than the assured.

And in *Smith v. Penn Mut. L. Ins. Co.* (1882) 11 W. N. C. (Pa.) 295, *supra*, where the insured was stricken with apoplexy early in the morning of the day the sixth annual premium fell due, became unconscious, and remained so until he died, six days later, and the premium was not paid when due, but was tendered to the company after the insured's death, it was held that the principle was too well settled to be controverted that, where a party contracts to do a thing which does not absolutely require him to do it in person, sickness will not excuse nonperformance, for he should provide for such casualty in the contract itself.

In *Gateman v. American L. Ins. Co.* (1876) 1 Mo. App. 300, *supra*, it was held that the company could rightfully take advantage of the assured's failure to pay the premium, when due, although he was then in a dying condition. The policy provided that it should become void if the annual premiums were not paid at the required time.

b. Mutual benefit insurance.

1. Generally.

It has been held that insanity of a member of a mutual benefit society,

occurring while he is in good standing and continuing until his death, is no excuse for noncompliance with his contract as to payment of dues or assessments.

United States.—*Hawkshaw v. Supreme Lodge, K. H.* (1887) 29 Fed. 770.

Connecticut.—*Pitts v. Hartford Life & Annuity Ins. Co.* (1895) 66 Conn. 376, 50 Am. St. Rep. 96, 34 Atl. 95.

Illinois.—*Grand Lodge, A. O. U. W. v. Jesse* (1892) 50 Ill. App. 101; *Scheiber v. Protected Home Circle* (1909) 146 Ill. App. 574.

Maryland.—*McCann v. Supreme Conclave, I. R. H.* (1913) 119 Md. 655, 46 L.R.A.(N.S.) 537, 87 Atl. 383.

New York.—*Ingram v. Supreme Council, A. L. H.* (1888) 28 N. Y. Week. Dig. 320, 14 N. Y. S. R. 600.

Pennsylvania.—*Buchanan v. Supreme Conclave, I. O. H.* (1896) 178 Pa. 465, 34 L.R.A. 436, 56 Am. St. Rep. 774, 35 Atl. 873 (recognizing rule).

Washington.—*Sheridan v. Modern Woodmen* (1906) 44 Wash. 230, 7 L.R.A.(N.S.) 973, 120 Am. St. Rep. 987, 87 Pac. 127.

Canada.—*McCuaig v. Independent Order of Foresters* (1909) 14 Ont. Week. Rep. 935.

In *Pitts v. Hartford Life & Annuity Ins. Co.* (Conn.) *supra*, it was said: "Nonpayment at the day involves absolute forfeiture, because the terms of the contract so prescribe, and the court has no power to vary the stipulations of the parties. It must be conceded that promptness of payment is essential in the business of life insurance as carried on by the defendant. All its calculations are based on the hypothesis of prompt payments. It calculates on the receipt of its assessments and other dues on the day they are payable. And as the amount of the assessment is itself to be determined by the number and the age of the members who are to pay it, and as these conditions change every day, it is impossible, in a case where a member fails to pay, to restore the company to the condition it would have been in, had that member paid on the day. It is on this basis that the defendant is enabled to offer in-

surance at the favorable rates it does. Forfeiture for nonpayment is a necessary means of protecting itself from embarrassment. . . . Whatever period of grace is accorded is a matter of stipulation, or of discretion on the part of the company. And when no stipulation exists, it is the general understanding that time is material, and that the forfeiture is absolute if the dues are not paid. We must, therefore, regard the payment of the assessments and dues as a condition precedent to any subsequent liability on the part of the defendant."

And in *McCann v. Supreme Conclave, I. R. H.* (Md.) *supra*, where the rules of the society provided that "any member failing to pay his regular monthly or extra payment within the time prescribed for the payment thereof shall thereby suspend himself ipso facto from all the rights and benefits of the order, as well as the rights and benefits of his beneficiaries," the court said that the fact that the member was sick or insane does not relieve of the consequences of his neglect; that the laws of the defendant made no exception of such cases, and his beneficiary was bound by the terms of his contract.

So, in *Scheiber v. Protected Home Circle* (Ill.) *supra*, there was a provision in the benefit certificate that it should be null and void, upon failure to pay any premium within thirty days of its becoming due. The constitution of the order also provided that, for the neglect or failure to make payments within the month for which they became due and payable, the member should stand suspended from the order. It was said: "The court held as a proposition of law that the insanity of Scheiber 'did not relieve him from a compliance with the rules and regulations of the defendant society, relating to the reinstatement of suspended members.' That such is the law is not disputed. . . . Neither will insanity excuse the nonpayment of dues and assessments so as to operate to keep an insurance certificate in force while the insured is insane. Insanity does not relieve the insured from any obligation imposed by

the terms of his insurance certificate, with the sole exception of personal attendance in complying with requisite conditions, that may be done by another for him."

The same rule applies with respect to incapacitating sickness of a member of a mutual benefit society, viz., that the fact that the member's failure to pay dues or assessments, as required by his certificate or the rules of the order, was due to such sickness, will not relieve against the effect of nonpayment.

District of Columbia.—McElphone v. Massachusetts Ben. Asso. (1894) 2 App. D. C. 397.

Iowa. — Carpenter v. Centennial Mut. Life Asso. (1886) 68 Iowa, 453, 56 Am. Rep. 855, 27 N. W. 456; Sleight v. Supreme Council, M. T. (1903) 121 Iowa, 724, 96 N. W. 1100.

Maryland.—Yoe v. Benjamin C. Howard Masonic Mut. Benev. Asso. (1884) 63 Md. 86.

Minnesota.—Bost v. Supreme Council, R. A. (1902) 87 Minn. 417, 92 N. W. 337.

Missouri.—Smith v. Sovereign Camp, W. W. (1903) 179 Mo. 119, 77 S. W. 862; Curtin v. Grand Lodge, A. O. U. W. (1895) 65 Mo. App. 294.

Texas.—Brotherhood of Railroad Trainmen v. Dee (1908) 101 Tex. 597, 111 S. W. 396.

Utah.—See Sterling v. Head Camp, P. J. W. W. (1905) 28 Utah, 505, 80 Pac. 375.

As before stated, there was generally, in the above cases, a stipulation for nonliability, suspension, or forfeiture of the policy or certificate upon failure to pay a premium or assessment when due. Of course, where the constitution and by-laws of a benevolent order provide that a default in making payments of dues and assessments during illness will not work a forfeiture, a default shown to have occurred during the insured's last sickness will not affect his rights in the premises. Grand Lodge, A. O. U. W. v. Brand (1890) 29 Neb. 644, 46 N. W. 95.

In Brotherhood of Railroad Trainmen v. Dee (Tex.) supra, the benefit certificate provided that any failure to

pay dues or assessments should at once forfeit any and all rights thereunder, and the certificate should become null and void. It was contended, as a reason why the forfeiture should not be sustained, that at the time the dues became payable the member was unable to attend to business,—was, in fact, unconscious,—and that therefore it would be unreasonable to enforce the forfeiture. The court stated merely that no authority in support of that contention had been cited or found, and quoted the doctrine that "neither insanity, sickness, nor absence is an excuse for nonpayment of an assessment, the payment being an act that can be performed for the member by some other person."

And in Carpenter v. Centennial Mut. Life Asso. (Iowa) supra, it was held that the mere fact that the beneficiary did not know of the policy until after the death of the insured would not take the case out of the rule that incapacitating sickness will not excuse nonpayment of assessments. In this case the plaintiff's husband, the insured, was delirious from typhoid fever from about the middle of November until his death in December. Notice of an assessment due December 1 was duly sent to him, but because of his condition was not delivered to him. On the day after his death the plaintiff discovered the delinquency in payment of dues, and at once forwarded the same, but it was held that the association was not bound to accept them, but might regard the policy as having lapsed. It was said: "Counsel for plaintiff insists that the obligation of the assured to pay the assessment was a condition subsequent, the nonperformance of which was excused by the unconsciousness and delirium of the assured, which is to be regarded as the act of God. It is urged by the counsel that, as it became impossible for the assured to pay his insurance by reason of the visitation of God, the policy did not become forfeited. It is a familiar rule that, when the performance of a contract becomes impossible by the act of God, the obligor is excused, and his rights under the contract are not forfeited. We presume

that the rule contemplates cases of absolute impossibility to perform contracts. But there was no such impossibility of performing the contract in this case. It is true, it was impossible for the assured, at the time required therein, to perform it, but he could have provided for its performance beforehand, and those of his family about him could have performed it for him. The fact that the plaintiff did not know of the existence of the policy before her husband's death does not change the case. Prudence and care on the part of assured would have prompted him to prepare for the payment of the assessment upon the day it became due, and to inform his wife of his contract, and his obligation to perform it at the time therein prescribed. We reach the conclusion that the facts of the case do not constitute grounds for excusing the non-performance of the contract of the assured, and do not present a case of impossibility of performance caused by the act of God." See, in this connection, *Klein v. New York L. Ins. Co.* (U. S.) under II. a, supra.

But failure to pay an assessment by reason of a stroke of apoplexy, causing unconsciousness which continues until death, it was held in *Dennis v. Massachusetts Ben. Asso.* (1890) 120 N. Y. 496, 9 L.R.A. 189, 17 Am. St. Rep. 660, 24 N. E. 843, will not forfeit a benefit certificate which declares that it shall be void for failure to pay assessments, where it also provides that a member may be reinstated, by paying assessment arrearages, "for valid reasons to the officers of the association (such as a failure to receive notice of an assessment)." The court held that the "valid reasons" for which, under his contract, the member might be reinstated in the association after failure to pay an assessment, were not to be arbitrarily determined by its officers, but that their determination was subject to review in the courts.

2. Notice.

See *Dennis v. Massachusetts Ben. Asso.* (N. Y.) under II. b, 1, supra.

Where the benefit certificate or the

rules of the order require payment of assessments upon notice, the question arises as to the effect of the insanity or incapacitating sickness of the member, preventing receipt by him of actual notice. And a similar question arises where he is thus prevented from giving notice to the company, according to the rules of which he would be entitled, because of his incapacity, to certain benefits.

In *Pitts v. Hartford Life & Annuity Ins. Co.* (1895) 66 Conn. 376, 50 Am. St. Rep. 96, 34 Atl. 95, it appeared that the benefit certificate provided that the depositing in the postoffice of a notice directed to the insured's address "shall be deemed a legal and sufficient notice for all the purposes" of the contract; and it was held that the fact that the insured was insane at the time he received a notice of assessment did not make the notice ineffective, or the company liable on the certificate, where the assessment was not paid within the time required by the contract.

And so it was held in *Yoe v. Benjamin C. Howard Mut. Masonic Benev. Asso.* (1884) 63 Md. 86, where the assured was sick, in a state of delirium, and entirely incapable of attending to business, when he received a notice through the postoffice, which, by a by-law of the association, was declared to be a legal notice.

And *Sterling v. Head Camp, F. J. W. W.* (1905) 28 Utah, 505, 80 Pac. 375, supports the proposition that, where the laws of a fraternal order require prompt payment of dues and assessments as a prerequisite to liability, and also provide that, in case of sickness and inability to pay dues and assessments, the local camp will keep up the sick member's dues for him, if he notifies the camp of such sickness before he becomes delinquent, notice after delinquency is not sufficient; and his default in paying his dues and assessments because of sickness terminates the liability of the association to the beneficiary.

So, in *Bost v. Supreme Council, R. A.* (1902) 87 Minn. 417, 92 N. W. 337, it was held that, under such a provision, sickness would not relieve the

members from the giving of such notice; and, when required to be in writing, verbal notice would not be sufficient.

In *Smith v. Sovereign Camp, W. W.* (1903) 179 Mo. 119, 77 S. W. 862, it was held that, while such notice can be given by some other person for the member, the notice must not only state that the member is sick, but that, by reason of such sickness, he is unable to pay, without which notice the member not paying, though delirious and unconscious, becomes delinquent, and the fraternal order is relieved from liability.

But in *Courtney v. United States Masonic Ben. Asso.* (1892) — Iowa, —, 53 N. W. 238, it was held that, where the benefit certificate provided that the assured must pay \$1 upon the death of each member, "said payment to be made within thirty days from the date of notice of said death," actual notice was required; and where the assured was taken ill and rendered incapable of understanding or transacting any business, and so continued until his death, and, during such illness, notice of assessment was sent him through the mail and delivered to one authorized by the assured to receive his mail, but the envelop containing the notice was laid aside unopened, and so remained until his death, his certificate was not forfeited by his failure to pay the assessment. The court said: "Appellant contends that it did not insure against this incapacity of . . . [the insured] to receive actual notice, while appellee contends that by agreeing to give actual notice the appellant assumes the hazard of any event, not caused by the voluntary act of . . . [the insured], that would prevent it from giving such notice. This claim of appellee is emphasized somewhat by the benevolent character and purposes of the defendant association. Its original articles declare its purposes to be 'the collection and disbursement of such Masonic and other benevolent contributions as may be intrusted to it, by those who, by compliance with the rules and regulations, may become

members thereof.' The right to cancel these certificates rested upon . . . [the insured's] failure to pay assessments after actual notice. The obligation to give the notices was upon appellant, and the obligation to pay the assessments did not attach until the notice was given. We do not discern why a different rule should apply from that which would obtain under any other contract, wherein, to create a forfeiture or default, actual notice must be given."

And it was held in *Buchanan v. Supreme Conclave, I. O. H.* (1896) 178 Pa. 465, 34 L.R.A. 436, 56 Am. St. Rep. 774, 35 Atl. 873, that the beneficiary of a certificate of insurance on the life of her father, who is insane or incapable of attending to business, is entitled to notice of his default in paying assessments, before a forfeiture can be declared therefor, after she has given notice to the company of his condition, and requested a notice of any default on his part so that she might make an effort to pay the assessment if he did not. It was said: "If the plaintiff, having knowledge of the assessment, had offered to pay it to the proper officer, there can be no question but that he would be bound to accept it. When the offer was made in advance, good faith required that the beneficiary should have the opportunity to preserve her rights, not against the voluntary act of the member, but as against neglect caused by his inability to act. She was therefore entitled to notice, upon proper request made."

As illustrative of cases involving accident and health policies, attention is called to *Whiteside v. North American Acci. Ins. Co.* (1911) 200 N. Y. 320, 35 L.R.A. (N.S.) 696, 93 N. E. 948, holding that an assured is not relieved from the obligation imposed upon him by the terms of his policy to give notice, by himself or his representative, within a certain time, of illness or injury, by the fact that his illness is such as to render him delirious and unable to remember that he has the policy. It seems, however, to be the general rule in this class of cases that,

where, because of circumstances and conditions surrounding the transaction, the giving of notice within the time specified becomes impossible, it

will be excused and held sufficient if given within a reasonable time after the removal of the obstacle.

R. E. H.

PEOPLE OF THE STATE OF COLORADO, Plff. in Err.,
v.
WESTERN UNION TELEGRAPH COMPANY et al.

Colorado Supreme Court (In Banc)—April 4, 1921.

(— Colo. —, 198 Pac. 146.)

Constitutional law — denial of power to judges to pass on constitutionality of statutes.

1. A state Constitution cannot deny to the trial judges of the state power to determine whether or not the statutes of the state violate the Federal Constitution.

[See note on this question beginning on page 331.]

— forbidding contract not to belong to labor union.

2. A statute forbidding under penalty an employer from contracting with his employee not to be or become a member of a labor union violates the constitutional right to freedom of contract.

[See 16 R. C. L. 480, 481.]

— conflict between state and Federal Constitutions.

3. Any provision of a state Constitution which is contrary to the Federal Constitution is null and void.

[See 6 R. C. L. 37, 38.]

Judge — oath — effect.

4. A judge does not, by taking oath to support the state Constitution, absolve himself from the duty of upholding the Federal Constitution if it conflicts with the Constitution of the state.

Constitutional law — validity of recall of judicial decision.

5. A constitutional provision authorizing the people of the state or of a municipality to recall a judicial decision holding a state statute or a municipal ordinance to violate the Federal Constitution is null and void.

ERROR to the District Court for the City and County of Denver (Denison, J.) to review a judgment sustaining defendants' demurrer to an information charging them with violation of the Anti-coercion Act. *Affirmed.*

Statement by Burke, J.:

In this cause an information was filed in the trial court against the defendants, charging them with a violation of chapter 5, Session Laws of 1911, known as the "Anti-coercion Act," in that, as a condition to the continued employment of one Holson, they required of him a contract that he sever his connection with the Commercial Telegraphers' Union of America, and, upon his refusal to comply, discharged him. To this information defendants demurred on the ground that the "Anti-coercion Act" was unconstitu-

tional under the Bill of Rights of the state of Colorado and the 14th Amendment to the Federal Constitution. To the consideration of this issue the people objected on the ground that such consideration was prohibited by amended § 1, art. 6, of the state Constitution. See Laws 1913, p. 678.

The objection was overruled, the "Anti-coercion Act" held in conflict with the Federal Constitution, and final judgment entered, discharging defendants and releasing their bondsmen. To review that judgment the people bring this cause

here by writ of error under the mandate of § 1997, Rev. Stat. 1908, which provides: "Writs of error shall lie on behalf of the state . . . to review decisions of the trial court in any criminal case . . . where a statute is declared unconstitutional. And whenever any act of the legislature, upon which has been based the indictment or information in any criminal case, shall be adjudged inoperative or unconstitutional by any district or county court, it shall be the duty of the district attorney of the judicial district within which such court making such decision is situate, to sue out a writ of error on behalf of the people of the state of Colorado from said supreme court to review the judgment of said district or county court in this particular. Provided, that nothing in this act shall be construed so as to place a defendant in jeopardy a second time for the same offense."

This cause was orally argued May 13, 1920. Two weeks prior thereto, transcript of the record in cause No. 9823, *People v. Max*, — *Colo.* —, 198 *Pac.* 150, this day decided, involving other phases of the questions herein raised, had been filed in this court. In both cases defendants had been finally discharged. No particular injury could therefore be done by a delay in the final determination hereof. Several members of the bar, who had given special study to the questions involved, were invited by the court to file briefs as *amici curiæ* (others have since voluntarily done so), and further consideration was postponed until such time as *People v. Max* should be at issue and all briefs filed in both.

Messrs. William E. Foley and T. E. McIntyre for the People.

Messrs. T. J. O'Donnell, J. W. Graham, and G. W. Musser for defendants in error.

Messrs. Melville, Melville, & Walton, Thomas H. Gibson, Horace N. Hawkins, and Harvey Riddell, *amici curiæ*.

Burke, J., delivered the opinion of the court:

Three questions are here presented: The right of the trial court to hear and determine the Federal constitutional question; the correctness of its judgment; and the date when our decision becomes effective. For convenience the second of these will be first considered.

So much of the "Anti-coercion Act" in question as is material here reads as follows:

"Section 1. It shall be unlawful for any corporation, company, partnership, association, individual or any employer of labor to demand as a condition of employment, or as a condition of continuing any employment, any contract, agreement or reservation, evidenced by writing or otherwise, or by condition reserved in any contract, that the person or persons so employed shall sever any present connection with or shall refrain from joining any lawful organization or society, or under any pretense whatever to prohibit, limit or restrain such employee from exercising his social, financial, fraternal or business rights in connection with or through any lawful organization or society, during his employment by any employer.

"Sec. 2. Any such contract, agreement or reservation or condition reserved shall be prima facie evidence of the violation of this act.

"Sec. 3. That any corporation, company, partnership, association, individual or any employer of labor, which or who shall violate any provision of this act, shall be deemed guilty of a misdemeanor, and as to any corporation such guilt shall extend to all the officers, directors or trustees thereof and any agent or authority by which such corporation acts, as individuals, and as to any partnership or company, all persons composing the same as individuals, and as to any person the person and his agent shall be guilty as individuals, and upon conviction of any person or persons under the provisions of this act, such person or persons shall be punished by a fine of

not less than \$50 nor more than \$500 for each and every repetition of such offense or by imprisonment of not less than ninety days nor more than six months in the county jail for the county in which such offense was committed, or by both such fine and imprisonment in the discretion of the court." Laws 1911, chap. 5, p. 8.

That this act is a plain violation of the Federal Constitution has been

Constitutional law—forbidding contract not to belong to labor union.

clearly determined by the Supreme Court of the United States. *Coppage v. Kansas*, 236 U. S. 1,

59 L. ed. 441, L.R.A.1915C, 960, 35 Sup. Ct. Rep. 240. In that case a decision of the supreme court of Kansas was reversed, and a statute of that state, in all material particulars identical with the one here under consideration, was declared a violation of the "due process" clause of the United States Constitution.

Having determined that this cause was correctly decided below, it may be said that the constitutionality of the "Anti-coercion Act" has now, at least, been passed upon by a court having jurisdiction, and it is therefore unnecessary to consider the objection of the people to the hearing on the demurrer. If so, the same situation would be presented had we held the act constitutional. Since the passage of the amendment to § 1, art. 6, we have assumed the correctness of that rule. However, there has arisen such a disparity of opinion in our trial courts concerning their power to determine constitutional questions, and such a resulting confusion among members of the bar concerning the practice, that it now becomes our imperative duty, under § 2, art. 6, of our state Constitution, which vests in the supreme court "a general superintending control over all inferior courts," to construe § 1, art. 6, with reference to the power of such courts where Federal constitutional questions are involved.

The jurisdiction of the district court in the premises, prior to Jan-

uary 22, 1913, is undisputed, and is too well settled in this country to admit of argument or require the citation of authority. On that date (if ever) said § 1 became effective. It specifies the courts in which the judicial power of the state shall be vested, and then provides: "None of said courts, except the supreme court, shall have any power to declare or adjudicate any law of this state or any city charter or amendment thereto adopted by the people in cities acting under article 20 hereof as in violation of the Constitution of this state or of the United States."

Paragraph 2, art. 6, of the Constitution of the United States provides: "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."

Section 8 of article 12 of the state Constitution provides: "Every civil officer, except members of the general assembly and such inferior officers as may be by law exempted shall, before he enters upon the duties of his office, take and subscribe an oath or affirmation to support the Constitution of the United States and the state of Colorado, and to faithfully perform the duties of the office upon which he shall be about to enter."

It is said that, notwithstanding the provision of the Federal Constitution above cited, the trial judge was precluded by amended § 1 of article 6 of the state Constitution from passing upon the question raised by the demurrer. The answer is that the trial judge was bound by the mandate of the Federal Constitution to apply that instrument upon all proper occasions, and to hold it to be the supreme law of the land, "anything

—denial of power to judges to pass on constitutionality of statutes.

in the constitution or laws of any state to the contrary notwithstanding." It is said that the judge's oath to support the Constitution of Colorado bound him to give effect to that clause thereof prohibiting him from declaring a legislative act

—conflict between state and Federal Constitutions.

contrary to the Federal Constitution. The answer is that any section of the

state Constitution which is contrary to the Federal Constitution is, for that reason and to that extent, null and void. It is no part of the

Judge—oath—effect.

state Constitution, and no legerdemain of logic can cover it with the sanctity of a judge's oath.

The reasoning of Chief Justice Marshall in *Marbury v. Madison*, 1 Cranch, 137, 2 L. ed. 60, is as applicable to a state constitutional provision which violates the Federal Constitution as it is to a Federal statute which violates that instrument; and his reasoning from the standpoint of the judicial oath as unanswerable here as there. It follows that the trial court in the instant case had the right, and it was its bounden duty, to determine the Federal constitutional question raised by the demurrer.

The district attorney, after presenting the question of the right of the trial court to pass upon the constitutional issue, then prays "that the law of this state be declared and announced as it is and ought to be in this case and similar cases, that this question may be judicially, by the opinion of this court, or popularly, under 'recall of decisions' by the people, or by both this court and the people, determined and settled in this jurisdiction, with directions by this court for further proceedings in accordance with such opinion or decision of this court, even though, 'that before such decision shall be binding, it shall be subject to approval or disapproval by the people, . . . by referendum petition, . . . [that] may request that such law be submitted to the people of

this state for adoption or rejection . . . [and] when approved by . . . the votes cast thereon . . . shall be and become the law of this state, notwithstanding the decision of the supreme court,' so that by either of, or by both of, such methods, 'such law shall be and become the law of this state,' as by said constitutional amendment further provided."

That prayer, taken in connection with the matters herein decided, imposes upon us a further duty under said § 2, art. 6, of the state Constitution, vesting in the supreme court "a general superintending control over all inferior courts." That duty is to declare what effect is to be given this decision, and involves the construction of that part of said amended § 1 of article 6, which immediately follows the portion hereinbefore quoted: "Provided that before such decision shall be binding it shall be subject to approval or disapproval by the people, as follows: Such decision shall be filed in the office of the clerk of the supreme court within ten days after it is finally made. If it concerns a state law it shall not be binding until sixty days after such date. Within said sixty days a referendum petition, signed by not less than 5 per cent of the qualified electors, addressed to and filed with the secretary of state, may request that such law be submitted to the people of this state for adoption or rejection at an election to be held in compliance herewith. The secretary of state shall cause to be published the text of such law or part thereof, as constitutional amendments are published, as near as may be, and he shall submit the same to the people at the first general election held not less than ninety days after such petition shall have been filed; provided that provision may be made by law for also submitting such laws or parts thereof at a special election. All such laws or parts thereof submitted as herein provided when approved by a majority of the votes

cast thereon at such election shall be and become the law of this state notwithstanding the decision of the supreme court."

If any doubt can be said to exist as to our duty under said § 2, art. 6, to here and now interpret the foregoing language, no such doubt can exist as to the absolute necessity for so doing for the guidance and direction of the clerk and reporter of our own court. The clerk must know whether or not it be his official duty to file the decision as therein provided, and the reporter must know whether it is to be published with the other decisions of this court, or held in abeyance pending a possible recall.

Immediately following the language of § 1, last quoted, is a similar provision for the recall of decisions declaring charter provisions of home rule cities contrary to the state or Federal Constitution, save that in the latter case the charter provision held unconstitutional is submitted to a vote of the citizens of said city; and it is further provided: "All such charters, or amendments thereto, so submitted as herein provided, when approved by a majority of the votes cast thereon in said city or city and county, shall be and become the law of this state and of said city or city and county notwithstanding the decision of the supreme court."

We pass without comment such startling declarations as that, in case of approval by the people of a city of a section of its charter, after this court shall have declared it unconstitutional, said city charter or amendment "shall be and become the law of this state," and address ourselves to the fundamental question underlying each of these provisions for the recall of decisions on Federal constitutional questions. If the people of the state be empowered, by the mere re-enactment of a statute which violates the Federal Constitution, to give full force and effect to such unconstitutional legislation, then that portion of the state Con-

stitution which vests in them such power is itself prohibited by the terms of the Federal compact, and is null and void and of no force or effect whatsoever.

Constitutional law—validity of recall of judicial decision.

What the whole people of a state are powerless to do directly, either by statute or Constitution, i. e., set aside the Constitution of the United States, they are equally powerless to do indirectly, either by a pretended authority granted to a municipality, or by a popular election, under the guise of a recall. The original Constitution of Colorado was a solemn compact between the state and the Federal government, a compact which stipulated that it should never be altered save in the manner therein provided, and that all amendments and all revisions thereof would conform to the supreme law. The whole people of the state have no power to alter it save according to their contract. They cannot do so, even by unanimous consent, if such alteration violates the Constitution of the United States. Should they make the attempt their courts are bound by the mandate of the Federal Constitution, and by the oath they have taken in conformity therewith and with their own Constitution, to declare such attempt futile, to disregard such violation of the supreme compact, and decline to enforce it. There is no sovereignty in a state to set at naught the Constitution of the Union and no power in its people to command their courts to do so. That issue was finally settled at Appomattox.

When a Federal constitutional question is raised in any of the trial courts of Colorado the right is given, and the duty is imposed upon those courts, by that instrument itself, to adjudicate and determine it. That right so given can neither be taken away or that duty abrogated by the state of Colorado, by constitutional provision or otherwise, and any attempt to do so is null and void. Such pretended constitutional inhibition is no part of the Constitution of the

state of Colorado, and the judge's oath binding him to the support and enforcement of that instrument has no relation to such void provisions. The question may be brought by writ of error to this court for review, and from our judgment the cause may be taken for final determination to the Supreme Court of the United States itself. It cannot be reviewed by popular vote of the citizens of Colorado, or one of its municipalities; and any pretended constitutional provision of this state, assuming to provide such method of review, is null and void. To hold otherwise is not only to vest in the people of Colorado the power to nullify the United States Constitution, but is likewise to vest that tremendous power in every municipality of this state, having a population of 2,000 or more, which sees fit to bring itself within the terms of the home rule amendment to our Constitution.

Many authorities might be cited in support of the general principles herein announced, as many might be cited in support of the proposition

that parallel lines can never meet. They would be equally useless.

It is to be observed that the validity of said amended § 1, art. 6, so far as it prohibits trial courts from holding statutes and city charters to be in violation of the state Constitution, and assumes to provide a method of recalling decisions of the supreme court so holding, is not herein determined.

In conformity with the views herein expressed, and for the reasons hereinbefore given, we find that the trial court had the power to determine the question which it assumed to adjudicate, that the statute complained of was in fact unconstitutional, and that this decision cannot be reviewed, suspended, or reversed by the method attempted to be provided by said amended § 1 of article 6 of the state Constitution, but stands upon the same footing as any other decision of this court. The judgment is accordingly affirmed.

Scott, Ch. J., not participating.

ANNOTATION.

Validity and effect of provisions limiting the power of courts to declare a statute unconstitutional.

I. In general, 331.

II. Recall, 333.

I. In general.

The decision in the reported case (PEOPLE v. WESTERN U. TELEG. CO. ante, 326) that a state constitutional provision limiting the power of trial courts to pass upon the constitutionality of a state statute is invalid, in so far as it relates to its constitutionality as tested by the guaranties of the Federal Constitution, is also supported by the conclusion in *People v. Max* (1921) — *Colo.* —, 198 *Pac.* 150, decided at the same time as the reported case, where the court holds the provision invalid as it relates to questions arising under the state Constitution, on the theory that the provision is indivisible. The court says: "It thus appears that in all particulars in which this section is held void in the

opinion in cause No. 9522 [the reported case], no distinction is made between the two classes of decisions, and no portion of the section relating to that subject can be held to have been considered by the voters as standing alone, or to have been treated as independent. It is inconceivable that the people of Colorado would ever have enacted this law had they realized that in no event could it ever be applied further than to their own Constitution, or that they would ever have considered the advisability of taking from their own courts the power to construe their own Constitution, had they realized that while the Constitution of the United States stands they were impotent to deprive those same courts of power to construe that charter. The rule as to the divisibility of a constitutional pro-

vision, a portion of which is held void, is the same as that applied to a statute under similar conditions. "Where a separation cannot be made and the invalid provision completely detached and treated as independent, the whole act must be pronounced void." *Griffin v. State* (1889) 119 Ind. 520, 22 N. E. 7. That portion of the section is therefore indivisible, and a part of it having fallen, it must all fall. It is hence apparent that, for the simple reason that said § 1 is invalid as to Federal constitutional questions, and is indivisible, it is likewise invalid as to state constitutional questions, and the trial court had the power and it was its duty to adjudicate the questions presented."

There is practically no other authority upon the right to limit the courts' power in declaring a legislative act unconstitutional. Limitations upon this authority may be attempted by constitutional provision or by statute. It seems clear that a constitutional limitation, if regularly adopted, is beyond question, unless it is in a state Constitution and conflicts with some provision of the Federal Constitution. The right of the courts to declare unconstitutional a legislative act deemed to be in violation of some constitutional provision is now too well settled in American jurisprudence to be denied. That power of the courts was not established, however, without some opposition, nor is it without present-day critics. All, however, recognize its uniform exercise. It is generally recognized that it is the duty of state courts to enforce the guaranties of the Federal Constitution by holding invalid legislation which conflicts therewith. *Montgomery v. State* (1908) 55 Fla. 97, 45 So. 879. And see the reported case (*PEOPLE v. WESTERN U. TELEG. Co.* ante, 326).

A reluctance is expressed by many courts of first instance against exercising the power to declare an act of the legislature unconstitutional. *International Mercantile Marine Co. v. Stranahan* (1907) 155 Fed. 428 (circuit court); *Lindsley v. Natural Carbonic Gas Co.* (1908) 162 Fed. 954

(same); *Re Hosack* (1902) 39 Misc. 180, 78 N. Y. Supp. 983 (surrogate); *Re Wendel* (1916) 95 Misc. 406, 160 N. Y. Supp. 822 (same); *Re Wintjen* (1917) 99 Misc. 471, 165 N. Y. Supp. 927 (same); *Re Hoffman* (1919) 108 Misc. 612, 177 N. Y. Supp. 905; court of first instance, from which an appeal was taken in *People v. Pray* (1914) 87 Misc. 464, 150 N. Y. Supp. 1061.

In fact it has been stated that a court of first instance will assume a statute to be constitutional until otherwise determined by the higher courts. *Re Porter* (1910) 67 Misc. 19, 124 N. Y. Supp. 676, affirmed without opinion in (1911) 148 App. Div. 896, 132 N. Y. Supp. 1143 (surrogate court); *Re Thornburgh* (1911) 72 Misc. 619, 132 N. Y. Supp. 268 (same); *Brainerd v. New York* (1911) 74 Misc. 101, 131 N. Y. Supp. 221 (court of claims); *Re Whitewright* (1915) 89 Misc. 97, 151 N. Y. Supp. 242 (surrogate court); *Re Brewster* (1915) 92 Misc. 339, 156 N. Y. Supp. 588. Especially is this true when the statute in question is one under which the court of last resort of the state has acted. *Re Whitewright* (1915) 89 Misc. 97, 151 N. Y. Supp. 242.

The power "of declaring an act of the legislature unconstitutional should never, in my opinion, be assumed by a court of first instance, except possibly in rare cases involving life or liberty and where the invalidity of the legislative act is apparent on its face. The exercise of a judicial power to declare acts of the legislature void, should, I think, be reserved to the graver courts of the state, in solemn session in banc, or held for the final review of such great questions. . . . But the power and the exercise of the power are distinct." *Re Thornburgh* (1911) 72 Misc. 619, 132 N. Y. Supp. 268.

In *Ortman v. Greenman* (1856) 4 Mich. 291, where a justice of the peace had assumed to decide that a statute was unconstitutional, the supreme court says: "We regret that any magistrate should, in the course of his official duty, presume to do that which the highest judicial tribunals of

the land do with great caution, and only after the most mature deliberation." The court then cites expressions of opinion from various judges as to the care to be exercised in declaring an act unconstitutional, and concludes: "We forbear to make further quotations upon this point, and hope the example and precept of these eminent judges may not be disregarded; and that hereafter no justice of the peace, however great his legal learning may be, will presume to sit in judgment and decide upon the constitutionality of an act of the legislature."

Other trial courts have not exhibited this becoming modesty, but have said that the duty rests upon the court of first instance as well as upon appellate courts. *People ex rel. Wogan v. Rafferty* (1912) 77 Misc. 258, 136 N. Y. Supp. 4; *People v. Pray* (1914) 87 Misc. 464, 150 N. Y. Supp. 1061 (an appellate court was here deciding the question); *Syracuse & S. R. Co. v. Syracuse* (1920) 113 Misc. 28, 183 N. Y. Supp. 757.

The jurisdiction of intermediate appellate courts to entertain appeals involving the constitutionality of a statute is denied in some jurisdictions. *Falch v. People* (1881) 8 Ill. App. 351; *Graham v. People* (1890) 35 Ill. App. 568; *Cook County v. Sennott* (1890) 37 Ill. App. 268; *Gorr v. Dahmke* (1892) 46 Ill. App. 421; *Baumeister v. Fink* (1908) 141 Ill. App. 372; *Knudsen v. Houghton* (1911) 160 Ill. App. 440; *Ex parte Sweeney* (1891) 126 Ind. 583, 27 N. E. 127; *Benson v. Christian* (1891) 129 Ind. 535, 29 N. E. 26; *State v. Atkinson* (1894) —

Ind. App. —, 38 N. E. 340. But this is another question, and no exhaustive citation of cases is attempted.

II. Recall.

In the decision in the reported case (*PEOPLE v. WESTERN U. TELEG. Co. ante*, 326) upon the validity of the recall of judicial decisions, the court confines itself to the validity of the Colorado constitutional provision as applied to questions arising under the Federal Constitution, and expressly refrains from passing upon its validity as applied to questions arising under the state Constitution.

But in *People v. Max* (1921) — Colo. —, 198 Pac. 150, such a provision is held invalid in so far as it attempts to prohibit trial courts from adjudicating state constitutional questions. The conclusion of the court in the *Max Case* upon this question seems ultimately to have been based upon the ground that the provision of the state Constitution is a violation of the Federal Constitution. The court says: "We must not be understood as saying that the people of Colorado cannot make any change in or amendments to their fundamental law which is not of itself a violation of the Federal Constitution. They have the power to create courts and abolish them. They may confer jurisdiction upon one court and deny it to another, but they are powerless to violate the Federal Constitution or strip their courts of the power to pass upon such a violation." That such a provision of the state Constitution can only be held invalid because in violation of the Federal Constitution seems clear.

W. A. E.

MISSOURI PACIFIC RAILROAD COMPANY, Appt.,

v.

DAVID KOHLER et al.

Kansas Supreme Court—November 6, 1920.

(107 Kan. 673, 193 Pac. 323.)

Railroads — grant of stand privilege — validity — interference by city.
A railway company by contract may grant to a firm of cab and baggage-

Headnote by DAWSON, J.

men an exclusive privilege to board its passenger trains to solicit the patronage of passengers and to arrange for their safe and expeditious transportation to other railroad stations, and may also grant to such firm an exclusive right to stand its vehicles on a portion of the property owned by the railway company, when the space so granted is not required for the necessary and convenient use of the public having business with the railway company; and, in the absence of valid statutory authority, a city may not authorize its police officers to interfere with the reasonable exercise of the exclusive privileges so granted.

[See note on this question beginning on page 356.]

APPEAL by plaintiff from a judgment of the District Court for Montgomery County (Holdren, J.) in favor of defendants in an action brought to enforce payments of monthly instalments alleged to be due under a contract for cab and soliciting privileges. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. W. P. Waggener, J. M. Chaliess, and S. H. Piper, for appellant:

The contract in question is entirely within the power of the railroad company, and is a reasonable regulation in the interest of and for the convenience of the traveling public.

10 C. J. 657; Depot Carriage & Baggage Co. v. Kansas City Terminal R. Co. 190 Fed. 212; Hedding v. Gallagher, 72 N. H. 377, 64 L.R.A. 811, 57 Atl. 225; Godbout v. St. Paul Union Depot Co. 79 Minn. 188, 47 L.R.A. 532, 81 N. W. 835; New York, N. H. & H. R. Co. v. Scovill, 71 Conn. 136, 42 L.R.A. 157, 71 Am. St. Rep. 159, 41 Atl. 246; Donovan v. Pennsylvania Co. 199 U. S. 279, 50 L. ed. 192, 26 Sup. Ct. Rep. 91; Oregon Short Line R. Co. v. Davidson, 33 Utah, 370, 16 L.R.A. (N.S.) 777, 94 Pac. 10, 14 Ann. Cas. 489; State ex rel. Sheets v. Union Depot Co. 71 Ohio St. 379, 68 L.R.A. 792, 73 N. E. 633, 2 Ann. Cas. 186; Painter v. London, B. & S. C. R. Co. 2 C. B. N. S. 702, 140 Eng. Reprint, 592; Beadell v. Eastern Counties R. Co. 2 C. B. N. S. 509, 140 Eng. Reprint, 515, 26 L. J. C. P. N. S. 250, 5 Week. Rep. 650; Donovan v. Pennsylvania Co. 61 L.R.A. 140, 57 C. C. A. 362, 120 Fed. 215; Com. v. Carey, 147 Mass. 40, note, 17 N. E. 97; Old Colony R. Co. v. Tripp, 147 Mass. 35, 9 Am. St. Rep. 661, 17 N. E. 89; Boston & A. R. Co. v. Brown, 177 Mass. 65, 52 L.R.A. 418, 58 N. E. 189; New York C. & H. R. R. Co. v. Flynn, 74 Hun, 124, 26 N. Y. Supp. 859; Snyder v. Union Depot Co. 10 Ohio C. D. 645; Hole v. Digby, 27 Week. Rep. 884; Jencks v. Coleman, 2 Sumn. 221, Fed. Cas. No. 7,258; Kates v. Atlanta Baggage & Cab Co. 107 Ga. 636, 46 L.R.A.

431, 34 S. E. 372; Summitt v. State, 8 Lea, 413, 41 Am. Rep. 637; Griswold v. Webb, 16 R. I. 649, 7 L.R.A. 302, 19 Atl. 143; Union Depot & R. Co. v. Meeking, 42 Colo. 89, 126 Am. St. Rep. 145, 94 Pac. 16; Norfolk & W. R. Co. v. Old Dominion Baggage Transfer Co. 99 Va. 111, 50 L.R.A. 722, 37 S. E. 784; Denton v. Texas & P. R. Co. — Tex. Civ. App. —, 160 S. W. 113.

Mr. A. M. Etchen, for appellees:

The ordinance of the city of Coffeyville, and the orders of the chief of police, made in pursuance thereof, are valid, and said contract was in contravention thereof and void.

Ottawa v. Bodley, 67 Kan. 178, 72 Pac. 545; Donovan v. Pennsylvania Co. 199 U. S. 279, 50 L. ed. 192, 26 Sup. Ct. Rep. 91; Lindsay v. Anniston, 104 Ala. 257, 27 L.R.A. 436, 53 Am. St. Rep. 44, 16 So. 545; Cole v. Rowen, 88 Mich. 219, 13 L.R.A. 848, 50 N. W. 138; Kalamazoo Hack & Bus Co. v. Sootsma, 84 Mich. 194, 10 L.R.A. 819, 22 Am. St. Rep. 693, 47 N. W. 667; 9 Cyc. 465; McBratney v. Chandler, 22 Kan. 692, 31 Am. Rep. 213; Gerlach v. Skinner, 34 Kan. 86, 55 Am. Rep. 240, 8 Pac. 257; Thacker v. Smith, 103 Kan. 644, 175 Pac. 983; Mader v. Topeka, 106 Kan. 867, post, 340, 189 Pac. 969.

Dawson, J., delivered the opinion of the court:

This action questions the validity of a contract for certain exclusive privileges granted by a railway company to a firm of cab and baggage men in and about the railway company's station grounds and trains at Coffeyville.

The city of Coffeyville has railway service supplied by three railroads, the Missouri Pacific, the Katy, and the Santa Fé. Each of these has its separate depot. In 1914 the Missouri Pacific, plaintiff, conceived the idea of providing transportation service from its own depot to those of the other railroads operating in and out of Coffeyville, so that passengers, express, and baggage might be furnished through service over its own lines and connecting carriers at Coffeyville. To that end it made a contract with defendants, which in part reads:

"Whereas, it is mutually desired by the parties hereto that all such passengers, and their baggage, including property checked as baggage, as well, be promptly transported from the depot of the company to the depot of the carrier at said junction point upon and under those certain terms and conditions hereinafter set forth: . . .

"1. The contractor shall promptly and safely transport, by proper and safe conveyance, any and all baggage, including property checked as baggage, as well as passengers, immediately following arrival of same at depot of the company at said junction point, and free of cost to the company or to said passengers, respectively, to the depot of the carrier thereat, if and when the company shall have transported same to its said depot on a through ticket or tickets reading to any place or places on or reached via the line of the carrier. . . .

"The contractor shall pay to the company, monthly, in advance, on or before the 1st day of each calendar month of the full term hereof, compensation computed at the rate of one hundred twenty dollars (\$120) per annum; and, also the contractor shall, when and as requested so to do by the superintendent of the company or his authorized representative, transfer any and all supplies, including stationery and small office equipment, for the company between each depot and the

general offices of the company in said city of Coffeyville.

"3 (A) The company also hereby grants to the contractor, during the full term of this agreement, the right and privilege of soliciting patronage, for the contractor's cab and baggage service, on the passenger trains of the company entering the city of Coffeyville, said solicitation to include the taking up and rechecking of passenger's baggage by duly authorized representatives of the contractor, such representatives, when and while engaged in such solicitation, to be transported, as one of the considerations of this agreement and without further charge, . . . provided, however, that each and all of said things, so to be done by the contractor as well as by said representatives under this paragraph, shall be done at such time or times and in such manner as may be designated by and be satisfactory to the superintendent of the company or his authorized representatives, and as may be required by ordinances of said city of Coffeyville and the laws of the state of Kansas, as well as the state of Oklahoma.

"(B) The contractor, at its sole cost and risk, shall provide uniformed solicitors to canvass such of said passenger trains as may be designated by said superintendent, . . . and shall require said employees at all times to be courteous and polite to its patrons, both upon the premises of the company, . . .

"4. This agreement shall be held to grant unto the contractor the privilege, exclusive as against all other and different persons as well as corporations so far as the company may lawfully so contract (a) to bring and stand busses, carriages, motors, and other and different vehicles at such place or places, on as well as adjacent to the company's station premises in Coffeyville. . . ."

The defendant's contractor, David Kohler, failed to pay the monthly sums stipulated in the contract, and this action was begun by the railway company for their collection. De-

defendant answered, admitting the execution of the contract, but set up as his principal defense an ordinance of the city of Coffeyville, which, among other matters regulating the standing and running of hacks, carriages, and omnibuses in Coffeyville, provided: "Sec. 3. That the owner, driver or person in charge of any hack, omnibus, or carriage for hire, shall be under the control and direction of the chief of police, or police, while at any railroad depots in said city for the purpose of delivering passengers or baggage and attending trains, and such owners, drivers or persons in charge shall occupy such place and stands at such depots as may be ordered and fixed by the chief of police or police and may be most convenient for the public. It shall be unlawful for any owner, driver, or person in charge of any hack, omnibus, or carriage for hire to wilfully disobey any such orders and directions made by the chief of police or the police."

Defendant alleged that pursuant to this ordinance the chief of police had designated certain places upon the company's depot grounds mentioned in the contract to others than himself, thereby depriving him of the exclusive right attempted to be granted to him by the contract, and that the contract was without consideration, and in violation of the said ordinance, against public policy, lacked mutuality, and was void. He further answered that upon several occasions subsequent to the execution of such contract he had attempted to exercise the rights and privileges granted, and was prevented from so doing by the chief of police, and that such prevention operated as a discharge of the contract. He also alleged that certain places had been designated by the agent of the railroad company upon the station grounds where he was permitted to maintain exclusive cabstand privileges by the railroad company, which places had not been so designated by the chief of police, and that he was forcibly prevented from so exclusively occupying and

using such depot grounds by the chief of police.

The other defendants were sureties on Kohler's bond, and their answers were to the same effect.

The case was tried upon an agreed statement of facts, to which was attached a plat of the depot grounds. The execution of the contract was conceded; also that Kohler had been arrested and fined \$10 in the police court for standing his cab on the depot grounds as privileged by the contract, but at a place not designated by the chief of police, and that no appeal had been taken from the police court judgment. It was also stipulated that the plaintiff had permitted the general public to use its grounds for receiving, discharging, and taking up passengers and baggage, and had permitted vehicles to be driven thereon by the public. It was further admitted, "that said defendant Kohler has been denied the exclusive right to occupy said depot grounds by the chief of police of the city of Coffeyville, but such denial on the part of the authorities of the city of Coffeyville was not acquiesced in or agreed to by the plaintiff in this case."

Laying aside for a moment the consideration of the Coffeyville city ordinance and the interference of the chief of police, the contract between the plaintiff and defendant was one to facilitate the transportation of passengers and baggage between the different railroads in Coffeyville. Through traffic arrangements between different railroads is in the public interest, and where the expense is not large and the want of it is seriously detrimental to the public, such arrangements have sometimes been compelled by law. *State ex rel. Dawson v. Chicago, B. & Q. R. Co.* 85 Kan. 649, 118 Pac. 872.

The exclusive privileges conferred by the contract did not impair or diminish any rights of the general public. The public was in no way discommoded by the privilege of permitting the defendant to board its passenger trains and negotiate

with passengers for the expeditious transportation of their persons and baggage to other railway depots or elsewhere in Coffeyville. But while one hack and bus line might be granted such a privilege, it would create an intolerable situation to have several rival and competing hackmen going through the trains on a similar errand. Doubtless the state, and perhaps the city, could regulate the service governed by such a contract, to make certain that the public should be adequately and conveniently served, and that the charge exacted for such service be limited to a reasonable figure. And this would be true also in the matter of the privilege of keeping a cab stand on the station grounds.

But a wholly different question arises when we have to consider a positive interference with such a service by city authority. These grounds are not public property. They are the private property of the railway company, and so long as free and convenient access to the railway depot was not impaired, the railway company could lawfully grant to a cabman an exclusive privilege to stand his cab at an agreed or designated point on its own property. And certainly it could not be compelled, at least without a statute, to grant cab stands to everybody. We note on the map attached to the agreed statement of facts that on the railway property there are located an express office and space for Van Noy's news and notions agency. How came these concessions to be thus established? Undoubtedly by contract and exclusive concessions obtained from the landowner, the railway company. Could it be said that, without a statute, the city Coffeyville could authorize its chief of police to order the express office to be moved to some other part of the railway company's property, or to grant equal privileges to other express companies to permanently occupy space on the railway property? 4 R. C. L. 593, 594. If there is any 15 A.L.R.—22.

difficulty in solving the present problem, we are largely relieved of that task by the Supreme Court of the United States, which has had to consider a substantially similar exclusive privilege granted by the Pennsylvania Railroad Company to the Parmelee Transfer Company at the Union Passenger Station in Chicago. *Donovan v. Pennsylvania Co.* 199 U. S. 279, 50 L. ed. 192, 26 Sup. Ct. Rep. 94. That court held that, so long as the public was adequately and conveniently accommodated, the railway company could "make arrangements with, including the granting of special privileges to, a single concern to supply passengers arriving at its terminals with hacks and cabs, and it is not bound, at least, in the absence of valid state legislation requiring it to do so, to accord similar privileges to other persons, even though they be licensed hackmen." (Syl. ¶ 1.) In the opinion the court said:

"Although its functions are public in their nature, the company holds the legal title to the property which it has undertaken to employ in the discharge of those functions. And as incident to ownership it may use the property for the purposes of making profit for itself; such use, however, being always subject to the condition that the property must be devoted primarily to public objects, without discrimination among passengers and shippers, and not be so managed as to defeat those objects. It is required, under all circumstances, to do what may be reasonably necessary and suitable for the accommodation of passengers and shippers. But it is under no obligation to refrain from using its property to the best advantage of the public and of itself. It is not bound to so use its property that others, having no business with it, may make profit to themselves. Its property is to be deemed, in every legal sense, private property as between it and those of the general public who have no occasion to use it for purposes of transportation. . . .

"Applying these principles to the

case before us, it would seem to be clear that the Pennsylvania Company had the right—if it was not its legal duty—to erect and maintain a passenger station and depot buildings in Chicago for the accommodation of passengers and shippers as well as for its own benefit; and that it was its duty to manage that station so as to subserve, primarily, the convenience, comfort, and safety of passengers and the wants of shippers. It was therefore its duty to see to it that passengers were not annoyed, disturbed, or obstructed in the use either of its station house or of the grounds over which such passengers, whether arriving or departing, would pass. It was to that end—primarily, as we may assume from the record—that the Pennsylvania Company made an arrangement with a single company to supply all vehicles necessary for passengers. We cannot say that that arrangement was either unnecessary, unreasonable, or arbitrary; on the contrary, it is easy to see how, in a great city and in a constantly crowded railway station, such an arrangement might promote the comfort and convenience of passengers arriving and departing, as well as the efficient conduct of the company's business. The record does not show that the arrangement referred to was inadequate for the accommodation of passengers. But if inadequate, or if the transfer company was allowed to charge exorbitant prices, it was for passengers to complain of neglect of duty by the railroad company, and for the constituted authorities to take steps to compel the company to perform its public functions with due regard to the rights of passengers.

"Here the defendants press the suggestion that they are entitled to the same rights as were accorded by special arrangement to the Parmelee Transfer Company. They insist, in effect, that, as carriers of passengers, they are entitled to transact their business at any place which, under the authority of law,

is devoted primarily to public uses,—certainly at any place open to another carrier engaged in the same kind of business. But this contention, when applied to the present case, cannot be sustained. The railroad company was not bound to accord this particular privilege to the defendants simply because it had accorded a like privilege to the Parmelee Transfer Company; for it had no contractual relations with the defendants, and owed them as hackmen no duty to aid them in their special calling. . . . In maintaining a highway, under the authority of the state, the first and paramount obligation of the railroad company was, as we have already said, to consult the comfort and convenience of the public who used that highway. To that end it could use all suitable means that were not forbidden by law.

"This question is not controlled by any statute of Illinois. . . . It does not appear that the state has undertaken by any statute to compel the railroad company to share the use of its depot grounds and station with hackmen and cabmen seeking to use them only to solicit custom for themselves. Whether such a statute would be valid we need not now consider or determine." 199 U. S. 294-298.

The supreme court of Michigan has considered the same question and reached a similar conclusion. In *Dingman v. Duluth, S. S. & A. R. Co.* 164 Mich. 328, 330, 32 L.R.A. (N.S.) 1181, 1184, 130 N. W. 25, it is said:

"To give to § 6266, 2 Comp. Laws [1897], the construction contended for by plaintiff, would result in depriving the public of one of the most valuable privileges incident to public travel. That the privilege of dealing with a competent and trustworthy baggage agent is a valuable one seems too obvious for argument. The traveling stranger is often ignorant of the location of termini or his destination, and the best means of transportation to and from the same. He is entitled to receive

this information, and to receive it from one whose position upon the train is a guaranty that he is responsible and may be safely intrusted with the person or property of the traveler. In large cities, scores, nay hundreds, are engaged in the same business as is the plaintiff. To compel the railroad company to transport all persons who desired to solicit the transportation of passengers or baggage would, of necessity, result in the refusal of the company to carry any, and, as a consequence, the denial to the traveling public of a service of the greatest possible importance.

"But suppose the railroad, instead of refusing to carry all, permitted two or more baggage agents upon its trains. The conditions which would result from such a course would at once become intolerable. Rival agents would besiege the passenger for his business, to his infinite annoyance, and, when he finally made a selection, he would have no means of knowing that he had chosen either a competent or responsible agency for its transaction. It may be urged that the passenger is subjected to the same annoyance upon his arrival at his destination. If this is so, it is because he voluntarily transacts his business at the depot, rather than upon the train. But the conditions at the depot are different from those upon the train. At the depot the competition for his business is ordinarily duly regulated and under the supervision of the police—a safeguard entirely wanting upon trains."

The trend of all the later decisions seems to be to the same effect (10 C. J. 657), although such was not the earlier view (10 C. J. 659). Defendant cites our own case (*Ottawa v. Bodley*, 67 Kan. 178, 72 Pac. 545) as opposed to this view. That case was decided before *Donovan v. Pennsylvania Co.* supra, by the Supreme Court of the United States. Moreover, in the *Bodley* Case, there was no question of contractual rights between the railway company and the hackman. If *Bodley* had

been able to justify his assumption of cab-standing privileges on railway property not necessary for the convenient use of the general public, a different result might have been reached in his appeal. And this brings us to a consideration of the Coffeyville ordinance. Doubtless, as said in the *Bodley* Case, a city has full authority to regulate railroad depots and depot grounds as far as concerns the needs and convenience of the general public who have business with the railway company. It is also correct that a city may establish reasonable regulations touching the conduct of hackmen who collect about the depot to solicit patronage, and the power to designate places for the rival hackmen—all of whom have equal rights and no more—may properly be vested in a police officer. But such considerations do not justify disregard of a private contract between a hackman and a railway company for the exclusive privilege of standing his hack upon a portion of the railway company's property which is not otherwise needed for the convenient and efficient discharge of the railway company's corporate duties of transportation. In the absence of valid and specific statutory authority, the city cannot lawfully interfere, through its chief of police or otherwise, with the reasonable use of the concession granted by the plaintiff to the defendant hackman. In *Mader v. Topeka*, 106 Kan. 867, 189 Pac. 969, the court had to consider other phases of this general subject, but in that case the city ordinance recognized certain private rights of ownership held by the railway company, while the city ordinance in the present case seems to overlook those rights.

If the city has transcended its authority, or the chief of police, through misinterpretation of the ordinance, has transcended his powers, or acted arbitrarily in disregard of the defendant's lawful

Railroads—
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city.

contractual rights, adequate pursuit of redress at law or equity by the defendant would not have failed him. Neither the ordinance nor the interference of the police with the defendant's lawful exclusive privilege was a defense in the present action. This conclusion necessitates a reversal of the judgment; and it is so ordered.

A petition for rehearing having been filed, Dawson, J., on December 11, 1920, handed down the following response (108 Kan. 6, 193 Pac. 899):

The petition for a rehearing assumes that the Bodley Case, 67 Kan. 178, 72 Pac. 545, is overruled by the present decision. It was not necessary to overrule this case; it being sufficient to distinguish it from the present case, and that, we think, we have clearly done.

The appellee, however, does point out an inaccuracy in our statement of facts, where we said that no appeal was taken from the police court judgment. There was an appeal to the district court, and the police court judgment was sustained. But that judgment cannot control in this case. Either the matter should have been so thoroughly presented to the district court that no such erroneous result would have transpired, or it should have been brought to this court for authoritative determination. Certainly the

judgment in the police court and in the district court, where Kohler paid a fine of \$10, did not determine the rights of the railway company. If Kohler was disposed to acquiesce in the judgment of these courts, he could have exercised the right reserved to him in his contract with the railway company—that of canceling that contract on thirty days' notice. Since he has never done this, he is bound by his contract.

The petition for a rehearing is denied.

NOTE.

The general question of the right to give the exclusive privilege of soliciting patronage at railroad stations or on trains is treated in the annotation following THOMPSON'S EXP. & STORAGE CO. v. MOUNT, post, 356 and the reported case (MISSOURI P. R. CO. v. KOHLER, ante, 333) will be found cited in subdivision I. b, which deals with the cases adhering to the general rule as to soliciting at stations; in subdivision I. d, wherein are collated the authorities upon the question of the effect of statutes and ordinances upon the right to grant exclusive solicitation privilege at stations; and in subdivision II., which treats the question of soliciting patronage on trains.

AUGUST M. MADER

v.

CITY OF TOPEKA et al.

Kansas Supreme Court—May 8, 1920.

(106 Kan. 867, 189 Pac. 969.)

Monopoly — grant of hack privileges.

1. A railway company may grant an exclusive privilege to one and exclude all others who desire to go upon its premises for the sole purpose of soliciting customers or business.

[See note on this question beginning on page 356.]

Headnotes 1-3 by PORTER, J.

License — discrimination — effect.

2. A city ordinance is not void, because it grants a license to one and denies it to another, where the grant and the restriction are in the interest of the public.

— to hack drivers — consent of owners.

3. A city ordinance, which, in effect, grants special permit to licensed hack drivers who can procure the consent of the abutting property owners to stand their vehicles in the street in front of such property, is not unconstitutional on the ground that it grants special privileges, although the same privilege is not granted to those who do not obtain such consent.

[See 6 R. C. L. 407.]

Municipal corporations — ordinance — reasonableness — power of court.

4. The court cannot inquire into the reasonableness of an ordinance which is within the power expressly granted to a municipal corporation.

[See 6 R. C. L. 244; 19 R. C. L. 805.]

— necessity of reasonableness.

5. When the mode of exercising power conferred upon a municipal corporation is not prescribed, the exercise must be reasonable to be upheld.

[See 19 R. C. L. 805.]

— reasonableness in part.

6. An ordinance may be reasonable when applied to one state of facts and unreasonable when applied to circumstances of a different character.

APPLICATION for a writ of habeas corpus to secure petitioner's release from custody to which he had been committed upon his conviction for the violation of a city ordinance alleged by him to be unconstitutional. *Writ denied.*

The facts are stated in the opinion of the court.

Mr. Edwin D. McKeever, for petitioner:

The ordinance in question is unconstitutional.

McQuillin, Mun. Corp. § 728; Salvation Army Case (Anderson v. Wellington) 40 Kan. 173, 2 L.R.A. 110, 10 Am. St. Rep. 175, 19 Pac. 719; Hutchinson v. Leimbach, 68 Kan. 37, 63 L.R.A. 630, 104 Am. St. Rep. 384, 74 Pac. 598; Emporia v. Atchison, T. & S. F. R. Co. 94 Kan. 718, 147 Pac. 1095; State v. Crawford, 104 Kan. 141, 2 A.L.R. 880, 177 Pac. 360; Babbitt, Motor Vehicles, 2d ed. § 161; Com. v. Maletsky, 203 Mass. 241, 24 L.R.A. (N.S.) 1168, 89 N. E. 241; Ex parte Adlof, 86 Tex. Crim. Rep. 13, 215 S. W. 222; Jacksonville v. Ledwith, 26 Fla. 163, 9 L.R.A. 69, 23 Am. St. Rep. 558, 7 So. 885; Re Quong Woo, 13 Fed. 229; St. Louis v. Russell, 116 Mo. 248, 20 L.R.A. 721, 22 S. W. 470; Cicero Lumber Co. v. Cicero, 176 Ill. 9, 68 Am. St. Rep. 155, 51 N. E. 758; State ex rel. Garrabad v. Dering, 84 Wis. 585, 19 L.R.A. 858, 36 Am. St. Rep. 948, 54 N. W. 1104; Chicago v. Trotter, 136 Ill. 430, 26 N. E. 359; Richmond v. Dudley, 129 Ind. 112, 13 L.R.A. 587, 28 Am. St. Rep. 180, 28 N. E. 312; Ex parte Battis, 40 Tex. Crim. Rep. 112, 43 L.R.A. 863, 76 Am. St. Rep. 708, 48 S. W. 513; Smith v. Hosford, 106 Kan. 363, 187 Pac. 685.

A railway company cannot make an

exclusive contract with a taxi company concerning the use even of its own premises.

McConnell v. Pedigo, 92 Ky. 465, 18 S. W. 15; State v. Reed, 76 Miss. 211, 43 L.R.A. 134, 71 Am. St. Rep. 528, 24 So. 308, 11 Am. Crim. Rep. 651; Indianapolis Union R. Co. v. Dohn, 158 Ind. 10, 45 L.R.A. 427, 74 Am. St. Rep. 274, 53 N. E. 937; Palmer Transfer Co. v. Anderson, 131 Ky. 217, 19 L.R.A. (N.S.) 756, 133 Am. St. Rep. 237, 115 S. W. 182; Parkinson v. Great Western R. Co. L. R. 6 C. P. 554, 40 L. J. C. P. N. S. 222, 24 L. T. N. S. 830, 19 Week. Rep. 1063; Re Palmer, L. R. 6 C. P. 194; Marriott v. London & S. W. R. Co. 1 C. B. N. S. 499, 140 Eng. Reprint, 205, 26 L. J. C. P. N. S. 154, 3 Jur. N. S. 493, 5 Week. Rep. 312; Pennsylvania Co. v. Chicago, 181 Ill. 289, 58 L.R.A. 223, 54 N. E. 825; Baker-Whiteley Coal Co. v. Baltimore & O. R. Co. 110 C. C. A. 234, 188 Fed. 405.

Mr. D. H. Branaman, for respondents:

No inherent right of the petitioner is violated.

Smith v. Leavenworth, 15 Kan. 81; Lippincott v. Lasher, 44 N. J. Eq. 120, 14 Atl. 103; Desser v. Wichita, 96 Kan. 820, L.R.A. 1916D, 246, 153 Pac. 1194; 87 Cyc. 266; State v. Phillips, 107 Me. 249, 78 Atl. 283; 3 Abbott, Mun. Corp. 2048; Emporia v. Shaw, 6 Kan. App. 808, 51 Pac. 237; Ottawa v. Bodley, 67

Kan. 178, 72 Pac. 545; *Leavenworth v. Douglass*, 59 Kan. 413, 53 Pac. 123; *Heller v. Atchison, T. & S. F. R. Co.* 28 Kan. 625.

The ordinance protects the inherent right of the property owner.

Brarahan v. Cincinnati Hotel Co. 39 Ohio St. 333, 48 Am. Rep. 457; *McCaffrey v. Smith*, 41 Hun, 117; *Pennsylvania Co. v. Chicago*, 181 Ill. 299, 53 L.R.A. 223, 54 N. E. 825; *Pennsylvania Co. v. Donovan*, 116 Fed. 907.

Section 9 is a valid police regulation, and not in contravention of any constitutional provision.

Donovan v. Pennsylvania Co. 199 U. S. 279, 50 L. ed. 192, 26 Sup. Ct. Rep. 91; *Kansas City Terminal R. Co. v. Depot Carriage & Baggage Co.* 190 Fed. 212; *McFall v. St. Louis*, 232 Mo. 716, 33 L.R.A.(N.S.) 471, 135 S. W. 51; *Desser v. Wichita*, 96 Kan. 820, L.R.A.1916D, 246, 153 Pac. 1194; *New York v. Reesing*, 38 Misc. 129, 77 N. Y. Supp. 82, 77 App. Div. 417, 79 N. Y. Supp. 331; *Emporia v. Shaw*, 6 Kan. App. 808, 51 Pac. 237; *Kissinger v. Hay*, 52 Tex. Civ. App. 295, 113 S. W. 1005; *Veneman v. Jones*, 118 Ind. 41, 10 Am. St. Rep. 100, 20 N. E. 644.

Section 9 is a reasonable and necessary police regulation.

Napman v. People, 19 Mich. 352; *Chillicothe v. Brown*, 38 Mo. App. 609; *Depot Carriage & Baggage Co. v. Kansas City Terminal R. Co.* 190 Fed. 212; *Skaggs v. Kansas City Terminal R. Co.* 233 Fed. 827; *Emporia v. Shaw*, 6 Kan. App. 808, 51 Pac. 237; *Ottawa v. Bodley*, 67 Kan. 178, 72 Pac. 545.

Mr. C. M. Monroe also for respondents.

Porter, J., delivered the opinion of the court:

The petitioner operates a taxicab for hire upon the public streets of the city of Topeka, and seeks his release from imprisonment upon a conviction for the violation of a city ordinance, claiming that the ordinance is unconstitutional. The ordinance, No. 4951, enacted by the board of commissioners of the city of Topeka, was published on March 17, 1920. The question turns upon the validity of § 9, which reads: "It shall be unlawful for the owners or driver of any hackney carriage, taxicab, auto bus, baggage wagon, truck, or any other passenger or baggage vehicle to stand any such

vehicle or solicit business on any public street, alley or sidewalk in the city of Topeka, without the owner of such vehicle having first obtained and filed with the city clerk of said city the written consent of the owner or of the person, corporation or company, having control of the abutting property, business house, hotel, or railroad depot: Provided, however, that such consent may be revoked by such property owner or person, corporation or company having control thereof, giving at least ten days' written notice to be served on the owner or driver of such vehicle and a copy thereof, with proof of such service, filed with the city clerk: And provided further that the city commission shall have the power at any time to revoke such consent or permit: And provided further that this section shall not be construed to prevent or interfere with the driver of any licensed vehicles hereinbefore mentioned from temporarily stopping at any convenient place, not elsewhere prohibited by ordinance, for the purpose of discharging or receiving passengers."

The petitioner contends that this section, if enforced against him, will destroy the profits of his business; that there is no express authority from the state justifying its enactment; that it does not protect or purport to protect the health, safety, morals, or welfare of the public, and is not a proper exercise of police power. It is claimed that the section is unreasonable, oppressive, uncertain, not uniform in its operation, discriminatory, in restraint of trade, and that it deprives him of his property and earnings without due process of law. There is the further contention that the ordinance delegates to private persons and others the power to enforce its provisions and to determine who are entitled to its benefits, and to discriminate between persons engaged in the same line of business, and further that it permits private individuals to confer a monopoly upon favored firms and individuals. We

may pass by a great deal of surplusage in the petition, such as the averments that it is opposed and condemned by a large majority of the public, and that protests against it have been signed by many business men.

The various grounds urged against the validity of the ordinance have been pleaded and presented in the petitioner's brief in the form of a general indictment. Before attempting to consider them it is proper to state some general rules that are applied in the construction of city ordinances.

Where the city has authority to act, it is governed by its own discretion, and not that of the courts. *Fisher v. Harrisburg*, 2 Grant, Cas. 291. So, where an ordinance is

within the express power granted, the court can only construe the extent of the grant, and has nothing to do with the reasonableness of an ordinance carrying it into effect. Our attention has not been directed to any statute conferring express power upon the city to enact the particular provisions of § 9, and the respondents rely upon the general grant to cities of the first class of power over streets, the powers conferred upon such cities to issue licenses and to regulate the business of operating hackneys, taxicabs, and other vehicles transporting merchandise, baggage, or passengers for hire (Gen. Stat. 1915, § 1221), and by the grant of the police power and the authority conferred by the general welfare clause. It has been said that "where the power to legislate on a given subject is conferred, and the mode of its exercise is not prescribed, then the ordinance

passed in pursuance thereof must be a reasonable exercise of the power, or it will be pronounced invalid." 2 Dill. Mun. Corp. 5th ed. § 600; *Lake View v. Tate*, 130 Ill. 248-252, 6 L.R.A. 268, 22 N. E. 791.

An ordinance may be adjudged

reasonable as applied to one state of facts and unreasonable when applied to circumstances of a different character, and facts may be pleaded and proved tending to show it to be unreasonable as applied to a particular person. *Chicago v. Gunning System*, 214 Ill. 628-641, 70 L.R.A. 230, 73 N. E. 1035, 2 Ann. Cas. 892; *State, Pennsylvania R. Co., Prosecutor, v. Jersey City*, 47 N. J. L. 286. "But the courts will declare an ordinance to be void, because unreasonable, upon a state of facts being shown which makes it unreasonable." 2 Dill. Mun. Corp. 5th ed. § 591. See also *Emporia v. Atchison, T. & S. F. R. Co.* 94 Kan. 718, 147 Pac. 1098; *Smith v. Hosford*, 106 Kan. 363, 187 Pac. 685.

Upon the theory of the law just stated it is averred in the petition that for years it has been the custom and habit of persons engaged in the taxicab business to stand and solicit business in front of the railway stations in the city, not only for the profit and benefit of themselves, but for that of the traveling public, and that § 9 in no way benefits the public or any person, except those using it to secure a monopoly of the taxicab business, and it is alleged that the Payne Taxicab & Baggage Company, or a business conducted in that name, has negotiated with certain railway companies for a monopoly of the business of operating taxicabs to and from their railway stations in the city. The same allegations are made with respect to the owner of a certain hotel in the city; and in this connection it is alleged that the railway companies are public common carriers of freight, passengers, baggage, and express, and have published and declared their rates and the character of their business, and that their stations in the city are for the benefit and use of the traveling public.

The answer of the respondents, after denying the contention that § 9 is discriminatory, and alleging that every taxi driver has equal op-

Municipal corporations—ordinance—reasonableness—power of court.

—necessity of reasonableness.

portunity to obtain the permit from the abutting property owners in order to use any portion of a street as a hack stand, alleges that § 9 goes no further than to recognize the rights of property owners to prevent the use of public streets abutting their property for private purposes without their consent; that the rights of the public are protected by the provision that such consents may be revoked by the city commission if it finds that any hack stands are interfering with the use of the public street for the regular purposes of public traffic. It is admitted, however, in the answer, that the Payne Taxicab Company is operating under an agreement with the Rock Island and Union Pacific Railway Companies by which it is given exclusive privilege to stand its taxicabs and solicit business upon the property of these railroads, and to solicit business in their depots and on their station platforms. It is alleged that neither company has given consent, as provided under the ordinance, for any person to use the public streets abutting their depots for the purpose of hack stands; but, on the contrary, both have notified the city authorities that they desired all taxicabs kept away from the public streets adjacent to their property, and that such streets be left open for the convenience and use of ordinary traffic and such private vehicles as have occasion to stop from time to time at the stations. The answer also admits that under the provisions of § 9 the managers of the National Hotel have given their consent that the Payne Taxicab Company may stand taxicabs at the side entrance of the hotel, and have given no consent to any other party.

Before taking up the contention that the ordinance is void, because it permits and authorizes the creation of a monopoly, we may first inquire whether in other respects § 9 is oppressive, partial, or unfair, or authorizes unwarranted discriminations. If it is open to these objections, it must be held unreasonable.

The petitioner relies upon the Salvation Army Case (*Anderson v. Wellington*, 40 Kan. 173, 2 L.R.A. 110, 10 Am. St. Rep. 175, 19 Pac. 719) and kindred cases. In that case an ordinance declaring it unlawful for any person, society, association, or organization, under whatsoever name, to parade the public streets, shouting, singing, or beating drums, etc., or playing upon musical instruments, or doing any other act designed to attract or call together an unusual crowd of people upon the streets, without having first obtained in writing the consent of the mayor, or, in his absence, the president of the council, city clerk, or the city marshal in the order named, authorizing such parade, was held to be of doubtful, delegated power, and unreasonable, because it did not fix the conditions uniformly and impartially, and contravened common right. The opinion by Commissioner Simpson has frequently been cited in textbooks and by other courts in support of the general proposition.

It is insisted that the doctrine of that case, and other decisions which have followed and approved it (*Crawford v. Topeka*, 51 Kan. 756, 20 L.R.A. 692, 37 Am. St. Rep. 323, 33 Pac. 476; *Paola v. Wentz*, 79 Kan. 148, 131 Am. St. Rep. 290, 98 Pac. 775, and similar cases), control the present case. We do not think so. The principles declared in those cases are only in the most general way applicable. It is well settled that it is within the general powers of cities to protect the traveling public from imposition and annoyance or improper conduct on the part of baggagemen and taxi drivers, and that ordinances enacted for the purpose of regulating such business are not unreasonable, nor open to the objection that they unjustly discriminate where all are treated alike. This court has held that a regulation of a city, requiring hackmen and others who solicit passengers at railway stations to occupy certain

License—
discrimination—
effect.

places designated by the city marshal, is not invalid, nor open to the claim of discrimination in the regulation, because it placed them all under the direction and control of the city marshal, which was held to be a reasonable and practical method of regulation. *Ottawa v. Bodley*, 67 Kan. 178, 72 Pac. 545, cited in note in L.R.A.1915F, 726. It has been held that it is no objection to the validity of such an ordinance that it requires the solicitors and vehicles to remain within the stands assigned, although some are much more advantageous than others, so that the hotels receiving the more favorable assignments have a material advantage over others. *City Cab, Carriage & Transfer Co. v. Hayden*, 73 Wash. 24, L.R.A.1915F, 726, 131 Pac. 472, Ann. Cas. 1914D, 731.

Is the ordinance invalid because it delegates power to abutting property owners to grant or withhold the consent? It will be observed that this consent is not required for the purpose of passing over the streets, nor for stopping to discharge a passenger or to take on a passenger; it forbids the establishing of a hack stand by the proprietor of a taxicab or hack in any portion of a public street without first obtaining the written consent of the abutting owner. The petitioner relies upon the recent case of *Smith v. Hosford*, 106 Kan. 363, 187 Pac. 685. The ordinance involved there placed it in the power of the city officers to grant a permit to build a garage or to refuse such permit at will; the city clerk was prohibited from issuing the license or permit until the application was first approved by the board of commissioners. It was held that it left the granting of the permit to the arbitrary discretion of the municipal authorities, without any limitations or restrictions, and for that reason was void. It is true in the present case there is no limitation or restriction on the rights of the abutting property owners to grant or refuse the permit; but the ordinance recog-

nizes the inherent rights of the property owner to insist that the public streets shall be maintained for strictly public purposes, unless he sees fit to waive his rights by giving his consent to the standing of hacks or taxicabs on the street in front of his property. It cannot be doubted that the abutting owner possesses valuable property rights in a public street, which are not enjoyed by the public. His right to ingress and egress to and from his property cannot be unduly restricted. *Longnecker v. Wichita R. & Light Co.* 80 Kan. 413, 102 Pac. 492. He may enjoin an obstruction or nuisance in the street which occasions a special annoyance, inconvenience, or damage to him. The interest of the abutting owner in a shade tree growing in the street is as sacred as any other property right. *Paola v. Wentz*, supra. The title to the land comprising the street is not in the city, but in the county, and upon a vacation of the street the title reverts to the abutting owners. *Wallace v. Cable*, 87 Kan. 835, 42 L.R.A. (N.S.) 587, 127 Pac. 5. It has been held, as against the abutting owner and without his consent, even the legislature has not the power to confer upon any person the right to make use of the highway for any other purpose than to pass and repass. *McCaffrey v. Smith*, 41 Hun, 117. An ordinance which permitted owners and drivers of hackney coaches to occupy and use the side of a public street on which plaintiff's storerooms fronted, as a hackney coach stand, in such manner as to constitute an unlawful interference with the use of the plaintiff's premises, was held void. It was said: "As well might the city authorize permanent booths or structures for the use of dealers in the various articles of trade. Having no rent to pay, the occupants could accommodate the public at better rates." *Branahan v. Cincinnati Hotel Co.* 39 Ohio St. 333, 48 Am. Rep. 457.

The petitioner has no inherent right to make a public hack stand of any part of the street. Doubtless,

in the absence of an ordinance attempting to regulate the use of the streets in this respect, or to prohibit all taxicab drivers from so doing, they may be left free to use the streets in that way until prevented by a lawful ordinance. The provision requiring the property owner's consent before the street may be occupied for the purposes of establishing hack stands is not unreasonable.

~~—to hack drivers~~ It is not open to
~~—consent of~~ the objection that
~~owners.~~ it permits unlawful discrimination, because it applies to all proprietors of hacks and taxicabs and to all abutting owners. It leaves no unregulated discretion in some officer of the corporation. It provides for all of the terms under which the permit is to be issued, and prescribes a uniform rule applicable to all of the classes to which it applies. The argument that, in order to avoid violation of the ordinance, taxi drivers in the city are compelled to procure the written consent of the property owners abutting upon miles of streets, is based upon the unwarranted assumption that the ordinance forbids the petitioner and others similarly situated from traveling upon the streets in the prosecution of their business. The consent of abutting property owners is required only where a taxicab driver seeks to establish a public stand for soliciting business.

A case in point is *McFall v. St. Louis*, 232 Mo. 716, 33 L.R.A. (N.S.) 471, 135 S. W. 51, in which substantially all the contentions raised here are determined adversely to the petitioner. It was there held that a municipal ordinance is not invalid, as unconstitutionally granting special privileges, which allows the municipality to grant special permission to licensed taxi drivers, who can procure the consent of the abutting property owners, to stand their vehicles in the street in front of such property, when the same privilege is not granted to those who do not obtain such consent. See also *Landberg v. Chicago*, 237 Ill. 112, 21 L.R.A. (N.S.) 830, 127 Am. St.

Rep. 319, 86 N. E. 638; *New York v. Reesing*, 77 App. Div. 417, 79 N. Y. Supp. 331.

The remaining question for consideration is the validity of the ordinance as affecting the rights of the abutting owner of railroad property. The conceded facts are that under the authority of the ordinance certain railroad companies have granted to a competitor of the petitioner the exclusive privilege of standing his taxicabs and to solicit business upon the railroad property and in the stations and on the station platforms. Exclusive franchises granted by a city are not always unlawful, although creating legal monopolies. *O'Neal v. Harrison*, 96 Kan. 339, L.R.A. 1915F, 1069, 150 Pac. 551; *Desser v. Wichita*, 96 Kan. 820, L.R.A. 1916D, 246, 153 Pac. 1194. In the *O'Neal* Case it was held: "Under a statute giving it power to make regulations to secure the general health, to prevent and remove nuisances, and to compel and regulate the removal of garbage and filth beyond the corporate limits, a city may grant an exclusive right to the highest bidder to remove all garbage, the term being defined, in the ordinance authorizing the action, to mean 'all rejected food, offal.'" *Re Lowe*, 54 Kan. 757, 27 L.R.A. 545, 39 Pac. 710, overruled."

The opinion, however, quoted with approval from 2 Dillon on Mun. Corp. 5th ed. § 678, in which the reasons for upholding the granting by a city of an exclusive right to remove garbage and refuse matter are expressly stated to be that "garbage matter and refuse are regarded by the decisions as inherently of such a nature as to be either actual or potential nuisances. By reason of the inherent nature of the substance, it is therefore not a valid objection to an ordinance requiring disposal in a specified manner that garbage has some value for purposes of disposal, and that the effect of the ordinance is to deprive the owner or householder of such value,"—and that upon these con-

siderations it is within the power of the city to grant an exclusive franchise.

So far as the question as to granting a monopoly affects the present case, it turns upon whether a distinction must be made between railroad property and the property of other abutting owners; and upon this question there is an irreconcilable conflict in the decisions. The averment in the petition that for years it has been the custom and habit of persons engaged in the taxicab business to stand and solicit business at these railroad stations, and upon portions of the railway ground used by the public for that purpose, can hardly be said to add anything to the petitioner's rights, because, assuming that he was one of those formerly favored in this respect, he was a mere licensee, liable at any time to have his license revoked. He had no express authority to make use of the railroad stations or grounds for the purpose of soliciting passengers or establishing a hackstand. Referring to the same contention in a similar case, the New Hampshire supreme court, in *Hedding v. Gallagher*, 72 N. H. 377, 64 L.R.A. 811, 57 Atl. 225, said: "But it is elementary that a mere license to enter upon land is not by lapse of time changed into an absolute right of entry. . . . But all such licenses are in their nature revocable; and if actually revoked, and due notice given to an individual or class of individuals, and they still persist in entering, it is without a license, and the owner has a right to exclude them." Page 383.

The defendants in that case, who were insisting upon the right to enter upon the railroad property to solicit the business of carrying the baggage of passengers, were common carriers themselves. It was held, however, that the railroad company might give such right to one individual or common carrier and exclude others from its grounds, if the reasonable requirements of passengers were fully met, and in reference to the railroad's duty to

its passengers in this respect it was said: "Whether the soliciting agents are independent local truckmen, or whether they are men specially permitted by the railroad to perform that service in its station, is an unimportant detail in the reasonable performance of the public duty to passengers of providing adequate facilities for the transfer of baggage" (72 N. H. 380), and that to hold the contrary "is the assertion of a principle founded upon the radically erroneous assumption that the property of a railroad may be used by others, without compensation and against the protest of the corporation, for the prosecution of their private business" (72 N. H. 381).

Among the cases cited by the petitioner in his brief is *New England Exp. Co. v. Maine C. R. Co.* 57 Me. 188, 2 Am. Rep. 31, holding that one common carrier was legally required to carry another common carrier (an express company) although such other carrier desired to conduct an independent business on the property of the first. The decision was overruled by the Supreme Court of the United States in the *Express Cases*, 117 U. S. 1, 29 L. ed. 791, 6 Sup. Ct. Rep. 542, 628. Not only in the earlier decisions, but in the more recent ones, the courts have divided upon the question whether a railroad company may lawfully permit a hack company to have the exclusive right to stand and solicit patronage upon the railroad company's premises and exclude all other hackmen, provided adequate accommodations are furnished to passengers arriving at or departing from the station. One line of decisions asserts that the upholding of such an exclusive privilege prevents competition between rival carriers of passengers, creates a monopoly in the privileged hackman likely to result in inconvenience and loss to persons traveling over the railroad or those having freight transported over it, and in effect confers upon the railroad company the control of the transportation of passengers be-

yond its own lines, a right not granted by its charter and against the interests of the public. These decisions take the ground that the question affects not only the excluded hackmen, but the interests of the public, and that the railroad company cannot arbitrarily, for its own pleasure or profit, admit to its platforms or depot grounds one carrier of passengers or merchandise and at the same time exclude all others. The leading cases supporting this doctrine are: *Lucas v. Herbert*, 148 Ind. 64, 37 L.R.A. 376, 47 N. E. 146; *Pennsylvania Co. v. Chicago*, 181 Ill. 289, 53 L.R.A. 223, 54 N. E. 825; *Kalamazoo Hack & Bus Co. v. Sootsma*, 84 Mich. 194, 10 L.R.A. 819, 22 Am. St. Rep. 693, 47 N. W. 667; *Montana Union R. Co. v. Langlois*, 9 Mont. 419, 8 L.R.A. 753, 18 Am. St. Rep. 745, 24 Pac. 209; *Cravens v. Rodgers*, 101 Mo. 247, 14 S. W. 106; *Indianapolis Union R. Co. v. Dohn*, 153 Ind. 10, 45 L.R.A. 427, 74 Am. St. Rep. 274, 53 N. E. 937; *State v. Reed*, 76 Miss. 211, 43 L.R.A. 134, 71 Am. St. Rep. 528, 24 So. 308, 11 Am. Crim. Rep. 651; *McConnell v. Pedigo*, 92 Ky. 465, 18 S. W. 15; *Palmer Transfer Co. v. Anderson*, 131 Ky. 217, 19 L.R.A. (N.S.) 756, 133 Am. St. Rep. 237, 115 S. W. 182. The Kentucky court, in reaffirming its decision in the *Pedigo* Case, 92 Ky. 465, 18 S. W. 15, held that "a contract by which a railroad gave a transfer company the exclusive use of a part of its station grounds along which there was a gravel walk, and which was most convenient to the trains on which the greater number of passengers arrived and departed, so that such passengers were compelled to walk 150 feet past the transfer company's cabs before reaching a place where other cabs could stand, gave the transfer company a practical monopoly of the transfer business, and was void." *Palmer Transfer Co. v. Anderson*, supra.

Among the English authorities supporting the same doctrine are *Parkinson v. Great Western R. Co.* L. R. 6 C. P. 554, 40 L. J. C. P. N. S.

222, 24 L. T. N. S. 830, 19 Week. Rep. 1063; *Re Palmer*, L. R. 6 C. P. 194; *Marriott v. London & S. W. R. Co.* 1 C. B. N. S. 499, 140 Eng. Reprint, 205, 26 L. J. C. P. N. S. 154, 3 Jur. N. S. 493, 5 Week. Rep. 312. In a note by Mr. Freeman to the *Sootsma* Case, supra, in 22 Am. St. Rep. 702, the author asserts that "notwithstanding the serious conflict existing between the authorities upon this subject, we think the better reasoning sustains the doctrine approved in the principal case; namely, that a railway company or other common carrier may exclude all persons from its depot or grounds who are not using or seeking to use its means of carriage, but it cannot grant an exclusive right or more favorable preference to one individual or company engaged in soliciting patronage from its passengers, than it gives to another individual or company engaged in the same line of business. It seems to us that an agreement to grant such exclusive privilege to any one person is contrary to public policy, and the spirit of our laws, especially in the face of a statutory or constitutional provision existing in nearly all of the states, prohibiting discrimination in charges or facilities for transportation between carriers or individuals, or in favor of either." Page 699.

In reference to the conflict upon the subject in the decisions, the author says: "Still, we apprehend that the majority of them, as well as the better reasoning, are in support of the English doctrine above announced." Page 699.

All the cases holding this doctrine recognize that the railway companies which control the depot grounds and buildings may make needful rules for their regulation and protect passengers and others lawfully on their grounds from annoyance. The following American cases sustain the doctrine that a common carrier may grant an exclusive privilege to one and exclude all others who desire to go upon his premises for the sole purpose of

soliciting customers or business: *Old Colony R. Co. v. Tripp*, 147 Mass. 35, 9 Am. St. Rep. 661, 17 N. E. 89 (the chief justice and two associate justices dissenting); *Boston & A. R. Co. v. Brown*, 177 Mass. 65, 52 L.R.A. 418, 58 N. E. 189; *Kates v. Atlanta Baggage & Cab Co.* 107 Ga. 636, 46 L.R.A. 431, 34 S. E. 372; *New York, N. H. & H. R. Co. v. Bork*, 23 R. I. 218, 49 Atl. 965; *Hedding v. Gallagher*, 72 N. H. 377, 64 L.R.A. 811, 57 Atl. 225; *Norfolk & W. R. Co. v. Old Dominion Baggage & Transfer Co.* 99 Va. 111, 50 L.R.A. 722, 37 S. E. 784; *State ex rel. Sheets v. Union Depot Co.* 71 Ohio St. 379, 68 L.R.A. 792, 73 N. E. 633, 2 Ann. Cas. 186; *New York, N. H. & H. R. Co. v. Scovill*, 71 Conn. 136, 42 L.R.A. 157, 71 Am. St. Rep. 159, 41 Atl. 246; *Fluker v. Georgia R. & Bkg. Co.* 81 Ga. 461, 2 L.R.A. 843, 12 Am. St. Rep. 328, 8 S. E. 529; *McFall v. St. Louis*, 232 Mo. 716, 33 L.R.A. (N.S.) 471, 135 S. W. 51; *Oregon Short Line R. Co. v. Davidson*, 33 Utah, 370, 16 L.R.A. (N.S.) 777, 94 Pac. 10, 14 Ann. Cas. 489; *Union Depot & R. Co. v. Meeking*, 42 Colo. 89, 126 Am. St. Rep. 145, 94 Pac. 16; *Depot Carriage & Baggage Co. v. Kansas City Terminal R. Co.* (C. C.) 190 Fed. 212; *Skaggs v. Kansas City Terminal R. Co.* (D. C.) 233 Fed. 827.

In *Donovan v. Pennsylvania Co.* 199 U. S. 279, 50 L. ed. 192, 26 Sup. Ct. Rep. 91, it was held that the arrangement with the Parmalee Company gave it an opportunity to control to a great extent the business of carrying passengers from the depot to other railway stations and hotels, or private houses. It was said: "But in a real, substantial, legal sense, that arrangement cannot be regarded as a monopoly in the odious sense of that word, nor does it involve an improper use by the railroad company of its property."

The reasoning of the cases upholding exclusive contracts of this character is well stated by the supreme court of Utah in the case of *Oregon Short Line R. Co. v. David-*

son, 33 Utah, 370, 16 L.R.A. (N.S.) 777, 94 Pac. 10, 14 Ann. Cas. 489. That was an action for injunction. The defendant had fenced off a portion of its depot grounds for the accommodation of passengers arriving or departing on the trains, and for the convenience of cabs and other vehicles engaged in transporting passengers and baggage to and from its trains. It permitted all persons to enter the fenced-off portion to have access to the trains if engaged to meet incoming passengers or to deliver baggage, but required them to leave the inclosure as soon as they had received such persons or baggage, or after delivering the baggage or passengers at the trains. The company had entered into an arrangement with a reliable company owning suitable carriages and other vehicles for the transportation of passengers, and had given it the exclusive privilege of entrance into the inclosure. In the opinion it was said: "Appellants argue that they obtain the right from the fact that the respondent may not discriminate as between applicants in conferring the privilege, and that, if it grants it to one, then it has waived the right to exclude all others, and must admit all." Page 377.

It was said that the mere fact that the grantee is not excluded, would not give appellants the legal right to enter. In the opinion it was said: "Assuming that the respondent may not create a monopoly in this regard, and for that reason the exclusive privilege granted to one is void as against public policy, how does this give the appellants the right to enter upon the respondent's premises for the purpose of soliciting business? Does the granting of an exclusive privilege to one, which, as is contended, is illegal and void, transform what are termed mere privileges into absolute rights?" Page 378.

It was further said: "If appellants desire to be carried as passengers or intend to deliver or receive freight, they may enter upon re-

spondent's premises as a matter of right. All or any one of them may also do this in behalf of another who has business with respondent; but this gives them no legal right to require the respondent to devote any of its property to their use for the purpose of soliciting business for themselves." Page 378.

In some of the decisions upholding similar exclusive contracts by railroad companies, it has been asserted that the numerical weight of authority in this country supports that doctrine; on the other hand, it has been as often asserted in decisions denying the right of a railway company to make such a contract, that the numerical weight of authority upholds that contention. The conflict as to this matter is generally supported in each instance by drawing distinctions between the facts involved in some of the cases, and eliminating them from the count. Without attempting to determine upon which side rests the numerical weight of authority, we approve the reasoning of the cases following the Supreme Court of the United States in the *Donovan Case*, and hold that it is no objection to

the validity of the ordinance that it permits abutting property owners, including railroad companies, to make such exclusive contracts.

In the *Donovan Case*, *supra*, the Pennsylvania Company owned a passenger station in Chicago and had made a contract with the Parmalee Transfer Company under which two of its agents were permitted to stand within the depot building to solicit the custom of passengers. The appellants were hackmen, and insisted on the right to have two of their number enter the building to solicit custom. The main question was the right of the hackmen to solicit business within the station over the appellee's protest. The court held that "its property is to be deemed, in every legal sense, private property as between it, and those of the general public

who have no occasion to use it for purposes of transportation." Page 294.

The circuit court enjoined the hackmen from congregating on the sidewalk in front of, adjacent to, or about the entrance of the passenger station and there soliciting custom. Both the court of appeals and the United States Supreme Court held that the injunction was too broad, and that only "*such congregating*" on the sidewalk could be restrained "*as would interfere with the ingress and egress of passengers and employees.*" 199 U. S. 301, 50 L. ed. 192, 26 Sup. Ct. Rep. 97. Justice Harlan, who wrote the opinion, held that "licensed hackmen and cabmen, unless forbidden by valid local regulations, may, within reasonable limits, use a public sidewalk in prosecuting their calling, provided such use is not materially obstructive in its nature; that is, of such exclusive character as, in a substantial sense, to prevent others from also using it upon equal terms, for legitimate purposes. Generally speaking, public sidewalks and streets are for use by all, upon equal terms, for any purpose consistent with the object for which such sidewalks and streets are established, subject, of course, to such valid regulations as may be prescribed by the constituted authorities for the public convenience; this to the end that, as far as possible, the rights of all may be conserved without undue discrimination." 199 U. S. 303.

It was further said: "The city has no power or authority to grant the exclusive use of its streets to any private person or for any private purposes, but must hold and control the possession exclusively for public use, for purposes of travel and the like." 199 U. S. 302.

In the present case the ordinance forbids the use of the streets in front of railway stations as cab stands, without the consent of the abutting owner, and permits the owner of the station to grant an exclusive permit to one individual to use the streets for that purpose.

**Monopoly—
grant of hack
privileges.**

While it is conceded that the railroad companies concerned in the particular contracts in question have notified the city that they would grant no permit for the use of the street in front of their stations as a hack stand, the validity of the ordinance in this respect is involved in the case; but since, in our opinion, there is no ground for a distinction between the right of the owner of railroad property abutting upon a street and that of any other abutting property owner, it follows that the ordinance is not void in this respect.

The writ will therefore be denied.
All the Justices concur.

Petition for rehearing denied
June 14, 1920.

NOTE.

The reported case (MADER v. TOPEKA, ante, 340) aptly illustrates that large class of cases which support the general rule that a railroad company may grant an exclusive right to solicit patronage on its station grounds. The specific question of the right of a railroad company to grant such a privilege is treated in subdivision I. of the annotation following THOMPSON'S EXP. & STORAGE CO. v. MOUNT, post, 356, which collates the authorities passing upon the right of a railroad company to give an exclusive privilege of soliciting patronage at railroad stations or on trains. The reported case is treated in I. b.

**THOMPSON'S EXPRESS & STORAGE COMPANY, Respt.,
v.
NORMAN MOUNT et al., Appts.**

New Jersey Court of Errors and Appeals — June 14, 1920.

(— N. J. —, 111 Atl. 178.)

Monopoly — right to contract for exclusive use of platform for baggage solicitation.

1. Statutory authority to a railroad to inclose its stations, and exclude from the inclosures all persons except travelers, empowers it to contract to give exclusive rights to one wishing to solicit patronage for baggage and passenger transfer service within the inclosure.

[See note on this question beginning on page 356.]

--effect of Public Utility Act.

2. The provision of the Public Utility Act forbidding discrimination by common carriers does not prevent

their granting exclusive privileges for soliciting bus and baggage service on their platforms.

[See 19 R. C. L. 20, 179.]

(Williams, Taylor, and Gardner, JJ., dissent.)

APPEAL by defendants from a decree of the Court of Chancery (Walker, Ch., and Foster, V. Ch.) in favor of plaintiff in a suit brought to enjoin interference by defendants with plaintiff's exclusive rights under an agreement with a railroad company. *Affirmed.*

Statement by Swayze, J.:

The Central Railroad Company of New Jersey made a written agreement with the complainant, giving it the privilege of soliciting on the platform of the Lakewood station

orders for baggage delivery, hack, taxicab, and omnibus service, from arriving passengers, and also the privilege of soliciting on west-bound trains orders for like service to and from Lakewood station. These

privileges were to be exclusive to such extent as the railroad company might lawfully so accord.

The defendants solicited like orders upon the station platform. The present bill was filed to enjoin this interference with complainant's exclusive rights under the agreement with the railroad. The injunction was granted, and the defendants appealed.

Mr. Charles E. Cook, for appellants:

The lease in question violates the Public Utility Laws.

Pennsylvania R. Co. v. Public Utility Comrs. 83 N. J. L. 67, 83 Atl. 945; *Messenger v. Pennsylvania R. Co.* 37 N. J. L. 581, 18 Am. Rep. 754.

A railroad company cannot grant to one person, a common carrier, to the exclusion of all other persons engaged in a like business, the right to come upon its depot grounds with his vehicles for the purpose of receiving freight or passengers.

McConnell v. Pedigo, 92 Ky. 465, 18 S. W. 15; *Cravens v. Rodgers*, 101 Mo. 247, 14 S. W. 106; *Kalamazoo Hack & Bus Co. v. Sootsma*, 84 Mich. 194, 10 L.R.A. 819, 22 Am. St. Rep. 693, 47 N. W. 667; *Montana Union R. Co. v. Langlois*, 9 Mont. 419, 8 L.R.A. 753, 18 Am. St. Rep. 745, 24 Pac. 209; *Indianapolis Union R. Co. v. Dohn*, 153 Ind. 10, 45 L.R.A. 427, 74 Am. St. Rep. 274, 53 N. E. 937, 16 L.R.A. (N.S.) 748, note; *State v. Reed*, 76 Miss. 211, 43 L.R.A. 134, 71 Am. St. Rep. 528, 24 So. 308, 11 Am. Crim. Rep. 651; *Re Palmer*, L. R. 6 C. P. 194; *Marrick v. London & S. W. R. Co.* 1 C. B. N. S. 499, 140 Eng. Reprint, 205, 26 L. J. C. P. N. S. 154, 3 Jur. N. S. 493, 5 Week. Rep. 312; *Pennsylvania Co. v. Chicago*, 181 Ill. 289, 53 L.R.A. 223, 54 N. E. 825; *Markham v. Brown*, 8 N. H. 523, 31 Am. Dec. 209; *Colorado Springs v. Smith*, 19 Colo. 554, 36 Pac. 540; *Lindsay v. Anneton*, 104 Ala. 257, 27 L.R.A. 436, 53 Am. St. Rep. 44, 16 So. 545; 1 *Fetter*, Carr. Pass. ¶ 245; *Lewis v. Weatherford*, M. W. & N. W. R. Co. 36 Tex. Civ. App. 48, 81 S. W. 111; *Kates v. Atlanta Baggage & Cab Co.* 107 Ga. 636, 46 L.R.A. 431, 34 S. E. 372; *Godbout v. St. Paul Union Depot Co.* 79 Minn. 188, 47 L.R.A. 532, 81 N. W. 835.

Mr. Wilfred H. Jayne, Jr., for respondent:

A railroad company may grant an exclusive license and privilege to one

person, or to one company, to solicit custom for the transportation of passengers and baggage at its station and upon its station grounds, and exclude all others from like privilege.

Donovan v. Pennsylvania Co. 199 U. S. 279, 50 L. ed. 192, 26 Sup. Ct. Rep. 91; *Old Colony R. Co. v. Tripp*, 147 Mass. 35, 9 Am. St. Rep. 661, 17 N. E. 89; *Hedding v. Gallagher*, 72 N. H. 377, 57 Atl. 225; *Express Cases*, 117 U. S. 1, 29 L. ed. 791, 6 Sup. Ct. Rep. 542, 628; *Chicago, St. L. & N. O. R. Co. v. Pullman Southern Car Co.* 139 U. S. 79, 25 L. ed. 97, 11 Sup. Ct. Rep. 490; *Skaggs v. Kansas City Terminal R. Co.* 233 Fed. 827; *Godbout v. St. Paul Union Depot Co.* 79 Minn. 188, 47 L.R.A. 532, 81 N. W. 835; *New York, N. H. & H. R. Co. v. Scovill*, 71 Conn. 136, 42 L.R.A. 157, 71 Am. St. Rep. 159, 41 Atl. 246; *Kates v. Atlanta Baggage & Cab Co.* 107 Ga. 636, 46 L.R.A. 431, 34 S. E. 372; *Snyder v. Union Depot Co.* 19 Ohio C. C. 368; *State ex rel. Sheets v. Union Depot Co.* 71 Ohio St. 379, 68 L.R.A. 792, 73 N. E. 633, 2 Ann. Cas. 186; *Depot Carriage & Baggage Co. v. Kansas City T. R. Co.* 190 Fed. 212; *Barney v. Oyster Bay & H. S. B. Co.* 67 N. Y. 301, 23 Am. Rep. 115; *Boston & A. R. Co. v. Brown*, 177 Mass. 65, 52 L.R.A. 418, 58 N. E. 189; *Boston & M. R. Co. v. Sullivan*, 177 Mass. 230, 83 Am. St. Rep. 275, 58 N. E. 689; *Bluker v. Georgia R. & Bkg. Co.* 81 Ga. 461, 2 L.R.A. 843, 12 Am. St. Rep. 328, 8 S. E. 529; *New York, N. H. & H. R. Co. v. Bork*, 23 R. I. 218, 49 Atl. 965; *Harris v. Stevens*, 31 Vt. 79, 73 Am. Dec. 337; *Norfolk & W. R. Co. v. Old Dominion Baggage Transfer Co.* 99 Va. 111, 50 L.R.A. 722, 37 S. E. 784; *Baker Whitely Coal Co. v. Baltimore & O. R. Co.* 176 Fed. 632; *Union Depot & R. Co. v. Meeking*, 42 Colo. 89, 126 Am. St. Rep. 145, 94 Pac. 16; *The D. R. Martin*, 11 Blatchf. 233, Fed. Cas. No. 1,030; *Thompson's Exp. & Storage Co. v. Whitmore*, 88 N. J. Eq. 535, 102 Atl. 692.

The legality of the contract is supported by the clear weight of authority.

Snyder v. Union Depot Co. 19 Ohio C. C. 368; *Donovan v. Pennsylvania Co.* 199 U. S. 279, 50 L. ed. 192, 26 Sup. Ct. Rep. 91; *Hedding v. Gallagher*, 72 N. H. 377, 57 Atl. 233; *State ex rel. Sheets v. Union Depot Co.* 71 Ohio St. 379, 68 L.R.A. 792, 73 N. E. 636, 2 Ann. Cas. 186.

Defendants have no prescriptive right to solicit upon the station platform.

Hedding v. Gallagher, 72 N. H. 377, 57 Atl. 228; Com. v. Power, 7 Met. 596, 41 Am. Dec. 465; Harris v. Stevens, 31 Vt. 79, 73 Am. Dec. 337.

The contract is not in violation of any statute.

Old Colony R. Co. v. Tripp, 147 Mass. 35, 9 Am. St. Rep. 661, 17 N. E. 89; Baggage & Omnibus Transfer Co. v. Portland, 84 Or. 343, L.R.A.1917F, 1080, 164 Pac. 570; New York C. & H. R. R. Co. v. Flynn, 74 Hun, 124, 26 N. Y. Supp. 859; Brown v. New York C. & H. R. R. Co. 75 Hun. 355, 27 N. Y. Supp. 69; New York C. & H. R. R. Co. v. Sheeley, 57 N. Y. S. R. 766, 27 N. Y. Supp. 185; Norfolk & W. R. Co. v. Old Dominion Baggage Transfer Co. 99 Va. 111, 50 L.R.A. 722, 37 S. E. 784; Louisville & N. R. Co. v. West Coast Naval Stores Co. 198 U. S. 483, 49 L. ed. 1135, 25 Sup. Ct. Rep. 745.

The court has jurisdiction to enjoin the defendants.

Thompson's Exp. & Storage Co. v. Whitmore, 88 N. J. Eq. 535, 102 Atl. 692; Western U. Teleg. Co. v. Rogers, 42 N. J. Eq. 311, 11 Atl. 13; Boston & M. R. Co. v. Sullivan, 177 Mass. 232, 83 Am. St. Rep. 275, 58 N. E. 689; 1 High, Inj. § 12; 3 Pom. Eq. Jur. § 1357; 1 Beach, Inj. § 253; 1 Spelling, Inj. § 342.

Swayze, J., delivered the opinion of the court:

The general question raised is not new. The great weight of authority sustains the complainants. It is enough to cite *Barney v. Oyster Bay & H. S. B. Co.* 67 N. Y. 301, 23 Am. Rep. 115; *Old Colony R. Co. v. Tripp*, 147 Mass. 35, 9 Am. St. Rep. 661, 17 N. E. 89; *New York, N. H. & H. R. Co. v. Scovill*, 71 Conn. 136, 42 L.R.A. 157, 71 Am. St. Rep. 159, 41 Atl. 246; *Donovan v. Pennsylvania Co.* 199 U. S. 279, 50 L. ed. 192, 26 Sup. Ct. Rep. 91. It would serve no useful purpose to repeat the reasons so well stated in those cases. All that is required of us is to pass upon the effect of our own statutes.

1. The first act to require consideration is the Railroad Act of 1903, § 22 (Comp. Stat. p. 4230), which enacts that any railroad company

may erect a fence or other inclosure around its stations so as to prevent any persons other than passengers from coming near its trains, and may exclude from such inclosures all persons except travelers. The act is, in substance, the same as the Act of 1839 (Pamph. Laws p. 170; Rev. Stat. p. 594), and antedates by ten years the charter of the Central Railroad. That railroad has, therefore, always had the right to exclude from its stations all persons except travelers and the agents of the company. The importance of the enactment to the present purpose is that it demonstrates, if demonstration were needed, that the legislature could not have meant to require railroads to transport passengers beyond their own stations, for such transportation would require the entrance of others—hackmen and the like—to the station grounds. As the railroad business developed, and towns increased in size, a demand arose for cab and omnibus service. This was a kind of public service which the railroads might well provide for the better accommodation of the traveling public. Even if they were without authority to do so under their charters, the case would come within the ruling of the United States Supreme Court in *Jacksonville, M. P. R. & Nav. Co. v. Hooper*, 160 U. S. 514, at page 523, 40 L. ed. 515, 523, 16 Sup. Ct. Rep. 379, 383. The court said: "Although the contract power by a railroad company as is to be deemed restricted to the general purposes for which they are designed, yet there are many transactions which are incidental or auxiliary to its main business, or which may become useful in the care and management of the property which it is authorized to hold, and in the safety and comfort of the passengers whom it is its duty to transport. Courts may be permitted, where there is no legislative prohibition shown, to put a favorable construction upon such exercise of power by a railroad company as is suitable to promote the success of

the company, within its chartered powers, and to contribute to the comfort of those who travel thereon."

It was held in that case that the railroad company might, under the Florida statute, even lease a summer hotel. The principle was approved by the same court in *Union P. R. Co. v. Chicago, R. I. & P. R. Co.* 163 U. S. 564, 592, 41 L. ed. 265, 275, 16 Sup. Ct. Rep. 1173, and applied to an agreement by one railroad with another for the right and privilege to move and operate its trains over the tracks of the latter. We do not question the right of the Central Railroad Company to operate hacks and omnibuses in connection with its train service for the convenience of its passengers, and if it had undertaken to do so, perhaps a different question would now be presented. It has not done so, but has merely contracted that no one but the complainant shall have access to its station and platform for the purpose of conducting business which the railroad itself has not undertaken. The question we have to decide is not, as counsel urges, whether the railroad, in the performance of a public duty, can discriminate between the complainant and other hackmen, but whether the railroad company can give the complainant an exclusive right in a case where neither the complainant nor any of the defendants have any right whatever, or, in other words, whether the railroad may select its own company in a case where it is under no public duty to serve all who come, and has express statutory authority to exclude

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use of platform
for baggage
solicitation.**

all except travelers. Reason clearly answers in favor of the exclusion. The authorities above cited justify the exclusion on the ground that, even where the public duty exists, the right of the railroad company to make reasonable regulations involves the right to protect itself and its passengers from the turmoil and

danger involved in a competition between the hackmen on the platform of a railroad station, and the consequent liability of the railroad company to respond in damages to a passenger in case of injury. *Ex-ton v. Central R. Co.* 62 N. J. L. 7, 56 L.R.A. 508, 42 Atl. 486, 5 Am. Neg. Rep. 675, affirmed in 63 N. J. L. 356, 56 L.R.A. 512, 46 Atl. 1099. We are not dealing with visions of possible dangers, but with dangers that have actually occurred, and led to the regulations for protection of passengers reviewed in the cases cited. No case has arisen of complaint by passenger or traveler of such regulations. The defendants set up rights that do not exist. Their real complaint is not that they have been denied rights, but that a privilege which the railroad was free to refuse to all has been granted to the complainant. The railroad may well say, like the householder in the parable to the servant who demanded more wages than his contract called for, because other servants had made a better bargain: "Friend, I do thee no wrong. Is it not lawful for me to do what I will with my own?"

A different case might arise if the railroad were under a legal duty to allow hackmen to do business and ply their calling on railroad property. This view has not only reason on its side, but also the authority of the highest tribunal which can pass upon the question of the equal protection of the laws. In the *Express Cases*, 117 U. S. 1, 29 L. ed. 791, 6 Sup. Ct. Rep. 542, 628, the United States Supreme Court held that railroad companies are not required by usage or by the common law to transport the traffic of independent express companies over their lines, in the manner in which such traffic is usually carried and handled, and need not, in the absence of a statute, furnish to all independent express companies equal facilities for doing an express business upon their passenger trains. The result was that the right of an express company to

the necessary transportation rested upon contract, and was exclusive of companies having no contract. The reasons are well stated by Chief Justice Waite on pages 23–25 of 117 U. S. A similar question arose in *Chicago, St. L. & N. O. R. Co. v. Pullman Southern Car Co.* 139 U. S. 79, 35 L. ed. 97, 11 Sup. Ct. Rep. 490. The case is even stronger than the Express Cases, since the court held that the railroad company was under a duty, arising from the public nature of its employment, to furnish for the use of passengers on its lines such accommodations as were reasonably required by the existing conditions of passenger traffic, including sleeping and parlor cars. This duty, however, did not forbid the railroad company from employing the Pullman Company to supply drawing-room and sleeping cars, and from giving that company an exclusive right to furnish cars for that purpose. Under that ruling the grant of an exclusive right to the present complainants might be justified by the railroad company assuming to render cab and like services, and employing the complainants as its agent. It stands, however, upon the ground that the service is outside of its public duty until voluntarily assumed. Of course, if the railroad company is under no legal compulsion, it may, if it voluntarily permits hackmen to solicit business on its station grounds, do so to the extent it chooses and no more. In *Santa Fe P. & P. R. Co. v. Grant Bros. Constr. Co.* 228 U. S. 177, 57 L. ed. 787, 33 Sup. Ct. Rep. 474, the construction company recovered judgment for the value of property destroyed by a fire said to be due to negligence of the railroad company. By the existing contract between the railroad company and the construction company, all risk of loss was to be borne by the latter. To this it was answered by the plaintiff that it is the established doctrine that common carriers cannot secure immunity from liability for their negligence by any sort of stipulation.

To this the court said: "Manifestly, this rule has no application when a railroad company is acting outside the performance of its duty as a common carrier. In such case, it is dealing with matters involving ordinary considerations of the contractual relation; those who choose to enter into engagements with it are not at a disadvantage; and its stipulations, even against liability for its own neglect, are not repugnant to the requirements of its public service. The rule extends no further than the reason for it. It is apparent that there may be special engagements which are not embraced within its duty as a common carrier, although their performance may incidentally involve the actual transportation of persons and things, whose carriage in other circumstances might be within its public obligation."

The same result was reached by this court in *Dodd v. Central R. Co.* 82 N. J. L. 524, 83 Atl. 1118, affirmed on the opinion of our supreme court in 80 N. J. L. 56, 76 Atl. 544. The same view was reaffirmed by the United States Supreme Court in *Robinson v. Baltimore & O. R. Co.* 237 U. S. 84, 59 L. ed. 849, 35 Sup. Ct. Rep. 491. The rule is applicable in the present case, and precludes the defendants from claiming that the railroad furnish them with facilities which it is not required to furnish anyone.

2. What we have already said probably suffices to dispose of the argument that the making of an exclusive contract with the complainant is unjustly discriminatory, within the prohibition of § 18 of the Public Utilities Act, Supp. Comp. Stat. p. 1280, pl. 17. The act can only refer to what the public utility is under a legal obligation to do, and cannot refer to what it is under no legal obligation to do. Much less can it operate to impose upon the railroad company an obligation to ^{—effect of Public Utility Act.} throw open its station and grounds, which it is expressly authorized by the Railroad

Act to close to all but passengers. No right of a passenger is here infringed, since it is entirely open to passengers to employ any cabmen they wish. The injunction only prohibits soliciting on the station platform. The prohibition of the Public Utilities Act is directed against unjust discrimination. It is well settled that provisions of that kind are not infringed where the railroad has undertaken to render services, if in fact it need not render them. *Interstate Commerce Commission v. Baltimore & O. R. Co.* 145 U. S. 263, 36 L. ed. 699, 4 Inters. Com. Rep. 92, 12 Sup. Ct. Rep. 844; *Baltimore*

& O. S. W. R. Co. v. Voigt, 176 U. S. 498, 44 L. ed. 560, 20 Sup. Ct. Rep. 385. For example, under the Interstate Commerce Act (U. S. Comp. Stat. §§ 8563 et seq. 4 Fed. Stat. Anno. 2d ed. p. 337), it is not unjust discrimination to deliver freight free in one town, and not in another. *Interstate Commerce Commission v. Detroit, G. H. & M. R. Co.* 167 U. S. 633, 42 L. ed. 306, 17 Sup. Ct. Rep. 986.

These views lead to an affirmance of the decree. The complainant is entitled to costs.

Williams, Taylor, and Gardner, JJ., dissent.

ANNOTATION.

Right to give exclusive privilege of soliciting patronage at railroad stations or on trains.

- I. Soliciting at railroad stations:
 - a. In general, 356.
 - b. Majority rule, 356.
 - c. Minority rule, 362.
 - d. Under statute or ordinance, 363.
- II. Soliciting on trains, 368.

I. Soliciting at railroad stations.

a. In general.

While there is no question that a common carrier may not lawfully exclude from its station grounds a passenger's own carriage, or a carriage hired by him, and it is well settled that all hackmen and baggage expressmen may be prohibited from soliciting patronage on station grounds, there is a decided conflict of opinion upon the question of the right of a railroad company to grant such a right to a favored solicitor of patronage to the exclusion of all others of like vocation.

However, the more modern and seemingly the better-reasoned doctrine, including that of the Supreme Court of the United States, is to the effect that, in the absence of controlling statute to the contrary, such an exclusive privilege lawfully may be granted.

For cases involving the effect of

statutes, constitutional provisions, and municipal ordinances, see *infra*, I d.

b. Majority rule.

The decided weight of authority is to the effect that a railroad company may, so long as it thereby affords reasonable accommodation to the public, grant to one company or person the exclusive privilege of entering its stations and depot grounds for the purpose of soliciting patronage from passengers.

United States.—*Donovan v. Pennsylvania Co.* (1905) 199 U. S. 279, 50 L. ed. 192, 26 Sup. Ct. Rep. 91, affirming (1903) 60 C. C. A. 168, 124 Fed. 1016 (same case on former appeal in (1903) 61 L.R.A. 140, 57 C. C. A. 362, 120 Fed. 215); *Terminal Taxicab Co. v. Kutz* (1916) 241 U. S. 252, 60 L. ed. 984, P.U.R.1916D, 972, 36 Sup. Ct. Rep. 583, Ann. Cas. 1916D, 765; *Depot Carriage & Baggage Co. v. Kansas City Terminal R. Co.* (1911) 190 Fed. 212; *Skaggs v. Kansas City Terminal R. Co.* (1916) 233 Fed. 827.

Colorado.—*Union Depot & R. Co. v. Meeking* (1908) 42 Colo. 89, 126 Am. St. Rep. 145, 94 Pac. 16.

Connecticut.—*New York, N. H. & H. R. Co. v. Scovill* (1898) 71 Conn. 136,

42 L.R.A. 157, 71 Am. St. Rep. 159, 41 Atl. 246.

Georgia.—*Fluker v. Georgia R. & Bkg. Co.* (1888) 81 Ga. 461, 2 L.R.A. 843, 12 Am. St. Rep. 328, 8 S. E. 529; *Kates v. Atlanta Baggage & Cab Co.* (1899) 107 Ga. 636, 46 L.R.A. 431, 34 S. E. 372; *Atlanta Terminal Co. v. American Baggage & Transfer Co.* (1906) 125 Ga. 677, 54 S. E. 711.

Kansas.—*MADER v. TOPEKA* (reported herewith) ante, 340; *MISSOURI P. R. Co. v. KOHLER* (reported herewith ante, 333).

Massachusetts.—*Old Colony R. Co. v. Tripp* (1888) 147 Mass. 35, 9 Am. St. Rep. 661, 17 N. E. 89; *Com. v. Carey* (1888) 147 Mass. 40, note, 17 N. E. 97; *Boston & A. R. Co. v. Brown* (1900) 177 Mass. 65, 52 L.R.A. 418, 58 N. E. 189; *Boston & M. R. Co. v. Sullivan* (1900) 177 Mass. 230, 88 Am. St. Rep. 275, 58 N. E. 689; *Re Hayes* (1916) P.U.R.1917B, 923.

Michigan.—*Napman v. People* (1869) 19 Mich. 352. But see contra *Kalamazoo Hack & Bus Co. v. Sootsma* (1890) 84 Mich. 194, 10 L.R.A. 819, 22 Am. St. Rep. 693, 47 N. W. 667, with reference to which the court in *Dingman v. Duluth, S. S. & A. R. Co.* (1911) 164 Mich. 328, 32 L.R.A.(N.S.) 1181, 130 N. W. 24, said that while the decision was "probably not in harmony with the current weight of authority," it was unnecessary then to question the soundness of the principles there enunciated.

Minnesota.—*Godbout v. St. Paul Union Depot Co.* (1900) 79 Minn. 188, 47 L.R.A. 532, 81 N. W. 835.

Missouri.—*United Commercial Travelers v. Marshall Bros. Livery Co.* (1918) P.U.R.1918E, 391. But see *Cravens v. Rodgers* (1890) 101 Mo. 247, 14 S. W. 106, which apparently holds to the contrary, but which the public service commission in the *United Commercial Travelers Case* says has been discredited.

New Hampshire.—*Hedding v. Gallagher* (1903) 72 N. H. 377, 64 L.R.A. 811, 57 Atl. 225, overruling (1899) 69 N. H. 650, 76 Am. St. Rep. 204, 45 Atl. 96, and (1900) 70 N. H. 631, 47 Atl. 614.

New Jersey.—*Thompson's Exp. &*

Storage Co. v. Whitmore (1917) 88 N. J. Eq. 535, 102 Atl. 692; *THOMPSON'S EXP. & STORAGE Co. v. MOUNT* (reported herewith) ante, 351.

New York.—*New York C. & H. R. R. Co. v. Flynn* (1893) 74 Hun, 124, 26 N. Y. Supp. 859; *Brown v. New York C. & H. R. R. Co.* (1894) 75 Hun, 355, 27 N. Y. Supp. 69, appeal dismissed without opinion in (1897) 151 N. Y. 674, 46 N. E. 1145; *New York C. & H. R. R. Co. v. Warren* (1900) 31 Misc. 571, 64 N. Y. Supp. 781; *New York C. & H. R. R. Co. v. Ryan* (1911) 71 Misc. 241, 129 N. Y. Supp. 55.

Ohio.—*State ex rel. Sheets v. Union Depot Co.* (1905) 71 Ohio St. 379, 68 L.R.A. 792, 78 N. E. 633, 2 Ann. Cas. 186; *Snyder v. Union Depot & Co.* (1899) 19 Ohio C. C. 368, 10 Ohio C. D. 645, reversing (1899) 7 Ohio N. P. 64, 9 Ohio S. & C. P. Dec. 68.

Oregon.—*Baggage & O. Transfer Co. v. Portland* (1917) 84 Or. 343, L.R.A.1917F, 1080, 164 Pac. 570.

Pennsylvania.—*Philadelphia & R. R. Co. v. Godfrey* (1903) 28 Pa. Co. Ct. 326; *Lehigh Valley R. Co. v. Graham* (1916) 64 Pa. Super. Ct. 437. But see *Com. v. Grau* (1907) 16 Pa. Dist. R. 806, wherein Landis, P. J., expressed a contrary opinion.

Rhode Island.—See *Griswold v. Webb* (1889) 16 R. I. 649, 7 L.R.A. 302, 19 Atl. 143, and *New York, N. H. & H. R. Co. v. Bork* (1901) 23 R. I. 218, 49 Atl. 965.

Texas.—*Clisbee v. Chicago, R. I. & G. R. Co.* (1921) — Tex. Civ. App. —, 280 S. W. 235. See *Denton v. Texas & P. R. Co.* (1913) — Tex. Civ. App. —, 160 S. W. 113.

Utah.—*Oregon Short Line R. Co. v. Davidson* (1908) 33 Utah, 370, 16 L.R.A.(N.S.) 777, 94 Pac. 10, 14 Ann. Cas. 489.

Virginia.—*Norfolk & W. R. Co. v. Old Dominion Baggage Transfer Co.* (1901) 99 Va. 111, 50 L.R.A. 722, 37 S. E. 784.

West Virginia.—*Rose v. Public Service Commission* (1914) 75 W. Va. 1, L.R.A.1915B, 358, 83 S. E. 85, Ann. Cas. 1918A, 700.

England.—*Barker v. Midland R. Co.* (1856) 18 C. B. 46, 139 Eng. Reprint, 1281, 25 L. J. C. P. N. S. 184; *Beadell*

v. Eastern Counties R. Co. (1857) 2 C. B. N. S. 509, 140 Eng. Reprint, 515, 26 L. J. C. P. N. S. 250, 5 Week. Rep. 650, distinguishing *Marriott v. London & S. W. R. Co.* (1857) 1 C. B. N. S. 499, 140 Eng. Reprint, 205, 26 L. J. C. P. N. S. 154, 3 Jur. N. S. 493, 5 Week. Rep. 312; *Painter v. London, B. & S. C. R. Co.* (1857) 2 C. B. N. S. 702, 140 Eng. Reprint, 592; *Hole v. Digby* (1879) 27 Week. Rep. 884. And see *Perth General Station Committee v. Ross* [1897] A. C. 479, 66 L. J. P. C. N. S. 81, 77 L. T. N. S. 226.

Canada.—*Twin City Transfer Co. v. Canadian P. R. Co.* (1913) 24 West. L. R. 208, 15 Can. Ry. Cas. 323, 11 D. L. R. 744. But compare *Purcell v. Grand Trunk P. R. Co.* (1911) 21 West. L. R. 638, 13 Can. Ry. Cas. 194.

In fact, it has been said that the grant of such a right does not constitute an unlawful discrimination, but rather tends to promote the comfort and convenience of passengers, as well as the efficient conduct of the company's business. Thus, in *Donovan v. Pennsylvania Co.* (1905) 199 U. S. 279, 50 L. ed. 192, 26 Sup. Ct. Rep. 91, the court said: "It would seem to be clear that the Pennsylvania Company had the right, if it was not its legal duty, to erect and maintain a passenger station and depot buildings in Chicago, for the accommodation of passengers and shippers, as well as for its own benefit; and that it was its duty to manage that station so as to subserve, primarily, the convenience, comfort, and safety of passengers and the wants of shippers. It was, therefore, its duty to see to it that passengers were not annoyed, disturbed, or obstructed in the use either of its station house or of the grounds over which such passengers, whether arriving or departing, would pass. It was to that end—primarily, as we may assume from the record—that the Pennsylvania Company made an arrangement with a single company to supply all vehicles necessary for passengers. We cannot say that that arrangement was either unnecessary, unreasonable, or arbitrary; on the contrary, it is easy to see how, in a great city, and in a constantly crowd-

ed railway station, such an arrangement might promote the comfort and convenience of passengers arriving and departing, as well as the efficient conduct of the company's business." This decision was quoted with approval and followed in *MADER v. TOPEKA* (reported herewith) ante, 340.

So, the Missouri Public Service Commission, in *United Commercial Travelers v. Marshall Bros. Livery Co.* (1918; Mo.) P.U.R.1918E, 391, has said: "The commission is drawn to the irresistible conclusion that the terminal company, operating its business as it does in the great metropolitan city of St. Louis, to properly safeguard the interests of its passenger patrons, must either contract its carriage, taxi, and baggage business to a single responsible agency, as it is now doing, or, as an alternative, completely forbid entrance of any and all such agencies within its property. To do the latter means that the traveling public must suffer much discomfort because a complaining taxi company is at the present time unsuccessful in competing with a rival company for the prize of a purely private contract, while if the single responsible agency system is continued it means that the terminal company can control by contract the present highly efficient manner by which it yearly handles its throng of patrons; that these patrons will not be subjected to the petty annoyances of a pull-and-haul process system, necessarily incident where representatives of competing transfer companies come in contact with incoming passengers; and that unattended females, children, and those unsophisticated in the wiles and devices of a great city, are to an appreciable extent duly protected."

And in *Depot Carriage & Baggage Co. v. Kansas City Terminal R. Co.* (1911) 190 Fed. 212, where a union depot company was held to have the right to make a contract with a single taxicab company, giving the latter the exclusive right to furnish taxicabs or carriages for transporting passengers and baggage, and the right to maintain a booth in the depot and solicit business of transferring passengers

and baggage, and another taxicab company was held not entitled to have an equal privilege under a similar contract, the court said: "It is a matter of general knowledge that it is exceedingly annoying to have a multitude of soliciting agents harassing passengers for transportation. Many of such soliciting agents are rough and uncouth, and become exceedingly offensive in their solicitations. Persons who travel but little are so bewildered as not to know what to do. Excessive charges are imposed upon them, and they are subjected to many inconveniences, and sometimes grievous annoyances, and often insults and greater wrongs. The general public has the right to be free from all these things."

And in *New York, N. H. & H. R. Co. v. Scovill* (1898) 71 Conn. 136, 42 L.R.A. 157, 71 Am. St. Rep. 159, 41 Atl. 246, it was said that, in regulating matters affecting the comfort and convenience of passengers, "a wide discretion is necessarily intrusted to the managers of the railroad. They are in a situation which should make them the best judges of what promotes the comfort of those who ride upon their road. Courts will always be slow to pronounce unreasonable any rule purporting to be directed towards that end which they have deliberately adopted."

And in *New York* the theory is that exclusive solicitation of patronage contracts are not against public policy, but rather are for the comfort and convenience of passengers. *Brown v. New York C. & H. R. R. Co.* (1894) 75 Hun, 355, 27 N. Y. Supp. 69, appeal dismissed without opinion in (1897) 151 N. Y. 674, 46 N. E. 1145.

And the theory adopted in *Oregon* is that an exclusive-privilege contract does not violate public policy by creating an unlawful monopoly. *Baggage & O. Transfer Co. v. Portland* (1917) 84 Or. 343, L.R.A.1917F, 1080, 164 Pac. 570.

Nor can such an arrangement be regarded as an unlawful monopoly or wrongful use by the railroad company of its property. Thus, in *Donovan v. Pennsylvania Co.* (1905) 199 U. S. 279,

50 L. ed. 192, 26 Sup. Ct. Rep. 91, in holding that a railway company which has made an arrangement with a transfer company to furnish, at its passenger station, all the vehicles necessary for the accommodation of the passengers arriving there on its trains, or on the trains of other railroad companies using the station, may legally exclude from the station and depot grounds all other hackmen or cabmen seeking entrance for the purpose of soliciting for themselves the custom or patronage of passengers, the court said: "But in a real, substantial, legal sense, that arrangement cannot be regarded as a monopoly in the odious sense of that word, nor does it involve an improper use by the railroad company of its property. That arrangement is to be deemed, not unreasonably, a means devised for the convenience of passengers and of the railroad company, and as involving such use by the company of its property as is consistent with the proper performance of its public duties and its ownership of the property in question. If the company, by such use of its property, also derived pecuniary profit for itself, that was a matter of no concern to the defendants, and gave them no ground for complaint." And in *Clisbee v. Chicago, R. I. & G. R. Co.* (1921) — Tex. Civ. App. —, 230 S. W. 235, it was again held that the grant of an exclusive privilege to solicit patronage on depot grounds was neither in contravention of the rule against monopolies nor violative of the Federal Anti-trust Statutes.

So it has been held that a common carrier is not precluded from contracting out the exclusive privilege of soliciting patronage on its premises, upon the theory that its property is dedicated to a public use, and that the rights of the public are impaired by destruction of competition and impairing facilities for transportation at least, where the recipient of the privilege and the facilities afforded are subject to legislative regulation. *Oregon Short Line R. Co. v. Davidson* (1908) 33 Utah, 370, 16 L.R.A.(N.S.) 777, 94 Pac. 10, 14 Ann. Cas. 489.

And in *Thompson's Exp. & Storage Co. v. Whitmore* (1917) 88 N. J. Eq. 535, 102 Atl. 692, the theory that an exclusive right to solicit patronage on a railroad station platform does not create an unlawful monopoly, and that such platforms are private property which may be controlled accordingly, was again adopted.

And in *Oregon Short Line R. Co. v. Davidson* (Utah) *supra*, in refuting the contention that a contract granting an exclusive privilege to solicit patronage on depot grounds creates an unlawful monopoly, and allows the railroad company to control the transportation of passengers beyond its own line, the court, after an extended review of the authorities both pro and con, said: "Counsel for appellants [excluded hackmen, etc.] concede (and this concession is also made by all the authorities cited by them) that the respondent railroad company may exclude all persons who desire to come upon its premises for the sole purpose of soliciting custom or business, and may likewise prevent all who come there to transact business with it from soliciting business for themselves. But counsel, therefore, must contend that respondent may not grant the privilege to one to solicit business, and refuse it to all others. Counsel, therefore, must concede that no person may go upon respondent's premises to solicit business as matter of right; that to do so is a privilege that the respondent may grant or refuse at pleasure. If this be, how do the appellants acquire the right to compel the respondent to admit them, or any one of them, into its depot or upon its ground for the purpose of soliciting business in their own behalf? Appellants argue that they obtain the right from the fact that the respondent may not discriminate as between applicants in conferring the privilege, and that, if it grants it to one, then it has waived the right to exclude all others, and must admit all. This argument seems to be based upon the theory that so long as all are excluded no monopoly is created, but, if all are excluded save one, then a monopoly results in favor of the one

who is granted the privilege. Assuming that the respondent may not create a monopoly in this regard, and for that reason the exclusive privilege granted to one is void as against public policy, how does this give the appellants the right to enter upon the respondent's premises for the purpose of soliciting business? Does the granting of an exclusive privilege to one, which, as is contended, is illegal and void, transform what are termed mere privileges into absolute rights? That this transformation takes place is the logical result of appellants' contention. If it be true that respondent may not grant an exclusive privilege, and that to do so is illegal, it does not follow that, if it does this, thereby a mere privilege is transformed into a right. What would legally follow is this: The exclusive privilege granted would confer no legal rights upon the grantee, and would not be binding upon the respondent. In other words, it would leave the appellants, the person to whom the privilege was granted, and the respondent, in the same relative situation they were in before the privilege was granted. The grantee could not enforce the contract, because illegal, and hence could be excluded from respondent's premises at its pleasure; and, since the appellants never had the permission to enter, it necessarily follows that they, too, may be excluded. The mere fact, therefore, that the grantee is not excluded, does not give appellants the legal right to enter."

And the Ohio courts have upheld the right of railroad companies to grant the exclusive privilege of soliciting patronage at their depots, upon the ground that they may control their own private property in instances where there is no contractual obligation arising from the duty to carry, such as permitting soliciting of incoming passengers at stations. See *State ex. rel. Sheets v. Union Depot Co.* (1905) 71 Ohio St. 379, 68 L.R.A. 792, 73 N. E. 633, 2 Ann. Cas. 186, and *Snyder v. Union Depot Co.* (1899) 19 Ohio C. C. 368, 10 Ohio C. D. 645, reversing (1899) 7 Ohio N. P. 64. 9

Ohio S. & C. P. Dec. 63. And to the same effect is *Rose v. Public Service Commission* (1914) 75 W. Va. 1, L.R.A.1916B, 358, 83 S. E. 85, Ann. Cas. 1918A, 700.

So, in *Fluker v. Georgia R. & Bkg. Co.* (1888) 81 Ga. 461, 2 L.R.A. 843, 12 Am. St. Rep. 328, 8 S. E. 529, in holding that a railroad company has the right to grant the exclusive privilege of selling lunches and soliciting the selling of lunches upon its grounds to one party, to the exclusion of all others, the court said: "We cannot believe that there is a sort of right of common lodged in the public at large, to enter upon lands on which railroads are located, and over which they have secured the right of way. Such lands the railroad companies may inclose by fences, if they choose to do so, and exclude any and all persons whomsoever. Their dominion over the same is no less complete or exclusive than that which every owner has over his property. If they do not choose to erect fences and make inclosures, they may, by mere orders, keep off intruders, and they may treat as intruders all who come to transact their own business with passengers, or with persons other than the companies themselves. . . . It is manifest that the grant of the privilege to one or more is no rightful cause of complaint on the part of others to whom a like privilege is denied. The right to make such discriminations is incident to the ownership of all property which is not devoted to some use that in and of itself involves an invitation to the public to enter and enjoy for the time being. The business of selling lunches to passengers, or of soliciting from them orders for the same, is not one which every citizen has the right to engage in upon the tracks and premises of a railway company, and consequently those who do engage in it and carry it on must be dependent upon the company for the privilege. And whether the permission, when granted, be called a lease or a license, makes no difference; nor does it make any difference, except in the matter of revocation, whether the grant be

gratuitous or made for a consideration."

And in *Skaggs v. Kansas City Terminal R. Co.* (1916) 233 Fed. 827, the court discussed this question, saying: "The property of the terminal company is to be deemed in every legal sense private property, as between it and those of the general public who have no occasion to use it for purposes of transportation. The right of the company to the exclusive use and enjoyment thereof is as perfect and absolute as that of an owner of real property not burdened with public or private easements or servitudes. Furthermore, the rights of the public are not impaired by the grant by a railroad company of the exclusive privilege to solicit patronage for hacks and baggage transferring within its depot grounds, where the recipient of the privilege, and the facilities furnished, are subject to legislative regulation. . . . It appears convincingly that the limitation of the station transfer privileges to a single responsible party is in no sense unreasonable. While the matter of revenue is concededly involved, nevertheless the station company is no doubt actuated by experience thus to eliminate, to great extent, the possibility of abuses which are known to have been present in the past at the old station. Adequate provision is made in the contract for all the needs of the traveling public in this regard. Manifestly, outgoing passengers are in no wise affected, because plaintiffs and others have the conceded right to enter upon the premises of the terminal company for the purpose of actual delivery of passengers and baggage for whose transportation they shall have already received orders. The freedom of all parties to take their stands upon appropriate public places outside the limits of the premises of defendant terminal company affords to the public generally, including all incoming passengers, every opportunity to avail itself of their services, should it so desire. . . . This case is decided upon the property rights involved."

And in Georgia it has been held that the right to grant an exclusive privilege to solicit patronage at a railroad station cannot be denied on the ground that the company, because of its character as a common carrier, must treat all alike, since such obligations only relate to its duties as such, rather than to the management and control of its property with respect to matters involving no duty to the public; such, for instance, as permitting persons to enter its premises for the soliciting of patronage. Thus, in *Kates v. Atlanta Baggage & Cab Co.* (1899) 107 Ga. 636, 46 L.R.A. 431, 34 S. E. 372, it was held that if a railroad company acts in good faith, it does not violate any public duty, or deprive any citizen of any lawful right, by granting to a single corporation or individual the exclusive right of entering its trains to solicit the transportation of passengers and baggage, or by renting to such corporation or individual a portion of its baggage room, and conceding to it or him the privileges necessarily incident to the occupancy and use thereof, provided that so doing does not interfere with the exercise by any other person of any right which he may lawfully demand of the company as a carrier.

c. Minority rule.

The courts in a few jurisdictions have denied the right of railroad companies to grant exclusive privileges of soliciting patronage on station grounds to favored hackmen, baggage expressmen, etc.

Illinois. — *Pennsylvania Co. v. Chicago* (1899) 181 Ill. 289, 53 L.R.A. 223, 54 N. E. 825 (dicta).

Indiana. — *Indianapolis Union R. Co. v. Dohn* (1899) 153 Ind. 10, 45 L.R.A. 427, 74 Am. St. Rep. 274, 53 N. E. 937.

Kentucky. — *McConnell v. Pedigo* (1892) 92 Ky. 465, 18 S. W. 15; *Palmer Transfer Co. v. Anderson* (1909) 131 Ky. 217, 19 L.R.A.(N.S.) 756, 133 Am. St. Rep. 237, 115 S. W. 182.

Michigan. — *Kalamazoo Hack & Bus Co. v. Sootsma* (1890) 84 Mich. 194, 10 L.R.A. 819, 22 Am. St. Rep. 693, 47 N. W. 667. But see, in connection

with this case, *Napman v. People* (1869) 19 Mich. 352, as cited *supra*, I. b; and *Dingman v. Duluth, S. S. & A. R. Co.* (1911) 164 Mich. 328, 32 L.R.A.(N.S.) 1181, 130 N. W. 24, wherein the court said that the decision was probably not in harmony with the current weight of authority, but that it was unnecessary then to question the soundness of the principles there enunciated.

Mississippi. — *State v. Reed* (1898) 76 Miss. 211, 43 L.R.A. 134, 71 Am. St. Rep. 528, 24 So. 308, 11 Am. Crim. Rep. 651.

Missouri. — *Cravens v. Rodgers* (1890) 101 Mo. 247, 14 S. W. 106; *Hobart-Lee Tie Co. v. Stone* (1909) 135 Mo. App. 438, 117 N. W. 604. But see *United Commercial Travelers v. Marshall Bros. Livery Co.* (1918) P.U.R.1918E, 391, which squarely holds to the contrary.

Montana. — *Montana Union R. Co. v. Langlois* (1890) 9 Mont. 419, 8 L.R.A. 753, 18 Am. St. Rep. 745, 24 Pac. 209.

Pennsylvania. — *Com. v. Grau* (1907) 16 Pa. Dist. R. 806. But see, *contra*, *Philadelphia & R. R. Co. v. Godfrey* (1908) 28 Pa. Co. Ct. 326, and *Lenigh Valley R. Co. v. Graham* (1916) 64 Pa. Super. Ct. 437.

These decisions, in the main, proceed upon the theory that to allow the granting of exclusive privileges of the kind under consideration would be to create a monopoly, stifle competition, and inconvenience the public.

Thus, in *State v. Reed* (Miss.) *supra* (a leading and much-quoted case), the court, in holding that a railroad company has no right to give one hackman an exclusive privilege of entering with his hacks its inclosed station grounds, to solicit passengers, said: "The question is one that affects not only the excluded hackmen; it affects the interests of the public. The upholding of the grant of this exclusive privilege would prevent competition between rival carriers of passengers, create a monopoly in the privileged hackmen, and might produce inconvenience and loss to persons traveling over the railroad, or those having freights transported over it, in cases of exclusion of drays

and wagons from its grounds, other than those owned by the person having the exclusive right to enter the railroad's depot grounds. To concede the right claimed by the railroad in the present case would be, in effect, to confer upon the railroad company the control of the transportation of passengers beyond its own lines, and, in the end, to create a monopoly of such business, not granted by its charter, and against the interests of the public."

And in *Indianapolis Union R. Co. v. Dohn* (Ind.) *supra*, the court adopted the theory that the granting of exclusive privileges to solicit patronage on depot grounds was the granting of special privileges and immunities, and that such action was against public policy, as tending to restrict competition and to enhance prices. It was argued that the payment by passengers for transportation includes payment for the common use of the station facilities, and entitles them to have the railroad company refrain from coercing them into yielding further tribute, by giving an exclusive right to a hackman to solicit their business as they leave the station.

And in *Kalamazoo Hack & Bus Co. v. Sootsma* (1890) 84 Mich. 194, 10 L.R.A. 819, 22 Am. St. Rep. 692, 47 N. W. 667, a granted monopoly of a railroad company's grounds, for a hack and bus stand, and the solicitation of passengers, was held void on grounds of public policy. And the objection that such a contract is against public policy was advanced and upheld in *Montana Union R. Co. v. Langlois* (1890) 9 Mont. 419, 8 L.R.A. 758, 18 Am. St. Rep. 745, 24 Pac. 209.

And in *McConnell v. Pedigo* (1892) 92 Ky. 465, 18 S. W. 15, in holding that a railroad company cannot, by granting to one person the exclusive privilege of standing hacks at the platform of its depot, prevent other persons from doing likewise, and there soliciting for the carriage of passengers from the depot, so long as they do not interfere with the company's business, as such a contract tends to prevent competition, and

makes such a discrimination as is unreasonable and detrimental to the public, the court said: "To give to the railway company the exclusive right to say what persons should come upon its grounds to receive passengers and freight would not only create a monopoly, but subject to great inconvenience those who travel and have freight transported over its road. . . . Such a contract prevents competition, and makes such a discrimination as is unreasonable and detrimental to the public. . . .

There is no question here affecting the safety or comfort of passengers at this depot, but there arises from this contract, if enforced, an inconvenience to the passengers and the public that the company has no power to create, either by the provisions of its charter, or for the reason that it is the owner of the property on which the depot stands." And the *McConnell* Case (Ky.) *supra*, was followed in *Palmer Transfer Co. v. Anderson* (1909) 131 Ky. 217, 19 L.R.A. (N.S.) 756, 133 Am. St. Rep. 237, 115 S. W. 182, the decision being upon the ground that the privilege constituted an unlawful monopoly.

d. Under statute or ordinance.

In a number of instances, a question has been raised as to whether statutes, which, in general, prohibit discriminations by common carriers, render unlawful exclusive privilege contracts of the kind under consideration in this annotation. Here, again, we find a decided conflict of opinion, although in the main the decisions are to the effect that such statutes do not prohibit the granting of exclusive rights to solicit patronage on railroad premises at stations.

Probably the leading case which supports the theory of the majority is *Old Colony R. Co. v. Tripp* (1888) 147 Mass. 35, 9 Am. St. Rep. 661, 17 N. E. 89, wherein it was held that a contract by a railroad company with one, to furnish the means to carry incoming passengers or their baggage from its station, and granting to him the exclusive right there to solicit the patronage of such passengers,

was not within Massachusetts Public Statute, chap. 112, § 188, which provided that railroad companies "shall give to all persons or companies reasonable and equal terms, facilities, and accommodations . . . for the use of its depot and other buildings and grounds." The court reasoned as follows: "The statute, in providing that a railroad corporation shall give to all persons equal facilities for the use of its depots, obviously means a use of right. It does not intend to prescribe who shall have the use of the depot, but to provide that all who have the right to use it shall be furnished by the railroad company with equal conveniences. The statute applies only to relations between railroads as common carriers and their patrons. It does not enact that a license given by a railroad company to a stranger shall be a license to all the world. If a railroad company allows a person to sell refreshments or newspapers in its depots, or to cultivate flowers on its station grounds, the statute does not extend the same right to all persons. If a railroad company, for the convenience of its passengers, allows a baggage expressman to travel in its cars to solicit the carriage of the baggage of passengers, or to keep a stand in its depots for receiving orders from passengers, the statute does not require it to furnish equal facilities and conveniences to all persons. The fact that the defendant, as the owner of a job wagon, is a common carrier, gives him no special right under the statute; it only shows that it is possible for him to perform for passengers the service which he wishes to solicit of them." This decision was followed in *Com. v. Carey* (1888) 147 Mass. 40, note, 17 N. E. 97.

So, it has been held that Virginia Act, March 3, 1892, which made it unlawful for any common carrier to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, etc., to any undue

or unreasonable prejudice or disadvantage in any respect whatsoever, and which was adopted from the English Railway & Canal Traffic Act of 1854 (17 & 18 Vict. chap. 31), applied only to preferences by common carriers in respect to their services as such, so that it did not inhibit the giving of an exclusive privilege by a railroad company to one baggage transfer company, to enter its railroad depot to solicit business. *Norfolk & W. R. Co. v. Old Dominion Baggage Transfer Co.* (1901) 99 Va. 111, 50 L.R.A. 722, 37 S. E. 784. And, construing West Virginia Acts 1913, chap. 9, § 9, which contains almost identical language, a similar conclusion was reached in *Rose v. Public Service Commission* (1914) 75 W. Va. 1, L.R.A. 1915B, 358, 83 S. E. 85, Ann. Cas. 1918A, 700. And the English act from which, as above noted, the Virginia and West Virginia acts were taken, has received a similar construction. *Barker v. Midland R. Co.* (1856) 18 C. B. 46, 139 Eng. Reprint, 1281, 25 L. J. C. P. N. S. 184; *Beadell v. Eastern Counties R. Co.* (1857) 2 C. B. N. S. 509, 140 Eng. Reprint, 515, 26 L. J. C. P. N. S. 250, 5 Week. Rep. 650, distinguishing *Marriott v. London & S. W. R. Co.* (1857) 1 C. B. N. S. 499, 140 Eng. Reprint, 205, 26 L. J. C. P. N. S. 154, 3 Jur. N. S. 493, 5 Week. Rep. 312; *Painter v. London B. & S. C. R. Co.* (1857) 2 C. B. N. S. 702, 140 Eng. Reprint, 592; *Hole v. Digby* (1879) 27 Week. Rep. (Eng.) 884. And see *Perth General Station Committee v. Ross* [1897] A. C. (Eng.) 479, 66 L. J. C. P. N. S. 81, 77 L. T. N. S. 226. And the same construction was placed upon § 317 of the Canadian Railway Act (Can. Rev. Stat. 1906, chap. 37), in *Twin City Transfer Co. v. Canadian P. R. Co.* (1893) 24 West. L. R. 208, 15 Can. Ry. Cas. 323, 11 D. L. R. 744. But compare *Purcell v. Grand Trunk R. Co.* (1911) 21 West. L. R. 638, 13 Can. Ry. Cas. 194.

And Laws of New York 1890, chap. 565, § 34, as amended by Laws of 1892, chap. 676, providing that a railroad company shall give no preference for the transaction of the business of a common carrier on its cars, or in its

depots, or on its grounds, to any persons competing in the same business, or in the business of transporting property for themselves or others, have been held to relate only to those who have a contract relation to the common carrier, and therefore not to require a railroad company to allow all hack drivers alike to use its grounds and depots as a place for soliciting business, when they have no contract with a passenger, or to prevent such company from granting a single transfer company the exclusive privilege of soliciting business on such grounds. *New York C. & H. R. R. Co. v. Flynn* (1893) 74 Hun, 124, 26 N. Y. Supp. 859; *Brown v. New York C. & H. R. R. Co.* (1894) 75 Hun, 355, 27 N. Y. Supp. 69, affirmed without opinion in (1897) 151 N. Y. 674, 46 N. E. 1145; *New York C. & H. R. R. Co. v. Warren* (1900) 31 Misc. 571, 64 N. Y. Supp. 781; *New York C. & H. R. R. Co. v. Ryan* (1911) 71 Misc. 241, 129 N. Y. Supp. 55. See also *New York C. & H. R. R. Co. v. Sheeley* (1893) 57 N. Y. S. R. 766, 27 N. Y. Supp. 185.

In *Depot Carriage & Baggage Co. v. Kansas City Terminal R. Co.* (1911) 190 Fed. 212, a Missouri statute against discrimination was held to have no application to an action by a taxicab company against a railway and union depot company, to compel the latter to give the complainant the same right to solicit the business of transporting passengers and baggage which it had given another taxicab company, it appearing that the greater part of the business was interstate business.

And in New Jersey it has been held that statutory authority to a railroad company to inclose its stations, and exclude therefrom all persons except travelers, authorizes it to grant exclusive right to solicit patronage within the inclosure, and that the provisions of the Public Utilities Act forbidding discrimination by common carriers does not prevent their granting such exclusive privileges. *THOMPSON'S EXP. & STORAGE CO. v. MOUNT* (reported herewith) ante, 351. It will be remembered that this decision like-

wise proceeded upon the theory that the statute preventing discrimination had reference only to the public as distinguished from the private functions of public utilities.

So, in *Baggage & O. Transfer Co. v. Portland* (1917) 84 Or. 343, L.R.A. 1917F, 1080, 164 Pac. 570, it was held that contracting to give a particular baggage company exclusive rights to solicit patronage at its stations was not forbidden by a statute making it unlawful for any railroad company to make or give any undue or unreasonable privilege or advantage to any particular person, firm, or corporation since the statute was merely intended to prohibit preferences among passengers and shippers.

And in Utah it has been held that a constitutional provision that all railroad companies shall receive and transport each other's passengers and freight, without discrimination or unreasonable delay, does not prevent a railroad company from excluding all passenger and baggage transfer companies from coming on its grounds to solicit patronage, or from granting an exclusive privilege to do so to a favored transfer company. *Oregon Short Line R. Co. v. Davidson* (1908) 33 Utah, 370, 16 L.R.A.(N.S.) 777, 94 Pac. 10, 14 Ann. Cas. 489.

And that Minnesota Gen. Stat. 1894, § 380, subd. 8, which is a part of the Warehouse and Commission Laws, applies only to persons having contractual relations with a common carrier, and that a hackman is not a person having such relations with a common carrier as will permit him to enter a station to solicit patronage, see *Godbout v. St. Paul Union Depot Co.* (1900) 79 Minn. 188, 47 L.R.A. 532, 81 N. W. 835.

On the other hand, in *Kalamazoo Hack & Bus Co. v. Sootsma* (1890) 84 Mich. 194, 10 L.R.A. 819, 22 Am. St. Rep. 692, 47 N. W. 667, a contract granting a monopoly of a railroad company's grounds for a hack and bus stand and for the solicitation of passengers was held void under How. Stat. § 3355, which required railroad companies to give equal facilities to all persons, companies, or corporations,

the court adopting the theory that the statute does not relate merely to carrying in cars, but includes receiving, etc., at its depots, and by other "persons, companies, or corporations at the point upon its road where the carriage ends." The court said: "The granting of this exclusive privilege to occupy this favored spot of ground, and one theretofore used customarily by all hackmen and busmen, to the plaintiff, was a discrimination against the defendant, as well as all other hackmen and busmen not in the employ or service of the plaintiff, thus giving to the plaintiff a monopoly of the railroad company's grounds for the standing of hacks and busses, and the solicitation of passengers therefor. How. Stat. § 3355, provides that 'all railroad corporations shall grant equal facilities for the transportation of passengers and freight to all persons, companies, or corporations.' A violation of this statute is punished by a penalty. This statute evidently does not relate entirely to the mere carriage in the cars of the road. To be effective, it must be construed to include, also, not only the receiving of such passengers and freight at its depots, but, as well, the receiving of them by other 'persons, companies, or corporations' at the point upon its road where the carriage ends. The access to its depots must be free and equal to all, whether it be to take passage or leave the trains. No railroad company, under this statute, would be permitted to give to one hack and bus company exclusive access to its depots, or even better access than to others, in the carriage of passengers or freights to its trains. Nor can it any more appropriately give such exclusive or better privilege to such company taking passengers or freights from its trains, to be transported from thence elsewhere." But that this statute does not preclude a railroad company from granting an exclusive privilege to solicit patronage on trains, see *Dingman v. Duluth, S. S. & A. R. Co.* (1911) 164 Mich. 328, 32 L.R.A.(N.S.) 1181, 130 N. W. 24, as set out *infra*, II.

And again, in *Montana Union R. Co.*

v. Langlois (1890) 9 Mont. 418, 8 L.R.A. 753, 18 Am. St. Rep. 745, 24 Pac. 209, it was held that a railroad company cannot grant to one person the exclusive right to the use of a portion of its depot platform to deliver passengers departing, and to receive and solicit the patronage of incoming passengers, to the exclusion of all other persons from the exercise of such rights, as such grant is contrary to the provisions of Montana Const. art. 15, § 7, which provides that "no discrimination in charges or facilities for transportation of freight or passengers of the same class shall be made by any railroad, or transportation or express company, between persons or places within the state."

And an agreement to give the exclusive privilege of using a certain part of a station platform to the owner of an omnibus line was held in *Cravens v. Rodgers* (1890) 101 Mo. 247, 14 S. W. 106, to be against public policy and the spirit of the Missouri Constitution, art. 12, § 23, which prohibited discrimination in facilities of transportation between companies and individuals, notwithstanding the owner of such line built an approach to that portion of the platform designated to him. But, in connection with this case, see *United Commercial Travelers v. Marshall Bros. Livery Co.* (1918; Mo.) P.U.R.1918E, 391, which holds in effect that the *Cravens Case* does not correctly portray the law as at present laid down in Missouri.

A number of decisions have involved the question of the effect of municipal ordinances upon exclusive solicitation of patronage contracts of the kind under consideration herein.

Thus, in *Lindsay v. Anniston* (1893) 104 Ala. 257, 27 L.R.A. 436, 53 Am. St. Rep. 44, 16 So. 545, where a railroad company granted to a hackman the exclusive right, "so far as is lawful," to enter its depot and trains for soliciting passengers, it was held that such contract became subordinate to a subsequent ordinance requiring hackmen to keep outside a railroad depot while trains are there, etc., the decision being placed upon the ground

that the ordinance was a valid exercise of a power intended for the protection and benefit of the public and the promotion of good order; and, if thereby pre-existing private rights were restrained or limited, that the restraint or limitation became *damnum absque injuria*. The court said: "The contract, whatever may be its objects, or whatever may be the rights it confers, or it was intended to confer, must be deemed to have been entered into in view and in subordination to the powers of the municipal authorities to exercise the power to regulate the business and employment of hackmen. . . . The charter of the city is essentially a public statute; . . . and obedience to it is due from all who are within its protection. It is not mere legal presumption, resting upon considerations of public policy, that the law silently incorporates itself into the contracts of parties. The incorporation, when the parties are dealing in good faith, most often comports with their actual intention, or they would have expressed all that the law implies. The parties could not have contemplated that the municipal authorities would never exercise the power with which they were clothed to regulate the business of hackmen; nor is it to be presumed that they intended any embarrassment or diminution of the power when exercised. The juster presumption is that it was not intended the rights and privileges the contract may confer should endure, if they became in conflict with the regulations ordained by the municipal authorities. However this may be, the ordinance is a valid exercise of the power with which the municipal authorities were clothed; a power intended for the protection of the public, and the promotion of good order, and its exercise deemed necessary for the public benefit. If thereby pre-existing private rights are restrained or limited, the restraint or limitation is *damnum absque injuria*."

Likewise, in *Seattle v. Hurst* (1908) 50 Wash. 424, 18 L.R.A.(N.S.) 169, 97 Pac. 454, it was held that a municipal ordinance forbidding the solicitation of business from passengers

entering or leaving a railroad station was a valid exercise of the police power, and did not unconstitutionally impair an existing contract between the railroad company and a transfer company, giving the latter the exclusive right to solicit such business within the depot grounds, and, therefore, that such a contract was rendered invalid by the ordinance, and the termination thereof *damnum absque injuria*.

And in *Colorado Springs v. Smith* (1894) 19 Colo. 554, 36 Pac. 540, it is held that a city ordinance providing that hackmen, expressmen, etc., plying their respective vocations at any passenger depot of any railroad in such city on the arrival and departure of trains, shall occupy no part of the depot grounds or premises except that portion allotted and designated to them by the station agent of such depot, is not to be construed as giving a railway company the right to exclude from its depot grounds or premises any person lawfully engaged in serving the traveling public, either with or without vehicles, nor to confer upon such company the power to grant exclusive rights and privileges to persons engaged in such occupations, but such ordinance, being authorized by statute, is to be upheld as a reasonable regulation to promote the convenience of the traveling public and to prevent disorder at railway stations.

So, in *Chillicothe v. Brown* (1890) 38 Mo. App. 609, it was held that a railway company cannot suspend the operation at its depot of a municipal ordinance prohibiting licensed hackmen, etc., from soliciting business at railway depots by granting such privilege to a certain hackman, the city having charter power to regulate such occupation.

But an ordinance prohibiting hackmen from going within 20 feet of a train at a depot was held invalid, as against a privilege granted to a hackman by the railroad company, in *Napman v. People* (1869) 19 Mich. 352, the court saying: "Passengers who are strangers in the city have no means of knowing the character of

the runners they may encounter outside of the depot, and if they can deal without confusion, and at their leisure, with responsible agents, it will be much more convenient and safe than to compel them to select from among strangers and in the noise and bustle attendant on the arrival of the cars. Such contracts of employment, made in the cars and on the premises by the companies, cannot be lawfully restrained by the city authorities."

So it has been held that a charter conferring upon a municipal corporation police power and the authority to regulate all public utilities does not empower it to forbid a carrier granting a baggage company the exclusive privilege of soliciting patronage at its station; wherefore such an ordinance is invalid, and does not render nugatory a contract of the kind under consideration. *Baggage & O. Transfer Co. v. Portland* (1917) 84 Or. 343, L.R.A.1917F, 1080, 164 Pac. 570.

And in *Clisbee v. Chicago, R. I. & G. R. Co.* (1921) — Tex. Civ. App. —, 230 S. W. 235, it was held that since the defendant city's authority, under the statutes, could extend no further than to its streets and public ways, and to regulations, if any were necessary, tending to afford travelers sufficient accommodations, a municipal ordinance did not affect a contract granting an exclusive privilege to solicit patronage on station grounds, where such contract did not deny reasonable accommodation to the traveling public.

And in *MISSOURI P. R. Co. v. KOHLER* (reported herewith) ante, 333, it was held that, in the absence of valid statutory authority, a municipal corporation cannot by ordinance authorize its police officers to interfere with the reasonable exercise by a hackman of an exclusive privilege to solicit patronage at a railroad station, which has been granted him by the railroad company. This was upon the theory that the right of a city to regulate depot grounds as far as concerns the needs and convenience of the public, and to establish reasonable

regulations touching the conduct of hackmen who collect about a depot to solicit patronage, does not justify disregard of a private contract between a hackman and the railroad company, for the exclusive privilege of its private grounds for that purpose.

It has also been held that a constitutional provision that "no law shall be passed granting to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens," does not prohibit railroad companies from granting exclusive privileges to solicit patronage at railroad stations, since such provision relates only to the enactment of laws, and does not prohibit or regulate the right to contract. *Baggage & O. Transfer Co. v. Portland (Or.) supra.*

II. *Soliciting on trains.*

The decisions are in substantial accord in holding that common carriers may grant the exclusive train or boat privilege of soliciting the patronage of passengers, to one baggage or passenger transportation company.

Arizona.—*Union Transfer v. Arizona E. R. Co.* (1915) P.U.R.1915D, 734.

Georgia.—*Kates v. Atlanta Baggage & Cab Co.* (1899) 107 Ga. 636, 46 L.R.A. 431, 34 S. E. 372.

Kansas.—*MISSOURI P. R. Co. v. KOHLER* (reported herewith) ante, 333.

Michigan.—*Dingman v. Duluth, S. S. & A. R. Co.* (1911) 164 Mich. 328, 32 L.R.A.(N.S.) 1181, 130 N. W. 24.

Minnesota.—*Godbout v. St. Paul Union Depot Co.* (1900) 79 Minn. 188, 47 L.R.A. 532, 81 N. W. 835.

New York.—*Barney v. Oyster Bay & H. S. B. Co.* (1876) 67 N. Y. 301, 23 Am. Rep. 115; *Brown v. New York C. & H. R. R. Co.* (1894) 75 Hun, 355, 27 N. Y. Supp. 69, appeal dismissed without opinion in (1897) 151 N. Y. 674, 46 N. E. 1145.

Oregon.—*Baggage & O. Transfer Co. v. Portland* (1917) 84 Or. 343, L.R.A.1917F, 1080, 164 Pac. 570.

Texas.—*Lewis v. Weatherford, M. W. & N. W. R. Co.* (1904) 36 Tex. Civ. App. 48, 81 S. W. 111; *Denton v. Texas*

& P. R. Co. (1913) — Tex. Civ. App. —, 160 S. W. 113.

Thus, in *Lewis v. Weatherford, M. W. & N. W. R. Co. (Tex.) supra*, in holding that a carrier might grant an individual the exclusive right to solicit on its trains the transfer business of its passengers, the court said: "There are many cases which deny the right of a railroad company to enter into an arrangement whereby the right of its passengers to choose their own transfer agents after leaving the railway company's premises is controlled. But this may be, and is, we think, a different question from the one presented in this case, and the authorities referred to need not be discussed. Ordinarily, all hackmen alike have the common right of soliciting the patronage of railroad passengers, but this common right may be defeated by the railroad company, by the establishment of a reasonable rule or regulation with respect to its passengers while they are in such company's charge. At the point where the railroad company's right to maintain its rule or regulation ends, this common right of the transfer companies begins. It is not contended in this case, neither indeed can it be, that appellee did not have the right to exclude all hackmen from its trains. Our statutes have never declared railroad companies common carriers of transfer companies. But the contention mainly is that since appellee has not seen fit to exclude all, but has permitted Green and his agents to canvass its passengers, it therefore lost all right to exclude others. But this contention cannot be maintained. A properly regulated transfer service on passenger trains in this day is not only a convenience, but practically a necessity. The means adopted by appellee in this case, or some similar method, are practically the only plan by which such business can be regulated at all. To admit all transfer agents would amount not only to an inconvenience to the traveling public, but would render it well-nigh impossible to establish any rules or regulations in regard to the business whatever. To hold as appellant insists in

15 A.L.R.—24.

this case would be nothing short of judicial legislation. If the rule or regulation adopted by a railway company is unreasonable, the court would doubtless afford relief; otherwise, the question is one for the legislative, and not the judicial, branch of the government."

And in *Union Transfer Co. v. Arizona Eastern R. Co. (1915; Ariz.) P.U.R. 1915D, 734*, in holding that the delegation by contract to one company of the right to solicit baggage on trains, and check from residences and hotels, and the denial of such rights or privileges to other companies, did not constitute undue discrimination, the commission said: "In the matter of solicitation of baggage on the trains for delivery to hotels and residences, and in the matter of checking baggage from hotels and residences to destination of passengers, it is obvious that this practice is one in the interest of the traveling public; that the railroad companies may profit to the extent of a fixed charge for such privilege, or a percentage of the earnings accruing on such business, does not change this obvious fact. It is a decided convenience for passengers on trains to be able to make arrangements for delivery of their baggage without the annoyance and loss of time that would result from completing such arrangements after their arrival at the stations. . . . It is clear that railroad companies could not allow indiscriminately all transfer companies the right to check baggage from hotels and residences, or to place solicitors upon trains. Railroads necessarily must exact bonds for the faithful performance of these duties. The checking of baggage and observance of tariffs and regulations as to weight, excess charges, etc., would make it impracticable, if not impossible, to permit the general checking of baggage by all transfer companies and agents, and insure observance of state and interstate charges and rules. The delegation of the right by contract to solicit baggage on trains, and check from residences and hotels, to one company, and the denial of such rights or privileges to other companies, can-

not be viewed as undue discrimination. The contracting parties to such arrangement must use care to protect the public against imposition and the exaction of discriminatory charges for services rendered by the transfer company."

And in New York contracts granting the exclusive privilege of soliciting patronage on trains have been held to be not only against public policy, but for the comfort and convenience of passengers. *Brown v. New York C. & H. R. R. Co.* (1894) 75 Hun, 355, 27 N. Y. Supp. 69, appeal dismissed without opinion in (1897) 151 N. Y. 674, 46 N. E. 1145.

And in Oregon the theory which has been adopted is that a contract granting an exclusive privilege to solicit patronage on trains is not against public policy as creating an unlawful monopoly. *Baggage & O. Transfer Co. v. Portland* (1917) 84 Or. 348, L.R.A.1917F, 1080, 164 Pac. 570.

So, in *Kates v. Atlanta Baggage & Cab Co.* (1899) 107 Ga. 635, 46 L.R.A. 431, 34 S. E. 373, it was held that, in its character as a common carrier, a railroad company cannot grant to any person, or persons, rights or privileges which it refuses others, but that in the management and control of its property it may grant concessions to some which it denies to others; and where it acted in good faith, it was held not to violate any public duty or deprive any citizen of any lawful right by granting to a single corporation or individual the exclusive right of entering its trains to solicit the transportation of passengers and baggage, providing that in so doing it did not interfere with the exercise by any other person of any right which he might lawfully demand of the company as a common carrier.

And in *Barney v. Oyster Bay & H. S. B. Co.* (1876) 67 N. Y. 301, 23 Am. Rep. 117, in holding that a carrier which has established, for its own profit and the convenience of passengers, on its car or vessel, an agency for the delivery of baggage, can exclude all other persons from entering its car or vessel to solicit orders in

competition, the court said: "The carrier, however, may make reasonable rules and regulations for the conduct of his business, and when they are made known passengers are bound to observe them. He may carry on, in connection with his business of carrier, any other business, and may use his property in any way he may choose, to promote his interests, not inconsistent with the duty he owes to passengers. The vessel or vehicle which he uses is his own, and, except to the extent to which he has devoted it to public use by the business in which he has engaged, he may manage and control it for his own profit and advantage, to the exclusion of all other persons. For instance, the sale of books, papers, or refreshments is a common incident to the business of a carrier by certain modes of conveyance, and the carrier may avail himself of the opportunity which his business gives him to supply the special wants of travelers in these and other respects, and appropriate to himself the profits of the business, and exclude third persons from entering the car or vessel to carry on the same business, in opposition to him. He may grant or refuse the privilege at his option. In this, no right of a passenger is invaded. The passenger has the right to be carried and to enjoy equal privileges with others, or, at least, to be exempt from unjust or offensive discrimination in favor of other passengers. But he has no right to demand that in matters not falling within the contract of carriage, the carrier shall surrender in any respect rights incident to his ownership of his property. So, also, a carrier may establish, for the convenience of passengers and for his own profit, on his car or vessel, an agency for the delivery of baggage of passengers, and exclude all other persons from entering to solicit or receive orders from passengers, in competition with the agency established by him. This is in no just sense a monopoly. It is simply saving to the carrier a legitimate advantage which his position and business give him."

And a steamboat company may law-

fully refuse to take on board as a passenger an agent who seeks passage merely to solicit business, where the company has made a reasonable contract with another to solicit such business on its boats. *Jencks v. Coleman* (1835) 2 Sumn. 221, Fed. Cas. No. 7,258; *The D. R. Martin* (1873), 11 Blatchf. 233, Fed. Cas. No. 1,030. Thus, in *Jencks v. Coleman* (Fed.) supra, it was held that a steamboat company may refuse to take on board as a passenger, the agent of a line of stagecoaches, who seeks passage merely to solicit business, where the company has made a reasonable contract with another line for the transportation of all its passengers who choose to go on that line. And in *The D. R. Martin* (1873) 11 Blatchf. 233, Fed. Cas. No. 1,030, where the carrier's duty to transport one who went on board a steamer for the purpose of carrying on the business of an express agent was under consideration, the court said: "A steamboat company or a railroad company is not bound to furnish traveling conveniences for those who wish to engage, on their vehicles, in the business of selling books, papers, or articles of food, or in the business of receiving and distributing parcels or baggage; nor to permit the transaction of this business in their vehicles when it interferes with their own interests. If a profit may arise from such business, the benefit of it belongs to the company, and they are entitled to the exclusive use of their vehicles for such purposes."

And it has been held that a railroad company is not prevented from granting to a particular person, engaged in transferring passengers and baggage, the exclusive right to solicit on its trains the patronage of passengers, by a statute requiring it to grant equal facilities for transportation of freight and passengers, without discrimination. *Dingman v. Duluth, S. S. & A. R. Co.* (1911) 164 Mich. 328, 32 L.R.A. (N.S.) 1181, 130 N. W. 24. In reaching this conclusion, the court distinguished soliciting on trains from soliciting at stations, saying: "To give to § 6266, 2 Comp. Laws, the construction con-

tended for by plaintiff, would result in depriving the public of one of the most valuable privileges incident to public travel. That the privilege of dealing with a competent and trustworthy baggage agent is a valuable one seems too obvious for argument. The traveling stranger is often ignorant of the location of termini or his destination, and the best means of transportation to and from the same. He is entitled to receive this information, and to receive it from one whose position upon the train is a guaranty that he is responsible and may be safely intrusted with the person or property of the traveler. In large cities, scores, nay hundreds, are engaged in the same business as is the plaintiff. To compel the railroad company to transport all persons who desired to solicit the transportation of passengers or baggage would, of necessity, result in the refusal of the company to carry any, and, as a consequence, the denial to the traveling public of a service of the greatest possible importance. But suppose the railroad, instead of refusing to carry all, permitted two or more baggage agents upon its trains. The conditions which would result from such a course would at once become intolerable. Rival agents would besiege the passenger for his business, to his infinite annoyance, and when he finally made a selection he would have no means of knowing that he had chosen either a competent or responsible agency for its transaction. It may be urged that the passenger is subjected to the same annoyance upon his arrival at his destination. If this is so, it is because he voluntarily transacts his business at the depot, rather than upon the train. But the conditions at the depot are different from those upon the train. At the depot the competition for his business is ordinarily duly regulated, and under the supervision of the police, a safeguard entirely wanting upon trains." And a similar conclusion has been reached in New York, under a statute providing that a railroad company shall give no preference for the transaction of the busi-

ness of a common carrier on its cars, or in its depots, or on its grounds, to any person competing in the same business, or in the business of transporting property for themselves or others, the theory being that such provisions relate only to those having contractual relations with the carrier. *Brown v. New York C. & H. R. R. Co.* (1894) 75 Hun, 355, 27 N. Y. Supp. 69, appeal dismissed without opinion in (1897) 151 N. Y. 674, 46 N. E. 1145. And in Oregon the rule is that a statute making it unlawful for a common carrier to make or give any undue or unreasonable privilege or advantage to any particular person, firm, or corporation, enacted with the intent merely to prohibit preferences among passengers and shippers, does not affect the validity of a contract by a railroad company, giving a particular baggage company the exclusive right to solicit patronage on its trains. *Baggage & O. Transfer Co. v. Portland* (1917) 64 Or. 343, L.R.A., 1917F, 1080, 164 Pac. 570. Nor does the grant to one of the exclusive right to solicit on a carrier's trains the transfer business of its passengers constitute a violation of an anti-trust statute as an unauthorized restriction in the free pursuit of business. *Lewis v. Weatherford, M. W. & N. W. R. Co.* (1904) 36 Tex. Civ. App. 48, 81 S. W. 111. The court said: "One of appellant's assignments of error, though not the first presented in the brief, is that the court erred in perpetuating the injunction, because the rule or regulation by the appellee whereby the exclusive privilege of soliciting the patronage of its passengers was given to Green creates a monopoly, and it is violative of the Anti-trust Law of this state. That portion of the Anti-

trust Law which is germane to the point here made is as follows: 'A trust is a combination of capital, skill, or acts by two or more persons, firms, corporations, or association of persons, or either two or more of them, for either, any or all of the following purposes: (1) . . . To create or carry out restriction in the free pursuit of any business authorized or permitted by the laws of this state.' It is, we think, sufficient answer to this contention that the rule or regulation of appellees, by which Green was permitted to solicit the patronage of its passengers to the exclusion of appellant, did not 'create or carry out restrictions in the free pursuit of any business authorized or permitted by the laws of this state,' because the only restriction imposed is with respect to the transaction of appellant's business on appellee's passenger trains, which he is nowhere authorized or permitted by the laws of this state to engage in. It is, therefore, not a restriction upon the free pursuit of his lawful business. In the sense that the regulation prevents appellant from securing the patronage of appellee's passengers, it may be said to be a restriction upon his business. But the least reflection will show that, if this construction of the law were to be adopted, a very large per cent of the everyday contracts in the business world, such as those of leasing, of agency, of service, and the like, would be reprobated, a result never dreamed of by the legislators who enacted the statute. If appellee is to be denied the relief prayed for, it must be upon other grounds than that asserted in this assignment."

G. J. C.

CHARLES E. BERGER, Plff. in Certiorari,
v.
SUPERIOR COURT FOR SACRAMENTO COUNTY, et al.

California Supreme Court (In Banc)—August 14, 1917.

(175 Cal. 719, 167 Pac. 143.)

Contempt — member of class — disobedience of injunction.

1. An injunction may run against a party to the action, and class of persons through whom he may act though they are not parties to the action, so as to render a member of such class guilty of contempt for disobedience of the injunction.

[See note on this question beginning on page 386.]

Pleading — affidavit to support contempt proceeding.

2. To support an adjudication for contempt the affidavit on which the proceeding is instituted must state facts constituting the offense.

[See 6 R. C. L. 537; see also note in 2 A.L.R. 225.]

Contempt — violation of injunction — who punishable.

3. Actual notice by one engaged in picketing a place of business alleged to be unfair to union labor, of a judgment enjoining others from performing such acts in an action to which

he was not a party, does not render him guilty of contempt in violating the injunction within the terms of which he does not come.

[See 6 R. C. L. 504, 506, 507.]

Injunction — who may violate.

4. There can be no disobedience of an injunction by a person who was not included in the mandate of the court, either by name or as a member of a class which is properly included, and who is not acting as an aider or abettor of one so included in the assertion of his claim.

CERTIORARI to the Superior Court for Sacramento County (Busick, J.) to review an order adjudging petitioner guilty of contempt for violation of an injunction. *Order annulled.*

The facts are stated in the opinion of the court.

Mr. Henry B. Lister, for plaintiff in certiorari:

Certiorari will lie to review a judgment of contempt.

Batchelder v. Moore, 42 Cal. 414; Hutton v. Superior Ct. 147 Cal. 156, 81 Pac. 409; Schwarz v. Superior Ct. 111 Cal. 106, 43 Pac. 580; Frowley v. Superior Ct. 153 Cal. 220, 110 Pac. 817.

Even after an arrest in a criminal cause, where the jurisdiction of the court has been established over the person, by reason of the arrest, judgment cannot be taken against the defendant by default, although of course his bail may be forfeited.

1 Bishop, New Crim. Proc. §§ 267 et seq.; Bigelow v. Stearns, 19 Johns. 39, 10 Am. Dec. 189.

The court exceeded its jurisdiction in finding that Berger was guilty of a contumacious contempt, for the reason that he had not been charged with a contumacious contempt.

Re Reese, 47 C. C. A. 87, 107 Fed. 943, 14 Am. Crim. Rep. 253.

In a contempt case the guilt of the defendant must be established by evidence beyond a reasonable doubt.

Re Buckley, 69 Cal. 1, 10 Pac. 69; Reymert v. Smith, 5 Cal. App. 380, 90 Pac. 470.

Mr. Charles B. Harris also for plaintiff in certiorari.

Mr. W. T. Phipps, for defendant in certiorari:

Certiorari will not lie upon any ground that has so far been stated by petitioner.

Armstrong v. Superior Ct. 173 Cal. 341, 159 Pac. 1176.

Angellotti, Ch. J., delivered the opinion of the court:

This is a proceeding in certiorari to review an order of the superior court of Sacramento county, adjudg-

ing petitioner guilty of contempt for violation of the terms of a final judgment of said court, enjoining certain parties therein named, "their officers, members, agents, clerks, attorneys, and servants" from picketing, or causing to be picketed, the place of business of the plaintiffs in the action, with any placard or device having on it words and figures as follows: "This theater is unfair to organized labor, indorsed by Central Labor Council"—or any other placard or device having words of similar import and form, or from displaying any such placard or device in front of or in the immediate vicinity of said place of business. The parties named in the judgment as so enjoined were all the defendants in the action, being a motion picture operators' union and certain officers thereof. The petitioner, Berger, was not a party to the action, and was not named in the judgment. The affidavit on which the contempt proceeding was based shows merely the following: Some five months after the judgment was given he did "picketing" in front of plaintiff's place of business, "by walking and parading back and forth in front of said premises, and carrying on his person a conspicuously displayed sash, which sash bore words conspicuously displaying in large letters, to wit, 'Unfair to organized labor.'" He was then personally served with a copy of said judgment, but nevertheless continued his acts. It was for this alleged disobedience to the terms of the judgment that he was adjudged guilty of contempt by the court, and punishment was imposed. There was no allegation whatever in the affidavit, which constitutes the foundation of the contempt proceeding, to the effect that petitioner was a member of the defendant motion picture operators' union, or that there was any connection, either as aider, abettor, or in any other way, between him and any of the enjoined parties, or that he was an officer or member or agent or clerk or attorney or servant of any such

party. So far as appears therefrom, or from the findings of the judge of the superior court, he was an absolute stranger to the proceedings, having no connection, direct or indirect, with any of the parties, and not acting in concert with any of them. The claim that, although an entire stranger to the proceedings, he was guilty of contempt, is based entirely on the fact that he had actual notice of the terms of the injunction, by reason of the service of a copy thereof upon him, and because of this actual notice is bound by its terms equally with those against whom it runs.

It is thoroughly settled in this state that the affidavit by which a contempt proceeding is instituted, in order to sufficiently support an adjudication of contempt, must state facts constituting the offense. It is the complaint in such a case, and if defective in that respect, the adjudication cannot stand. So we are not concerned here with any question whether the lower court might properly infer, as mere matter of evidence, from the facts set forth in the affidavit, that petitioner was acting in concert with the enjoined parties as an agent or servant of some kind, or as an aider or abettor, or in support of their claims. Such was neither the charge against him nor the conclusion of the lower court. The judgment of contempt was based solely on the fact that he did the specified thing, with actual notice that other persons were enjoined from doing the same thing by a judgment in a civil action to which he was not a party, and which did not, by its terms, prohibit him from doing anything.

It seems manifest on principle that this affidavit did not charge a disobedience of the judgment. The judgment enjoining was not a judgment in rem, of course, but strictly one in personam.

Ordinarily only the parties to an

Pleading—affidavit to support contempt proceeding.

Contempt—violation of injunction—where punishable.

action and their successors are bound by a judgment given in an action inter partes. In matters of injunction, however, it has been a common practice to make the injunction run also to classes of persons through whom the enjoined party may act, such as agents, servants, employees, aiders, abettors, etc., though not parties to the action; and this practice has always been upheld by the courts, and any of such parties violating its terms with notice thereof are held guilty of contempt for disobedience of the judgment. But the whole effect of this is simply to make the injunction effectual against all through whom the enjoined party may act, and to prevent the prohibited action by persons acting in concert with or in support of the claim of the enjoined party, who are in fact his aiders and abettors. As we have said, this practice is thoroughly settled and approved by the courts, and there is a fair foundation for a conclusion that persons so co-operating with the enjoined party are guilty of a disobedience of the injunction. But despite expressions in some authorities that at first blush lend support to the contention of respondent, it is generally held that a theory of disobedience of the injunction cannot be predicated on the act of a person not in any way included in its terms, or acting in concert with the enjoined party and in support of his claims. Most of the cases cited by learned counsel for respondent relate to a person so included or so acting. The situation as to the law in this regard is, as we think, correctly set forth in the opinion of the New York court of appeals in *Rigas v. Livingston*, 178 N. Y. 20, 70 N. E. 107, in which it was said: "It is true that persons not parties to the action may be bound by an injunction if they have knowledge of it, provided they are servants or agents of the defendants or act in collusion or combination with them. . . . Authorities illustrating the rule might be cited

to an indefinite extent, but the underlying principle in all cases of this class, on which is founded the power of the court to punish for the violation of its mandate persons not parties to the action, is that the parties so punished were acting either as the agents or servants of the defendants, or in combination or collusion with them, or in assertion of their rights or claims."

This was approvingly quoted by the same court in *People ex rel. Stearns v. Marr*, 181 N. Y. 463, 106 Am. St. Rep. 562, 74 N. E. 431, 3 Ann. Cas. 25, and we think it is unquestionably correct. Even in the Federal cases relied on as establishing that, under the practice of the Federal courts, an absolute stranger to the proceedings having actual notice of the injunction may be punished as for a contempt in the event of action by him in contravention of its terms, it is recognized that his contempt is not for disobedience of the injunction. The only theory upon which such decisions declare he may be held at all under such circumstances is set forth in the opinion in *Garrigan v. United States*, 23 L.R.A. (N.S.) 1295, 89 C. C. A. 494, 163 Fed. 16, where it was said that "he is not chargeable for breach or violation of the injunction, in the well-recognized sense of those terms applicable to parties," and therefore no remedial contempt proceedings, "for the benefit and enforcement of the rights" of parties to the suit, could be maintained against him; and that the proceedings and conviction must be regarded as "distinctly criminal in their nature," and solely "to punish for acts in contempt of the power and dignity of the court." We think it manifest there can be no disobedience of an injunction by a person who is not included in the mandate of the court, either by name or as a member of a class of persons which is properly included, and who is not acting as an aider and abettor of one so included in the assertion of his claims. The injunction here was

—member of
class—dis-
obedience of
injunction.

Injunction—
who may violate.

not one prohibiting the picketing of plaintiff's premises by any and all persons,—one running against the whole world, as it were,—but simply one prohibiting certain persons and classes of persons from picketing; and only those who may fairly be held to be included in its terms can disobey the same.

We are entirely at a loss to see how, there being no disobedience of the injunction charged, as we have shown, there can be any conviction of contempt based on the theory that the affidavit or complaint shows acts "in contempt of the power and dignity of the court,"—acts, as referred to in *Garrigan v. United States*, supra, in defiance of the "command of the court," and constituting an "interference with or obstruction of the administration of justice." There was no "command" of the court addressed to petitioner in any way, by or as a member of any class, and it was not charged that he was acting in concert or connection with or in aid of any party to whom the command was addressed. How, then, can it be said that he was acting in defiance of the command of the court, or in any way interfering with the execution of that command against those to whom it was addressed? Nor can we see in the matters charged any interference with "the process or proceedings of a court." Code Civ. Proc. § 1209, subd. 9. We are firmly of the opinion that the only logical view in such cases as the one at bar is that we have set forth from *Rigas v. Livingston*, supra, and that for such acts as are described in the affidavit herein there can be no adjudication

of contempt unless the same constitute a disobedience of the injunction.

A similar question was presented to us in *Otto v. Superior Ct. S. F.* No. 8121, which was decided from the bench on March 5, 1917, against the claim here made by respondent. The views of the court were then orally stated, and no written opinion was filed.

As we have already suggested, what we have said bears not at all upon the right of a court, in a case where contempt is sufficiently charged by complaint or affidavit, to make such reasonable inferences from the evidence as to the character in which a party acted as are warranted by such evidence. But in this case, as already shown, we have neither charge nor findings by the lower court of matters showing what amounts to a disobedience of the injunction by the petitioner.

In view of our conclusion on this point, other points made by petitioner need not be considered.

The order adjudicating petitioner guilty of contempt, and prescribing a penalty therefor, is annulled.

We concur: Sloss, J.; Shaw, J.; Victor E. Shaw, Judge pro tem.; Melvin, J.; Henshaw, J.

NOTE.

The violation of an injunction by one not a party to the injunction suit, as a contempt, is the subject of the annotation following *STATE ex rel. LINDSLEY v. GRADY*, post, 386.

SAM TOSH et al., Plffs. in Err.,
v.

WEST KENTUCKY COAL COMPANY.

United States Circuit Court of Appeals, Sixth Circuit—June 14, 1918.

(164 C. C. A. 156, 252 Fed. 44.)

Contempt — acts in separate proceeding.

1. Notice of an injunction issued at the time of a strike growing out

of an attempt to unionize a business, restraining all persons with notice thereof from interfering in any manner with complainant's business, or compelling or inducing employees to refuse to work, will not render persons interfering with such employees, in another attempt to unionize the business several years later, guilty of contempt, unless the persons accused are associates of or represent defendants in the injunctive decree, or the condition out of which the alleged attempt grows is a mere continuation of the earlier strike.

[See note on this question beginning on page 386.]

Appeal — joint writ of error — motion to dismiss — denial.

2. A writ of error will not be dismissed because joint, where it was sued out by two persons convicted of contempt of an injunction decree in a proceeding which was joint throughout, and the motion was not made until some months after opposing counsel had agreed that the record would be sufficient.

Contempt — violation of injunction — lapse of time.

3. The mere facts that an injunction decree finally adjudicated the rights of the parties to the proceeding, and that several years have elapsed since

it was entered, will not prevent punishment for contempt for its violation by persons amenable to it.

— acts not connected with those enjoined.

4. Renewed efforts by members of a labor union to unionize a mine, ten years after the issuance of an injunction forbidding other members as individuals to interfere with mine employees, is not enough to tie the conditions at the later date to those of the earlier one so as to make persons acting at the later date guilty of contempt for violation of the injunction.

ERROR to the District Court of the United States for the Western District of Kentucky (Evans, Dist. J.) to review a judgment in favor of complainant in proceedings for contempt, for violation of an injunction. *Reversed.*

The facts are stated in the opinion of the court.

Argued before Knappen and Denison, Circuit Judges, and Sater, District Judge.

Messrs. Henson & Taylor, W. O. Smith, and Luke Teague for plaintiffs in error.

Messrs. H. D. Allen, W. T. Harris, H. D. Allen, Jr., Edmund F. Trabue, John C. Doolan, Attila Cox, and W. W. Crawford for defendant in error.

Per Curiam:

Defendant in error, as complainant in a bill in equity filed during a strike affecting its employees in its mining business, and growing out of an attempt to unionize its mines, obtained in November, 1907, a final decree enjoining the defendants therein, and "all other persons associated or connected with them or under their authority, or direction, or control, and all persons whatsoever, who may have acquired notice, information, or knowledge of this judgment . . . from in any manner interfering with, molesting, hindering, ob-

structing, or stopping any of the business of complainant, . . . or its agents, servants, or employees, in the operation of its property or business at any of the mines or upon any of the properties" of complainant, in certain counties named, and from compelling or inducing (or attempting to do so) any of complainant's employees, by threats, intimidation, force, or violence, to refuse or fail to do their work, or to discharge their duties as such employees, or to leave its service, or from in any manner interfering with, molesting, or hindering any of such employees, and from preventing or attempting to prevent any person or persons by threats, intimidation, force, or violence from entering or continuing in complainant's employ, as well as from other means of violence, interference, or intimidation set up.

Plaintiffs in error were not parties to that action. A certified copy

of the decree was served on each of the plaintiffs in error in April, 1917, and May, 1917, respectively—thus between nine and ten years after entry of the final decree. On June 2, 1917, the coal company, upon affidavit of its general superintendent, accompanied by affidavits of other parties, obtained in the court below an order to show cause why plaintiffs in error (and others) should not be punished for contempt of court in violating this injunction. Later, plaintiffs in error were, upon trial by jury under Clayton Act Oct. 15, 1914, chap. 323, § 22, 38 Stat. at L. 738, Comp. Stat. § 1245b, 6 Fed. Stat. Anno. 2d ed. p. 142, convicted of contempt of court, in violating the injunction, by knowingly attempting, the one by threats of violence, to induce and compel a certain employee of the coal company to refuse or fail to do his work as such employee, the other by threats and violence to induce another employee of the coal company to leave its service and employment. Plaintiffs in error were sentenced each to sixty days, imprisonment, and each to the payment of a substantial fine—both fines being ordered paid to the coal company, except that in the case of one of them a portion was ordered paid to the subject of the alleged violence. This trial and conviction were had against the contentions of plaintiff in error, seasonably urged, that they were not amenable to the injunction, and that neither the facts alleged nor the evidence offered constituted an offense or authorized their conviction. This writ was brought to reverse that judgment.

1. Plaintiffs joined in a single writ of error. Motion is made to dismiss on the ground that review can be had only on separate writs. Separate writs are required where judgments in wholly separate suits are sought to be reviewed (*Brown v. Spofford*, 95 U. S. 474, 484, 24 L. ed. 508, 510), even though the cases were consolidated for trial (*Louisville & N. R. Co. v. Summers* [C. C.

A. 6th C.] 60 C. C. A. 487, 125 Fed. 720), and even where the cases grew out of one accident (*Waters-Pierce Oil Co. v. Van Elderen* [C. C. A. 8th C.] 70 C. C. A. 255, 137 Fed. 562). In two of the cases cited jurisdiction was retained in the absence of objection by defendant in error. In the third a motion to dismiss, made after the lapse of the six months' period for issuing writ, was overruled because of stipulation by counsel that the writs of error might be considered and treated as a single writ, the record printed and treated as one and the same, and the causes argued as one.

In the instant case, while the motion to dismiss was made about four months after judgment, it was not made until more than four months after settlement of the joint bill of exceptions, nor until more than three months after filing præcipe calling for copy of the proceedings as to each plaintiff in error, accompanied by an indorsement of opposing counsel,—“Service of this præcipe is accepted, and we agree that the above record will be sufficient,”—nor until more than two months after the filing in this court of the printed transcript. The proceeding in this case was joint throughout, both as respects affidavit for arrest, order to show cause, trial, verdict, and judgment entry; the judgment as to each respondent being merely separately paragraphed. Moreover, it has been the practice of this court to review judgments, not only in criminal cases proper, but in proceedings for criminal contempt, by joint writ of error, as in *Foster v. United States*, 101 C. C. A. 485, 178 Fed. 165; *Sona v. Aluminum Casting Co.* 131 C. C. A. 232, 214 Fed. 936; *Kalamazoo Loose Leaf Binder Co. v. Proudfit Loose Leaf Co.* 144 C. C. A. 418, 230 Fed. 120. The motion to dismiss is overruled.

2. We see no merit in the contention that the injunctive decree in the equity suit afforded no basis for contempt proceedings for its viola-

Appeal—Joint writ of error—motion to dismiss—denial.

tion, against parties amenable to it, upon the ground that the decree finally adjudicated the rights of the

parties to it, or because of mere lapse of time since its rendition. The purpose of the decree was to restrain; it looked to the future. Instances of contempt proceedings for violations of final decrees are numerous; it is enough to refer to *L. E. Waterman Co. v. Standard Drug Co.* 120 C. C. A. 455, 202 Fed. 167, and *Kalamazoo Loose Leaf Binder Co. v. Proudfit Loose Leaf Co.* supra (both decisions of this court), and *Clay v. Waters* (C. C. A. 8th C.) 101 C. C. A. 645, 178 Fed. 385, 21 Ann. Cas. 897. Analogy is found in *Worden v. Searls*, 121 U. S. 14, 30 L. ed. 853, 7 Sup. Ct. Rep. 814, where the right to maintain proceedings for violation of preliminary injunction was expressly declared, notwithstanding the reversal of the final decree with direction to dismiss the bill. Nor is the instant case analogous to *Gompers v. Buck's Stove & Range Co.* 221 U. S. 418, 451, 55 L. ed. 797, 809, 34 L.R.A.(N.S.) 874, 31 Sup. Ct. Rep. 492, where it was held that the settlement of the main case settled contempt proceedings between the parties. Indeed, it was there said that such settlement could not affect prosecution for criminal contempt; and the proceedings in the instant case were criminal in character, so far as they sought, and so far as they imposed, punishment for the public wrong involved in a contemptuous disregard of the authority of the court, as distinguished from private relief to the party. *Bessette v. W. B. Conkey Co.* 194 U. S. 324, 329, 48 L. ed. 997, 1003, 24 Sup. Ct. Rep. 665; *Kalamazoo Loose Leaf Binder Co. v. Proudfit Loose Leaf Co.* supra.

3. Were plaintiffs in error amenable to the injunction in the equity suit? The acts now complained of were committed in the course of another alleged effort to unionize the mines. One of the plaintiffs in er-

ror was an organizer for the union; both had been discharged by the company, one about May 1, 1917; the other had been discharged two or three months earlier, for joining the union. The company was within its rights in refusing to employ union men, and in discharging those who joined the union, and was entitled to protection against unlawful invasions of such rights. *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229, 62 L. ed. 260, L.R.A.1918C, 497, 38 Sup. Ct. Rep. 65, Ann. Cas. 1918B, 461. Plaintiffs in error had a right, by peaceful methods, to persuade others not to work in a non-union mine, but had no right to attempt such result by violence or intimidation. *Hitchman Coal & Coke Co. v. Mitchell*, supra; *Sona v. Aluminum Castings Co.* 131 C. C. A. 232, 214 Fed. 936. (The right of an employer to enjoin attempts by peaceful methods to induce its employees to violate their contracts not to remain in his employ after joining the union is not involved here.) If plaintiffs in error were amenable to the injunction, the evidence would sustain their conviction.

The inclusion of the words, "and all other persons whatsoever, who may have acquired notice, information, or knowledge of this judgment," would not alone operate to make them parties to the litigation and the resulting decree. It is not even claimed that up to the time of the decree they were in privity with the defendants. Nevertheless, had the strike which was the occasion of the decree been still in progress, plaintiffs in error, by committing the acts of which they were found guilty after actual knowledge of the injunction, would have rendered themselves amenable to it and liable for its violation (*Re Lennon*, 166 U. S. 548, 554, 41 L. ed. 1110, 1113, 17 Sup. Ct. Rep. 658; *Sona v. Aluminum Castings Co.* supra); for we see no reason why the rule laid down in the *Lennon Case* (hereafter referred to) would not apply to a final decree, as well as to a preliminary in-

junction or restraining order. But unless the subject-matter of the suit in which the injunction was issued still existed, that is to say, unless the condition out of which the alleged contempt grew was, in substance, the strike condition of nearly ten years earlier,—a mere continuation of it,—or unless plaintiffs in error, in the commission of the acts charged against them in 1917, can be said to have been the associates of, or to have represented,

—acts in separate proceeding. the defendants in the injunctiveal decree, we think they cannot be held amenable to the old injunction. We are not cited to, nor have we found, authority supporting a contrary view. The Lennon Case does not, to our minds, lend such support. In that case the strike against the Ann Arbor Railroad was still on, accompanied by refusal on the part of the other railroads defendant to haul Ann Arbor freight, and respondent was himself an employee of the Lake Shore road, and within the express terms of the injunctiveal order. The court there said: "To render a person amenable to an injunction, it is neither necessary that he should have been a party to the suit in which the injunction was issued, nor to have been actually served with a copy of it, so long as he appears to have had actual notice. *High, Inj. § 1444; Mead v. Norris, 21 Wis. 310; Wellesley v. Mornington, 11 Beav. 181, 50 Eng. Reprint, 786.*"

In *Ex parte Lennon, 12 C. C. A. 134, 22 U. S. App. 561, 64 Fed. 323*, the decision of this court affirmed by *Re Lennon, supra*, there were cited, in support of a similarly stated proposition, *Wellesley v. Mornington, supra, Rorke v. Russell, 2 Lans. 242, and High, Inj. § 1435*. Presumably the language used by each court had relation to the facts of the case. None of the references cited by either court is important, except to the proposition that one having knowledge of an injunction may be guilty of contempt in disobeying it, notwithstanding

there was no service, or a defective service.

In *Employers' Teaming Co. v. Teamsters' Joint Council (C. C.) 141 Fed. 679*, cited by defendant in error, where a similar proposition to that announced in the Lennon Case was asserted, the strike was still in progress. While a strike is actually on, it frequently is necessary to the protection of property and business affected, to reach persons not parties to the suit, all of whom could in no other way be brought in, by reason, frequently, of their large numbers, and because of conditions of emergency. But such considerations are normally inapplicable to a new condition arising ten years later.

4. Does it appear that the condition existing in 1917, when the alleged violation of the injunction was committed, was in substance the strike of 1907, or that plaintiffs in error were so far associated with, or so far represented, the defendants in the injunctiveal decree, as to make them amenable to it by reason of their acts in 1917? We find nothing in either allegations or proofs indicating that the strike of 1907, or the interference with the business of complainant which formed the basis of the injunction, had continued subsequent to the decree made in that year, or that the conditions existing in 1917 were anything more than a new and independent effort to unionize the mines. The most which can be said is that there was danger of a strike or of serious troubles if agitation was permitted, or interference with the company's employees tolerated, and that the issue of union or nonunion mine was the same in 1917 as it had been in 1907.

The defendants in the equity suit were made such in their individual capacities only. The only allegations in the affidavit initiating the contempt proceedings, by which it was attempted to connect plaintiffs in error and their actions with the original suit and the defendants therein, are that defendants in

that suit were at the time members of the United Mine Workers of America, and were acting on behalf of that "organization and their associates therein in all matters charged against them" in the bill of complaint; that that organization "has from time to time added to its membership, and for some time past" plaintiffs in error, and others, "have been members of said organization, and associated with the individual defendants named in said original bill of complaint and in the decree heretofore rendered in this cause," and that plaintiffs in error, and others, "have co-operated and confederated with said individual defendants, or acted in the room and stead of said individual defendants, in carrying out the purposes of said organization and said individual defendants, and in attempting, as set forth in the original bill of complaint, to shut down the mines and plant of the plaintiff, and to destroy its property and its earning capacity, unless this plaintiff would accede to the demands of said organization, and of said individuals composing it, and discharge from its employment all of its said employees who were not members of said organization, and refuse to employ in its said mines and plant any person except members of said organization;" that, "for several months last past, said United Mine Workers of America, the organization aforesaid, have become very active in their endeavors to induce the workmen employed by plaintiff in its mines aforesaid to strike, unless plaintiff would agree with said organization to employ only its members in and about its said mines and plant," and through plaintiffs in error, and others named, "from time to time, have threatened the said workmen that unless they left plaintiff's employment, when said union should, as said union would, call a strike of plaintiff's workmen," plaintiff's employees would be killed; and that other threats of similar character have been made by plaintiffs in error, and others named, from time

to time, and prior to the notice of decree before referred to; that the threats made by the members of the union had caused excitement and alarm in the neighborhood of plaintiff's mines, prompting plaintiff to serve printed and certified copies of the decree in the equity suit upon a large number of prominent members (including plaintiffs in error) of the union residing in the western district of Kentucky, who were alleged to have made threats against and to have intimidated plaintiff's workmen. Plaintiffs in error admitted their membership in the union, asserting, however, their innocence of the misconduct charged against them, including a denial of co-operation or confederation with the defendants in the equity suit, or an acting in their stead in carrying out the alleged purposes of the organization, and of such defendants, in attempting to shut down plaintiff's plant and mines, or to destroy its property and earning capacity, unless the company would agree to employ only union men. The union was not proceeded against, perhaps because not incorporated.

It is not charged that plaintiffs in error were employees of the coal company at the time of the strike involved in the injunction suit, or that they were in any way connected with the strike, or with the committing of any of the acts which were the occasion of the suit in which the decree was entered. The implications are all to the contrary. It is not charged, nor does it appear, that either plaintiff in error was then a member of the union. There was no evidence on the trial that the defendants in the injunction suit had anything to do with the conditions in 1917 (the offer of plaintiffs in error of testimony tending to negative such connection was rejected), or that plaintiffs in error had at any time any actual relations with the real defendants in the injunction suit; nor do we construe the affidavit initiating the contempt proceedings as in substance charging, in this respect, more than that

the union was behind the actual strike of 1907, as well as the threatened strike in 1917, and that the defendants in the injunction suit, as well as the plaintiffs in error here, were members of the union and acting in its behalf, the former in the proceedings in 1907 which were the subject of the decree, the latter in the activities of 1917. Indeed, the contention of defendant in error, as stated in the brief of its counsel, is that plaintiffs in error were covered by the decree, "not only because they were members of the union referred to in the bill and decree [in fact, the decree makes no mention of the union, directly or indirectly], and assisting in doing the things forbidden by the decree, but because they were doing the things which the decree forbade 'all persons whatsoever' to do."

In our opinion, the renewed efforts of the United Mine Workers to unionize the mines, and the connection of plaintiffs in error with such

~~acts not connected with those enjoined.~~

efforts, were not enough to so tie the conditions of 1917

to those existing in 1907 as either to make the former but an extension of the strike of 1907, or as to make plaintiffs in error, with respect to their acts in 1917, the associates or representatives of the defendants in the decree of 1907. We have no occasion to consider what the situation would have been, had the United Mine Workers been a party to the injunction suit, or had the defendants therein been made such in an official capacity, as representing the union, as was the course taken in *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229, 62 L. ed. 260, L.R.A.1918C, 497, 38 Sup. Ct. Rep. 65, Ann. Cas. 1918B, 461. The conditions in 1917 may or may not have been enough to justify an injunction. If they were, it is to be presumed one could have been had. There has been no adjudication to that effect, on supplemental proceedings or otherwise.

The conviction of plaintiffs in error by the jury was made to depend solely upon their making the

threats or committing the acts of violence charged against them, with knowledge that the employee so threatened or subjected to violence was in the company's service or employment, and with intent to prevent such employee from continuing therein or from performing his services in such employment, as the case may be. If the injunction of 1907 is of its own force applicable to new conditions in 1917, no reason appears why it would not be applicable to conditions twenty years, or even thirty years, after the decree is entered, provided the union which was back of the attempted unionizing of the mines in 1907, out of which the injunction grew, was also back of the new and independent attempt to unionize the mines twenty or thirty years later. Under such circumstances the recognition of the power of summary prosecution for contempt, without previous adjudication that the existing conditions are such as to justify injunction, especially where the remedy is sought to be exercised, not through the public officers, but by the employer alone, and primarily on behalf of its private interests, is fraught with great possibilities for oppression.

Under the circumstances, shown here, to hold plaintiffs in error amenable to contempt for violating the injunction made nearly ten years before would extend the rule of the *Lennon Case*, as well as of the adjudications generally, far beyond any decision which has come to our attention. To our minds such extension is unwarranted upon principle, as well as unsupported by authority.

The judgment of the District Court must be reversed, and the record remanded to that court, with directions to dismiss the contempt proceedings.

NOTE.

The violation of an injunction by one not a party to the injunction suit, as a contempt, is the subject of the annotation following *STATE ex rel. LINDSLEY v. GRADY*, post, 386.

STATE OF WASHINGTON EX REL. JOSEPH B. LINDSLEY, Prosecut-
ing Attorney for Spokane County, Respt.,

v.

JOHN GRADY et al.

NICK WALLACE, Contemner, Appt.

Washington Supreme Court (Dept. No. 1) — March 7, 1921.

(State ex rel. Lindsley v. Wallace, — Wash. —, 195 Pac. 1049.)

Contempt — violation of injunction — want of knowledge.

1. One not a party to an injunction suit cannot be punished for contempt in violating the injunction if he has no knowledge of it.

[See note on this question beginning on page 386.]

Injunction — binding effect.

2. An injunction binds the parties defendant to the action who are named and upon whom service has been secured, and all other persons who have knowledge of its provisions.

[See 6 R. C. L. 504; 14 R. C. L. 471.]

Contempt — failure to show notice.

3. One not a party to an injunction

suit, who is not shown to have been in the county more than a few days, is not chargeable with notice of the injunction, which was posted and given some publicity in the newspapers, so as to be punishable for contempt for violating it.

[See 6 R. C. L. 504.]

APPEAL by contemner from a decree of the Superior Court for Spokane County (Webster, J.) convicting him of contempt for alleged violation of a decree of injunction in a proceeding to enjoin advocating the doctrines and circulating the literature of the I. W. W. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. W. C. Donovan, George F. Vanderveer, and Ralph S. Pierce, for appellant:

Equity has no jurisdiction of crimes. High, Inj. 4th ed. ¶ 20; Joyce, Inj. ¶ 59, note 80a; Pom. Eq. Rem. 2d ed. ¶ 1890; 14 R. C. L. p. 376, note 14; 22 Cyc. 902, note 35.

Nor has equity general jurisdiction to enjoin public nuisances.

State ex rel. Circuit Atty. v. Uhrig, 14 Mo. App. 413.

Equity is concerned with property rights.

Pom. Eq. Rem. 2d ed. ¶ 1890; Pom. Eq. Jur. 4th ed. p. 4441; Sheridan v. Colvin, 78 Ill. 237; People v. McWeeney, 259 Ill. 161, 102 N. E. 233, Ann. Cas. 1916B, 34; Re Sawyer, 124 U. S. 200, 31 L. ed. 402, 8 Sup. Ct. Rep. 482.

Before equity will enjoin a public nuisance, it must be shown that civil or property rights are interfered with.

State v. Vaughan, 81 Ark. 117, 7 L.R.A.(N.S.) 899, 118 Am. St. Rep. 29, 98 S. W. 685, 11 Ann. Cas. 277; Lyric Theater Co. v. State, 98 Ark. 437, 33

L.R.A.(N.S.) 325, 136 S. W. 174; Re Debs, 158 U. S. 564, 39 L. ed. 1092, 15 Sup. Ct. Rep. 900; State v. Patterson, 14 Tex. Civ. App. 465, 37 S. W. 478; State v. Ehrlick, 65 W. Va. 700, 23 L.R.A.(N.S.) 691, 64 S. E. 935; State v. Baltimore & O. R. Co. 78 W. Va. 526, L.R.A.1916F, 1001, 89 S. E. 288; People v. Condon, 102 Ill. App. 449; People ex rel. Atty. Gen. v. District Ct. 26 Colo. 380, 46 L.R.A. 855, 58 Pac. 608; Atty. Gen. v. Utica Ins. Co. 2 Johns. Ch. 371.

Where the criminal laws are sufficient, equity gives no remedy.

High, Inj. 4th ed. § 745; State v. Baltimore & O. R. Co. 78 W. Va. 526, L.R.A.1916F, 1001, 89 S. E. 288; Heber v. Portland Gold Min. Co. 64 Colo. 352, L.R.A.1918D, 681, 172 Pac. 12; People v. Condon, 102 Ill. App. 449; Crighton v. Dahmer, 35 Am. St. Rep. 666, note; People ex rel. Atty. Gen. v. District Ct. 26 Colo. 380, 46 L.R.A. 855, 58 Pac. 608.

The court erred in denying contemner's motion to quash, made at the commencement and close of the con-

tempt proceeding, and in making and entering the order or judgment finding him guilty of contempt.

Heber v. Portland Gold Min. Co. 64 Colo. 352, L.R.A.1918D, 681, 172 Pac. 12; *State ex rel. Weatherby v. Dick & Bros. Q. Brewing Co.* 270 Mo. 100, L.R.A.1917D, 1023, 192 S. W. 1022; *State ex rel. Chicago, B. & Q. R. Co. v. Woolfolk*, 269 Mo. 389, 190 S. W. 877; *State ex rel. Alton v. Moffett*, 194 Mo. App. 286, 188 S. W. 930; *People ex rel. Atty. Gen. v. District Ct. supra*; *Winsor v. Hanson*, 40 Wash. 423, 82 Pac. 710; *Tacoma v. Bridges*, 25 Wash. 221, 65 Pac. 186; *State ex rel. News Pub. Co. v. Milligan*, 3 Wash. 144, 28 Pac. 369; *Wintermute v. Tacoma Light & Water Co.* 3 Wash. 727, 29 Pac. 444; *Morse v. O'Connell*, 7 Wash. 117, 34 Pac. 426; *Woodcock v. Guy*, 33 Wash. 234, 74 Pac. 358; *Joyce, Nuisances*, ¶ 415.

The court was without authority to grant the restraining order or injunction without requiring bonds.

Keeler v. White, 10 Wash. 420, 38 Pac. 1134; *Cherry v. Western Washington Industrial Exposition Co.* 11 Wash. 586, 40 Pac. 136; *Swope v. Seattle*, 35 Wash. 69, 76 Pac. 517; *Western Academy v. De Bit*, 101 Wash. 42, 171 Pac. 1036.

One cannot be punished for contempt unless he has had notice of the injunctive order.

22 Cyc. 1013; *State ex rel. Thompson v. Lavery*, 31 Or. 77, 49 Pac. 852; *Garrigan v. United States*, 23 L.R.A. (N.S.) 1295, 89 C. C. A. 494, 163 Fed. 16; *Harris v. Hutchinson*, 160 Iowa, 149, 44 L.R.A. (N.S.) 1035, 140 N. W. 830; *Woodcock v. Guy*, 33 Wash. 242, 74 Pac. 358.

It was an unconstitutional exercise of power to restrain, or attempt to restrain, contemner from membership in the I. W. W. organization.

Ex parte Smith, 135 Mo. 223, 33 L.R.A. 606, 58 Am. St. Rep. 576, 36 S. W. 628; *State ex rel. A. M. Stephens Lumber Co. v. Smith*, 129 Mo. 585, 31 S. W. 917; *Watertown v. Christnacht*, 39 S. D. 290, L.R.A.1917F. 903, 164 N. W. 62; *St. Louis v. Fitz*, 53 Mo. 583.

In imposing a jail sentence upon contemner, the lower court exceeded its jurisdiction.

Wright v. Suydam, 79 Wash. 550, 140 Pac. 578; *State ex rel. Curtiss v. Erickson*, 66 Wash. 639, 120 Pac. 104; *State ex rel. Holland v. Miesen*, 98 Minn. 20, 106 N. W. 1134, 108 N. W. 513.

Mr. William C. Meyer, for respondent:

The allegations and acts complained of constitute a public nuisance against which the court had power to issue an injunction.

Wilcox v. Henry, 35 Wash. 591, 77 Pac. 1055; *Kirkland v. Ferry*, 45 Wash. 663, 88 Pac. 1123; *Stead v. Fortner*, 255 Ill. 468, 99 N. E. 680; *Everett v. Paschall*, 61 Wash. 47, 31 L.R.A. (N.S.) 827, 111 Pac. 879, Ann. Cas. 1912B, 1128; *O'Brien v. People*, 216 Ill. 354, 108 Am. St. Rep. 219, 75 N. E. 108, 3 Ann. Cas. 966; *State ex rel. Crow v. Canty*, 207 Mo. 439, 15 L.R.A. (N.S.) 747, 123 Am. St. Rep. 393, 105 S. W. 1078, 13 Ann. Cas. 787; *People v. St. Louis*, 10 Ill. 351, 48 Am. Dec. 339; 14 R. C. L. 379, § 80; *Hamilton Corp. v. Julian*, 130 Md. 597, 7 A.L.R. 746, 101 Atl. 558; 2 Beach, Eq. Jur. p. 820; 4 Pom. Eq. Jur. 3d ed. ¶ 620, 1349; 2 Pom. Eq. Rem. 3d ed. ¶ 620; 2 Beach, Eq. Jur. ¶ 744; *United States v. Workmen's Amalgamated Council*, 26 L.R.A. 153, 4 Inters. Comp. Rep. 831, 54 Fed. 994; 2 High, Inj. 4th ed. ¶ 1415H; *State ex rel. Belden v. Fagan*, 22 La. Ann. 545.

If parties not named especially in a writ, but found to be acting in concert with the defendants named, are served with or have notice of a restraining order, and subsequently do any act in violation of the injunction, they will come within the terms of the restraining order.

United States v. Elliott, 5 Inters. Com. Rep. 148, 64 Fed. 27; *O'Brien v. People*, 216 Ill. 354, 108 Am. St. Rep. 219, 75 N. E. 108, 3 Ann. Cas. 966.

Mackintosh, J., delivered the opinion of the court:

On January 5, 1920, the superior court of Spokane county, in an action against several defendants, the appellant here not being one of them, made a decree enjoining the defendants, "and all others not now known, whose names and identity may hereafter be disclosed, from associating, confederating, affiliating, and acting in concert with said named defendants," from continuing as members of the I. W. W., and from "advocating, advising, teaching, or promulgating the said theories, doctrines, practices, and alleged principles of the said" organization, and from "circulating or distributing

any of the written or printed pamphlets, papers, handbills, documents, or other propaganda or literature of" the I. W. W. Thereafter, on June 30, 1920, the appellant was arrested and tried for contempt in having violated this decree, and, on trial, was found guilty and sentenced. From that judgment he has appealed.

Extended argument has been made attacking the validity of the decree, but we find it unnecessary to discuss that phase of the case, and will assume, without deciding, that the court had jurisdiction to enter such a decree, and that the decree was in all respects valid and binding. The rule is, in cases of injunction, that the injunction binds the parties defendant who are named

**Injunction—
binding effect.**

and upon whom service has been secured, and all other

persons who have knowledge of its provisions; in other words, that persons not parties to the injunction proceeding, and against whom the decree is not directed by name, may be punished for contempt if they violate the terms of the decree; provided that, subsequent to the making of the decree, they have been served with a copy of it and have had notice of it. In *O'Brien v. People*, 216 Ill. 354, 108 Am. St. Rep. 219, 75 N. E. 108, 3 Ann. Cas. 966, the court said: "Immediately after the writ of injunction was issued the Kellogg company had 500 copies of it posted in the immediate vicinity of its works. It also had copies served upon some of defendants personally, by the sheriff, and sent copies to others through the mail. The fact that some of the plaintiffs in error were not parties to the injunction suit, and were not served with process, and had no notice of the application for the injunction, or were not served by the officer of the court with such injunction, is immaterial, so long as it is made to appear that they had actual notice of the contents of the injunction ordered and issued by the court. "To render a person amenable to an

15 A.L.R.—25.

injunction it is not necessary that they should have been a party to the suit, so long as they had actual notice of the contents of such injunction.' High, Inj. § 1444. With the exception of Fisher and Brent, it is admitted that all of the other plaintiffs in error knew of the injunction, and, in view of the prominent part which they both took in the matter, it is unreasonable to suppose that they (Fisher and Brent) did not have knowledge of its existence. If they did not, it was their duty to properly present that fact to the trial court upon the hearing, which they failed to do."

But a person not named as a party cannot be punished for contempt for having violated the terms of a decree of which he had no knowledge.

**Contempt—
violation of
injunction—
want of
knowledge.**

The testimony in this case shows that the officers arresting the appellant on June 30 had no acquaintance with him, and there is no testimony that a copy of the decree had ever been served upon him, and the only testimony tending to show that the appellant had any knowledge of such a decree was that it was proved that copies thereof had been posted in numerous places in Spokane county, and that the issuance of the decree had been a matter of considerable newspaper publicity and comment.

There is no testimony in the case showing the length of time the appellant had been in Spokane county; the only reference to this being a statement of one of the witnesses that he thought he had seen the appellant around Spokane about twelve days before his arrest, which testimony was later modified, on cross-examination, that it might have been only about a couple of days. The evidence, as we view it, is entirely inadequate to prove that the appellant had

**—failure to show
notice.**

notice of the injunctive order, and he, not having been a party to the action, of course, could not be held in contempt in having disobeyed the

decree of which he had no notice. This view is supported by the following authorities: *United States v. Elliott* (C. C.) 5 Inters. Com. Rep. 148, 64 Fed. 27, and *Garrigan v. United States*, 23 L.R.A.(N.S.) 1295, 89 C. C. A. 494, 163 Fed. 16, wherein it is said: "The finding that the plaintiff in error had 'full knowledge of the injunction'—a fundamental requisite for either charge of contempt—rests alone on the alleged publicity of the issuance, through newspapers and notices thereof, which were posted on the wagons intercepted by the mob. No testimony appears of word or action on the part of the plaintiff in error, or in his hearing, in reference to the injunction; nor that his attention was directed to the wagons, their contents, or any notices thereon. He is clearly entitled to the benefit of 'the presumption of innocence, as evidence in favor of the accused, introduced by the law in his behalf,' . . . which arises alike in respect of notice and conduct, as 'an instrument of proof created in his favor,' and the mere inference of 'full knowledge,' derived solely from the above-mentioned facts, is without force, as we believe, to overcome the express denial of knowledge on the part of the accused, fortified by the presumption thus defined."

In *State ex. rel. Thompson v. Lavery*, 31 Or. 77, 49 Pac. 852, the following language occurs: "It is true the decree restrains the 'defendant Daniel Lavery, his agents, attorneys, and employees, and all persons acting under, by, or through

him,' etc.; but without serving a copy thereof upon the defendant John Lavery, or alleging or proving that he had knowledge of its provisions, he cannot be in contempt for violating its terms. While there is some conflict of authority upon the question of the liability of a person for violating the process of a court, the weight and better reason seem to support the rule that a stranger to an injunction who has notice or knowledge of its terms, is bound thereby, and may be punished for contempt for violating its provisions."

In *Harris v. Hutchinson*, 160 Iowa, 149, 44 L.R.A.(N.S.) 1035, 140 N. W. 830, the court says: "It is true that in this opinion the following words were used: 'The decree was sufficiently broad in its terms to enjoin all persons from maintaining a nuisance on the premises therein described, and it was sufficient, as a public record, to impart constructive notice to all persons.' It is evident that those words were used with reference to the facts in that particular case, and where it says, 'It was sufficient as a public record to impart constructive notice to all persons,' it evidently meant, and should be understood as meaning, all persons dealing with the property as purchaser or lessee, or dealing with the property itself."

For these reasons the trial court was in error in finding the appellant guilty of contempt. The judgment will be reversed and the appellant discharged.

Parker, Ch. J., and Bridges, Fullerton, and Holcomb, JJ., concur.

ANNOTATION.

Contempt: violation of injunction by one not a party to injunction suit.

- I. Scope, 386.
- II. General rule, 387.
- III. One acting as agent of, or in connection with, party, 389.
- IV. Tenant or purchaser, 391.

I. Scope.

This note includes both civil and criminal contempts, but excludes

- V. Necessity of relationship to, or concert with, party, 393.
- VI. Necessity of notice of injunction, 398.
- VII. Sufficiency of notice of injunction, 400.

cases involving the violation of an injunction by officers or servants of a corporation, including a municipal

corporation, when the injunction runs against the corporation.

II. General rule.

The general rule is that one who violates an injunction is guilty of contempt, although he is not a party to the injunction suit, if he has notice or knowledge of the injunction order, and is within the class of persons whose conduct is intended to be restrained, or acts in concert with such a person.

United States.—United States v. Debs (1894) 5 Inters. Com. Rep. 163, 64 Fed. 724; United States v. Sweeney (1899) 95 Fed. 434; Chisolm v. Caines (1903) 121 Fed. 397; Re Wilk (1907) 155 Fed. 943; Puget Sound Traction Light & P. Co. v. Lawrey (1913) 202 Fed. 263.

California.—Buffandeau v. Edmondson (1861) 17 Cal. 437, 79 Am. Dec. 189.

Illinois.—O'Brien v. People (1905) 216 Ill. 354, 108 Am. St. Rep. 219, 75 N. E. 108, 3 Ann. Cas. 966; Sloan v. People (1904) 115 Ill. App. 84; Mears Slayton Lumber Co. v. District Council, C. U. B. C. J. A. (1910) 156 Ill. App. 327.

Indiana.—Shaughnessey v. Jordan (1916) 184 Ind. 499, 111 N. E. 622; Anderson v. Indianapolis Drop Forging Co. (1904) 84 Ind. App. 100, 72 N. E. 277.

Kansas.—State v. Cutler (1874) 13 Kan. 181.

Louisiana.—Crucia v. Behrman (1920) 147 La. 144, 84 So. 525.

Missouri.—Re Coggschall (1903) 100 Mo. App. 585, 75 S. W. 183.

Ohio.—Miller v. Toledo Grain & Mill. Co. (1900) 21 Ohio C. C. 325, 11 Ohio C. D. 629.

Oregon.—State v. Lavery (1897) 31 Or. 77, 49 Pac. 852.

Pennsylvania.—Titusville Iron Co. v. Quinn (1903) 13 Pa. Dist. R. 416.

Texas.—Ex parte Young (1910) 103 Tex. 417, 129 S. W. 599.

Washington.—STATE EX REL. LINDSLEY v. GRADY (reported herewith) ante, 383.

England.—Avory v. Andrews (1882) 30 Week. Rep. 564, 51 L. J. Ch. N. S. 414, 46 L. T. N. S. 279.

Ireland.—Smith-Barry v. Dawson (1891) Ir. L. R. 27 Eq. 558.

Thus, members of a labor union may be committed for contempt in violating an injunction against the union, with knowledge thereof, although they were not made parties to the injunction suit. *Armstrong v. Superior Ct.* (1916) 173 Cal. 341, 159 Pac. 1176; *Shaughnessey v. Jordan* (1915) 184 Ind. 499; 111 N. E. 622; *People ex rel. Stearns v. Marr* (1905) 181 N. Y. 463, 106 Am. St. Rep. 562, 74 N. E. 431, 3 Ann. Cas. 25; *York Mfg. Co. v. Oberdick* (1902) 11 Pa. Dist. R. 616.

And members of an association, though not parties to the injunction suit, are guilty of contempt where they violate, with knowledge thereof, an injunction restraining the president of the association, its officers, and members. *Rorke v. Russell* (1869) 2 Lans. (N. Y.) 242.

And in *Cumberland R. & Coal Co. v. McDougall* (1911) 9 East. L. R. (N. S.) 289, a motion for attachment for contempt against several members of a labor union, some of whom were named defendants in the injunction, and the others came under its general terms, the court said: "After careful consideration I am unable to make any distinction between the acts of those specially named, and those fully included under the general terms of restraint against members of the U. M. W. of America, in Nova Scotia. In my judgment all are equally bound by the order, and equally liable for its wilful violation."

But it was held in *BERGER v. SUPERIOR CT.* (reported herewith) ante, 373, that actual notice by one engaged in picketing a place of business alleged to be unfair to union labor, of a judgment enjoining others from performing such acts in an action to which he was not a party, does not render him guilty of contempt in violating the injunction within the terms of which he does not come. Upon the assumption indulged in by the court in this case that the person charged with contempt was not within the class of persons whose conduct the injunction purported to

restrain, and did not act in concert or collusion with such a person, it will be observed that the decision is not in conflict with the rule, as above stated. In this connection, however, attention is called to a distinction between contempt predicated upon the violation of an injunction by one within its scope, and a contempt predicated upon the obstruction of justice by one not within its scope, who does the act which the injunction restrained.

In *Garrigan v. United States* (1908) 23 L.R.A. (N.S.) 1295, 89 C. C. A. 494, 163 Fed. 16, the court said: "As it is neither charged nor proven that the plaintiff in error was one of the parties enjoined, he is not chargeable for breach or violation of the injunction in the well-recognized sense of those terms applicable to parties. He was bound, alike with other members of the public, to observe its restrictions, when known, to the extent that he must not aid or abet its violation by others, nor set the known command of the court at defiance by interference with, or obstruction of, the administration of justice; and the power of the court to proceed against one so offending, and punish for the contemptuous conduct, is inherent and indisputable. . . . We believe the above-mentioned distinction in contempt proceedings, between disobedience of the injunction by parties and privies, and the conduct of others in contempt of the authority and commands of the court, to be elementary."

It was held in *Re Reese* (1900) 98 Fed. 984, that a person cannot be committed for contempt for violating an injunction granted in a suit between private persons to which he was not made a party by words of specific or general description, where the court in which the suit was brought was one of limited jurisdiction as respects the persons who might be sued therein and subjected to its jurisdiction without their consent, and the person sought to be committed was not subject to be sued by the complainant in that court, unless he elected to submit himself to its jurisdiction, which he had not done when the order of injunction was

entered, nor when it was alleged to have been violated, or subsequently. But it was held, on an affirmance of this case in (1901) 47 C. C. A. 87, 107 Fed. 942, 14 Am. Crim. Rep. 253, that although a person was not a party to the injunction suit, and was not within the terms of the injunction order so that he could violate it, he could be guilty of contempt if, with knowledge of the injunction order, he intentionally interfered to thwart the purposes of the court in making the order. The appellate court, however, sustained the lower court and released the petitioner on habeas corpus proceedings, upon the ground that he was mistakenly committed upon the theory that he was a party to the injunction suit, and guilty of a violation of the injunction order, and that, as contempt proceedings are in the nature of criminal proceedings, the petitioner could only be committed upon the offense charged against him, and that his commitment could not be sustained upon the theory that, although neither a party nor within the terms of the injunction order, he was guilty of contempt in interfering with, and obstructing the administration of, justice, by doing the things which the parties to the suit had been enjoined from doing.

See also the reference to this distinction in *BERGER v. SUPERIOR CT.* (reported herewith) ante, 373.

It was held in *Shelby v. Burtis* (1857) 18 Tex. 644, that one who was not a party to a suit in which was issued an injunction against the enforcement of a trust deed was not guilty of contempt in bringing a suit on the note which the trust deed was given to secure, although he had knowledge of the injunction, where the note was assigned to him before the commencement of the injunction suit.

And it was held in *Barthe v. Larquie* (1890) 42 La. Ann. 131, 7 So. 80, that one not a party to an injunction suit, and against whom the injunctive order is not directed, cannot be held guilty of contempt, upon the ground that the power to punish for contempt is limited to the one against

whom the injunction was directed, by an article of the Code of Practice which reads that if one against whom the injunction is directed violates the same, or refuses to obey, the court may punish him.

In *Watson v. Fuller* (1854) 9 How. Pr. (N. Y.) 425, holding that one not a party to an injunction suit could not be held in contempt for violating the injunction, the decision rested upon certain provisions of the Code which later cases appear to have ignored, or, at least, regarded as not controlling. The court said: "Independently of the former practice of the court of chancery, I think it is plainly to be inferred from the Code that an injunction order can only go against a party to the action. §§ 218, 219." These sections read as follows: Sec. 218. "The writ of injunction as a provisional remedy is abolished, and an injunction by order is substituted therefor. The order may be made by the court in which the action is brought, or by a judge thereof, or by a county judge in the cases provided in the next section; and when made by a judge may be enforced as the order of the court." Sec. 219. "Where it shall appear by the complaint, that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of some act the commission or continuance of which, during the litigation, would produce injury to the plaintiff, or when during the litigation it shall appear that the defendant is doing, or threatens or is about to do, or procuring or suffering some act to be done in violation of the plaintiff's rights, respecting the subject of the action and tending to render the judgment ineffectual, a temporary injunction may be granted to restrain such act. And where, during the pendency of an action, it shall appear by affidavit, that the defendant threatens or is about to remove or dispose of his property, with intent to defraud his creditors, a temporary injunction may be granted to restrain such removal or disposition." These provisions of the Code have continued in

force in practically the same form since the time of such decision up to the present time, and are now §§ 876, 877, and 878 of the Civil Practice Act, which is chapter 925 of the Laws of 1920.

And in *Sickels v. Borden* (1857) 4 Blatchf. (U. S.) 14, Fed. Cas. No. 12,833, a motion for an attachment for the violation of an injunction restraining the defendants alone from infringing a patent, there is an obiter statement to the effect that one not a party to the injunction suit cannot be committed for contempt for violating the injunction. In reference to one Allen, who was the servant or agent of the defendants, and who was not a party to the suit, and had not been served with a copy of the injunction order, the court said: "If the injunction had been properly served on Allen, and had been directed to the servants, agents, workmen, and employees of the defendants, and had, in terms, restrained such servants, agents, workmen, and employees, the very serious question would have been presented whether persons not parties to the bill could be restrained, under such a general designation, by an injunction issued upon notice only to the parties to the suit. The act of Congress, requires notice of an application for an injunction; and I am very strongly inclined to the opinion that, in order to attach for the breach of an injunction, the party to be proceeded against must be a party to the suit, and have had notice of the application for the injunction. But it is unnecessary to determine this question upon the present motion."

III. One acting as agent of, or in connection with, party.

There are numerous cases which hold that persons, though not parties to the injunction suit, who act as the agents, or servants, or associates, or confederates of parties to the suit in violating the injunction, are guilty of contempt.

Thus, one, though not a party to the injunction suit, may be punished for contempt for doing, with knowledge of the injunction, the things

prohibited thereby, as an agent of the parties to the suit. *Lytle v. Galveston, H. & S. A. R. Co.* (1905) 41 Tex. Civ. App. 112, 90 S. W. 316.

And a person not a party to the injunction suit may be punished for contempt for doing the things enjoined, where he acted as the agent of the party enjoined, with knowledge of the injunction, and aided and abetted the latter in disobeying it. *Ex parte Testard* (1909) 102 Tex. 287, 115 S. W. 1155, 20 Ann. Cas. 117.

One, though not a party to the injunction suit, in violating the injunction, with knowledge thereof, for the party restrained by the injunction, will be held guilty of contempt. *De Cosmos v. Victoria & E. Teleph. Co.* (1894) 3 B. C. 347. In this case, however, the alleged contemner was held not guilty, because it was not shown that he did the act complained of for the party enjoined.

And in *Wellesley v. Mornington* (1848) 11 Beav. 180, 50 Eng. Reprint, 785, 12 Jur. 367, holding that an agent or servant of the party enjoined could not be committed for breach of an injunction which did not extend to the party's servants and agents, it was stated that such agent could be punished for contempt, if he knowingly aided and assisted the parties in the breach of the injunction.

The court said in *Re Rice* (1910) 181 Fed. 217: "On principle it would seem, whatever the holding of some of the authorities to the contrary, that the directions and commands of an injunction, though not addressed to strangers, are admonitions and orders to anyone, although not named in any way in the suit, who acts in the assertion of the principal's right only, contrary to the terms of an injunction addressed to his principal, and that a mere agent may, in that way, be guilty of its breach, in the proper sense. He claims under one to whom the injunction speaks, acts for him only, and intentionally puts himself in privity with him, and in consequence is amenable to its commands."

One, though not a party to the bill, and whose name is not contained in the decree which enjoins the defend-

ants, their servants, aiders, and abettors, is guilty of contempt where he violates, with knowledge of the injunction, the provisions thereof as an aider and abettor of the defendants. *Fowler v. Beckman* (1891) 66 N. H. 424, 30 Atl. 1117.

No person with knowledge of the terms of an injunction, even if not a party to the injunction suit, can aid or co-operate with a party in doing the prohibited act, without becoming guilty of contempt, when the injunction is so drawn as to restrain not only the parties to the action, but also their attorneys, agents, or employees. *People ex rel. Empire Leasing Co. v. Mecca Realty Co.* (1916) 174 App. Div. 384, 161 N. Y. Supp. 241. It is stated in this case that not only does it appear that the alleged contemnners were either agents, servants, or employees in the doing of the forbidden work, in whatever way their activities are sought to be covered up, but, beyond that (and sufficient in itself to justify their punishment), they all had knowledge of the terms of the injunction order, and had been served therewith, and still persisted in disobeying it.

It was held in *Huttig Sash & Door Co. v. Fuelle* (1906) 143 Fed. 363, that one, though not a party to the injunction suit, who, with knowledge of the issuance of the injunction, aids and abets the defendant in violating the same, is guilty of contempt.

And it was held in *Diamond Drill & Mach. Co. v. Kelley Bros. & Spielman* (1904) 132 Fed. 978, that one not a party to the injunction suit could be punished for contempt on the ground that he acted as the defendants' agent in violating the injunction, where, with knowledge of the injunction order, he, in violation thereof, knowingly did acts by which the defendants profited, although he was not the defendants' paid agent.

It was held in *W. B. Conkey Co. v. Russell* (1901) 111 Fed. 417, appeal dismissed in (1904) 66 C. C. A. 291, 133 Fed. 165, that one, though not a party to the bill, and not directly restrained by the injunction, and, because of his citizenship, not capable

of being sued in the injunction suit, which was instituted in the Federal court because of diversity of citizenship, can be committed for contempt, where he combines and confederates with those who are enjoined, and aids and assists them in the violation of the injunction, with full knowledge of the scope and effect of the restraining order.

And it was held in *Ex parte Richards* (1902) 117 Fed. 658, that persons, though not parties to the injunction suit, and because of their citizenship not subject to be sued in the suit, were guilty of contempt in acting with knowledge of the injunction order, as confederates and associates of the defendants named in the suit, in violation of the injunction, which by its terms restrained the defendants named and their confederates, associates, agents, and promoters, from committing certain acts.

An attorney will be held guilty of contempt, where he violates an injunction with knowledge thereof, although not a party to the injunction suit. *Lewes v. Morgan* (1818) 5 Price, 518, 146 Eng. Reprint, 681, 19 Revised Rep. 566.

And an attorney who counsels, advises, aids, and abets his client in violating an injunction restraining him and his agents, attorneys, employees, etc., is guilty of contempt. *Ex parte Vance* (1891) 88 Cal. 281, 26 Pac. 118.

And an attorney who acted as counsel for one enjoined, and was in court when the injunction was granted, is guilty of contempt, where he violates an injunction which runs against his client, the latter's servants, agents, and employees, and the fact that such attorney has ceased to be the counsel for the party enjoined at the time of the violation of the injunction does not justify his conduct. *Wimpy v. Phinizy* (1881) 68 Ga. 188.

A private citizen, though not a party to a judgment ousting a city from the exercise of the unwarranted power of licensing the sale of intoxicating liquors, and enjoining all municipal officers as agents from engaging in the exercise of such power, is

guilty of contempt, where he attempts to defeat the purpose of the judgment, with knowledge thereof, whether or not he is to be regarded as violating the injunction, since, acting in concert with the municipal officers, he should be treated as an agent of the city, within the meaning of that term as used in the injunctive order. *State ex rel. Jackson v. Pittsburg* (1909) 80 Kan. 710, 25 L.R.A. (N.S.) 226, 133 Am. St. Rep. 227, 104 Pac. 847.

See also *Batterman v. Finn* (1864) 34 How. Pr. (N. Y.) 108, and same case in (1864) 32 How. Pr. 501, *infra*, IV.

IV. *Tenant or purchaser.*

An injunction decree for the abatement of a liquor nuisance under § 1543 of the Iowa Code, which provides that any person violating the terms of any injunction to abate a nuisance existing in a place kept for the unlawful sale of intoxicating liquors shall be punished for contempt, operates upon the property, as well as upon the person, of the defendant, and a lessee of the defendant, although not a party to the injunction proceedings, and without knowledge of the issuance of the injunction, may be punished for contempt for violating the injunction. *Silvers v. Traverse* (1891) 82 Iowa, 52, 11 L.R.A. 804, 47 N. W. 888.

And it was likewise held in *Dermody v. Jackson* (1910) 147 Iowa, 620, 125 N. W. 228, that one, though not a party to the injunction suit and without notice of the injunction, could be held guilty of contempt in violating an injunction which restrained the defendants from using the premises for the unlawful sale of intoxicating liquors, or permitting the same to be done by any other person or persons under their control, and enjoining the premises as a nuisance, and against the use or illegal sale of liquors by the defendants and any person, or persons, claiming by, through, or under them, or either of them, and all other persons. The court distinguished the following case of *Buhlman v. Humphrey*, upon the ground that in such case the in-

junction only purported to enjoin the particular defendant in the injunction suit.

But it was held in *Buhlman v. Humphrey* (1892) 86 Iowa, 597, 53 N. W. 318, that, where an injunction restrained certain named parties from keeping a liquor nuisance in certain described premises, a subsequent purchaser of the premises, or his lessee, is not guilty of contempt in violating the injunction, although he violates the injunction with knowledge thereof. The court said: "It is a general rule of law that 'the obligations of an injunction will not usually be extended to persons who are not named in the writ, and they will not be liable for a breach of a mandate which is not directed to them,'" and, in distinguishing *Silvers v. Traverse* (Iowa) *supra*, stated: "That was a case wherein the decree enjoined and restrained 'all persons from using or occupying the premises for unlawful keeping or traffic in intoxicating liquors,' and the question arose there whether a lessee of the defendant in the injunction proceeding was bound by the decree, he not having been a party to the action. It was held that he was concluded by the decree. In that case, by the very terms of the decree, it applied to everyone who should thus illegally use the premises. Not so in the case at bar, where, by the express wording of the decree, it is limited in its operation and effect to the parties therein named. By no reasonable rule of construction can such a decree be said to run against, or attach to, the property in the hands of a purchaser or his lessees. Code, § 1543, provides that 'any person violating the terms of any injunction' to abate the nuisance, etc., shall be punished for contempt. Clearly, that provision must mean that, in order to be guilty of a contempt, the violator must be one who is within the terms of the decree. To our minds it is immaterial whether the defendants, in fact, knew of the injunction or not. It was not directed against them; it did not attach to the property as against them; it simply, by its terms, enjoined the defendants in the in-

junction suit from doing or permitting certain things to be done. An injunction is an extraordinary remedy, and its force and legal effect should not be extended by implication. Counsel for the plaintiff do not cite any authority, nor do we find any, which would justify his contention that a decree worded as this is should be held to attach to, or follow the real estate into the hands of, a purchaser or his lessees."

And it was likewise held in *Newcomer v. Tucker* (1893) 89 Iowa, 486, 56 N. W. 499, following the case last cited, that a tenant of the premises is not guilty of contempt in violating an injunction, of which he has no knowledge, restraining the owner of the premises alone from maintaining a nuisance by the sale of intoxicating liquors.

And the rule announced in the case of *Buhlman v. Humphrey* (Iowa) *supra*, was followed in *Pearson v. District Ct.* (1894) 90 Iowa, 756, 57 N. W. 871, holding that one who was not a party to the injunction suit could not be adjudged guilty of contempt for the violation of an injunction restraining another from maintaining a nuisance by the unlawful sale of intoxicating liquors.

But it was held in *Batterman v. Finn* (1864) 34 How. Pr. (N. Y.) 108, that lessees of a riparian owner were guilty of contempt in violating an injunction, with knowledge thereof, restraining the owner, his servants, and agents, from using the water in a stream so as to throw backwater upon the wheels of the plaintiff's mill, although the lessees were not parties to the injunction suit, upon the ground that they were the agents and servants of the owner in violating the injunction. The court said that it is only by the owner's authority that the lessees had any rights whatever, and, in assuming to control the water power, and in violating the express prohibition of the injunction, they must be considered as his agents and servants, and, as such, amenable for their own acts, and that, although not named as parties individually, they were virtually such, and that, if

agents and servants, they were clearly covered by the injunction, and that the authorities which hold that an injunction can only issue against the parties can have no application. The contrary, however, was held in a case between the same parties, at the same term, by the same court, composed of the same justices (the judge writing the opinion in the foregoing report, however, dissenting), reported in (1864) 32 How. Pr. 501, an appeal from which was dismissed on jurisdictional grounds in (1869) 40 N. Y. 340. In the report in 32 How. Pr. 501, the court said that the only question in the case was whether the lessees were the agents or servants of the riparian owner in such sense as to bring them within the command of the injunction, and render them liable for a violation thereof, and citing the holding of *Watson v. Fuller* (1854) 9 How. Pr. (N. Y.) 425, *supra*, II., that an injunction only issues against a party to the action, said: "To make a person who is not a party to the action, or named in the injunction order, liable for disobeying such injunction, on the sole ground that he is an agent or servant, the persons should bear such a relation to the defendant as will enable the latter to control the action of the persons sought to be charged, in regard to the subject-matter as to which the injunction issues."

One, though not a party to a suit to determine water rights, which results in a decree restraining only the parties from interfering with the rights of each other, is guilty of contempt in violating the injunction; where he purchases the rights of one of the parties, and, prior to the acts complained of as violating the injunction, claims and receives the benefits of the injunction as against the other parties to the decree, since, by asserting rights under the injunctive decree, he, to all intents and purposes, made himself a party to it, and must be held to obey it. *State ex rel. Pool v. District Ct.* (1906) 34 Mont. 258, 86 Pac. 798.

And a grantee of a party to the injunction suit is guilty of contempt in violating an injunction restraining

the defendants, and their grantees and successors, from diverting the water of a stream, because judgments are binding not only upon the parties, but also upon their privies. *Ahlers v. Thomas* (1899) 24 Nev. 407, 77 Am. St. Rep. 820, 56 Pac. 98.

And one who has succeeded to the interests of another in a canceled certificate of purchase of land, after, and with notice of, an injunction restraining the latter from asserting the invalidity of the judgment canceling the certificate, is guilty of contempt for subsequently filing a cross complaint attacking the validity of such judgment, and the attorney for the complainant, although ignorant of the injunction at the time of the filing of the cross complaint, is guilty of contempt, where, after the injunction is called to his notice, he insists upon maintaining the cross complaint. *Lake v. Superior Ct.* (1913) 165 Cal. 182, 131 Pac. 371.

See also *State v. Porter* (1907) 76 Kan. 411, 13 L.R.A. (N.S.) 462, 91 Pac. 1073, and *State v. Terry* (1917) 99 Wash. 1, 168 Pac. 513, *infra*, VI.

V. *Necessity of relationship to, or concert with, party.*

One not a party to an injunction suit, and not named or designated in the injunction order, which runs against the defendants only, is not guilty of contempt in violating the injunction, though with knowledge thereof, where he does not act, in so violating the injunction, as the servant or agent of the defendants, or in collusion or combination with them, but acts independently. *Rigas v. Livingston* (1904) 178 N. Y. 20, 70 N. E. 107. In this case city officials were enjoined from removing a sidewalk fruit stand from in front of a store, and the owner of the store, and the tenant thereof, and a city marshal, with knowledge of the injunction, removed the stand after the issuance of a warrant in summary proceedings against the tenant of the store, and they were held not guilty of contempt in so violating the injunction, because they were in no way connected with the city officials who were enjoined.

And it was held in *Ex parte State ex rel. Higdon* (1909) 162 Ala. 181, 50 So. 143, that one not a party to an injunction suit, and a stranger to the writ of injunction, was not guilty of contempt in doing an act prohibited by the injunction, although done with knowledge thereof, where the injunction ran to the defendants alone, and where there was no evidence of a conspiracy or community of purpose between the defendants and the doer of the alleged contemptuous act. It was held that the latter did not violate the injunction, and the court said: "In this instance, the writ possessed no spirit broader than its letter. The command here was addressed to two persons or officers, and forbade them to move, molest, damage, destroy, etc., the safe described in the bill. It did not purport to protect the safe otherwise than by restraint of these two persons or officers from doing the acts defined. Neither the bill, the order, nor the writ assumed to do more than to restrain Ward and Bodeker as trespassers. The writ operated only in personam. High, *Inj.* § 2. It did not undertake to create a status effecting to place the safe in gremio legis. The court did not attempt to install any officer in possession of the safe. There was no effort to remove the safe from its location in the business house. It remained where it was, presumably in the control and possession of Howell, unless the mandate was not observed by Ward or Bodeker. Under such circumstances, with a writ of injunction sought and issued as this one was, we think this general statement, taken from § 1440 of High on Injunctions, apt in decision of the matter in hand: 'The obligations of an injunction will not usually be extended to persons who are not named in the writ, and they will not be liable for a breach of a mandate which is not directed to them. Thus where the writ is simply directed to a defendant, without including his agents or servants, an agent will not be punished for a breach.' The relator was a stranger to the writ. Its obligation was confined to the conduct of Ward and Bodeker. It was not framed, and did

not assume, to protect the safe generally. It did not attempt to maintain the status quo except by restraint of Ward and Bodeker. Its breach could only have been effected by conduct, in respect of the safe, by Ward and Bodeker, or either, or by persons conspiring with them to avoid the mandate of the writ."

Persons not parties to the injunction suit cannot be punished for disobedience of the injunction simply because the injunction order purports to restrain not only the defendants, but all persons whomsoever, since persons not parties can be disciplined for disobedience of the injunction only if it be made to appear that they were in fact acting as the agents of, or in collusion with, the actual defendants. *Strawberry Island Co. v. Cowles* (1913) 79 Misc. 279, 140 N. Y. Supp. 333.

And persons not parties to an injunction suit are not guilty of contempt in violating, with knowledge thereof, an injunction order restraining the defendants, and all persons whatsoever who may have acquired notice or knowledge of the injunction, from interfering with the complainant's business or employees, where the strike which was the cause of the issuance of the injunction is not still in progress at the time of the violation of the injunction order, some ten years afterwards, but at such time a new and independent effort is being made, though by the same labor union, to unionize the complainant's employees, and where the violators were not employees of the complainant, nor members of the union at the time of the strike involved in the injunction suit, and, in committing the acts charged, did not act as associates of, or represent in any way, the defendants in the injunctive decree; especially where the remedy is sought to be exercised, not through the public officers, but by the employer alone, and primarily on behalf of its private interests. *TOSH v. WEST KENTUCKY COAL CO.* (reported herewith) ante, 376.

But it was held in *Seaward v. Paterson* [1897] 1 Ch. (Eng.) 545, 66 L. J. Ch. N. S. 267, 76 L. T. N. S. 215,

45 Week. Rep. 610, where the injunction restrained the parties to the injunction suit, and his servants and agents, that a stranger who was not a party to the injunction suit, nor an agent or servant of the parties, was guilty of contempt, where he knowingly aided and assisted the party in violating the injunction. One of the judges distinguished the case of *Iveson v. Harris* (1802) 7 Ves. Jr. 257, 32 Eng. Reprint, 102, in the following words: "The appellant's counsel have argued very strenuously that there is no jurisdiction, and have based their contention upon a passage in Lord Eldon's judgment in *Iveson v. Harris* (Eng.) *supra*. That was a case of prohibition, and Lord Eldon differed from a decision of the court of exchequer in another case upon the question, Who was bound by a prohibition? He said: 'I have no conception that it is competent to this court to hold a man bound by an injunction who is not a party in the cause for the purpose of the cause. The old practice was that he must be brought into court, so as, according to the ancient laws and usages of the country, to be made a subject of the writ.' That strikes me as perfectly correct. Lord Eldon was addressing himself to the question who the persons were who were bound by an injunction; he was not referring to persons who assisted others in committing breaches of an injunction. There is a great difference between a notice of motion to commit a man for breach of an injunction, which would be technically wrong if he was not bound by it, and a notice of motion to commit him for so conducting himself as to help in a breach of the injunction. The difference is marked. If he is bound by the injunction, the court acts at the instance and for the benefit of the plaintiff or other party who has obtained the order. In the other case, the order of the court is being set at naught, and it is not for the public benefit that the court should allow its orders to be treated in this way. In the one case, the person who has obtained the order applies to enforce it; in the other

case, it is the court which acts, independently of the party and uninfluenced by him. The distinction between the two cases of contempt is perfectly well known, although sometimes it may be difficult to draw the line between them."

In the following cases, where the charge of contempt against one not a party to the injunction suit failed, it will be observed that the injunction purported to run against the party and persons standing in a certain described relationship to him, which the person charged did not sustain.

Thus, one not a party to the injunction suit, nor acting as the agent or servant of a party, cannot be held guilty of contempt in violating the injunction in terms directed against the defendants: "And all and singular of your agents and employees and all others acting for you." *State ex rel. Victor Boom Co. v. Peterson* (1902) 29 Wash. 571, 70 Pac. 71.

And a stranger to the injunction suit, who is unconnected with the parties defendant, will not be punished for doing the acts prohibited by the injunction. *Acquia Del Llano v. Acquia De Las Joyas Del Llano Frio* (1919) 25 N. M. 134, 179 Pac. 235. The injunction in this case restrained a certain "acqua" and its officers from diverting water, and the court said, in effect, that persons who were not shown to be parties to the original suits, or servants, or agents of, or in any manner in privity with, the parties, could not be adjudged guilty of contempt.

One not a party to the injunction suit is not guilty of contempt for violating an injunction restraining the defendant, his representatives or assigns, and his agents or servants, where in violating the injunction he did not act as the agent, or servant, or representative of the defendant, or have any relation to him whatsoever. *Re Zimmerman* (1909) 134 App. Div. 591, 119 N. Y. Supp. 275. It was stated in this case that there was nothing to show that a certified copy of the injunction had been served upon the alleged contemner, and that the only thing to connect him with

the injunction was the alleged fact that a circular had been sent to him, telling him of the existence of the injunction order.

It was held in *Dadirrian v. Gullian* (1897) 79 Fed. 784, that an injunction against a partnership, its servants, agents, and employees, may be violated by a servant personally, after he ceases to be a servant of the partnership, without making him guilty of contempt, although he has notice of the injunction order. The court said: "I am clearly of the opinion that the only persons who can be attached for contempt in disobeying an injunction order are the parties to the suit in which the order is granted, and those who, being their servants, agents, or employees, with knowledge of the injunction, aid and assist the defendants in disobeying its commands. The writ is directed specifically to the defendants in the suit, and then generally, without naming them, to their servants, agents, and employees. The object of this generalization is to prevent the defendants from doing by others that which the court has forbidden them to do personally; from accomplishing indirectly a result prohibited by the court. The full effect of the order is that the defendant shall not do the unlawful act himself, neither shall his agent, servant, or employee do it for him, nor shall the defendant do it as the agent, servant, or employee of another. . . . There is no restraint laid upon the agent, servant, or employee personally, but merely as the agent, servant, or employee of the enjoined defendant. . . . Notwithstanding the injunction and notice of it, he, upon ceasing to be the agent, servant, or employee of the defendant, is free to act for himself in the protection of his own rights, and the prosecutions of his own interests, even though it involve his doing the very thing prohibited his former master. . . . He may avoid obedience to a mandatory injunction by actually ceasing to be an employee of the company, . . . and he may enter the service of another master a stranger to the suit, and be as free

as he from obligation to obey the court's decree."

And in *United States Playing Card Co. v. Spalding* (1899) 92 Fed. 368, where it appeared that the dealer in an article which had been held to be an infringement on a patent was restrained from the further sale of such article by an order which enjoined the dealer and his officers, agents, servants, and manufacturers, and that the manufacturers assumed the defense of the injunction suit, it was held that the manufacturers were not guilty of contempt in selling the infringing article to other dealers. The court explained the reason for this holding as follows: "The counsel for the plaintiff urges that these manufacturers, having assumed the defense of their customers, are bound by the adjudication, and liable for violation of the injunction anywhere, as if they were parties of record. This seems to be correct as to the conclusiveness of what has been decided, but that does not make them liable upon the decree, as the parties of record would be. Execution would not run against them for profits, damages, or costs decreed. The injunction is a judicial writ, issued upon the decretal order. Notice of the order would bind those to whom the writ would run, and who would be included with them, before the writ itself should be issued; but it would not affect anyone any further than the writ would. As this writ runs to the agents and manufacturers of Spalding Brothers [the dealers], these manufacturers are said to be everywhere and always, while it remains in force, within its terms. But they are included in the writ, not as agents and manufacturers of everybody with whom they might do business, but as agents and manufacturers of Spalding Brothers; and, as what they have now done in this behalf has no connection with or relation to Spalding Brothers, they do not appear to have done any of it within the prohibition of the writ. If they had done it in aid in any way of a violation by Spalding Brothers, upon the supposition of which this proceeding may have been commenced, the question would be

very different. Cases are cited in which language is used that by itself might indicate that anyone, anywhere, having knowledge of an injunction, might not do what would violate it, if done by those included within it; but, as understood, none of them go outside the scope of the injunction itself.

. . . The proceeding itself is in nature criminal, and the foundation of it should not be extended by any doubtful construction. An amendment of the order and injunction is suggested; but that, if allowable, could not affect this question now."

And it was held in *BERGER v. SUPERIOR CT.* (reported herewith) ante, 873, that one who was not a party to the injunction suit, and is not one of the persons enjoined, and does not belong to any of the classes of persons against whom the writ of injunction runs, and, in violating the injunction, did not act as the servant or agent of any of the parties enjoined, or act in concert with any of them, could not be held guilty of contempt, the court overruling the claim that an entire stranger to the injunction proceedings was guilty of contempt if he violated the injunction with actual knowledge or notice of its terms. As appears from the opinion in this case, while ordinarily only the parties to an action, and their successors, are bound by a judgment given in an action inter partes, in matters of injunction, it has been a common practice to make the injunction run also to classes of persons through whom the enjoined party may act, such as agents, servants, employees, aiders, abettors, etc., though not parties to the action, and any of such parties violating its terms, with notice thereof, are held guilty of contempt for disobedience of the judgment. But the whole effect of this is simply to make the injunction effectual against all through whom the enjoined party may act, and to prevent the prohibited action by persons acting in concert with, or in support of, the claim of the enjoined party, who are in fact his aiders and abettors. There is a fair foundation for the conclusion that persons so co-oper-

ating with the enjoined party are guilty of a disobedience of the injunction, but it is generally held that a theory of disobedience of the injunction cannot be predicated on the act of a person not in any way included in its terms, or acting in concert with the enjoined party and in support of his claims, and, manifestly, there can be no disobedience of an injunction by a person who is not included in the mandate of the court, either by name, or as a member of a class of persons which is properly included, and who is not acting as an aider and abettor of one so included in the assertion of his claims.

And it was held in *Boyd v. State* (1886) 19 Neb. 128, 26 N. W. 925, that the mayor of a city was not guilty of contempt in violating an injunction, issued in a suit to which he was not a party, which restrained contractors, their agents and servants, from tearing up the track of a street railroad, although the mayor had knowledge of the injunction, where he acted independently, and not as the agent of, or in any connection with, the contractors. The rule was laid down in this case that only the parties to the injunction suit, and those persons who, acting in a subordinate capacity to the parties, were named or designated in the injunctive order, could be held guilty of contempt in violating the injunction, the court saying that in their state the writ of injunction is abolished, and the injunction provided for is declared by statute to be a command to refrain from a particular act, and that under their system, where no writ is used, nor even a formal order necessary, the persons bound by the injunction, and who would be punished for a breach of it, were usually designated by the allegations of the petition, where the injunction was allowed as a provisional remedy, and by the terms of the judgment itself in other cases; and that, in either case, it was a matter personal to the party against whom it was directed, and persons occupying a subordinate relation to such party.

VI. Necessity of notice of injunction.

It may be stated as a general rule that one not a party to the injunction suit cannot be charged with contempt in violating the injunction, in the absence of service upon him of the injunctive order, or a showing that he had actual knowledge thereof. *Stewart v. United States* (1916) 150 C. C. A. 100, 236 Fed. 838; *Harris v. Hutchinson* (1913) 160 Iowa, 149, 44 L.R.A.(N.S.) 1085, 140 N. W. 830; *State v. Lavery* (1897) 31 Or. 77, 49 Pac. 852; *York Mfg. Co. v. Oberdick* (1902) 11 Pa. Dist. R. 616; *Sperry & H. Co. v. McKelvey Hughes Co.* (1916) 64 Pa. Super Ct. 57; *STATE EX REL. LINDSLEY v. GRADY* (reported here-with) ante, 383; *State v. Terry* (1917) 99 Wash. 1, 168 Pac. 513.

One who was not a party to the proceedings in which an injunctive order was entered, and who had no notice or knowledge of the existence of the injunctive order, actual or constructive, cannot be punished as for contempt in the doing of the thing prohibited by the order, even though the decree itself is broad enough to cover and include the act charged, and broad enough in its intent and purpose, and in its injunctive force, to include parties other than the immediate parties to the suit in which the order was entered. *Harris v. Hutchinson* (1913) 160 Iowa, 149, 44 L.R.A.(N.S.) 1035, 140 N. W. 830.

And in *Re Rice* (1910) 181 Fed. 217, where an attorney formed and carried through a scheme whereby an anticipated injunction order was violated by the client by his evasion of service of the injunction order, and the avoidance by both client and attorney of sources of information of the injunction order, during the confirmation of the deal which constituted the violation of the injunction, it was held that the guilt or innocence of the attorney, who was not a party to the injunction suit, turned solely upon the question whether he had knowledge or fair notice of the injunction when he acted, and that as there was some doubt as to his knowledge of the injunction, and contempt proceedings are highly punitive and criminal in

their nature, he was entitled to the benefit of the doubt, and could not be punished for a criminal contempt, unless the evidence made it clear that he intended to commit it.

To this general rule there is, however, an exception, resting in sound reason and supported by authority. Where the decree of injunction is not only in personam against the defendants in the injunction suit, but also operates in rem against specific property, or, rather, against a given illegal use of such property, the decree is a limitation upon the use of the property, of which all subsequent owners, lessees, or occupants must take notice. In such a case the decree, if broad enough in its terms to enjoin all persons, is sufficient as a public record to impart constructive notice to all persons. *State v. Terry* (Wash.) *supra*.

Thus, actual knowledge or notice of the injunction order is not necessary to convict for contempt a subsequent tenant or occupant, although not a party to the injunction suit, who violates an injunction restraining the defendants, and all other persons whomsoever, from maintaining a liquor nuisance in a certain building, since the injunctive decree, being of record, is a restriction in the nature of an encumbrance upon the use of the building, of which all subsequent owners, tenants, or occupants thereof must take notice at their peril. *State v. Porter* (1907) 76 Kan. 411, 13 L.R.A. (N.S.) 462, 91 Pac. 1073.

And the same was held in *Silvers v. Traverse* (1891) 82 Iowa, 52, 11 L.R.A. 804, 47 N. W. 888, and *Dermedy v. Jackson* (1910) 147 Iowa, 620, 125 N. W. 228, *supra*, IV.

The exception to the rule requiring notice or knowledge of the injunction in order to render persons, not parties to the injunction suit, guilty of contempt in violating the injunction, is not peculiar to injunctions against liquor nuisances, but injunction proceedings under the Red Light Law of the Washington Code, in so far as they are directed against specific property, are proceedings in rem, and an injunction issued therein binds all

persons thereafter dealing with the property, and a tenant, though not a party to the injunction suit, and without notice of the injunction, is guilty of contempt if he violates the same. *State v. Terry* (1917) 99 Wash. 1, 168 Pac. 513.

But in *Harris v. Hutchinson* (1913) 160 Iowa, 149, 44 L.R.A. (N.S.) 1035, 140 N. W. 830, holding that the clerk of a saloon keeper, who was not a party to the injunction suit, and was without knowledge of an injunction restraining his employer, and all persons, from maintaining a liquor nuisance upon the premises, was not guilty of contempt in making sales of liquor in violation of the injunction, it was unsuccessfully contended that actual knowledge was unnecessary because the injunctive decree gave the clerk constructive notice, and, in support of this contention, the cases of *Silvers v. Traverse* and *Dermedy v. Jackson* (Iowa) *supra*, were cited. In answer to this contention the court said: "It is contended that under these decisions a different rule obtains in cases of this kind, and a different rule is observed and enforced in injunctive orders involving the sale of intoxicating liquors. A careful analysis of these cases will show that the contention is not well taken. In the case of *Silvers v. Traverse*, it was not shown that the party charged with contempt did not have notice or knowledge of the existence of the decree at the time of the commission of the act charged as constituting a nuisance. It appears that the injunctive decree was entered against the lessor of the party charged with contempt, and that the decree, in its provisions, affected his lessor's right and interest in the property, and limited and cut off his power to use the property for the unlawful keeping and selling of intoxicating liquors; that the decree was a restriction upon the use of the property, which followed as a burden and, as it were, an encumbrance; and it was held that the party charged with contempt, having leased the property, took it subject to this restriction and burden, and was therefore charged

with notice of the existence of the injunctive order having affected the real estate itself, limiting and cutting off the power to use the property for the unlawful keeping or selling of intoxicating liquors; that, therefore, all persons dealing with the property, or acquiring interest therein, were charged with notice of the proceedings and of the existence of the decree, and the court, in support of this contention, cites § 2628 of the Code of 1886, which reads as follows: 'When a petition has been filed affecting real estate, the action is pending so as to charge third persons with notice of its pendency, and, while pending, no interests can be acquired by a third person in the subject-matter thereof, as against the plaintiff's title, if the real property affected be situated in the county where the petition is filed.' While the language in this decision is broad in its argumentative features, the decision itself really rests upon the fact that the party charged in that case was the lessee of the party enjoined, and as such lessee took possession of and used the property affected by the decree. The opinion says, in substance and effect: The decree was a restriction upon the use of the property, which followed it as a burden. That it placed an encumbrance or restriction upon the right to use the property, and that, the party charged having taken the property from the party enjoined and put it to a use violative of the terms of the decree, he was charged with notice of all the terms of the injunctive order, in so far as it affected the property so used. In the case of *Dermedy v. Jackson* (Iowa) *supra*, it is said: 'Whether ignorance of the decree would have been a good showing of excuse or defense, we have no occasion to determine. No such excuse or defense was offered, either by pleading or evidence.' The facts in this case were substantially the same, so far as the relationship of the party charged to the property was concerned, as were the facts in *Silvers v. Traverse*. The decision is practically bottomed on that case, and the holding, touching the matter of notice,

goes no farther than the facts upon which it rests, and lays down no other or different rule. It is true that in this opinion the following words were used: 'The decree was sufficiently broad in its terms to enjoin all persons from maintaining a nuisance on the premises therein described, and it was sufficient, as a public record, to impart constructive notice to all persons.' It is evident that those words were used with reference to the facts in that particular case, and where it says, 'It was sufficient as a public record to impart constructive notice to all persons,' it evidently meant, and should be understood as meaning, all persons dealing with the property as purchaser or lessee, or dealing with the property itself. We find nothing in these decisions that indicates that a different rule obtains in cases where one is charged with contempt in a violation of a liquor injunction, than obtains in other cases where one is charged with a violation of an injunctive decree; and we find nothing in these cases to indicate a holding on the part of this court that one could be convicted of contempt in the violation of a decree, where he had neither actual nor constructive notice of its existence. Every man is presumed to know the law; but we know of no authority for holding that every man is presumed to know the scope, purpose, and intentment, or even the existence, of decrees entered by every court in causes to which he was not a party. No man is ever presumed to know that which, from the very nature of the thing itself, it was not his duty to know, and no reason exists why he should know. The servant of the master is not presumed to know that which affects his master's title in and to his master's property, or that which affects the master's right to the use and occupancy of his property, because it was not his duty to know, and no reason exists why he should know. A party dealing with real property is presumed to know, when the same is a matter of record, that which affects the title or right to the use, occupancy, or enjoyment of the property. These principles are

elementary. In this case Harris was but the servant of Judge and Bunting, and, being but a servant, is not presumed to know, nor was it his duty to know, that which affected their title, or their right to the occupancy, use, or enjoyment of the premises. It was not his duty to know this, nor was there any reason why he should know this; and therefore, being but a servant in and about his master's business, he was not charged, by reason of such relationship, with notice or knowledge of the limitation in the decree, affecting their right to the use and occupancy of the premises; and we therefore hold that the court erred in holding the petitioner herein, Harris, guilty of contempt under the facts disclosed in this case, and the order, therefore, of conviction entered, is annulled."

VII. Sufficiency of notice of injunction.

To charge a person who is not a party to the injunction suit, with contempt for violating the injunction, it is not necessary that he be served with a copy of the injunction order, but it is sufficient to show that he has actual knowledge of such order. *United States v. Debs* (1894) 5 Inters. Com. Rep. 163, 64 Fed. 724; *United States v. Sweeney* (1899) 95 Fed. 434; *Re Wilk* (1907) 155 Fed. 943.

And the same was held in *Re Cogshall* (1903) 100 Mo. App. 585, 75 S. W. 183, although by statute it was provided that if any person disobey or violate an injunction, after it is served on him, etc.,—the court stating that actual notice was all the service required.

The evidence was held, in *Stewart v. United States* (1916) 150 C. C. A. 100, 236 Fed. 838, to meet the demands of the rule requiring notice or knowledge on the part of a stranger to the original proceeding, where the record showed that there was a general posting of printed copies of the injunction, that the persons charged with contempt were union miners, all living in the community in which the original controversy and sequential events were staged, and that, although all the defendants in the contempt proceed-

ings were witnesses in their own behalf, none of them pleaded ignorance or want of notice of the injunction.

Information given by the plaintiff's counsel in the injunction suit to an inspector of police, of an injunction issued against his predecessor in office, is sufficient notice to the inspector to render him guilty of contempt in violating the injunction, where the existence of the injunctio-nal order could easily have been verified, either by applying to the court, or by communicating with the counsel for the city. *Crucia v. Behrman* (1920) 147 La. 144, 84 So. 525.

But the mere publication in newspapers, and posting upon wagons, of an injunctio-nal order forbidding interference with teams of a teaming company, are not sufficient to charge with knowledge thereof, so as to render guilty of contempt one not a party to the proceeding, who assists in a riot in which such teams are interfered with, and those in charge of them assaulted, in opposition to his denial of knowledge and the legal presumption of his innocence. *Garri-gan v. United States* (1908) 23 L.R.A. (N.S.) 1295, 89 C. C. A. 494, 163 Fed. 16, writ of certiorari denied in (1909) 214 U. S. 514, 53 L. ed. 1063, 29 Sup. Ct. Rep. 696.

And notice to one not a party to an injunction suit, in which the defend-ants, and all others not then known, whose names and identity may there-after be disclosed, are restrained from continuing as members of the I. W. W., and from promulgating its doctrines, and from circulating its literature, is

not shown, where a copy of the decree has not been served upon him, by evidence that copies thereof have been posted in numerous places in the county where the injunction was issued, and that the issuance of the decree has been a matter of consider-able newspaper publicity and com-ment, but there is no testimony showing the length of time he had been in such county, except the statement of one of the witnesses that he had seen him in the county about a couple of days. *STATE EX REL. LINDSLEY v. GRADY* (reported herewith) ante, 383.

And it is stated in a dissenting opinion in *Lewes v. Morgan* (1818) 5 Price, 518, 146 Eng. Reprint, 681, 19 Revised Rep. 566, that a newspaper account is not such notice of the pro-ceedings of a court as should bring a party into contempt.

And notice of an injunction issued at the time of a strike growing out of an attempt to unionize a business, re-straining all persons with notice thereof from interfering in any man-ner with complainant's business, or compelling or inducing employees to refuse to work, will not render persons interfering with such em-ployees, in another attempt to union-ize the business several years later, guilty of contempt, unless the persons accused are associates of or represent defendants in the injunctio-nal decree, or the condition out of which the alleged attempt grows is a mere con-tinuation of the earlier strike. *TOSH v. WEST KENTUCKY COAL CO.* (reported herewith) ante, 376. G. V. L.

SALVADORE ZARZANA, by Guardian ad Litem, Respt.,
v.

NEVE DRUG COMPANY et al., Appts.

California Supreme Court (Dept. No. 2)—February 26, 1919.

(180 Cal. 32, 179 Pac. 203.)

Negligence — imputed — parent to child.

1. The negligence of a parent in permitting a child to be upon the street
15 A.L.R.—26.

without adequate attendance is not imputed to the child in an action by it for injuries inflicted upon it by negligent operation of a vehicle in the street.

[See note on this question beginning on page 414.]

Trial — question of fact — imputed negligence.

2. Whether or not the negligence of the parent should be imputed to a child suing in his own right for personal injuries alleged to have resulted from another's negligence is, where it is properly a part of the case, a question of fact for the jury.

Automobile — negligence of driver of motorcycle.

3. One driving a motorcycle at a

speed of 15 miles an hour, upon a wet and slippery pavement at a point where the street was crowded with pedestrians and other vehicles, may be found to be negligent where, when he attempted to stop to avoid striking a pedestrian, the machine skidded and injured the pedestrian and threw the rider over the handle bars.

[See 2 R. C. L. 1191.]

APPEAL by defendants from a judgment of the Superior Court for Sacramento County (Busick, J.) in favor of plaintiff in an action brought to recover for personal injuries alleged to have been caused by defendants' negligence. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Downey, Pullen, & Downey for appellants.

Mr. Fred J. Harris, for respondent:

Ordinary care, under the circumstances, required defendant to have sufficient control of his machine to stop it entirely if that became necessary to avoid injuring plaintiff.

Well v. Kreutzer, 134 Ky. 563, 24 L.R.A.(N.S.) 557, 121 S. W. 471; Lauson v. Fond du Lac, 141 Wis. 57, 25 L.R.A.(N.S.) 40, 135 Am. St. Rep. 30, 123 N. W. 629, 2 R. C. L. 1165; O'Dowd v. Newnham, 13 Ga. App. 220, 80 S. E. 36.

Whether permitting plaintiff to be on the street constituted negligence on the part of the parent depended not only upon his age, but upon his intelligence and physical ability.

Schierhold v. North Beach & M. R. Co. 40 Cal. 454; Karr v. Parks, 40 Cal. 191; Denver City Tramway Co. v. Brown, 57 Colo. 484, 143 Pac. 364; Ayers v. Ratshesky, 213 Mass. 589, 101 N. E. 78.

Lennon, J., delivered the opinion of the court:

In this action plaintiff sued in his own right for the sum of \$5,000, and recovered judgment in the sum of \$350, with costs of suit, as damages for personal injuries, the result of being struck by a motorcycle ridden and driven by the defendant Albert Holthaus, who at the time was in

the employ of the defendant Neve Drug Company. Issue was joined as to the negligence of the defendants, and as a special defense the answer of both defendants pleaded that "the injuries occurring to . . . plaintiff were proximately caused by the negligence of the parents of . . . plaintiff in allowing . . . plaintiff, a boy of five years of age, to be upon the highway where said accident occurred, unaccompanied and unprotected, except by an older brother of . . . plaintiff, who was then and there of tender age, and not a fit and proper person to accompany . . . plaintiff across said highway."

The action was tried by the court below without a jury, and the appeal is from the judgment upon a record which shows the facts of plaintiff's case, in so far as they appertain to the time, cause, and character of the accident, to be substantially as follows: The accident occurred between the hours of 5 and 6 o'clock P. M. on January 24, 1916, at the intersection of two streets in the residential district of the city of Sacramento, which streets at the time of the accident, as was usual at that hour of the day, were crowded with the traffic of pedestrians, street

cars, motor vehicles, and other conveyances. The injuries complained of consisted generally of bodily bruises and lacerations, and fractures of the bones of plaintiff's left leg. The plaintiff, a boy of five years of age, in company with his brother, two years older, was on his way from his home on an errand to near-by relatives. The boys had arrived at the northeast intersection of the streets in question as the defendant Holthaus was approaching on a motorcycle, traveling, as he testified when called as a witness for plaintiff, at a speed of 15 miles an hour, and at a time when the asphalt paved streets were wet and slippery. When approaching the intersection of said streets, and when 30 feet distant therefrom, the defendant Holthaus saw the plaintiff and his brother standing on the edge of the sidewalk. While Holthaus was approaching, the plaintiff and his brother, the latter holding plaintiff's hand, started to cross the street, and when within about 8 feet of the boys, Holthaus applied the brake of the motorcycle, with the result that the machine skidded upon the wet and slippery pavement, and collided with the plaintiff with great force, and caused the injuries complained of. The sudden stoppage of the machine, resulting from the application of the brake, precipitated Holthaus over the handlebars and onto the ground. The testimony is in conflict as to whether or not Holthaus, at any time after he saw the plaintiff and his brother standing on the corner, sounded the horn of his machine. The evidence is also in conflict as to whether it was daylight or dark at the time of the accident, but the fact that the motorcycle was without a light at the time of the accident is undisputed. Upon the conclusion of the plaintiff's case as thus outlined, the defendants interposed a motion for a nonsuit upon the ground that the plaintiff's evidence did not show negligence on the part of Holthaus, and did show as a matter of law "imputed negligence" on the part of the mother of plaintiff in allowing him to be ex-

posed to the hazards of the street without adequate protection. The trial court found that Holthaus was guilty of negligence which was the proximate cause of the injury, and that the parents of the plaintiff were not guilty of "imputed" or any negligence. The correctness of the trial court's ruling upon the motion for a nonsuit, and the claimed insufficiency of the evidence to support the trial court's finding of negligence, are the only points involved on the appeal.

The contention that the trial court was compelled, as a matter of law, upon the decision of the motion for a nonsuit, to deduce from plaintiff's proofs the existence of imputed contributory negligence on the part of plaintiff's parents sufficient to defeat plaintiff's action, is based upon the assumption that the doctrine of imputed negligence is a firmly fixed feature of the law of negligence in California, and has been adopted in this state to the extreme extent that, when such a defense is relied upon, as was done here, the question of whether or not there was such negligence is wholly and exclusively a question of law; and, with this assumption as a basis, it is argued that, even though the action was not by the parents in their own behalf, but was by the plaintiff alone, in his own right, for personal injuries to him, the court below should have invoked and applied the doctrine of plaintiff's case, and then have determined as a matter of law whether the claim of contributory negligence on the part of the parents was well or ill founded. This contention is attempted to be supported by the citation of the following cases: *Schierhold v. North Beach & M. R. Co.* 40 Cal. 447; *Meeks v. Southern P. R. Co.* 52 Cal. 602; *McQuilken v. Central P. R. Co.* 64 Cal. 463, 2 Pac. 46, 2 Am. Neg. Cas. 176; *Higgins v. Deeney*, 78 Cal. 578, 21 Pac. 428; *Daly v. Hinz*, 113 Cal. 366, 45 Pac. 693; *Fox v. Oakland Consol. Street R. Co.* 118 Cal. 55, 62 Am. St. Rep. 216, 50 Pac. 25. Our perusal of these cases has not satisfied us that the doctrine of a par-

ent's "imputed negligence" in the care and control of the activities of its child is firmly fixed as a part and parcel of the substantive law of this state, in so far as it concerns the adjudication of cases of an infant suing in his own right for compensation for personal injuries to him. All but two of the cases cited do no more, primarily and directly, than decide that the solution of the question of whether or not "imputed negligence" as a contributing cause of an infant's injury is one of fact or of law is dependent, as is commonly the case, upon a consideration of the evidentiary circumstances preceding and attending the infliction of the injury, and that when such circumstances, even though the evidence be nonconflicting, may, as oftentimes happens, readily and rightfully respond to one of two distinctly different deductions, the question of negligence, imputed or otherwise, is always a question of fact. Applying, as doubtless the trial court did, these fundamental and familiar principles of the general rules of evidence pertaining to

Trial-question of fact—imputed negligence.

the law of negligence to the facts of the case, it correctly concluded that the question presented, assuming it to be properly a part of the case, was one of fact, and not of law. *Meeks v. Southern P. R. Co.* 52 Cal. 602; *Daly v. Hinz*, 113 Cal. 366, 45 Pac. 693. But was the question properly a part of the case? Doubtless, where the parent is suing in his own right, the doctrine of imputed negligence applies (*Neff v. Cameron*, 213 Mo. 350, 18 L.R.A. (N.S.) 320, 127 Am. St. Rep. 606, 111 S. W. 1139); but in this behalf it will be noted that only in two of the cases relied upon to support the contention made here (*Meeks v. Southern P. R. Co.* and *Daly v. Hinz*, supra) does it appear that the injured infant was a plaintiff suing in his own right, and while the doctrine in question was in those cases dealt with, still it was not definitely and distinctly invoked and applied as a decisive factor in either case, nor

was its soundness, in so far as its applicability to the instant cases was concerned, challenged or considered in either case, and therefore we are of the opinion that it cannot be held that the tacit recognition of the doctrine in those two cases warrants the conclusion that the doctrine, unrestricted, was ever the carefully considered and finally accepted law of this state; and we have but little difficulty and less hesitation in here and now refusing to recognize the doctrine as having any application to cases of the character under consid-

Negligence—imputed—parent to child.

eration here, when we stop to consider that the doctrine found no sanction in the common law, was originally conceived in the sin of a far-fetched fiction, and wormed its way into the law of a few jurisdictions through the medium of a dictum declared in the case of *Hartfield v. Roper*, 21 Wend. 615, 34 Am. Dec. 273, 12 Am. Neg. Cas. 293, and thereafter blindly followed, despite the fact that it has never, so far as we are aware, been decisively accepted by any court of last resort where its soundness was squarely challenged, and, when challenged, it has been judicially anathematized by the "overwhelming weight of authority as well as of argument," as an obsolete and exploded legal heresy which was ever contrary to humanitarian and common-sense conceptions of the justice of rules which should be employed in the adjudication of the relative and immediate rights and wrongs of individuals (*Neff v. Cameron*, supra; *Robinson v. Cone*, 22 Vt. 213, 54 Am. Dec. 67; *Berry v. Lake Erie & W. R. Co.* (C. C.) 70 Fed. 682; *Chicago, G. W. R. Co. v. Kowalski*, 34 C. C. A. 1, 92 Fed. 312; *Wymore v. Mahaska County*, 78 Iowa, 398, 6 L.R.A. 545, 16 Am. St. Rep. 449, 43 N. W. 264; *Flaherty v. Butte Electric R. Co.* 40 Mont. 454, 135 Am. St. Rep. 630, 107 Pac. 410; *Shearm. & Redf. Contrib. Neg.* §§ 75, 78). Commenting on *Hartfield v. Roper*, supra, the parent case in the United States on the doctrine

of imputed negligence, and referring to the approval of the doctrine by the English courts, Beach on Contributory Negligence, 3d ed. § 127, has this to say: "The rule of imputed negligence, as applied to persons non sui juris, is an anomaly. The English law on this point presents an extraordinary illustration. On the one hand, it is held that the negligence of the person having charge of a child is the negligence of the child, and imputable to it, when the child comes into a court of justice and asks damages for an injury negligently inflicted upon it by the defendant. But, per contra, when a donkey is carelessly run down in the highway, where he is negligently exposed, the defendant is liable, and though oysters are negligently placed in a river bed, it is an injury redressible at law in damages for a vessel negligently to disturb them. It appears, therefore, that the child, were he an ass or an oyster, would secure a protection which is denied him as a human being of tender years, in such jurisdictions as enforce the English or the New York rule in this respect."

The rule first enunciated in *Robinson v. Cone*, 22 Vt. 213, 54 Am. Dec. 67, to the effect that the negligent exercise of a parent's care and control of a child is not to be imputed to the child as a defense to an action by the child itself for personal injuries, is abundantly approved by the rulings and reasoning to be found in twenty and more jurisdictions throughout the United States (*Shearm. & Redf. Contrib. Neg. supra*), and "in at least three states where the doctrine of *Hartfield v. Roper*, *supra*, was once followed,—Indiana, Minnesota, and Illinois,—it is now repudiated." *Neff v. Cameron*, *supra*. Following in the wake of the preponderating weight of authority, we may well and wisely, although somewhat tardily, declare that the rule of imputed negligence as applied to actions by children in their own right, no longer prevails, if it ever did prevail, in this jurisdiction.

The evidence sufficiently supports

the finding of negligence on the part of the defendant Holthaus. In this behalf it will be noted that at the time of the accident there was in force and effect the Motor Vehicle Act of 1915 (Stat. 1915, p. 397), which provided that "every person operating or driving a motor or other vehicle on the public highways of this state shall operate or drive the same in a careful and prudent manner and at a rate of speed not greater than is reasonable and proper, having regard to the traffic and use of the highway, and no person shall operate or drive a motor or other vehicle on a public highway at such rate of speed as to endanger the life or limb of any person or the safety of any property." § 22(b).

Aside from the mandate of the statute, the driver of a motor vehicle is bound to use reasonable care to anticipate the presence on the streets of other persons having equal rights with himself to be there. Motor vehicles have not as yet been granted an exclusive right of way over public thoroughfares. In the presence of the uncontroverted testimony that the defendant Holthaus, just prior to the accident, was driving his motorcycle at a speed of 15 miles an hour upon a wet and slippery street crowded with the traffic of street cars, motor vehicles, and pedestrians, which speed was sufficient, upon a sudden stoppage, to throw him over the handlebars, we cannot say that the trial court was not justified in finding that the defendant Holthaus was guilty of negligence. *O'Dowd v. Newnham*, 13 Ga. App. 220, 80 S. E. 36.

The judgment is affirmed.

We concur: **Melvin, J.; Wilbur, J.**

NOTE.

The question whether negligence of a parent or custodian is imputable to a child suing in his own right for a personal injury is considered in the annotation following *GALLAGHER v. JOHNSON*, post, 414.

EDWARD S. GULESSERIAN, by Guardian ad Litem, Respt.,
v.
MADISON RAILWAYS COMPANY, Appt.

Wisconsin Supreme Court — October 19, 1920.

(172 Wis. 400, 179 N. W. 573.)

Negligence — imputed — parent to child.

1. The negligence of a parent in driving an automobile in which his infant child is riding will not be imputed to the child to prevent a recovery by it for injuries inflicted by the negligence of a third person.

[See note on this question beginning on page 414.]

Street railways—negligence in operation of car — rounding corner without looking.

2. A motorman of a street car may be found to be negligent when, in attempting to round a corner with his car, he fails to see an automobile which is attempting to cross the tracks, until the car is within 10 feet of it.
[See 25 R. C. L. 1218-1220.]

— failure to observe movements of car — negligence.

3. The driver of an automobile who,

after seeing a street car standing at a street intersection, without knowing whether it was to continue along the street on which it stood or turn into an intersecting street across the path of the automobile, continues to drive his car toward the intersection without again looking to see what the car will do until it appears on the track only 10 feet away, and collision is imminent, is negligent.

[See 25 R. C. L. 1279.]

APPEAL by defendant from a judgment of the Circuit Court for Dane County (Stevens, J.) in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

Statement by Siebecker, Ch. J.:

This action was brought for injuries to the eye of the plaintiff alleged to have been received through negligence of the defendant. The injuries were received through a collision between a street car of defendant company and an automobile in which plaintiff was riding. The collision took place at the intersection of University avenue and Mills street, in the city of Madison.

The complaint alleges in substance: That a street car of defendant was standing on University avenue tracks near the Mills street switch; that the defendant was negligent in that it started up the street car suddenly and turned it onto Mills street without any warning, causing it to collide with the automobile in which plaintiff was riding, when the motorman in the exercise of ordinary care should have seen that the

automobile was about to cross said tracks; that the defendant was further negligent in that the street car was operated at a high rate of speed under the circumstances; that the car was not kept under proper control; and that it was not stopped as soon as it could have been stopped by the motorman after he saw or should have seen that the automobile was in or near the zone of danger.

The answer denies each of the allegations of negligence set forth in the complaint; alleges that the car was operated with due care and in the manner in which street cars are customarily operated by similar companies under similar circumstances; alleges that the injuries received by plaintiff were due wholly to the negligence of the plaintiff or his mother.

The case was tried before the court and a jury. By a special ver-

dict the jury found that the injuries of plaintiff were due to the negligence of defendant, and that no negligence on the part of the mother of the plaintiff contributed to the injuries of the plaintiff. Judgment on the verdict was rendered in favor of the plaintiff in the sum of \$713.87 damages and costs. This is an appeal from such judgment.

Messrs. Jones & Schubring, for appellant:

The motorman had the right to assume that the automobile, when he first saw it, being out of the zone of danger, would keep out.

Cawley v. La Crosse City R. Co. 106 Wis. 239, 82 N. W. 197; Watermolen v. Fox River Electric R. & Power Co. 110 Wis. 153, 85 N. W. 663; Stafford v. Chippewa Valley Electric R. Co. 110 Wis. 331, 85 N. W. 1036; McCabe v. Milwaukee Electric R. & Light Co. 156 Wis. 621, 146 N. W. 806; Kuchler v. Milwaukee Electric R. & Light Co. 157 Wis. 107, 146 N. W. 1138, Ann. Cas. 1916A, 891; Kuhn v. Milwaukee Electric R. & Light Co. 158 Wis. 525, 149 N. W. 220, Ann. Cas. 1916E, 678.

The street car had the right of way. Watermolen v. Fox River Electric R. & Power Co. 110 Wis. 153, 85 N. W. 663; Stafford v. Chippewa Valley Electric R. Co. 110 Wis. 333, 85 N. W. 1036; Tesch v. Milwaukee Electric R. & Light Co. 108 Wis. 593, 53 L.R.A. 618, 84 N. W. 823, 9 Am. Neg. Rep. 388.

The driver of the automobile in which the plaintiff was riding was guilty of contributory negligence.

Meissner v. Southern Wisconsin R. Co. 160 Wis. 507, 152 N. W. 291; Dering v. Milwaukee Electric R. & Light Co. 171 Wis. 8, 14 A.L.R. 809, 176 N. W. 343; Vetter v. Southern Wisconsin R. Co. 140 Wis. 296, 122 N. W. 731; Henke v. Milwaukee Electric R. & Light Co. 147 Wis. 661, 133 N. W. 1107; Schliesleder v. Milwaukee Electric R. & Light Co. 147 Wis. 668, 134 N. W. 144.

The contributory negligence of the mother who was driving the car is imputable to the plaintiff.

Kuchler v. Milwaukee Electric R. & Light Co. 157 Wis. 107, 146 N. W. 1138, Ann. Cas. 1916A, 891; Ewen v. Chicago & N. W. R. Co. 38 Wis. 613; Johnson v. Chicago & N. W. R. Co. 49 Wis. 529, 5 N. W. 886; Hoppe v. Chicago, M. & St. P. R. Co. 61 Wis. 357, 21 N. W. 227; Parish v. Eden, 62

Wis. 272, 22 N. W. 399; Dahl v. Milwaukee City R. Co. 62 Wis. 652, 22 N. W. 755; Monrean v. Eastern Wisconsin R. & Light Co. 152 Wis. 618, 140 N. W. 309; Compt v. C. H. Starke Dredge & Dock Co. 129 Wis. 622, 9 L.R.A.(N.S.) 652, 109 N. W. 650; Prideaux v. Mineral Point, 43 Wis. 513, 28 Am. Rep. 558; Hartfield v. Roper, 21 Wend. 615, 34 Am. Dec. 273, 12 Am. Neg. Cas. 293; Holly v. Boston Gaslight Co. 8 Gray, 123, 69 Am. Dec. 233; Fitzgerald v. St. Paul, M. & M. R. Co. 29 Minn. 336, 43 Am. Rep. 212, 13 N. W. 168; Wright v. Malden & M. R. Co. 4 Allen, 283; Callahan v. Bean, 9 Allen, 401; Gibbons v. Williams, 135 Mass. 333; Casey v. Smith, 152 Mass. 294, 9 L.R.A. 259, 23 Am. St. Rep. 842, 25 N. E. 734; Canavan v. Stuyvesant, 12 Misc. 74, 33 N. Y. Supp. 53; Metcalfe v. Rochester R. Co. 12 App. Div. 147, 42 N. Y. Supp. 661; Finkelstein v. American Ice Co. 88 N. Y. Supp. 942; Juskowitz v. Dry Dock, E. B. & B. R. Co. 25 Misc. 64, 53 N. Y. Supp. 992; Lifschitz v. Dry Dock, E. B. & B. R. Co. 67 App. Div. 602, 73 N. Y. Supp. 888; Meeks v. Southern P. R. Co. 52 Cal. 602; Kyne v. Wilmington & N. R. Co. 8 Houst. 185, 14 Atl. 922; McMahon v. Northern C. R. Co. 39 Md. 438; Leslie v. Lewiston, 62 Me. 468; Delaware, L. & W. R. Co. v. Devore, 52 C. C. A. 77, 114 Fed. 155; Peterson v. Martin, 138 Minn. 195, 164 N. W. 813.

Messrs. Crownhart & Wylie, for respondent:

The motorman was negligent in not keeping a lookout.

Dahl v. Milwaukee City R. Co. 65 Wis. 371, 27 N. W. 185; Slensby v. Milwaukee Street R. Co. 95 Wis. 179, 70 N. W. 67, 1 Am. Neg. Rep. 393; Hanlon v. Milwaukee Electric R. & Light Co. 118 Wis. 210, 95 N. W. 100; Forrestal v. Milwaukee Electric R. & Light Co. 119 Wis. 495, 97 N. W. 182; Glettler v. Sheboygan Light, P. & R. Co. 130 Wis. 137, 109 N. W. 973; Gould v. Merrill R. & Lighting Co. 139 Wis. 433, 121 N. W. 161; Zucker v. Johnson, 158 Wis. 81, 146 N. W. 1127; Kramer v. Chicago & M. E. R. Co. 171 Wis. 627, 177 N. W. 874; Van Salvellergh v. Green Bay Traction Co. 132 Wis. 166, 111 N. W. 1120.

The motorman was negligent in not ringing the gong.

Coel v. Green Bay Traction Co. 147 Wis. 229, 133 N. W. 23; 86 Cyc. 1483; 25 R. C. L. 1242; Kujawa v. Chicago, M. & St. P. R. Co. 135 Wis. 562, 116

N. W. 249; *Michaels v. Chicago*, B. & Q. R. Co. 146 Wis. 466, 131 N. W. 892; *Burns v. North Chicago Rolling-Mill Co.* 65 Wis. 312, 27 N. W. 43; *Rohde v. Chicago & N. W. R. Co.* 86 Wis. 309, 56 N. W. 872; *Derr v. Chicago, M. & St. P. R. Co.* 163 Wis. 234, 157 N. W. 753.

The negligent character of defendant's acts is not changed, nor the defendant relieved of liability, by "right of way."

Stafford v. Chippewa Valley Electric R. Co. 110 Wis. 331, 85 N. W. 1036; 25 R. C. L. 1238; *O'Malley v. Dorn*, 7 Wis. 236, 73 Am. Dec. 403.

The verdict that Mrs. Gulesserian was not guilty of contributory negligence cannot be changed.

Derr v. Chicago, M. & St. P. R. Co. supra; *Grimm v. Milwaukee Electric R. & Light Co.* 138 Wis. 44, 119 N. W. 833; *Dahinden v. Milwaukee Electric R. & Light Co.* 169 Wis. 1, 171 N. W. 669; *Merrill v. Chicago, N. S. & M. R. Co.* 171 Wis. 464, 177 N. W. 613; *Dering v. Milwaukee Electric R. & Light Co.* 171 Wis. 8, 14 A.L.R. 809, 176 N. W. 343.

Contributory negligence on the part of Mrs. Gulesserian would not be imputable to the infant plaintiff.

29 Cyc. 552; 20 R. C. L. 165; *Chicago City R. Co. v. Wilcox*, 21 L.R.A. 76, note; *Neff v. Cameron*, 18 L.R.A. (N.S.) 320, note; *Louisville & N. R. Co. v. Wilkins*, Ann. Cas. 1912D, 521, note; 1 *Thomp. Neg.* 271; *Mattson v. Minnesota & N. W. R. Co.* 95 Minn. 477, 70 L.R.A. 503, 111 Am. St. Rep. 483, 104 N. W. 443, 5 Ann. Cas. 498, 18 Am. Neg. Rep. 511.

Siebecker, Ch. J., delivered the opinion of the court:

The appellant contends that the evidence fails to sustain the jury in finding the defendant negligent. It is alleged that the motorman neglected to sound the gong as a warning when he started the street car to make the turn from University avenue onto Mills street, and that he omitted to keep a proper lookout for travelers using the avenue at the Mills street crossing. The evidence shows that no warning was given by the motorman as he started the car to make this turn onto Mills street. True, as appellant claims, Mrs. Gulesserian, when about 125 feet to the west of the car on the avenue,

had observed the car standing on the north track on the avenue where all cars stop, whether west bound on the avenue or south bound on Mills street. It appears that she continued her course of travel towards the Mills street crossing, and had reached a point about 10 feet west of the Mills street track when the motorman saw her coming. He immediately applied the brakes and stopped the car within a distance of about 10 feet. This tends to show that he had taken no observation of the street to ascertain whether Mrs. Gulesserian or any other traveler was approaching the track, from the time he started and crossed over the street car tracks on the avenue up to the point where he observed Mrs. Gulesserian about 10 feet from him. From this state of the evidence the jury was justified in concluding that he negligently omitted to warn approaching travelers of the starting of the street car on the turn across the avenue onto Mills street, and that he failed to exercise ordinary care in keeping a proper lookout of the unobstructed view to ascertain whether or not travelers were approaching the track of his car at the crossing so as to avoid colliding with them. The conditions of travel on the avenue and the course in which the street car was being driven at the crossing required that the motorman keep a lookout and conduct his car with reasonable safety to protect others using the street near the crossing.

"Motormen in charge of electric cars are required, in the exercise of ordinary care, to keep a proper lookout as to the tracks and the streets upon which the cars are operated, to avoid collision with persons and vehicles on the streets. . . . He must observe the streets adjacent to the tracks sufficiently to enable him to ascertain whether persons are approaching or are about to approach the track, and, if such persons are in danger of being struck by the car, he must do all that an ordinarily careful

Street railways—
negligence in
operation of car
—rounding cor-
ner without
looking.

and prudent motorman would do to avoid" injury. Glettler v. Sheboygan Light, P. & R. Co. 130 Wis. 137, 109 N. W. 973; Dahl v. Milwaukee City R. Co. 65 Wis. 371, 27 N. W. 187.

It is considered that the verdict finding the defendant guilty of negligence, and that this negligence was a proximate cause of plaintiff's injury, must stand.

It is averred that Mrs. Gulesserian, the driver of the automobile, was guilty of contributory negligence in causing the collision. It appears that she was driving her car at a speed of from 8 to 12 miles per hour from the time she first saw the street car standing on the avenue about 124 feet distant from her up to the time of collision; that she had a clear view of the street car at all times; that she did not know whether the car was a west or south bound car; that she continued to approach the Mills street crossing, looked to the south on Mills street for approaching street cars or automobiles and for travelers near the crossing on the avenue and Mills street, and failed to look for the street car before attempting to cross the Mills street track until she was within about 10 feet of the car approaching her. There was nothing to prevent her from seeing the car at any time while she drove the automobile a distance of about 114 feet, nor from stopping the automobile before entering the zone of danger. It is urged that she was excused for her failure to look for the street car as she approached the track, because she was engaged in looking to the south to ascertain if any car or vehicle was approaching her course of travel, and that this absorbed her attention, and that, since the street car gong had not been sounded to warn her of its starting, she rightfully assumed that she had a safe course to cross the Mills street track before the car would reach her. This claim is refuted by the fact that the street car was plainly in her view from the time it started and had traveled a distance of fully 50 feet, and that she

could readily have cast her view towards it while driving the automobile. She was aware that the car was there to go either west on the avenue or south on Mills street. Under these circumstances it seems inexcusable for her to attempt to cross the Mills street track without looking in time to see whether or not the car was coming on the Mills street track, and in failing to stop her automobile before entering the zone of danger.

-failure to observe movements of car-negligence.

These circumstances permit of but one inference, namely, that Mrs. Gulesserian was guilty of a want of ordinary care in attempting to cross the street railway as she did in view of the approaching street car with which the automobile collided. The trial court erred in not granting defendant's motion to change the jury's answers to questions 5, 6, and 7 from "No" to "Yes."

The question remains: Is such contributory negligence of Mrs. Gulesserian imputable to this infant plaintiff? The proposition that the contributory negligence of a parent concurring with the negligence of a third person, which proximately caused an injury to a child, precludes the parent from recovering damages from such third person resulting from such injury to the child, is recognized in the cases in this court, cited to our attention by appellant's counsel. These adjudications, however, do not rule the instant case. No case is cited, nor has any case been called to our attention, holding that such contributory negligence of the parent is imputable to the child in an action by the child to recover damages for an injury for the actionable negligence of such third person. On the question whether, in an action by a child of tender years to recover damages for an injury caused by the actionable negligence of a third party, the contributory negligence of the parent having care of the child is to be imputed to such child to bar recovery by the child, the adjudications are in conflict.

Several jurisdictions, including New York and Massachusetts, hold that such contributory negligence of the parent defeats the child's action. But the great weight of authority is to the contrary holding, that the negligence of the parent having custody of the child contributing to the injury of the child will not be imputed to the child to bar its right of action for actionable negligence against a third person.

In *Mattson v. Minnesota & N. W. R. Co.* 95 Minn. 477, 70 L.R.A. 503, 111 Am. St. Rep. 483, 104 N. W. 443, 5 Ann. Cas. 498, 14 Am. Neg. Rep. 511, the court reconsidered this question and reversed its former decision on the subject in the case of *Fitzgerald v. St. Paul, M. & M. R. Co.* 29 Minn. 336, 43 Am. Rep. 212, 13 N. W. 168. It is there declared: "The right of an infant to damages for injuries to his person caused by the wrongful act of others is a property right, and entitled to the same protection in the courts as is accorded other property held or owned by him. He is entitled to the protection of the law equally with persons who have attained their majority, and to refuse him relief on the ground of his parents' indifference or negligence would be to deny it to him. To impute to him negligence of others is harsh in the extreme, whether the negligence so imputed be that of his parents, their servants, or his guardian."

Bishop (Non-contract Law, § 573) characterizes the imputed negligence doctrine as to children "as flatly in conflict with the established system of the common law as anything possible to be suggested. The law never took away a child's property because his parent was poor or shiftless or a scoundrel, or because anybody who could be made to respond to a suit for damages was a negligent custodian of it."

The cases bearing on this question and on the question of the rights of parents and other beneficiaries to recover for injuries to infants proximately caused by the actionable negligence of others contributed to

by parents and custodians of such infants are collected in 21 L.R.A. 76, note to *Chicago City R. Co. v. Wilcox*; 20 R. C. L. §§ 128 and 129; 38 L.R.A. (N.S.) 754, note to *Nashville Lumber Co. v. Busbee*; 18 L.R.A. (N.S.) 320, note to *Neff v. Cameron*; and in *Feldman v. Detroit United R. Co.* 162 Mich. 486, 127 N. W. 687, where the court declares: "We find from an examination of the authorities that the question has been considered by the courts in three classes of cases: (1) In actions brought by the child in its own right; (2) in actions brought by the parents for loss of service; (3) in actions brought under Lord Campbell's Act by the personal representative of the child to recover for loss of services to the parent. In the first class of cases, by the great weight of authority, it is held that the negligence of the parent cannot be imputed to the child. In the second class the negligence of the parent will bar the action. In the third class, where, although the action is brought by the personal representative for the benefit of the child, if the parent is the real beneficiary, his contributory negligence will be imputed to the child."

See cases cited in the opinion of the court.

It is considered that the doctrine approved in the foregoing citations and authors, holding that the contributory negligence of the parent or custodian of the child will not preclude recovery by the child for negligent injury, is a just rule, and should be adopted in the jurisprudence of this state. We do not regard the observations made in *Prideaux v. Mineral Point*, 43 Wis. 513, 28 Am. Rep. 558, as controlling in this case. It is there stated: "When paterfamilias drives his wife and child in his own vehicle, he is surely their agent in driving them, to charge them with his negligence."

Furthermore, this observation of the court was made where the hus-

Negligence—
imputed—parent
to child.

band and wife brought action for injuries to the wife caused by a defective highway. The question above mentioned was not involved in the case.

The judgment is affirmed.

Kerwin, Eschweiler, and Jones, JJ., took no part.

NOTE.

The question whether negligence of a parent or custodian is imputable to a child suing in his own right for personal injury is considered in the annotation following (GALLAGHER v. JOHNSON) post, 414.

JOHN J. GALLAGHER, JR., by Next Friend,

v.

FREDERICK H. JOHNSON.

JOHN J. GALLAGHER

v.

SAME.

Massachusetts Supreme Judicial Court — March 7, 1921.

(— Mass. —, 130 N. E. 174.)

Negligence — imputed — parent and child.

1. An infant of tender years in custody of his father is chargeable with his father's negligence so that he cannot recover for physical injuries negligently inflicted upon him if his father's negligence contributed to the injury.

[See note on this question beginning on page 414.]

Evidence — burden of proof — negligence of parent.

2. A child in custody of its father, being chargeable with the father's negligence, is entitled to the benefit of a statute providing that in actions to recover for injuries the person injured shall be presumed to have been

in the exercise of due care, and contributory negligence on his part must be proved by defendant; and therefore if the negligence of the parent is relied on as a defense to the action the defendant has the burden of proving it.

EXCEPTIONS by defendant to rulings of the Superior Court for Suffolk County (White, J.) made during the trial of separate actions brought to recover compensation for personal injuries sustained by the minor plaintiff in a collision with defendant's automobile, and to recover expenses incurred by the plaintiff father for his care and for damage to his automobile, which resulted in a verdict for plaintiff in each case. *Overruled.*

The facts are stated in the opinion of the court.

Messrs. T. H. Calhoun and Edward J. Sullivan, for defendant:

There is a presumption that a child of four years and two months is incapable of exercising due care. He is entitled to the care of those in whose custody he may be, and their negligence is imputable to him.

Callahan v. Bean, 9 Allen, 402; Shultz v. Old Colony Street R. Co. 193 Mass. 315, 8 L.R.A. (N.S.) 597, 118 Am. St. Rep. 502, 79 N. E. 873, 9 Ann. Cas. 402.

The burden was upon the minor plaintiff of proving not only the negligence of the defendant, but that his

father, operating the automobile in which he was riding, was in the exercise of due care.

Bullard v. Boston Elev. R. Co. 226 Mass. 262, 115 N. E. 294.

Mr. John F. McDonald for plaintiff.

Rugg, Ch. J., delivered the opinion of the court:

These are two actions of tort. The first is by a boy four years and two months old on July 21, 1917, by his father and next friend, to recover compensation for personal injuries arising from a collision on that date between an automobile owned and driven by his father and an automobile owned by the defendant and operated by his servant. The second action is by the father of the plaintiff in the first action to recover expenses incurred by him in the care of his son rendered necessary by his injuries, and also for damages to his automobile. Confessedly the collision of the automobiles took place. There was evidence tending to show negligence on the part of the defendant's servant contributing to the collision, and also on the part of the adult plaintiff. The charge of the judge now material was in these words: "In his case the boy has no independent standing from his father so far as the matter of liability is concerned. In other words his case must stand or fall with his father's, because the relationship between them is that of father and son. The boy was not old enough, nor was he in the condition, to exercise any independent due care on his own part, and so he is to have the benefit of the due care of his father in so far as his father exercised due care; and he is also charged with the negligence of the father in case the father is negligent. And so the cases stand or fall upon the due care or negligence of the father. . . . The burden of proof is upon him [John J. Gallagher, Sr.] of proving by the fair weight of the evidence that the defendant was negligent, and, if proving that, he is entitled to have compensation awarded him, unless the defendant maintains his burden of

proving his allegation of contributory negligence on the part of the plaintiff, which would prevent his recovering. If the plaintiff was guilty of any negligence which contributed to the accident, he can't recover. Broadly, it must appear, in order to enable the plaintiff to recover, that the accident happened and happened wholly on account of the negligence of the defendant, and if you shall decide that in the case of the senior, then the boy's case would follow his and he would be entitled to have his compensation assessed. If you shall find that there was contributory negligence [on the part of the father], of course, then there is no recovery by either of the plaintiffs."

No requests for instructions were presented by the defendant. The only question to be decided concerns the correctness of the charge so far as raised by the defendant's exception "to so much of the charge as stated in substance that in the first action the burden of proof was upon the defendant to show want of due care on the part of the driver of the automobile in which the plaintiff in the first action was riding."

No question is presented as to Stat. 1914, chap. 553, as applicable to the boy alone.

Manifestly, the child plaintiff, riding on the seat beside his father, who was driving the automobile, was too young to be capable of exercising any self-reliant care for his own safety. He was in the immediate control of his father, who was responsible for his preservation from hazard. It was the father's duty to watch over him and guard him from danger. He had a right to his father's protection. At common law, without merit or fault in respect of his own conduct, the child was entitled to the benefit of his father's vigilance and forethought, and was subject to all disadvantages resulting from any failure of performance of that parental duty. Ordinary care in that particular, as well as negligence on the part of the

father, would be attributable and imputed to the child.

**Negligence—
imputed—parent
and child.**

Being in the actual physical custody of his father, the child was identified with him so far as concerns due care and negligence. *Holly v. Boston Gaslight Co.* 8 Gray, 123, 130, 69 Am. Dec. 233; *Gibbons v. Williams*, 135 Mass. 333, 335; *Casey v. Smith*, 152 Mass. 294, 9 L.R.A. 259, 23 Am. St. Rep. 842, 25 N. E. 734; *Marchant v. Boston & M. R. Co.* 228 Mass. 472, 476, 117 N. E. 842, 18 N. C. C. A. 315; *Sughrue v. Bay State Street R. Co.* 230 Mass. 363, 119 N. E. 660. This principle of law arises out of the family. It recognizes the parent in a sense as the repository of a trust to nurture and protect his offspring. It charges him with responsibility on that footing. The natural fact of entire dependence of so young a child upon the parent is thus adopted as the basis of legal rights and obligations. This principle is quite disconnected with the law of master and servant, host and guest, joint adventurers, or any other association of life. It was thoroughly established in our law long before the enactment of Stat. 1914, chap. 553. That statute provides in § 1 that "in all actions . . . to recover damages for injuries to the person or property, . . . the person injured . . . shall be presumed to have been in the exercise of due care, and contributory negligence on his . . . part shall be an affirmative defense to be . . . proved by the defendant."

It must be assumed, in the absence of evidence on that point, that the circumstances in the case at bar were such as to render that statute applicable in favor of the father in the action in which he was plaintiff, because the jury were so instructed and no exception was taken. The father was a person seeking to recover damages for injury to his property, and hence he was within the words of the statute. He was himself the person in the active

operation of his own automobile. Therefore his conduct was the immediate object of inquiry as a vital issue on the trial of the action in which he was the plaintiff. His acts and omissions according to the law had precisely the same bearing in every particular in respect to the safety of his minor son that they had in respect to himself. When the common law has established such identity between the father and his son of tender years, and has so fully imputed to such child every element in the behavior of the parent having relation to either due care or negligence, it is rational to presume that the legislature intended any presumption created by it for the benefit of the father to inure equally for the benefit of the son under such circumstances as are here disclosed.

**Evidence—
burden of proof
—negligence of
parent.**

The father in the case at bar is a "person injured" because he is suing for a property damage. The son is a "person injured" because his action is brought to recover damages for injury to his person. Both are within the words of the statute. There would be a seeming inconsistency in holding that the father, in respect of his conduct so far as it affected his own rights, was entitled to the presumption of due care, with the burden of proving the contrary upon the defendant, and at the same time holding that his son as plaintiff was not entitled to the same benefits in respect of the same identical conduct so far as it affected his rights, notwithstanding the identity of the two established by general principles of law. The facts here disclosed do not require such inconsistency in the interpretation of the statute.

There is nothing at variance with this conclusion in *Bullard v. Boston Elev. R. Co.* 226 Mass. 262, 115 N. E. 294. The analysis of the statute there made shows that the presumption thereby created is available in general only in respect of the person injured. Its words are not applicable to the relation of master and

servant, nor to kindred cases. The principle there declared does not reach to the facts here disclosed, where both the father and son are injured by the same accident and the latter is so young as to be wholly dependent upon and identified with the due care or negligence of his father. The case at bar is distinguishable from *Sullivan v. Chadwick*, 236 Mass. 130, 127 N. E. 632, where the parents of the injured

child were not present nor injured, and were plainly negligent in their own conduct in regard to the child, and the plaintiff's case was rested on the deportment of the child alone, who did not exercise the requisite degree of care.

The defendant fails to show any harmful error in the instructions, which were sufficiently favorable to it.

Exceptions overruled.

ANNOTATION.

Imputing negligence of parent or custodian to child in action by or on behalf of child for personal injury.

- I. Introductory, 414.
- II. Majority view, 414.
- III. Minority view, 423.

I. Introductory.

The discussion in this note is limited to cases wherein the question has been raised whether, in an action brought by or in behalf of an injured child, the negligence of the parent or custodian should be imputed to the child. Cases involving actions brought by a parent or personal representative for the loss of services and expenses occasioned by the injury of a child, or for pecuniary damage on account of the death of a child, are not within the scope of the note and are excluded.

II. Majority view.

The rule adopted in a majority of the jurisdictions is that in an action by or in behalf of an infant of tender years for a personal injury, the fault or contributory negligence of its parent or custodian cannot be imputed to the child.

United States.—*Berry v. Lake Erie & W. R. Co.* (1895) 70 Fed. 679; *Chicago G. W. R. Co. v. Kowalski* (1899) 34 C. C. A. 1, 92 Fed. 310; *St. Louis & S. F. R. Co. v. Underwood* (1912) 114 C. C. A. 323, 194 Fed. 363, 3 N. C. C. A. 467. Compare *Delaware, L. & W. R. Co. v. Devore* (1902) 52 C. C. A. 77, 114 Fed. 155; *Grethen v. Chicago, M. & St. P. R. Co.* (1884) 22 Fed. 609; *The Burgundia* (1886) 29 Fed. 464.

Alabama.—*Government Street R.*

Co. v. Hanlon (1875) 53 Ala. 70; *Bay Shore R. Co. v. Harris* (1880) 67 Ala. 6, 2 Am. Neg. Cas. 1; *Alabama G. S. R. Co. v. Burgess* (1897) 116 Ala. 509, 22 So. 913; *Southern R. Co. v. Forrister* (1908) 158 Ala. 477, 48 So. 69; *Southern R. Co. v. Shipp* (1910) 169 Ala. 327, 53 So. 150; *Clover Creamery Co. v. Diehl* (1913) 183 Ala. 429, 63 So. 196, 7 N. C. C. A. 124; *Jones v. Strickland* (1917) 201 Ala. 138, 77 So. 562. See also *Pratt Coal & I. Co. v. Brawley* (1887) 83 Ala. 371, 3 Am. St. Rep. 751, 3 So. 555.

Arkansas.—*St. Louis, I. M. & S. R. Co. v. Rexroad* (1894) 59 Ark. 180, 26 S. W. 1037; *St. Louis, I. M. & S. R. Co. v. Colum* (1903) 72 Ark. 1, 77 S. W. 596; *St. Louis Southwestern R. Co. v. Cochran* (1905) 77 Ark. 398, 91 S. W. 747; *St. Louis, I. M. & S. R. Co. v. Flinn* (1908) 88 Ark. 484, 115 S. W. 142; *Nashville Lumber Co. v. Busbee* (1911) 100 Ark. 76, 38 L.R.A. (N.S.) 754, 139 S. W. 801.

California.—*ZARZANA v. NEVE DRUG Co.* (reported herewith) ante, 401: Compare the following cases which have been overruled: *Schierhold v. North Beach & M. R. Co.* (1870) 40 Cal. 447; *Meeks v. Southern P. R. Co.* (1878) 52 Cal. 604.

Colorado.—*Denver City Tramway Co. v. Brown* (1914) 57 Colo. 484, 143 Pac. 364, 9 N. C. C. A. 614.

Connecticut.—*Birge v. Gardiner* (1849) 19 Conn. 507, 50 Am. Dec. 261; *Daley v. Norwich & W. R. Co.* (1857)

26 Conn. 591, 68 Am. Dec. 413; *Bronson v. Southbury* (1870) 37 Conn. 199.

District of Columbia.—*Moore v. Metropolitan R. Co.* (1883) 2 Mackey, 437, reversed on other grounds in (1887) 121 U. S. 558, 30 L. ed. 1022, 7 Sup. Ct. Rep. 1334.

Florida.—*Jacksonville Electric Co. v. Adams* (1905) 50 Fla. 429, 39 So. 183, 7 Ann. Cas. 241; *Atlantic Coast R. Co. v. Crosby* (1907) 53 Fla. 400, 48 So. 318.

Georgia.—*Ferguson v. Columbus & R. R. Co.* (1886) 77 Ga. 102; *Atlanta & C. Air-Line R. Co. v. Gravitt* (1893) 93 Ga. 369, 26 L.R.A. 553, 44 Am. St. Rep. 145, 20 S. E. 550; *Herrington v. Macon* (1906) 125 Ga. 58, 54 S. E. 71; *Williams v. Jones* (1921) — Ga. App. —, 106 S. E. 616.

Illinois.—*Aurora Branch R. Co. v. Grimes* (1851) 13 Ill. 585; *Chicago v. Major* (1857) 18 Ill. 349, 68 Am. Dec. 553; *Chicago v. Starr* (1866) 42 Ill. 174, 89 Am. Dec. 422; *Chester v. Porter* (1868) 47 Ill. 66; *Pittsburg, Ft. W. & C. R. Co. v. Bumstead* (1868) 48 Ill. 221, 95 Am. Dec. 539; *Chicago & A. R. Co. v. Gregory* (1871) 58 Ill. 226; *Chicago & A. R. Co. v. Becker* (1875) 76 Ill. 25, s. c. on subsequent appeal (1877) 84 Ill. 483; *Chicago City R. Co. v. Wilcox* (1891) 138 Ill. 370, 21 L.R.A. 76, 27 N. E. 899, 11 Am. Neg. Cas. 402. An opinion previously rendered in this case to the same effect is reported in (1890) — Ill. —, 8 L.R.A. 494, 24 N. E. 419, explaining *Hund v. Geier* (1874) 72 Ill. 393; *Gavin v. Chicago* (1880) 97 Ill. 66, 37 Am. Rep. 99; *Chicago v. Hering* (1876) 83 Ill. 204, 25 Am. Rep. 378; *Toledo, W. & W. R. Co. v. Grable* (1878) 88 Ill. 441; *Richardson v. Nelson* (1916) 221 Ill. 254, 77 N. E. 583, 20 Am. Neg. Rep. 297; *Perryman v. Chicago City R. Co.* (1909) 242 Ill. 269, 89 N. E. 980, affirming (1908) 145 Ill. App. 187; *Jansen v. Siddal* (1891) 41 Ill. App. 279, reversed on other grounds in (1892) 143 Ill. 537, 30 N. E. 357, 32 N. E. 384; *Murphysboro v. Woolsey* (1893) 47 Ill. App. 447; *Louisville & St. L. Consol. R. Co. v. Gobin* (1894) 52 Ill. App. 565; *Heldmaier v. Taman* (1900) 88 Ill. App. 209, affirmed in (1900) 188 Ill. 283, 58 N. E. 960; *Rendahl v. Walsh*

(1908) 145 Ill. App. 601; *Clark v. Chicago* (1912) 174 Ill. App. 145; *Lovas v. Independent Breweries Co.* (1916) 199 Ill. App. 60.

Indiana.—*Evansville v. Senhenn* (1898) 151 Ind. 42, 41 L.R.A. 728, 68 Am. St. Rep. 218, 47 N. E. 634, 51 N. E. 88; *McNamara v. Beck* (1899) 21 Ind. App. 483, 52 N. E. 707; *Jeffersonville v. McHenry* (1899) 22 Ind. App. 10, 53 N. E. 183; *Indianapolis Street R. Co. v. Bordenchecker* (1903) 33 Ind. App. 138, 70 N. E. 995; *J. F. Darmody Co. v. Reed* (1916) 60 Ind. App. 662, 111 N. E. 817; *Terre Haute, I. & E. Traction Co. v. Stevenson* (1920) — Ind. App. —, 126 N. E. 34. See also *Jeffersonville, M. & I. R. Co. v. Bowen* (1872) 40 Ind. 545; *Louisville, N. A. & C. R. Co. v. Sears* (1894) 11 Ind. App. 654, 38 N. E. 837. Compare the following early cases which have been overruled: *Pittsburg, Ft. W. & C. R. Co. v. Vining* (1867) 27 Ind. 513, 92 Am. Dec. 269; *Lafayette & I. R. Co. v. Huffman* (1867) 28 Ind. 287, 92 Am. Dec. 318; *Hathaway v. Toledo, W. & W. R. Co.* (1873) 46 Ind. 25; *Cleveland, C. C. & St. L. R. Co. v. Keely* (1894) 38 Ind. 600, 37 N. E. 406, 11 Am. Neg. Cas. 497.

Iowa.—*Walters v. Chicago, R. I. & P. R. Co.* (1875) 41 Iowa, 71; *Wymore v. Mahaska County* (1889) 78 Iowa, 396, 6 L.R.A. 545, 16 Am. St. Rep. 449, 43 N. W. 264; *McCaull v. Bruner* (1894) 91 Iowa, 214, 59 N. W. 87; *Ives v. Weldon* (1901) 114 Iowa, 476, 54 L.R.A. 854, 89 Am. St. Rep. 379, 87 N. W. 408, 10 Am. Neg. Rep. 590; *Fink v. Des Moines* (1902) 115 Iowa, 641, 89 N. W. 28.

Kansas.—*Union P. R. Co. v. Young* (1896) 57 Kan. 168, 45 Pac. 580; *Missouri, K. & T. R. Co. v. Shockman* (1898) 59 Kan. 774, 52 Pac. 446; *Burzio v. Joplin & P. R. Co.* (1918) 102 Kan. 287, L.R.A.1918C, 997, 171 Pac. 351. Compare the following cases which have been overruled: *Atchison, T. & S. F. R. Co. v. Smith* (1882) 28 Kan. 541; *Horton v. Trompeter* (1894) 53 Kan. 150, 35 Pac. 1106.

Kentucky.—*Louisville & N. R. Co. v. Wilkins* (1911) 143 Ky. 572, 136 S. W. 1023, Ann. Cas. 1912D, 518. See also *South Covington & C. Street R.*

Co. v. Herrklotz (1898) 104 Ky. 400, 47 S. W. 265.

Louisiana.—**Westerfield v. Levis Bros.** (1891) 43 La. Ann. 63, 9 So. 52; **Danna v. Monroe** (1911) 129 La. 138, 55 So. 741.

Michigan.—**Battishill v. Humphreys** (1887) 64 Mich. 494, 31 N. W. 894; **Shippy v. Au Sable** (1891) 85 Mich. 280, 48 N. W. 584; **Mullen v. Owosso** (1894) 100 Mich. 103, 23 L.R.A. 693, 43 Am. St. Rep. 436, 58 N. W. 663; **Fye v. Chapin** (1899) 121 Mich. 675, 80 N. W. 797, 7 Am. Neg. Rep. 67; **Boehm v. Detroit** (1905) 141 Mich. 277, 104 N. W. 626; **Feldman v. Detroit United R. Co.** (1910) 162 Mich. 486, 127 N. W. 687; **Love v. Detroit, J. & C. R. Co.** (1912) 170 Mich. 1, 135 N. W. 963. Compare **Apsey v. Detroit, L. & N. R. Co.** (1890) 83 Mich. 432, 47 N. W. 319.

Minnesota.—**Mattson v. Minnesota & N. W. R. Co.** (1905) 95 Minn. 477, 70 L.R.A. 503, 111 Am. St. Rep. 483, 5 Ann. Cas. 498, 18 Am. Neg. Rep. 511; **Fox v. Chicago, St. P. M. & O. R. Co.** (1913) 121 Minn. 511, 141 N. W. 845; **Brennan v. Minnesota, D. & W. R. Co.** (1915) 130 Minn. 314, L.R.A. 1915F, 11, 153 N. W. 611. Compare **Fitzgerald v. St. Paul, M. & M. R. Co.** (1882) 29 Minn. 336, 43 Am. Rep. 212, 13 N. W. 168 (overruled by later cases).

Mississippi.—**Westbrook v. Mobile & O. R. Co.** (1889) 66 Miss. 560, 14 Am. St. Rep. 587, 6 So. 321.

Missouri.—**Brill v. Eddy** (1893) 115 Mo. 596, 22 S. W. 488, 8 Am. Neg. Cas. 471; **Neff v. Cameron** (1908) 213 Mo. 350, 18 L.R.A. (N.S.) 320, 127 Am. St. Rep. 606, 111 S. W. 1139; **Berry v. St. Louis, M. & S. E. R. Co.** (1908) 214 Mo. 593, 114 S. W. 27; **Profit v. Chicago G. W. R. Co.** (1901) 91 Mo. App. 369. See also **Zalotuchin v. Metropolitan Street R. Co.** (1907) 127 Mo. App. 577, 106 S. W. 548. Compare **Stillson v. Hannibal & St. J. R. Co.** (1878) 67 Mo. 675.

Montana.—**Flaherty v. Butte Electric R. Co.** (1910) 40 Mont. 454, 135 Am. St. Rep. 630, 107 Pac. 416.

Nebraska.—**Huff v. Ames** (1884) 16 Neb. 139, 49 Am. Rep. 716, 19 N. W. 623.

New Hampshire.—**Bisaillon v. Blood** (1888) 64 N. H. 565, 15 Atl. 147;

Warren v. Manchester Street R. Co. (1900) 70 N. H. 352, 47 Atl. 735.

New Jersey.—**Newman v. Phillipsburg Horse Car R. Co.** 52 N. J. L. 446, 8 L.R.A. 842, 19 Atl. 1102; **Markey v. Consolidated Traction Co.** (1900) 65 N. J. L. 82, 46 Atl. 573, affirmed in (1901) 65 N. J. L. 682, 48 Atl. 1117.

North Carolina.—**Bottoms v. Seaboard & R. R. Co.** (1894) 114 N. C. 699, 25 L.R.A. 784, 41 Am. St. Rep. 799, 19 S. E. 730; **Mullinax v. Hord** (1917) 174 N. C. 607, 94 S. E. 426.

Ohio.—**Bellefontaine & I. R. Co. v. Snyder** (1868) 18 Ohio St. 400, 98 Am. Dec. 175, 12 Am. Neg. Cas. 491; **Cleveland, C. C. & I. R. Co. v. Manson** (1876) 30 Ohio St. 457, 6 Am. Neg. Cas. 151; **St. Claire Street R. Co. v. Eadie** (1885) 43 Ohio St. 91, 54 Am. Rep. 802, 1 N. E. 519; **Ludden v. Columbus & C. M. R. Co.** (1900) 9 Ohio S. & C P. Dec. 793, 7 Ohio N. P. 106.

Oklahoma.—**Atchison, T. & S. F. R. Co. v. Calhoun** (1907) 18 Okla. 75, 89 Pac. 207, 11 Ann. Cas. 681.

Pennsylvania.—**Smith v. O'Connor** (1864) 48 Pa. 218, 86 Am. Dec. 582; **North Pennsylvania R. Co. v. Mahoney** (1868) 57 Pa. 187, 12 Am. Neg. Cas. 517; **Kay v. Pennsylvania R. Co.** (1870) 65 Pa. 269, 3 Am. Rep. 628; **Philadelphia & R. R. Co. v. Long** (1874) 75 Pa. 257, 12 Am. Neg. Cas. 535; **Erie City Pass. R. Co. v. Schuster** (1886) 113 Pa. 412, 57 Am. Rep. 471, 6 Atl. 269.

South Carolina.—**Watson v. Southern R. Co.** (1903) 66 S. C. 47, 44 S. E. 875.

Tennessee.—**Whirley v. Whiteman** (1858) 1 Head, 610; **Nashville R. Co. v. Howard** (1903) 112 Tenn. 107, 64 L.R.A. 437, 78 S. W. 1098.

Texas.—**Galveston, H. & H. R. Co. v. Moore** (1883) 59 Tex. 64, 46 Am. Rep. 265; **Western U. Teleg. Co. v. Hoffman** (1891) 80 Tex. 420, 26 Am. St. Rep. 759, 15 S. W. 1048; **Texas & P. R. Co. v. Beckworth** (1895) — Tex. Civ. App. —, 32 S. W. 809; **Texas & P. R. Co. v. Fletcher** (1894) 6 Tex. Civ. App. 736, 26 S. W. 446; **Douglas v. Central Texas & N. W. R. Co.** (1894) — Tex. Civ. App. —, 26 S. W. 892; **Allen v. Texas & P. R. Co.** (1894) — Tex. Civ. App. —, 27 S. W. 943; **Gulf, C. &**

S. F. R. Co. v. Johnson (1899) — Tex. Civ. App. —, 51 S. W. 531, 6 Am. Neg. Cas. 719; **Texas & P. R. Co. v. Kingston** (1902) 30 Tex. Civ. App. 24, 68 S. W. 518; **St. Louis Southwestern R. Co. v. Byers** (1902) — Tex. Civ. App. —, 70 S. W. 558; **Over v. Missouri, K. & T. R. Co.** (1903) — Tex. Civ. App. —, 73 S. W. 535; **Northern Texas Traction Co. v. Roye** (1905) 38 Tex. Civ. App. 601, 86 S. W. 621; **Kelley v. Texas & P. R. Co.** (1912) — Tex. Civ. App. —, 149 S. W. 349. Compare **Blossom Oil & Cotton Co. v. Poteet** (1911) 104 Tex. 230, 35 L.R.A.(N.S.) 449, 136 S. W. 432, reversing (1910) 60 Tex. Civ. App. 327, 127 S. W. 240.

Vermont.—**Robinson v. Cone** (1850) 22 Vt. 213, 54 Am. Dec. 67; **Ploof v. Burlington Traction Co.** (1895) 70 Vt. 509; 43 L.R.A. 108, 41 Atl. 1017.

Virginia.—**Norfolk & P. R. Co. v. Ormsby** (1876) 27 Gratt. 455; **Norfolk & W. R. Co. v. Groseclose** (1891) 88 Va. 267, 29 Am. St. Rep. 718, 13 S. E. 454, 7 Am. Neg. Cas. 51; **Roanoke v. Shull** (1899) 97 Va. 419, 75 Am. St. Rep. 791, 34 S. E. 34.

Washington.—**Roth v. Union Depot Co.** (1896) 13 Wash. 525, 31 L.R.A. 855, 43 Pac. 641, 44 Pac. 253; **Eskildsen v. Seattle** (1902) 29 Wash. 583, 70 Pac. 64, 12 Am. Neg. Rep. 366; **Gregg v. King County** (1914) 80 Wash. 196, 141 Pac. 340, Ann. Cas. 1916C, 135.

West Virginia.—**Dicken v. Liverpool Salt & Coal Co.** (1895) 41 W. Va. 511, 23 S. E. 582; **Gunn v. Ohio River R. Co.** (1896) 42 W. Va. 676, 36 L.R.A. 575, 26 S. E. 546.

Wisconsin.—**GULESSERIAN v. MADISON R. Co.** (reported herewith) ante, 406.

As was said in **Gregg v. King County** (1914) 80 Wash. 196, 141 Pac. 340, Ann. Cas. 1916C, 135: "In cases of injury to, or wrongful death of, a child, where the action is brought by a parent for his own benefit, the contributory negligence of the parent, the actual plaintiff, will, of course, bar a recovery. It is obvious that such cases afford no support to the doctrine that the negligence of the parent is to be imputed to the child. Both the ethical basis of the rule of imputed negligence and sound authority sustain the

view that, where the child is the real plaintiff in an action for his own injury, the parent's contributory negligence is no defense. This view is certainly sustained by reason, and is now supported by the great weight of authority."

So, in **Union P. R. Co. v. Young** (1896) 57 Kan. 168, 45 Pac. 580, it was said: "Complaint is made that the court erred in failing to charge the jury with reference to the contributory negligence of the plaintiff's parents. As this action was not brought by the parents or for their benefit, but is brought for the benefit of the plaintiff himself, the negligence of the parents cannot be imputed to him. In this respect there is a distinction between cases brought by an infant too young to be charged with contributory negligence, and cases brought by the parents to recover for the injury sustained by them by reason of the injury of such infant. In a recent case it was said that 'where an action for a negligent injury to an infant is brought by the parent, it is very justly held that the contributory negligence of such parent may be shown in bar, but it is otherwise if the action is brought by the infant or by a next friend for the benefit of the infant.'"

Likewise, in **Berry v. St. Louis, M. & S. E. R. Co.** (1908) 214 Mo. 593, 114 S. W. 27, the court said: "The proposition that the negligence of the parent (or another) may be imputed to the child as a bar to liability on the part of a negligent defendant, in the infant's suit, has received full and new consideration at the hands of this court in a very late case. **Neff v. Cameron** (1908) 213 Mo. 350, 18 L.R.A. (N.S.) 320, 127 Am. St. Rep. 606, 111 S. W. 1139. In that case we were asked to re-examine and alter the position of this court on that question. The result was that we refused to subscribe to the notion that the negligent sins of parents (or third parties) may be visited on the head of an innocent child in adjudicating the rights of the child itself. If parents sue in their own right to recover damages for injury to their child, a negligent defendant may defend by proving their

concurrent negligence, but such doctrine is unsound and harsh when applied to the infant who sues in its own right. I may not avoid liability by saying: 'I was negligent, it is true. If I had not been negligent the child would not have been injured. But a third person—a parent, a nurse, a maid, a grandmother—contributed to the injury of the child and therefore I am not liable.' On the reasoning of the Neff Case, and controlled by our former adjudications therein cited, refusing to impute the negligence of the parent to the child, the point is ruled against appellant."

In *Flaherty v. Butte Electric R. Co.* (1910) 40 Mont. 454, 135 Am. St. Rep. 630, 107 Pac. 416, the court said: "The trial court was requested by defendants to instruct the jury that the negligence of the child's mother, if shown, should be imputed to the child, and, if such negligence contributed to the injury, it would bar recovery by the child. This charge the trial court refused to give, but, on the contrary, gave an instruction that the negligence of the mother, if any, could not be imputed to the child. At the time of the injury the plaintiff was less than three years of age. In 1839 the supreme court of New York, in *Hartfield v. Roper*, 21 Wend. (N. Y.) 615, 34 Am. Dec. 273, 12 Am. Neg. Cas. 293, announced the doctrine of vicarious or imputable negligence, and the rule has been followed by the courts of New York and some other states. The doctrine is founded upon the assumption that, since the child is non sui juris, the parent is keeper of, and agent for, the child, and therefore the act of negligence of the parent is deemed the act of the child, and the maxim, 'qui facit per alium, facit per se,' is applied. We do not know of any other reason which has been advanced in support of the doctrine, and in view of our Code (§ 3590), if for no other reason, the doctrine cannot apply here. Agency implies the power to delegate authority, while the section last referred to provides: 'A minor cannot give a delegation of power.' But, aside from this section, we think the doctrine erroneous. Section 3599,

above, gives to the minor the same authority to enforce his rights by civil action as an adult, and to defeat his right by the act of another for which he is not in any sense responsible appears to us to be tantamount to a denial of his right altogether. In 29 Cyc. 553, it is said: 'According to the great weight of authority, in an action brought for the benefit of a child who has sustained injuries through the negligence of another, negligence on the part of the parents or those standing in loco parentis will not be imputed to the child nor bar a recovery by him. The rule announced in *Hartfield v. Roper* has received severe condemnation in many of the courts repudiating it as authority, and is very generally regarded as unsound by text-writers.' In 7 Am. & Eng. Enc. Law, 2d ed. 450, after referring to the courts which sustain the doctrine of the *Hartfield* Case, it is said: 'But in other jurisdictions it is held that the negligence of the parent, guardian, or custodian is not imputable to the child, because it is in no way responsible for the danger, had no volition in establishing the relation of privity with the person whose negligence it is sought to impute to it, and should not be charged with the fault of such person in allowing it to be exposed to danger which it had not the capacity either to know or to avoid.' And in 4 Current Law, 778, the same thing is said, as follows: 'By weight of modern authority, negligence of a parent or custodian is not imputable to a child non sui juris, so as to bar an action for or on its behalf.'"

So, it was said in *Atchison, T. & S. F. R. Co. v. Calhoun* (1907) 18 Okla. 75, 89 Pac. 207, 11 Ann. Cas. 681: "The first question presented is whether, in a suit by an infant of the age of three years, by its next friend, and in its own right, for personal injuries, negligence of a parent or some third person can be imputed to the child, and thereby defeat a recovery. The authorities upon this question are not entirely harmonious, but by the great preponderance of the adjudged cases it is held that the negligence of a parent, guardian, or custodian is not

imputable to the child, on the ground that it is not, and cannot be, responsible for the danger to which it is exposed; that it has no volition in establishing the relation of privity with the person whose negligence it is sought to impute to it, and should not and cannot be charged with the negligence of such person in permitting it to be exposed to a danger which it had not the capacity either to know or understand, or to avoid in any manner whatever. This doctrine, it seems to us, is based upon solid reason, and is certainly in consonance with right and justice."

In *Denver City Tramway Co. v. Brown* (1914) 57 Colo. 484, 143 Pac. 364, 9 N. C. C. A. 614, the court, in sustaining an instruction that the negligence of the plaintiff's parents was to be disregarded, said: "We cannot sustain the doctrine that the negligence of the parents of a child of tender years shall be imputed to the child, first announced by the New York courts, and since followed by courts in some jurisdictions. That doctrine seems not only unsound, but absurd and inhuman." In *Jacksonville Electric Co. v. Adams* (1905) 50 Fla. 429, 39 So. 183, 7 Ann. Cas. 241, it was held that the contributory negligence of parents in permitting their child, a boy four years and one month old, to go without a caretaker in the streets of a city on which electric cars were operated, could not be imputed to the child in an action by him to recover damages for personal injuries sustained in consequence of the negligent operation of an electric car.

In *Nashville Lumber Co. v. Busbee* (1911) 100 Ark. 76, 38 L.R.A. (N.S.) 754, 139 S. W. 301, which was an action by the administrator of an infant for damages for the conscious suffering of the intestate, it was held that the contributory negligence of the infant's parent, in whose care the child was at the time of the injury, would not bar a recovery, though the amount recovered would inure solely to the benefit of the parent as distributee. In that case the court said: "Contributory negligence of the father cannot be imputed to his infant son,

so as to defeat the right of the latter to recover during his life (*St. Louis, I. M. & S. R. Co. v. Rexroad* (1894) 59 Ark. 180, 26 S. W. 1037), and, at his death, the estate of the infant acquired, by devolution, precisely the same rights that he had during life."

And in *Atlantic Coast Line R. Co. v. Crosby* (1907) 53 Fla. 400, 43 So. 318, the court held that proof that the mother of the child voluntarily made the statement, after the injury occurred, that the accident was all her fault, would not destroy the child's right of action or prevent a recovery against the defendant, for the reason that, in an action by a child for damages for an alleged injury, the negligence of the parent cannot be imputed to the child, so as to prevent a recovery.

In *GULESSERIAN v. MADISON R. CO.* (reported herewith) ante, 406, it appeared that the infant plaintiff, while riding in an automobile driven by its mother, was injured in a collision with a street car of the defendant company. In holding that the contributory negligence of the mother would not bar a recovery by the child, the court said: "Is such contributory negligence of Mrs. Gulesserian imputable to this infant plaintiff? The proposition that the contributory negligence of a parent concurring with the negligence of a third person, which proximately caused an injury to a child, precludes the parent from recovering damages from such third person resulting from such injury to the child, is recognized in the cases in this court, cited to our attention by appellant's counsel. These adjudications, however, do not rule the instant case. . . . It is considered that the doctrine . . . holding that the contributory negligence of the parent or custodian of the child will not preclude recovery by the child for negligent injury is a just rule, and should be adopted in the jurisprudence of this state."

In *Zalotuchin v. Metropolitan Street R. Co.* (1907) 127 Mo. App. 577, 106 S. W. 548, it appeared that the plaintiff was injured while riding in a wagon driven by her stepfather. The

court held that the stepfather's negligence could not be imputed to the plaintiff, because her status was that of a mere passenger.

In *Burzio v. Joplin & P. R. Co.* (1918) 102 Kan. 287, 562, L.R.A.1918C, 997, 171 Pac. 351, it appeared that a boy of ten, while riding in an automobile driven by his father, was injured at a railroad crossing through the negligence of the defendant company and the contributory negligence of his father. It was held that the contributory negligence of the father did not defeat the boy's right of action. In the opinion, however, the question of imputed negligence was discussed only as between a driver and another occupant of a vehicle.

In *Perryman v. Chicago City R. Co.* (1909) 242 Ill. 269, 89 N. E. 980, affirming (1908) 145 Ill. App. 187, it was held that the negligence of a brother, who was in charge of a child four years of age while on the street, could not be imputed to the child so as to prevent a recovery by the latter for injuries negligently inflicted by a third person.

In *Kelley v. Texas & P. R. Co.* (1912) — Tex. Civ. App. —, 149 S. W. 349, it appeared that the infant plaintiff was injured while riding with his mother in a car of the defendant company, which was unheated. It also appeared that servants of the defendant offered to take the plaintiff and his mother to a seat in another car, but that the mother refused to accept the offer. In sustaining a refusal of the trial court to give an instruction that if the plaintiff, suing for injuries caused by the cold, was injured by reason of the mother's refusal to go into another car there could be no recovery, the court said: "It is perfectly apparent that the effect of this charge is to deny plaintiff the right to recover, even though he had shown that appellant was negligent, if his injuries would not have occurred but for the conduct of his mother. It is in effect imputing the negligence of the mother to the plaintiff. This cannot be done. *Northern Texas Traction Co. v. Roye* (1905) 38 Tex. Civ. App. 601, 86 S. W. 621. Indeed, the charge prevents a

recovery for the mother's conduct in failing to take him into another car, whether such conduct was negligent or not. Appellee denies any attempt to impute the negligence of the mother to the plaintiff, but it is plain that the charge has that effect."

In *Herrington v. Macon* (1906) 125 Ga. 58, 54 S. E. 71, it was held that in an action by a child, suing by his next friend, for a personal injury alleged to have arisen from the negligence of a municipal corporation in leaving one of its sidewalks in a dangerous condition, any negligence on the part of his mother in failing to keep him from danger could not be imputed to the plaintiff himself.

In *Boehm v. Detroit* (1905) 141 Mich. 277, 104 N. W. 626, it appeared from the evidence that at the time of the accident the plaintiff was a little over four years old, and was walking along the sidewalk between his father and mother, his father holding him by the left hand. The child stepped into a hole in the sidewalk and fell with considerable force against his father. The trial judge charged the jury as follows: "Gentlemen of the jury, there is another feature which is common to cases of this description, which is eliminated from this case. That is the case of contributory negligence. I charge you, gentlemen of the jury, that no negligence on the part of the parents of the boy in taking him over the walk in question can be imputed to the boy, and that, therefore, no negligence of the father would bar his right of action, as it would bar another if he was guilty of such conduct as contributed to the injury. I also charge you that a boy of that age, four years and three months, who is being led by his father, cannot be guilty of contributory negligence." The court held that this charge correctly stated the law.

The rule that the contributory negligence of a parent is not to be imputed to an injured child has been applied where the parent was negligent with respect to medical treatment after the injury. *Clark v. Chicago* (1912) 174 Ill. App. 145; *Western U. Teleg. Co. v. Hoffman* (1891) 80

Tex. 420, 26 Am. St. Rep. 759, 15 S. W. 1048; *Texas & P. R. Co. v. Beckworth* (1895) — *Tex. Civ. App.* —, 32 S. W. 809. In *Clark v. Chicago* (Ill.) *supra*, testimony was given tending to show that the injury to the plaintiff was aggravated by the refusal of his mother to permit an operation. The following instruction was held to be proper: "A child of ten years of age, who has sustained an injury, is only required by law to exercise ordinary care for one of his years, capacity, intelligence, and experience, to procure medical or surgical treatment, and in following the advice and instructions of his doctors or surgeons; and the negligence, if any, of the parents of such child, or either of them, in this regard cannot be imputed to the child." And it was held in *Texas & P. R. Co. v. Beckworth* (Tex.) *supra*, that the neglect of the parents of a child of tender years, to procure medical treatment for it after it was injured through the negligence of the defendant could not be imputed to the child in an action for its benefit.

Though the father of the injured child was the manager of the defendant company, and the only negligence of the defendant was through his agency, it has been held that the defendant was liable for an injury to the child due to an attractive nuisance. *Clover Creamery Co. v. Diehl* (1913) 183 Ala. 429, 63 So. 196, 7 N. C. C. A. 124. In that case the defendant interposed the following plea, to which a demurrer was sustained: "That at and for a long period, to wit, six months, prior to the time of the happening of the injury to plaintiff, her father had the power, and it was within the scope and line of his employment and duty as manager of defendant, to so conduct and operate its plant as a reasonably prudent man could do, and that the negligence, if any, complained of, was that of plaintiff's own father, said J. M. Diehl." The court said: "This was a suit by an infant three years of age, and the contributory negligence of her parent was not available as a defense. This rule has been so often followed in this state that citation of authority is unne-

cessary. The trial court properly sustained the plaintiff's demurrer to defendant's plea." See to the same effect, *St. Louis & S. F. R. Co. v. Underwood* (1912) 114 C. G. A. 823, 194 Fed. 363, 3 N. C. C. A. 467. For a different decision, however, on a similar state of facts, see *Blossom Oil & Cotton Co. v. Poteet* (1911) 104 Tex. 230, 35 L.R.A.(N.S.) 449, 136 S. W. 432, wherein it was held that the negligent acts of the father of the plaintiff could not be said to have been committed by him as an employee of the defendant rather than as father of the plaintiff, since his highest duty toward the child was as a father.

In the Federal courts it has been held that the question whether the negligence of the parent will be imputed to the child is one of general law, and not a question of local law, to be settled by the decisions of the highest courts of the state in which the cause of action arises. *Berry v. Lake Erie & W. R. Co.* (1895) 70 Fed. 679. The later decisions in the Federal courts on the question are not in accord with the earlier ones. In one of the more recent cases in the circuit court of appeals it was held that a parent's negligence would not be imputed to the child. *St. Louis & S. F. R. Co. v. Underwood* (Fed.) *supra* (fifth circuit), wherein the court said: "It is insisted by counsel that if the father, who had charge of the lumber as section foreman of the defendant, was negligent, either in failing to keep the pile of lumber in a safe condition, or in permitting the child to play on it, that his negligence was imputable to the child. It should be borne in mind that this suit is brought not for the benefit of the parents, but in behalf of the child, for injuries by her sustained. In such case the better rule, which is supported by the decided weight of authority, is that the negligence of the parents should not be imputed to the child." And in *Chicago G. W. R. Co. v. Kowalski* (1899) 34 C. C. A. 1, 92 Fed. 310 (circuit court of appeals, eighth circuit), the court, after a review of the authorities, said: "We think that there is at the present time a decided preponderance of au-

thority in favor of the doctrine that, in a suit brought by an infant in its own right for personal injuries, its parent's faults or negligence cannot be imputed to the child. In view of the general trend of the authorities it is highly probable that this view will ultimately prevail in the courts of last resort of all the states composing this circuit which have not already adopted it; and for that reason, among others, we think that it should be sanctioned by this court." See also *Berry v. Lake Erie & W. R. Co.* (Fed.) *supra* (circuit court, Indiana). In other cases in the Federal courts it has been held that the negligence of the parent will be imputed to the child. *Delaware, L. & W. R. Co. v. Devore* (1902) 52 C. C. A. 77, 114 Fed. 155 (circuit court of appeals, second circuit). In that case the court said: "The rule of law that the negligence of the parent of a minor who is suing a third person to recover damages for an injury caused by negligence at the time of and which contributed to the injury, and while the minor was under the protection and control of the parent, is imputable to the minor, is now well settled." See also *Grethen v. Chicago, M. & St. P. R. Co.* (1884) 22 Fed. 609; *The Burkundia* (1886) 29 Fed. 464.

In *Mattson v. Minnesota & N. W. R. Co.* (1905) 95 Minn. 477, 70 L.R.A. 503, 111 Am. St. Rep. 483, 104 N. W. 443, 5 Ann. Cas. 498, 18 Am. Neg. Rep. 511, it was held that in an action brought by a child, non sui juris, for injuries to his person caused by the negligence of defendant, the contributory negligence of his parent or guardian would not be imputed to him. The court said: "It may be conceded that plaintiff was guilty of contributory negligence as contended by defendant; but as his negligence can defeat a recovery only by imputing it to the injured son, as held in *Fitzgerald v. St. Paul, M. & M. R. Co.* (1882) 29 Minn. 336, 43 Am. Rep. 212, 13 N. W. 168, we take this occasion, the question being squarely presented by the facts, to reconsider the rule announced in that case. It was there held that negligence of a parent having the care of an infant non sui juris, which con-

tributes with the negligence of a third person to produce injury to the child, bars recovery by the latter. The decision was by a majority of the court, and was based upon what was regarded sound principle. . . . We have given the matter very serious consideration, with the result that, in our opinion, the doctrine of the *Fitzgerald Case* is unsound, at variance with elementary principles of the law respecting the rights of infants, and should be overruled. The right of an infant to damages for injuries to his person caused by the wrongful act of others is a property right, and entitled to the same protection in the courts as is accorded other property held or owned by him. He is entitled to the protection of the law equally with persons who have attained their majority, and to refuse him relief on the ground of his parents' indifference or negligence would be to deny it to him. To impute to him negligence of others is harsh in the extreme, whether the negligence so imputed be that of his parents, their servants, or his guardian." The later case adopting the majority view was cited with approval and followed in *Fox v. Chicago, St. P. M. & O. R. Co.* (1913) 121 Minn. 511, 141 N. W. 845, and *Brennan v. Minnesota, D. & W. R. Co.* (1915) 130 Minn. 314, L.R.A.1915F, 11, 153 N. W. 611.

Fox v. Chicago, St. P. M. & O. R. Co. (Minn.) *supra*, was an action brought by a father on behalf of a child for an injury to it occasioned by its falling from a platform or step of a train operated by the defendant company. The court said: "Defendant claims that plaintiff was negligent; that this negligence was the cause of the injury to the child, and bars recovery. It is conceded that the negligence of plaintiff is not imputed to the child. This was distinctly held in *Mattson v. Minnesota & N. W. R. Co.* (Minn.) *supra*. But it is contended that since the child was in the 'physical custody' of the parent, was under his sole control, and was included in his contract of carriage, there is such identity of status between father and child that it must be held, without violating the

principle of the Mattson Case, that the child can have no recovery. We cannot concur in this contention. The argument, of course, assumes that the father was negligent. We deem the whole question of the negligence of the father quite immaterial. Of course, if the father was negligent, and his negligence was the sole cause of the injury, there would be no room for liability on the part of defendant. No such situation is presented here. The jury found that defendant was negligent, and that its negligence was a proximate cause of the injury. If the father was negligent, his negligence was contributory or concurrent. But that such contributory or concurrent negligence does not bar a child's recovery is precisely the decision in the Mattson Case."

In *ZARZANA v. NEVE DRUG CO.* (reported herewith) ante, 401, the court said: "The rule first enunciated in *Robinson v. Cone* (1850) 22 Vt. 213, 54 Am. Dec. 67, to the effect that the negligent exercise of a parent's care and control of a child is not to be imputed to the child as a defense to an action by the child itself for personal injuries, is abundantly approved by the rulings and reasoning to be found in twenty and more jurisdictions throughout the United States. . . . Following in the wake of the preponderating weight of authority, we may well and wisely, although somewhat tardily, declare that the rule of imputed negligence as applied to actions by children in their own right no longer prevails, if it ever did prevail, in this jurisdiction."

III. *Minority view.*

In several jurisdictions the view is taken that the negligence of the parent or custodian contributing to the injury of a child should be imputed to it so as to bar a recovery by or in behalf of the child, if the child itself is not capable of exercising the ordinary care of an adult and its conduct does not conform to the standard of care which an adult would be bound to exercise.

Delaware.—*Kyne v. Wilmington &*

N. R. Co. (1888) 8 Houst. 185, 14 Atl. 922.

Maine.—*Brown v. European & N. A. R. Co.* (1870) 58 Me. 384; *Leslie v. Lewiston* (1873) 62 Me. 468; *O'Brien v. McGlinchy* (1878) 68 Me. 552. See also *Grant v. Bangor R. & E. Co.* (1912) 109 Me. 133, 83 Atl. 121; *Morgan v. Aroostook Valley R. Co.* (1916) 115 Me. 171, 98 Atl. 628.

Maryland.—*McMahon v. Northern C. R. Co.* (1873) 39 Md. 438; *Baltimore City Pass R. Co. v. McDonnell* (1875) 43 Md. 534. See also *United R. & E. Co. v. Carneal* (1909) 110 Md. 211, 72 Atl. 771.

Massachusetts.—*Holly v. Boston Gaslight Co.* (1857) 8 Gray, 123, 69 Am. Dec. 233; *Wright v. Malden & M. R. Co.* (1862) 4 Allen, 283; *Munn v. Reed* (1862) 4 Allen, 431; *Callahan v. Bean* (1864) 9 Allen, 401; *Lovett v. Salem & S. D. R. Co.* (1865) 9 Allen, 557, 3 Am. Neg. Cas. 754; *Mulligan v. Curtis* (1868) 100 Mass. 512, 97 Am. Dec. 121; *Lynch v. Smith* (1870) 104 Mass. 52, 6 Am. Rep. 188; *Gibbons v. Williams* (1883) 135 Mass. 335; *O'Connor v. Boston & L. R. Corp.* (1883) 135 Mass. 352; *McGeary v. Eastern R. Co.* (1883) 135 Mass. 363; *Messenger v. Dennie* (1884) 137 Mass. 197, 50 Am. Rep. 295; *Collins v. South Boston R. Co.* (1886) 142 Mass. 301, 56 Am. Rep. 675, 7 N. E. 856; *Casey v. Smith* (1890) 152 Mass. 294, 9 L.R.A. 259, 23 Am. St. Rep. 842, 25 N. E. 734; *McNeil v. Boston Ice Co.* (1899) 173 Mass. 570, 54 N. E. 257; *Cotter v. Lynn & B. R. Co.* (1901) 180 Mass. 145, 91 Am. St. Rep. 267, 61 N. E. 818; *Sullivan v. Chadwick* (1920) 236 Mass. 130, 127 N. E. 632. See also *Slattery v. Lawrence Ice Co.* (1906) 190 Mass. 79, 76 N. E. 459, 19 Am. Neg. Rep. 298; *Sughrue v. Bay State Street R. Co.* (1918) 230 Mass. 363, 119 N. E. 660; *Miller v. Flash Chemical Co.* (1918) 230 Mass. 419, 119 N. E. 702. And see *GALLAGHER v. JOHNSON* (reported herewith) ante, 411. Compare *Wiswell v. Doyle* (1893) 160 Mass. 42, 39 Am. St. Rep. 451, 35 N. E. 107.

New York.—*Hartfield v. Roper* (1839) 21 Wend. 615, 34 Am. Dec. 273, 12 Am. Neg. Cas. 293; *Mangam v. Brooklyn City R. Co.* (1868) 38 N. Y.

455, 98 Am. Dec. 66; *Ihl v. Forty-second Street & G. Street Ferry R. Co.* (1872) 47 N. Y. 317, 7 Am. Rep. 450; *Morrison v. Erie R. Co.* (1874) 56 N. Y. 302, 5 Am. Neg. Cas. 193; *Thurber v. Harlem Bridge, M. & F. R. Co.* (1875) 60 N. Y. 326; *McGarry v. Loomis* (1875) 63 N. Y. 104, 20 Am. Rep. 510; *Cumming v. Brooklyn City R. Co.* (1887) 104 N. Y. 669, 10 N. E. 853; *Serano v. New York C. & H. R. R. Co.* (1907) 188 N. Y. 156, 117 Am. St. Rep. 833, 80 N. E. 1025; *Hennessey v. Brooklyn City R. Co.* (1896) 6 App. Div. 206, 39 N. Y. Supp. 805; *Metcalf v. Rochester R. Co.* (1896) 12 App. Div. 147, 42 N. Y. Supp. 661; *Lifschitz v. Dry Dock, E. B. & B. R. Co.* (1902) 67 App. Div. 602, 73 N. Y. Supp. 888; *Canavan v. Stuyvesant* (1895) 12 Misc. 74, 33 N. Y. Supp. 53, modified and affirmed in (1897) 154 N. Y. 84, 47 N. E. 967, 3 Am. Neg. Rep. 709; *Juskowitz v. Dry Dock, E. B. & B. R. Co.* (1898) 25 Misc. 64, 53 N. Y. Supp. 992; *Lowery v. New York Ice Co.* (1899) 26 Misc. 163, 55 N. Y. Supp. 707, aff'd in (1899) 44 App. Div. 637, 60 N. Y. Supp. 1142; *Mangam v. Brooklyn City R. Co.* (1862) 36 Barb. 238, affirmed in (1868) 38 N. Y. 455, 98 Am. Dec. 66; *Flynn v. Hatton* (1873) 4 Daly, 552, 43 How. Pr. 333; *McLain v. Van Zandt* (1875) 7 Jones & S. 351; *Wallace v. John A. Casey Co.* (1909) 132 App. Div. 35, 116 N. Y. Supp. 394; *Manion v. Richmond Ice Co.* (1909) 133 App. Div. 254, 117 N. Y. Supp. 253; *Finkelstein v. American Ice Co.* (1904) 88 N. Y. Supp. 942; *Schindler v. New York, L. E. & W. R. Co.* (1886) 1 N. Y. S. R. 289; *Dudley v. Westcott* (1892) 44 N. Y. S. R. 882, 18 N. Y. Supp. 130; *Pastore v. Livingston* (1911) 72 Misc. 555, 131 N. Y. Supp. 971; *Doran v. Troy* (1885) 22 N. Y. Week. Dig. 230. See also *Cosgrove v. Ogden* (1872) 49 N. Y. 255, 10 Am. Rep. 361; *McGarry v. Loomis* (1875) 63 N. Y. 104, 20 Am. Rep. 510; *Fallon v. Central Park, N. & E. River R. Co.* (1876) 64 N. Y. 13; *Weil v. Dry Dock, E. B. & B. R. Co.* (1890) 119 N. Y. 147, 23 N. E. 487; *Smith v. City Realty Co.* (1903) 79 App. Div. 441, 79 N. Y. Supp. 1116; *Lannen v. Albany Gaslight Co.* (1865) 46 Barb. 264.

England.—See *Waite v. Northeast-*

ern R. Co. (1858) El. Bl. & El. 719, 120 Eng. Reprint, 679, 28 L. J. Q. B. N. S. 258, 5 Jur. N. S. 936, 72 Week. Rep. 311.

In *Sullivan v. Chadwick* (1920) 236 Mass. 130, 127 N. E. 632, it was held that, where there was nothing in the condition of the family justifying their conduct in permitting a boy under four years of age to be away from home unattended and his whereabouts unknown for two or three hours, the negligence of the parents barred a recovery on behalf of the child, for an injury due to its being struck by an automobile while it was thus away from home unattended.

In *Casey v. Smith* (1890) 152 Mass. 294, 9 L.R.A. 259, 23 Am. St. Rep. 842, 25 N. E. 734, it appeared that a mother permitted her child three years of age to go on the street accompanied by a brother and sister, the oldest of whom had not reached his eighth birthday. It also appeared that they went out from home to meet their father, though he was not expected for almost an hour. The court held that the conduct of the mother prevented a recovery by the three-year-old child for an injury sustained when it was run over by a vehicle.

In *Hennessey v. Brooklyn City R. Co.* (1896) 6 App. Div. 206, 39 N. Y. Supp. 805, it appeared that the plaintiff, an infant twenty-one months old, was riding with her father and mother in a phaeton, the father driving, and the mother holding the plaintiff in her lap. The father negligently drove on to the crossing of the defendant's railroad, and the infant was injured. It was held that the negligence of the father was not imputable to the infant, and that, the mother being free from contributory negligence, the plaintiff was entitled to recover. Mr. Justice Cullen in writing the opinion of the court said: "In this case the child, while in law subject to the paramount guardianship of the father, was in the immediate custody of the mother. Its extreme youth rendered it necessary that, except while in the house, someone must have not merely legal control, but almost actual personal possession of the child. Here that per-

son was the mother, who held the child in her arms. It should, for the purposes of this action, be deemed as in her immediate custody, not as in the custody of both parents, or of the father alone. The attention or care that at the time was to be bestowed upon it, from its helpless condition because it was an infant and not an adult, was to proceed from the mother. The care that the father was to exercise, he was to exercise whether the plaintiff was non sui juris or an adult, whether it was his child or a stranger's. The mother's negligence was, therefore, properly to be attributed to the child, but not that of the father." See also *Lewin v. Lehigh Valley R. Co.* (1900) 52 App. Div. 69, 65 N. Y. Supp. 49. But see *Delaware, L. & W. R. Co. v. Devore* (1902) 52 C. C. A. 77, 114 Fed. 155, disapproving *Hennessey v. Brooklyn City R. Co.* (N. Y.) supra. In *Morgan v. Aroostook Valley R. Co.* (1916) 115 Me. 171, 98 Atl. 628, it was said by way of dictum: "It seems to be conceded that this child, less than two years old, was not of sufficient age to exercise any care under any circumstances. And we think it should be so declared as a matter of law. This being so, the action cannot be defeated by the plaintiff's own conduct. But in such a case a duty devolves upon the parents or legal custodians of a child to exercise reasonable care in protecting it and keeping it off the streets and other places of danger. And in case of failure to exercise such care, the negligence of the parents or custodians is imputable to the child who suffers injury thereby. But parents are holden only to the exercise of reasonable care. And what is reasonable care depends upon the facts and circumstances, and sometimes in part, even, upon the financial condition of the family." See to the same effect, *Grant v. Bangor R. & E. Co.* (1912) 109 Me. 133, 83 Atl. 121, wherein the jury found that the parent of the child was not negligent.

However, in *McGarry v. Loomis* (1875) 63 N. Y. 104, 20 Am. Rep. 510, it was held that the doctrine of imputed negligence has no application

where it appears that a child, though not sui juris, has exercised the degree of care ordinarily exercised by an adult. See to the same effect, *Sullivan v. Chadwick* (1920) 236 Mass. 130, 127 N. E. 632; *Serano v. New York C. & H. R. R. Co.* (1907) 188 N. Y. 156, 117 Am. St. Rep. 833, 80 N. E. 1025.

In the reported case (*GALLAGHER v. JOHNSON*, ante, 411) it is held that in an action on behalf of a child four years old for an injury sustained in an automobile collision, there should be imputed to the child the negligence of the father in recklessly driving the automobile in which the child was riding. But it is also held that imputed contributory negligence is within the operation of a statute which gives to an injured person the advantage of a presumption that he was in the exercise of due care at the time of the injury, and which makes contributory negligence an affirmative defense to be proven by the defendant.

In England, it has been held that where a child of tender years was injured while a passenger on the defendant's railway and while in the care of its grandmother, through the joint negligence of the defendant and the grandmother, the child could not recover. *Waite v. Northeastern R. Co.* (1858) El. Bl. & El. 719, 120 Eng. Reprint, 679, wherein Lord Campbell, Ch. J., said: "In this case we think that the rule ought to be made absolute for entering a verdict for the defendants, or for a nonsuit. The jury must be taken to have found that Mrs. Park, the grandmother of the infant plaintiff, in whose care he was when the accident happened, was guilty of negligence without which the accident would not have happened; and that notwithstanding the negligence of the defendants, if she had acted upon this occasion with ordinary caution and prudence, neither she herself nor the infant would have suffered. Under such circumstances, had she survived, she could not have maintained any action against the company; and we think that the infant is so identified with her that the action in his name cannot be maintained.

The relation of master and servant certainly did not subsist between the grandchild and the grandmother; and she cannot, in any sense, be considered his agent; but we think that the defendants, in furnishing the ticket to the one and the half ticket for the

other, did not incur a greater liability towards the grandchild than towards the grandmother, and that she, the contracting party, must be implied to have promised that ordinary care should be taken of the grandchild."

W. S. R.

FARMERS' BANK & TRUST COMPANY, Appt.,

v.

B. BOSHEARS.

Arkansas Supreme Court — May 23, 1921.

(— Ark. —, 231 S. W. 10.)

Bank — deposit after banking hours — liability.

1. A bank is not relieved from liability for a deposit made after banking hours if it was its custom to receive deposits at that time for accommodation of customers.

[See note on this question beginning on page 429.]

— delay in claiming shortage of account.

2. A depositor is not charged with laches in delaying objection to a statement of account showing an omitted

deposit, when the delay is caused by his attempt to see the officer to whom he delivered the money before he notified the bank.

APPEAL by defendant from a judgment of the Circuit Court for Mississippi County (Dudley, J.) in favor of plaintiff in an action brought to recover the amount of a deposit alleged to have been made by him in the defendant bank, which it refused to place to his credit. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Davis, Costen, & Harrison for appellant.

Messrs. A. G. Little and Arthur L. Adams, for appellee:

Ten days cannot arbitrarily be fixed as sufficient time under all circumstances for a bank depositor to examine his pass book after it has been balanced and returned to him with canceled vouchers.

Kenneth Invest. Co. v. National Bank, 103 Mo. App. 613, 77 S. W. 1002.

Failure to examine the pass book within a reasonable time after it is balanced will not estop a depositor from subsequently showing the incorrectness of the statement, though by his delay he may be compelled to assume the burden of overcoming the presumption arising out of its correctness.

Rettig v. Southern Illinois Nat.

Bank, 147 Ill. App. 193; Critten v. Chemical Nat. Bank, 60 App. Div. 241, 70 N. Y. Supp. 246; Musgrove v. Macon County Bank, 187 Mo. App. 483, 174 S. W. 171; Michie, Banks & Bkg. § 133.

A reasonable time is to be determined by the situation of the parties and nature of their business.

Lockwood v. Thorne, 12 Barb. 487; Bainbridge v. Wilcocks, Baldw. 536, Fed. Cas. No. 755.

It depends upon the peculiar facts and circumstances attending the transaction whether the depositor is estopped to claim the funds in controversy.

Michie, Banks & Bkg. § 138; Leather Mrs.' Nat. Bank v. Morgan, 117 U. S. 96, 29 L. ed. 811, 6 Sup. Ct. Rep. 657; Robinson v. Security Bank & T. Co. 141 Ark. 414, 216 S. W. 717.

The finding of the jury having established the custom or usage of de-

fendant to receive deposits after the usual hours of business, it follows that its case must fail.

Pope v. Bank of Albion, 57 N. Y. 131; Neiffer v. Bank of Knoxville, 1 Head, 162; 17 C. J. 479, § 42; Marshall v. Wells, 7 Wis. 1, 73 Am. Dec. 381; Shaw v. Jacobs, 21 L.R.A. 440, note.

McCulloch, Ch. J., delivered the opinion of the court:

Appellant is a banking corporation engaged in business in the city of Blytheville, in this state, and during the autumn of the year 1919, appellee, a farmer living 8 or 10 miles out in the country from Blytheville, was one of its depositors. He claimed that he made a deposit of \$250 on October 17, 1919, which does not appear to his credit; and on the refusal of the bank to place it to his credit he instituted this action to recover that sum.

The issues in the case are whether the amount was deposited by appellee, as claimed by him; whether the deposit was received by an employee of the bank, if at all, at such time as they were authorized to receive deposits; and whether appellee is precluded from recovery of the sum by his failure within apt time to make objection to the account rendered him by the bank.

Appellee was a tenant on the farm of a Mr. Gay, who was formerly the president of appellant bank, and at the time of the transaction in controversy was one of its directors. According to appellee's testimony he brought cotton to Blytheville on October 17, 1919, and after selling it he and Mr. Gay had a settlement of their accounts, and he paid Mr. Gay a small balance due him, and that, having the sum of \$250 left out of the proceeds of the cotton, he deposited it in appellant bank. He described the method of deposit, as follows: That he counted out the money to Mr. Gay, who made out a deposit slip and handed it to Mr. Cheatham, the assistant cashier, who accepted the money and placed the letters "O. K." on the deposit slip, with his initials attached.

This was after the usual closing time of the bank, but the assistant cashier was in the bank at the time, and received this deposit. Appellee testified further that he was accustomed to making deposits in this way after the usual banking hours, for the reason that he came a long distance with his cotton, and did not usually sell it until after the bank closed. There was other testimony tending to show that it was the custom of the bank to receive deposits after the usual banking hours.

The testimony adduced by appellant tended to show that the money was never received by the bank or any of its employees. Cheatham testified that he had no recollection of the deposit, and it is shown by his testimony and that of other employees that the deposit had never been entered on the books of the bank, and that the amount of funds in the bank did not indicate that they exceeded the amount entered on the books. Mr. Cheatham also testified that the initials on the deposit slip held by appellee was not in his handwriting.

On October 21st appellant sent to appellee, by mail, a statement of his account, which did not show this deposit. The statement concluded with the following notice: "This statement is furnished you instead of balancing your pass book. It saves you the trouble of bringing your pass book to the bank and waiting for it to be balanced. These statements will be found very convenient to check up and file. All items are credited subject to final payment. Use your pass book only as a receipt book when making deposits."

Another such statement was furnished in like manner on December 15, 1919. There is a conflict in the testimony as to when appellee made objection to the bank that his account was not correctly set forth in the statement furnished to him. He testified that he made the discovery in three or four days after he received the statement, by

checking up the account with his deposit slips at home; that because of the fact that Mr. Gay was one of the directors of the bank he had made the deposit through the latter, and waited to see him before making his protest to the bank; and that it was several weeks before he could find Mr. Gay in town. He testified that at the first opportunity he presented the matter to Mr. Gay, and that they went to see the cashier of the bank, and presented the deposit slip, showing the deposit of this amount on the date mentioned.

The issues were properly submitted to the jury, and the court, among other instructions, gave the following: "Even though you may believe from the evidence that the deposit in question was received by the officers of the bank, if you further find and believe from the evidence that thereafter the plaintiff, Boshears, received a statement or statements from the bank, showing the amount of the deposits made by him and the charges against his account, as shown by the vouchers, and upon receiving such statement or statements he did not in a reasonable time thereafter notify the bank of the errors here complained of, and that such failure upon his part to so notify the bank occasioned injury to the bank, you will find for the defendant."

The contention of appellant's counsel is that the court should have given a peremptory instruction for the reason that the undisputed evidence shows that the money was received by the bank's employees, if at all, after banking hours, when there was no officer to receive such deposit, and also the fact that the undisputed evidence shows that appellant waited an unreasonable length of time before he made objection to the statement sent to him, omitting this deposit. We think the contention of counsel in both respects is unfounded. There is testimony tending to show that it was

the custom of the employees of the bank to receive de-
posits in the bank
after the usual <sup>Bank—deposit
after banking
hours—liability.</sup>
banking hours for the purpose of accommodating belated customers. The testimony also warranted a submission of the issue as to whether or not the objection made by appellee to the statement of his account was within a reasonable time. The rule approved by this court in several cases was stated by the Supreme Court of the United States in *Leather Mfrs.' Nat. Bank v. Morgan*, 117 U. S. 96, 29 L. ed. 811, 6 Sup. Ct. Rep. 657, as follows: "While no rule can be laid down that will cover every transaction between a bank and its depositor, it is sufficient to say that the latter's duty is discharged when he exercises such diligence as is required by the circumstances of the particular case, including the relations of the parties, and the established or known usages of banking business." *Citizens' Bank & T. Co. v. Hinkle*, 126 Ark. 266, 189 S. W. 679; *Bank of Black Rock v. B. Johnson & Son Tie Co.* — Ark. —, 229 S. W. 1.

Considering the circumstances under which the alleged deposit was made and the circumstances under which appellee was placed when he received the notice omitting this deposit, we think that the trial jury was warranted in drawing the inference that appellant proceeded with proper diligence in <sup>—delay in claim-
ing shortage of
account.</sup> presenting his protest to the bank, and that it was made within a reasonable time, considering all those circumstances.

The testimony was conflicting as to whether or not the deposit was actually made, but there was sufficient evidence to warrant the jury in finding that appellee deposited the sum mentioned in the manner which he described in his testimony.

Judgment is therefore affirmed.

ANNOTATION.

Liability of bank for deposit received by employees out of banking hours.

The reported case (*FARMERS' BANK & TRUST CO. v. BOSHEARS*, ante, 426) expressly holds that a bank which, according to custom, receives deposits after banking hours for the convenience of belated customers, cannot be relieved from liability for deposits so received because of the fact that it was received after hours. No other case seems to have passed squarely upon a similar proposition. But see *Second Nat. Bank v. Averell* (1894) 2 App. D. C. 470, 25 L.R.A. 761, wherein the court seems to have acted on the assumption that a bank may, in accordance with custom, accept deposits after regular banking hours. And see *Ex parte Clutton* (1849-1852) Fonbl. N. R. 167, where, as set out in 1 Mews, Eng. Case Law Dig. col. 1046, money was paid into a bank through the clerk of the bank after office hours, and the bankers, because of insolvency, did not again open the bank, and it was held that the money passed to the assignees.

However, in *Brinton v. Lewiston Nat. Bank* (1905) 11 Idaho, 92, 81 Pac. 112, where the C. bank wired the L. bank that certain money had been deposited with it for the credit of the latter for the use of B., a depositor, which telegram was received after banking hours, it was held that the C. bank could countermand the order on the following day before credit had been given and before any rights of B. had attached, so that the L. bank having acted on the countermanding order was not liable to B. for the deposit. This conclusion seems to imply that the receipt of the order to credit B. with the amount after hours did not amount to a deposit of the funds at that time.

And in England it has been held that where a bank customarily receives money after hours, but puts the same in a separate place of deposit and enters the same in a counter book, but does not carry the same to the customer's account until the next day,

the money remains that of the depositor until entered, so that where the bank closes because of insolvency after receiving such a deposit and before carrying it to the customer's account, he can recover the same as his property. *Sadler v. Belcher* (1843) 2 Moody & R. (Eng.) 489.

So, in *Philadelphia v. Eckels* (1896) 98 Fed. 485, where a public official, in accordance with his custom, deposited after banking hours on March 19, funds belonging in part to a city and in part to the state for safe-keeping overnight, which funds, according to custom, were separated in the morning (March 20) before banking hours and the part belonging to the city credited to its account in the usual way, it was held, the bank having been closed as insolvent at 10 A. M., on March 20, that the funds did not become the property of the bank. The bank was closed on order of the bank examiner, who directed that a few deposits which had been received that morning before 10 A. M., the regular opening hour of the bank, be set aside to be returned to depositors. *Acheson*, Cir. J., said: "It is quite plain to me that the city is entitled to the return of this fund. It was not deposited to the credit of the city treasurer on March 19th, but was left for safe-keeping in the vaults of the bank over-night. The precise interest of the city therein, as distinguished from the interest of the commonwealth, was not then known. Undoubtedly, the fund was left merely for safe-keeping, subject to the right of withdrawal by the city treasurer. The entry of credit in the city treasurer's bank book on the morning of March 20th, under the circumstances, did not create the relation of debtor and creditor, or divest the title of the city. That entry was not conclusive, either upon the bank or the city. At the time it was made, the bank was virtually, if not actually, in the hands

of the government officials. The functions of the bank for the transaction of ordinary business were then suspended. Moreover, the bank being insolvent, and about to pass into the hands of a receiver, it would have been a fraud on the city for the bank to accept a deposit of this fund, and on that ground alone it could have been reclaimed."

In *Simpson v. Pemigewasset Nat. Bank* (1895) 68 N. H. 289, 38 Atl. 1005,

where money was sent for deposit by registered mail as the depositor was accustomed to do, but the bank, upon notification that it had arrived at the postoffice, refused to receive the same because it was after banking hours and a rule of the bank did not permit receipt of money at that time of day, it was held that the bank could not be held for the money sent, it having been stolen from the postoffice during the night. G. J. C.

MERCHANTS' NATIONAL BANK OF BILLINGS, Respt.,

v.

THOMAS C. SMITH

and

WALTER O. LEE, Appt.

Montana Supreme Court—March 7, 1921.

(59 Mont. 280, 196 Pac. 523.)

Evidence — when instrument negotiated.

1. A promissory note payable to order is negotiated when delivered to the payee under a statute providing that an instrument is negotiated when transferred from one person to another in such manner as to constitute the transferee the holder thereof. If payable to bearer, it is negotiated by delivery; if payable to order, it is negotiated by the indorsement of the holder completed by delivery. So that such payee may become a holder in due course.

[See note on this question beginning on page 437.]

Bills and notes — effect of Negotiable Instruments Act on suretyship.

2. The Negotiable Instruments Act supersedes the law of suretyship as theretofore applied to negotiable instruments.

— release of collateral — effect on accommodation maker.

3. An accommodation maker of a promissory note is not released from liability by the payee's release of collateral to the one for whose accommodation he signs the note.

[See 3 R. C. L. 1279, 1280; 21 R. C. L. 1053.]

— obligation of accommodation maker.

4. One who is, to the knowledge of the payee of a note, an accommodation maker, receiving no part of the consideration, has a duty with respect to the instrument no less than that imposed upon the maker who received value.

[See 3 R. C. L. 1120.]

Evidence — presumption — holder in due course.

5. The statutory presumption that one in possession of a promissory note is a holder in due course is disputable, and may be overcome.

[See 3 R. C. L. 1037.]

APPEAL by defendant Lee from a judgment of the District Court for Yellowstone County (Spencer, J.) in favor of plaintiff in an action brought to recover the balance alleged to be due on a promissory note. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. McIntire & Murphy for appellant.

Messrs. Collins, Campbell, & Wood, for respondent:

Defendant Lee, as an accommodation maker, can only discharge his liability on the paper in suit by bringing himself within one or more of the provisions of § 5967, Revised Codes 1907, a part of the Negotiable Instruments Law, which section applies to the discharge of persons "primarily" liable on negotiable paper, and which contains all the law relating to the discharge of such persons from liability.

Hamilton v. Hamilton, 51 Mont. 509, 154 Pac. 717; Union Trust Co. v. McGinty, 212 Mass. 205, 98 N. E. 679, Ann. Cas. 1913C, 525; Wolstenholme v. Smith, 34 Utah, 300, 97 Pac. 329; Jamesson v. Citizens' Nat. Bank, 130 Md. 75, 99 Atl. 994, Ann. Cas. 1918A, 1097; Delaware County Trust, S. D. & Title Ins. Co. v. Haser, 199 Pa. 17, 85 Am. St. Rep. 763, 48 Atl. 694; Bradley Engineering & Mfg. Co. v. Heyburn, 56 Wash. 628, 134 Am. St. Rep. 1127, 106 Pac. 170; Lumbermen's Nat. Bank v. Campbell, 61 Or. 123, 121 Pac. 427; Oklahoma State Bank v. Seaton, — Okla. —, 170 Pac. 477; National Citizens' Bank v. Toplitz, 81 App. Div. 593, 81 N. Y. Supp. 422; Cowan v. Ramsey, 15 Ariz. 533, 140 Pac. 501; First Sav. Bank & T. Co. v. Flournoy, 24 N. M. 256, 171 Pac. 793; Bertin & Lepori v. Mattison, 80 Or. 354, 5 A.L.R. 590, 157 Pac. 153; Davis v. First Nat. Bank, 86 Or. 477, 161 Pac. 93, 168 Pac. 929; First State Bank v. Lang, 55 Mont. 146, 9 A.L.R. 1139, 174 Pac. 597; Vanderford v. Farmers' & M. Nat. Bank, 105 Md. 164, 10 L.R.A. (N.S.) 129, 66 Atl. 47; Lane v. Hyder, 163 Mo. App. 688, 147 S. W. 514; Night & Day Bank v. Rosenbaum, 191 Mo. App. 559, 177 S. W. 693; Cellers v. Meachem (Cellers v. Lyons) 49 Or. 186, 10 L.R.A. (N.S.) 133, 89 Pac. 426, 13 Ann. Cas. 997; First Nat. Bank v. Meyer, 30 N. D. 388, 152 N. W. 657; Richards v. Market Exch. Bank Co. 81 Ohio St. 348, 26 L.R.A. (N.S.) 99, 90 N. E. 1000; Graham v. Shepard, 136 Tenn. 418, 189 S. W. 867, Ann. Cas. 1918E, 804; Butte v. Industrial Acci. Bd. 52 Mont. 75, 156 Pac. 130.

Holloway, J., delivered the opinion of the court:

This action was brought to recover the balance due upon the following promissory note:

Billings, Montana, May 7, 1917.

Four months after date without grace, for value received, I promise to pay to the order of the Merchants' National Bank of Billings, Montana, \$3,500 with interest from date at the rate of 10 per cent per annum until paid, with an attorney's fee in case payment shall not be made at maturity. Presentment for payment, protest and notice of dishonor waived by each maker, indorser, and guarantor hereof.

Thos. C. Smith.
W. O. Lee.

The complaint is in the usual form. By his separate answer, defendant Lee admitted the execution and delivery of the note and the payments made thereon by Smith, and by way of special defense set forth that he signed the note for the accommodation of Smith, and received no part of the consideration; that these facts were known to the bank; that on May 8, Smith made, executed, and delivered to the bank a chattel mortgage upon property of a value equal to or greater than the amount of the note; that thereafter, and before the commencement of this action, the bank, without his knowledge or consent, released and discharged the mortgage, thereby depriving him of all benefit thereunder, and that immediately after the surrender of the security Smith became and ever since has been insolvent. Upon motion of plaintiff this entire special defense was stricken out, and judgment rendered and entered according to the prayer of the complaint. From that judgment defendant Lee appealed.

1. Appellant contends that, though upon the face of the note he is a maker, he is in fact a surety, and invokes the provisions of §§ 5680-5693, Revised Codes, which define the rights and liabilities of a surety. If these provisions are available to him, the portion of his answer stricken out states a complete defense, and the trial court erred in its ruling.

The sections enumerated, adopted in Montana in 1895, but crystallized

and arranged in convenient form certain rules of the law merchant applicable to suretyship, and it cannot be controverted that, under the common law of commercial paper, the release of security pledged by the principal debtor operated to discharge the surety; at least, to the extent of the value of the released property. 1 Brandt, Suretyship & Guaranty, 3d ed. §§ 480-483.

In 1903 this state adopted the Uniform Negotiable Instruments Act (Laws 1903, chap. 121; Rev. Codes, §§ 5842-6037), modeled after the English Bill of Exchange Act of 1882. The same statute has been enacted in forty-three states of the Union, in Alaska, District of Columbia, Hawaii, the Philippines, and in most of the Canadian provinces. It was proposed by commissioners from the several states, and was designed to secure uniformity in the text of the law, and through that agency uniformity in construction, and to remove the uncertainty which arose from diverse judicial decisions among the states, to the end that this "currency of commerce" might pass through the channels of trade, unembarrassed by the conflicts of laws. It may not comprehend all the rules applicable to negotiable instruments, but, so far as it does undertake to declare the law, its provisions are exclusive.

It could not be contended that the act repeals the suretyship statute above. Sections 5680-5693 are in full force and effect so far as they operate upon non-negotiable instruments; but it is our judgment that the act superseded those sections so far as the Law of Negotiable Instruments is concerned. Nowhere in the Uniform Negotiable Instruments Act is the term "surety" mentioned, and its provisions are so inconsistent with the law of suretyship that they cannot be reconciled. For example: By § 5688 a surety may require the creditor first to proceed against the principal debtor under penalty of a release of the surety. By § 192 of the act (Rev. Codes, § 5844) all persons liable on a nego-

tiabile instrument are comprehended in one or the other of two classes. That section provides: "The person 'primarily' liable on an instrument is the person who by the terms of the instrument is absolutely required to pay the same. All other parties are 'secondarily' liable."

In other words, the surety at common law is, by the terms of this act, made primarily liable, and by signing as a maker he binds himself absolutely to pay. 8 C. J. 73, 74; Edmonston v. Ascough, 43 Colo. 55, 95 Pac. 313.

Again, at common law, an extension of time to the principal debtor without the consent of the surety released the surety (1 Brandt, Suretyship & Guaranty, chap. 14; 8 C. J. 445; 32 Cyc. 191); but that defense is now available, only to one secondarily liable (§ 120, Rev. Codes, § 5968; 8 C. J. 447; First State Bank v. Lang, 55 Mont. 146, 9 A.L.R. 1139, 174 Pac. 597).

Furthermore, suretyship furnished one of the most vexatious sources of litigation at common law, and was a subject upon which judicial decisions were most at variance. To confirm this statement one has but to review chapters 3 to 18, 1 Brandt, Suretyship & Guaranty. If the primary purpose of this act was to secure uniformity in the Law of Negotiable Instruments, as is generally conceded to be the fact, it is inconceivable that the failure of the act to mention suretyship is to be charged up merely as a casus omissus. It seems clear to us that it was the purpose of the legislation to supersede the law

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of suretyship as theretofore applied to negotiable instruments, and to substitute therefor the law as declared by the act itself, and this is the view expressed by the courts quite generally. Union Trust Co. v. McGinty, 212 Mass. 205, 98 N. E. 679, Ann. Cas. 1913C, 525; Jameson v. Citizens Nat. Bank, 130 Md. 75, 99 Atl. 994, Ann. Cas. 1918A, 1097; Bradley Engineering & Mfg.

Co. v. Heyburn, 56 Wash. 628, 134 Am. St. Rep. 1127, 106 Pac. 170; Oklahoma State Bank v. Seaton, — Okla. —, 170 Pac. 477; Lumbermen's Nat. Bank v. Campbell, 61 Or. 123, 121 Pac. 427; Richards v. Market Exch. Bank, 81 Ohio St. 348, 26 L.R.A.(N.S.) 99, 90 N. E. 1000. The defendant Lee is not a surety, so far as the bank is concerned, and he may not invoke the provisions of §§ 5680-5693 above.

2. Section 191 (Rev. Codes, § 5843) defines a holder as "the payee or indorsee of a bill or note, who is in possession of it." The bank is therefore a holder, and, having parted with a valuable consideration for the note, is a holder for value within the meaning of the same section and other provisions of the act.

Lee signed the note without receiving value, and for the purpose of lending his name to Smith, and is an accommodation maker (§ 29 [Rev. Codes, § 5877]); and, since by the terms of the note he is absolutely required to pay it, he is a party primarily liable (§ 192 [Rev. Codes, § 5844]).

Section 120 (Rev. Codes, § 5968) enumerates the several circumstances under any of which a party secondarily liable may be released. There is no express provision for the release of a party primarily liable, and for the obvious reason that none is necessary. Such a party is absolutely bound to pay

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in the first instance (§ 192), and can be relieved only by a discharge of the instrument itself (Farmers' State Bank v. Forsstrom, 89 Or. 97, 173 Pac. 935).

Section 119 (Rev. Codes, § 5967) provides: "A negotiable instrument is discharged: (1) By payment in due course by or on behalf of the principal debtor. (2) By payment in due course by the party accommodated, where the instrument is made or accepted for accommodation. (3) By the intentional cancellation thereof by the

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holder. (4) By any other act which will discharge a simple contract for the payment of money. (5) When the principal debtor becomes the holder of the instrument at or after maturity in his own right."

But appellant contends that he is released by virtue of the provisions of subdivision 4 of this section, for, if the note in question were a simple contract, the release of the securities by the bank would operate to discharge him. Section 119 relates only to the discharge of the instrument, and not to the discharge of the parties, though the greater includes the less, and it never was the law that the release of a surety or accommodation maker discharged the instrument itself. Richards v. Market Exch. Bank, above.

The meaning of subdivision 4 is apparent. Anything which will discharge, that is, destroy, a simple contract,—literally blot it out of existence in contemplation of law,—will discharge an accommodation maker, but it will also release the principal debtor, and all other parties liable thereon.

And the fact that Lee signed the note without receiving any part of the consideration, and for the purpose only of lending his name to Smith, does not alter his situation. He is liable notwithstanding the bank, at the time it took the note, knew him to be only an accommodation party. Section 29. In other words, the fact that he is an accommodation maker gives rise to a duty on his part to the holder for value, no greater, or less, or different, than that imposed upon a maker who received value. Wolstenholme v. Smith, 34 Utah, 300, 97 Pac. 329; Union Trust Co. v. McGinty, and Farmers' State Bank v. Forsstrom, above.

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maker.

3. By its very terms the act now under review has to do only with negotiable instruments (United States Nat. Bank v. Shupak, 54 Mont. 542, 172 Pac. 324), and with such instruments only so long as they are in the hands of holders in

due course. Section 58 (Rev. Codes, § 5906) declares: "In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defense as if it were non-negotiable." If the bank is not a holder in due course, this case is not within the purview of the act, and its rights and Lee's liability are to be determined by the law applicable to simple contracts generally, under which the defense of suretyship may be maintained.

Is the bank, the payee of the note in possession of it, *prima facie* a holder in due course? Section 52 of the act (Rev. Codes, § 5900) provides: "A holder in due course is a holder who has taken the instrument under the following conditions: (1) That it is complete and regular upon its face. (2) That he became the holder of it before it was overdue, and without notice that it has been previously dishonored, if such was the fact. (3) That he took it in good faith and for value. (4) That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."

In submitting the draft of the Uniform Negotiable Instruments Act, the chairman of the committee in charge of it declared: "The statute proposed will be found clear, concise, and thorough."

It may be thorough, and it may be conceded that much is expressed in few words, but the fact that courts of high repute have reached diametrically opposite conclusions as to the meaning of several sections suggests that the language is not as clear as its proponents believed it to be.

The phrase "holder in due course" appears in several sections of the act, and the decisions upon the proper meaning to be given it are in hopeless conflict. Section 191 (Rev. Codes, § 5843) defines a "holder" of a note payable to order, as the payee or indorsee who is in possession of it. It follows, therefore, that the plaintiff bank is the holder. Section

59 of the act (Rev. Codes, § 5907) provides: "Every holder is deemed *prima facie* to be a holder in due course."

From this section the presumption arises that the plaintiff bank is a holder in due course, but the presumption is a disputable one, and the

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prima facie case made by the presentation of the note may be overcome, and the burden is upon defendant Lee, unless it appears that he is relieved by plaintiff's own pleading. How may he sustain this burden? Manifestly, by showing the absence of any one of the conditions enumerated in § 52, and not otherwise.

He does not contend that the note is not complete and regular upon its face, or that the bank did not become the holder before maturity and before it was dishonored, or that it did not take the note in good faith and for value. Assuming that the proper construction of subdivision 4 of § 52 compels the conclusion that to constitute the bank a holder in due course the note in question must have been "negotiated" to it, does it follow that, by alleging that it is the payee in possession of the note, it has pleaded itself out of court? Or, stating the question more succinctly: May the payee in possession of a note qualify as a holder in due course? If negotiation to the holder is indispensable in order to constitute him a holder in due course, and if § 30 of the act means that negotiation of a note payable to order can be effected only by indorsement and delivery, it follows that plaintiff bank is not a holder in due course, and the fact appears affirmatively from the face of the complaint.

In the following cases it is held, in effect, that negotiation to the holder is necessary to constitute him a holder in due course, and that delivery by the maker to the payee is not "negotiation" within the meaning of that term as employed in the Negotiable Instruments Act: *Vander Ploeg v. Van Zuuk*, 135 Iowa,

350, 13 L.R.A. (N.S.) 490, 124 Am. St. Rep. 275, 112 N. W. 807; Builders' Lime & Cement Co. v. Weimer, 170 Iowa, 444, 151 N. W. 100, Ann. Cas. 1917C, 1174; St. Charles Sav. Bank v. Edwards, 243 Mo. 553, 147 S. W. 978; Southern Nat. Life Realty Corp. v. Bank, 178 Ky. 80, 198 S. W. 543; Woods v. Finley, 153 N. C. 497, 69 S. E. 502.

In *Lewis v. Clay*, 67 L. J. Q. B. N. S. 224, the English court, in considering a section of the Bill of Exchange Act, substantially identical with our § 14 (Rev. Codes, § 5862), declared that a payee is not a holder in due course, and said: "A holder in due course is a person to whom, after its completion by and as between the immediate parties, the bill or note has been negotiated."

In the later case of *Herdman v. Wheeler* [1902] 1 K. B. 361, 5 B. R. C. 651, 71 L. J. K. B. N. S. 270, 86 L. T. N. S. 48, 50 Week. Rep. 300, 18 Times L. R. 190, the pronouncement in *Lewis v. Clay* was declared to be dictum, as it was, manifestly.

In *Bowles Co. v. Clark*, 59 Wash. 336, 31 L.R.A. (N.S.) 613, 109 Pac. 812, the court held that plaintiff in that action, payee of the check, was not a holder in due course, but did not discuss the provisions of the Negotiable Instruments Act.

In *Long v. Shafer*, 185 Mo. App. 641, 171 S. W. 690, the court held that delivery of a note by the maker to the payee did not constitute negotiation, and therefore the payee was not a holder in due course. When the case was certified to the supreme court, the decision of the appellate court was affirmed, but upon an entirely different theory. *Long v. Mason*, 273 Mo. 266, 200 S. W. 1062.

In *Bank of Gresham v. Walch*, 76 Or. 272, 147 Pac. 534, it was held that the payee of a note is not a holder in due course within the meaning of these terms used in § 28 of the act. There was not any discussion of the subject, and no reason assigned for the conclusion.

So far as our investigation has gone, these are the only decided cases which might, in principle, deny

to this plaintiff the right to recover. *National Bank v. Farmers' Bank*, 87 Neb. 841, 128 N. W. 522, and *Aurora State Bank v. Haynes Eames Elevator Co.* 88 Neb. 187, 129 N. W. 279, are cited by some authorities as bearing upon the question here involved, but in our judgment neither is in point.

Counsel for appellant cite and rely upon the decision in *Frazier v. First Nat. Bank*, 34 Ohio C. C. 508. The action was by the bank upon two notes. The statement of the case is that "each of these notes was *indorsed* by H. E. Frazier," and the question arose upon the sufficiency of Frazier's answer. Since Frazier was an accommodation indorser, and only secondarily liable under § 192 of the act, the case has no application here.

4. At common law (law merchant) it was held generally that a payee in possession of a bill or note payable to order may be a holder in due course. *Watson v. Russell*, 3 Best. & S. 34, 122 Eng. Reprint, 14, 34 L. J. Q. B. N. S. 93, 11 L. T. N. S. 641, 13 Week. Rep. 231, affirmed in 5 Best. & S. 968, 122 Eng. Reprint, 1090; *Armstrong v. American Exch. Nat. Bank*, 133 U. S. 433, 33 L. ed. 747, 10 Sup. Ct. Rep. 450; *J. G. Brill Co. v. Norton & T. Street R. Co.* 189 Mass. 431, 2 L.R.A. (N.S.) 525, 75 N. E. 1090; *First Nat. Bank v. Union Trust Co.* 158 Mich. 94, 133 Am. St. Rep. 362, 122 N. W. 547; *Jordan v. Jordan*, 10 Lea, 124, 43 Am. Rep. 294; *Lookout Bank v. Aull*, 93 Tenn. 645, 42 Am. St. Rep. 934, 27 S. W. 1014; *Brown v. Rowan*, 91 Misc. 220, 154 N. Y. Supp. 1098, and cases cited. But if, under the Negotiable Instruments Act, negotiation to the holder is indispensable to constitute him a holder in due course, and if negotiation of a promissory note payable to order can be effected only by indorsement and delivery, it follows that the payee can never be a holder in due course, and that his common-law rights have been greatly curtailed by this act.

It is inconceivable that it was the purpose of the act to work a change

in the law so radical without an express declaration to that effect, and we ought not to draw the inference that such a result was contemplated unless compelled by the weightiest considerations. Section 30 of the act (Rev. Codes, § 5878) provides: "An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. If payable to bearer it is negotiated by delivery; if payable to order it is negotiated by the indorsement of the holder completed by delivery."

It is upon the last sentence of the section that the courts which hold that the change has been wrought base their conclusions—conclusions which can be justified only by assuming that the last sentence is a part of the definition of the term "negotiated," but that it is not seems to us certain.

The first sentence of the section is complete in itself, and expresses the meaning of the term "negotiated" as it was used in the law merchant. In *Baring v. Lyman*, 1 Story, 416, Fed. Cas. No. 983, Justice Story of the Supreme Court of the United States, at circuit, said: "A bill [of exchange] is properly said to be negotiated when it has passed into the hands of the payee or indorsee, or other holder for value, who thereby acquires title thereto." *Liberty Trust Co. v. Tilton*, 217 Mass. 462, L.R.A.1915B, 144, 105 N. E. 605; *Boston Steel & I. Co. v. Steuer*, 183 Mass. 140, 97 Am. St. Rep. 426, 66 N. E. 646.

It is also the common and popular signification of the term. Webster's Int. Dict.; Anderson's Law Dict. The fact that it is generally employed to characterize the act of transferring a bill or note from one holder to another does not limit its meaning to such a transfer.

The last sentence of § 30 was manifestly intended only to describe the method by which one holder may pass title to another, but was not intended to define the exclusive methods by which negotiation can be

accomplished. In other words, it was never intended by the act to place ^{-when instrument negotiated.} the payee in a worse position than he was before it was adopted. *Liberty Trust Co. v. Tilton* and *Brown v. Rowan*, above; *Fletcher Moulton, L. J.*, in *Lloyd's Bank v. Cooke* [1907] 1 K. B. 794, 5 B. R. C. 666, 76 L. J. K. B. N. S. 666, 96 L. T. N. S. 715, 23 Times L. R. 429, 8 Ann. Cas. 182; *Ex parte Goldberg & Lewis*, 191 Ala. 356, L.R.A. 1915F, 1157, 67 So. 839; *McDonough v. Cook*, 19 Ont. L. Rep. 267; *Knetchel Furniture Co. v. Ideal House Furnishers*, 19 Manitoba L. R. 652. Indeed, the supreme court of Iowa, in *Vander Ploeg v. Van Zuuk*, above, said: "We do not mean to say that in no case can the person named as payee in a negotiable instrument be the holder thereof 'in due course' [giving an example of a supposititious case in which the payee would be a holder in due course at common law]. There is no reason to think the situation of the parties to such a transaction is different under the act." The Uniform Negotiable Instruments Act.

And our conclusion is fortified by other provisions of the act. The holder of a bill or note payable to order is the payee or indorsee in possession of it. Section 191. "Every holder is deemed prima facie to be a holder in due course." Section 59. Substituting for the term "holder" in § 59, its equivalent as defined by § 191, and § 59 would then read: "Every payee in possession of a note is prima facie a holder thereof in due course"—a conclusion which is impossible if negotiation by indorsement and delivery is necessary to constitute one a holder in due course.

It seems necessary, in order to harmonize the several provisions of the act, to hold that the complete definition of "negotiated" is contained in the first sentence of § 30, and that a payee who has taken a note complete and regular upon its face, before it was overdue, and for value and in good faith, may qualify

as a holder in due course, and *prima facie* is such.

There is nothing in the complaint herein to negative the presumption that the bank is a holder in due course, and the fact that Lee is an accommodation maker does not overcome the presumption.

The allegations stricken from the answer do not constitute a defense, and the trial court properly so ruled.

The judgment is affirmed.

Brantly, Ch. J., and Reynolds, Cooper, and Galen, JJ., concur.

ANNOTATION.

Payee as a holder in due course under the Negotiable Instruments Law.

There are two opposing theories as to whether the payee of a negotiable instrument can be a bona fide holder thereof, under the Negotiable Instruments Law. According to one line of authorities, the payee in whose hands the instrument has its inception as an obligation cannot be a bona fide holder. *Vander Ploeg v. Van Zuuk* (1901) 135 Iowa, 350, 13 L.R.A. (N.S.) 490, 124 Am. St. Rep. 275, 112 N. W. 807; *Builders Lime & Cement Co. v. Weimer* (1915) 170 Iowa, 444, 151 N. W. 100, Ann. Cas. 1917C, 1174. See *Devoy & K. Coal & Coke Co. v. Huttig* (1916) 174 Iowa, 357, 156 N. W. 412; *Southern Nat. Life Realty Corp. v. People's Bank* (1917) 178 Ky. 80, 198 S. W. 543; *St. Charles Sav. Bank v. Edwards* (1912) 243 Mo. 553, 147 S. W. 978; *Long v. Mason* (1917) 273 Mo. 266, 200 S. W. 1062; *Bank of Gresham v. Walch* (1915) 76 Or. 272, 147 Pac. 534; *Britton Mill. Co. v. Williams* (1921) — S. D. —, 184 N. W. 265; *Lewis v. Clay* (1897) 67 L. J. Q. B. N. S. (Eng.) 224, 77 L. T. N. S. 653, 14 Times L. R. 149, 46 Week. Rep. 319; *Herdman v. Wheeler* [1902] 1 K. B. (Eng.) 361, 5 B. R. C. 651, 71 L. J. K. B. N. S. 270, 50 Week. Rep. 300, 86 L. T. N. S. 48, 18 Times L. R. 190.

The court in *Vander Ploeg v. Van Zuuk* (Iowa) supra, says that it does not mean to say that in no case can a payee be a holder in due course. And the court cites the example of the purchase of a draft by A, to be transmitted to B, the draft being made payable directly to B. It is stated that "no doubt A is the holder of such draft, and B, taking it for value, becomes a holder in due course." But this rule is held not applicable where

the person to whom the paper is intrusted is not a holder, and the instrument has its inception in the hands of the payee. The court in *Herdman v. Wheeler* (Eng.) supra, says that it is not prepared to hold that the payee of a note can never be a holder in due course. The concession in the Iowa case, that the payee might in some circumstances be a holder in due course, was apparently due to the court's assumption that in some circumstances the paper might have its inception as a legal obligation before it reached the payee's hands.

Some of these cases have involved the filling of blanks. The defendant who has signed a blank note form as maker intrusts the paper so signed to another, who exceeds his authority in filling up the blanks. These cases deny the right of the one whose name is inserted as payee to recover of the maker. *Vander Ploeg v. Van Zuuk* (Iowa) and *Herdman v. Wheeler* (Eng.) supra. In *Vander Ploeg v. Van Zuuk* (Iowa) supra, two persons signed a blank note form as joint makers with one to whom the instrument was intrusted, and conferred upon him authority to fill it in for \$150 or \$200 for the purpose of raising money. He filled it in for \$2,000 and delivered it to the plaintiff in payment of a past-due indebtedness. In some of these cases the payee had no notice that the instrument, as delivered, was not filled out in accordance with the authority given. *Vander Ploeg v. Van Zuuk* (Iowa) supra. In *Herdman v. Wheeler* (Eng.) supra, the payee had no notice that the instrument had been signed in blank, or that the agent had in any way acted without authority.

In *Devoy & K. Coal & Coke Co. v. Huttig* (1916) 174 Iowa, 357, 156 N. W. 412, it seems the payee had no notice that the instrument was executed in blank.

In *Southern Nat. Life Realty Corp. v. People's Bank* (1917) 178 Ky. 80, 198 S. W. 543, it was held that the payee of a note could not be a bona fide holder thereof so as to preclude parties who appeared thereon as joint makers from defending on the ground that they were sureties, and that, subsequent to the execution of the note sued upon, the plaintiff, without their knowledge or consent, surrendered to the principal on the note collateral security that he had deposited with the payee.

A bank which is made the payee of a note given for stock in a corporation which was being promoted cannot be a holder for value so as to preclude the maker of the defense of fraud. *Bank of Gresham v. Walch* (1915) 76 Or. 272, 147 Pac. 534.

The payee of a bank check drawn by the cashier of the bank, who delivers the same to the payee in payment of his individual account, cannot be a bona fide holder thereof so as to require actual knowledge of an infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith, as required by § 56 (Mo. Rev. Stat. 1909, § 10,026) of the Negotiable Instruments Law. *St. Charles Sav. Bank v. Edwards* (1912) 243 Mo. 553, 147 S. W. 978. The action in this case was by the bank, to recover the amount of the checks which had been collected.

The rule that the payee cannot be the holder in due course was applied in *Builders Lime & Cement Co. v. Weimer* (1915) 170 Iowa, 444, 151 N. W. 100, Ann. Cas. 1917C, 1174, to an original holder other than the payee. The note in this case was made payable to a certain company or bearer, but not delivered to the payee named; instead, being delivered to the plaintiff. The defense was that the note had been altered after it had been signed by the defendant and before delivered, a defense which was held available. As appears above, the

plaintiff took a note payable to A, or bearer, directly from the maker, and thereby had notice that the note was not coming through the payee.

The rule that one who holds through a holder for value takes a negotiable instrument free from defenses as a bona fide holder was held not to reach so far as to include the original payee, who may in the course of business again become the owner of the note, in *Miller v. Chinn* (1917) — Mo. App. —, 195 S. W. 552, s. c. on later appeal in (1918) — Mo. App. —, 203 S. W. 212.

The payee of a note which is procured from a joint maker by the fraud of the other maker, who delivers the same to the payee and receives value therefor, cannot be a holder in due course under the Bills of Exchange Act. *Lewis v. Clay* (1897) 67 L. J. Q. B. N. S. (Eng.) 224, 77 L. T. N. S. 653, 14 Times L. R. 149, 46 Week. Rep. 319. The court says that a "holder in due course," under the Bills of Exchange Act, "is a person to whom, after its completion by and as between the immediate parties, the bill or note has been negotiated." This statement is referred to as an expression of opinion that a payee can never be a holder in due course, and as thus interpreted is said in *Herdman v. Wheeler* [1902] 1 K. B. (Eng.) 361, 5 B. R. C. 651, to have been a dictum only, and too broad. The court in the *Herdman Case* says: "We are not prepared to hold that a payee of a note can never be a holder in due course, but it is, as it seems to us, just as unnecessary for us to decide that question as it was for the late Lord Chief Justice to do so on the case before him."

See *St. Charles Sav. Bank v. Edwards* (1912) 243 Mo. 553, 147 S. W. 978, *supra*, as to notice.

According to the other line of authorities, the payee may be a bona fide holder. *Ex parte Goldberg* (1914) 191 Ala. 356, L.R.A.1915F, 1157, 67 So. 839; *Boston Steel & I. Co. v. Steuer* (1903) 183 Mass. 140, 97 Am. St. Rep. 426, 66 N. E. 646; *Liberty Trust Co. v. Tilton* (1914) 217 Mass. 462, L.R.A. 1915B, 144, 105 N. E. 605; *National Invest. & Secur. Co. v. Corey* (1916)

222 Mass. 453, 111 N. E. 357; Colonial Fur Ranching Co. v. First Nat. Bank (1917) 227 Mass. 12, 116 N. E. 731; **MERCHANTS' NAT. BANK v. SMITH** (reported herewith) ante, 430; Brown v. Brown (1915) 91 Misc. 220, 154 N. Y. Supp. 1098; Bergstrom v. Ritz-Carlton Restaurant & Hotel Co. (1916) 171 App. Div. 776, 157 N. Y. Supp. 959, appeal dismissed in (1917) 220 N. Y. 569, 115 N. E. 1033; Johnston v. Knipe (1918) 260 Pa. 504, L.R.A.1918E, 1042, 103 Atl. 957.

See Thorpe v. White (1905) 188 Mass. 333, 74 N. E. 592, and Empire Trust Co. v. Manhattan Co. (1916) 97 Misc. 694, 162 N. Y. Supp. 629, affirmed without opinion in (1917) 180 App. Div. 891, 166 N. Y. Supp. 1093. It was assumed in State Bank v. Missia (1920) 144 Minn. 410, 175 N. W. 614, that one whose name had been inserted in a blank left for the name of the payee might be a holder in due course.

That the payee may be a holder in due course is the rule followed in Canada and in some English cases. Glenie v. Smith [1908] 1 K. B. (Eng.) 263, 77 L. J. K. B. N. S. 193, 98 L. T. N. S. 515, 24 Times L. R. 177; Robinson v. Mann (1901) 21 Can. S. C. 484; McDonough v. Cook (1909) 19 Ont. L. Rep. 267; Knechtel Furniture Co. v. Ideal House Furnishers (1910) 19 Manitoba L. R. 652.

It has been held in England, however, that where in a suit upon a note signed by husband and wife as makers, the wife in fact being surety, which is executed and delivered through an intermediary, duress is shown by the wife, the burden of showing that value was given in good faith is not shifted to the payee by the provision of the Bills of Exchange Act that "every holder of a bill is prima facie deemed to be a holder in due course" . . . 'but if in an action on a bill it is admitted or proved that the acceptance, issue, or subsequent negotiation of the bill is affected with fraud, duress, or force and fear, or illegality, the burden of proof is shifted.'" The provision as to the shifting of the burden of proof was not intended to apply to the case of

an instrument which remains in the hands of the person to whom it was originally delivered. Talbot v. Von Boris [1911] 1 K. B. (Eng.) 854.

The case of Lilly v. Farrar (1908) Rap. Jud. Quebec 17 B. R. 554, which is sometimes cited as authority for the proposition that the payee may be a holder in due course, is a decision based upon the theory of estoppel announced in Lloyd's Bank v. Cooke [1907] 1 K. B. (Eng.) 794, 5 B. R. C. 666, 76 L. J. K. B. N. S. 666, 96 L. T. N. S. 715, 23 Times L. R. 429, 8 Ann. Cas. 182. But see Herdman v. Wheeler (Eng.) supra.

A bank which was the indorsee and holder of a note, and which, upon the maturity thereof, accepted from the indorser, who was in reality an accommodation party, a demand note signed by himself and wife, and payable directly to the bank as collateral for the original note, was held to be a holder for value in Lowell v. Bickford (1909) 201 Mass. 543, 88 N. E. 1, as against the wife who was the accommodation party on the demand note, so as to preclude her from setting up a lack of consideration.

This theory is adopted in an obiter statement in Redfield v. Wells (1918) 31 Idaho, 415, 173 Pac. 640, but in that case the payee of a partnership check, who had received the same from one of the partners, and applied it on the partner's individual debts, was held not to be a bona fide holder, because of the fact that he knew it to be a partnership check and applied it for the individual benefit of one of the partners.

Various situations have been involved in these cases. In Ex parte Goldberg (1914) 191 Ala. 356, L.R.A. 1915F, 1157, 67 So. 839, it was held that a surety on a note cannot defeat payment to the payee on the ground that he was defrauded into signing by the false representation of the principal maker, to whom the note was intrusted, that the purported signature of another surety was genuine, and that others would be secured before the note was delivered, under the provisions of the Negotiable Instruments Act that a holder in due course is one

who had no notice of infirmity at the time the paper was negotiated to him, and making the note subject to defenses in the hands of the holder other than in due course, since the statute will not be construed as excluding the payee from the status of holder in due course.

In *Boston Steel & I. Co. v. Steuer* (1903) 183 Mass. 140, 97 Am. St. Rep. 426, 66 N. E. 646, the payee of a wife's check, intended by the wife to be a payment on her debt, but which was intrusted to her husband and delivered by him to the payee in payment of his own debt, is stated to be a bona fide holder of the check. It seems, however, that the check had been paid; at least, the action was on the account of the wife, who claimed the amount of the check as a credit.

The payee named in a promissory note, who purchases it complete in form before maturity, in good faith, and without notice of any infirmity in title or otherwise, may, according to the court in *Liberty Trust Co. v. Tilton* (1914) 217 Mass. 462, L.R.A.1915B, 144, 105 N. E. 605, enforce it under the Negotiable Instruments Law as one to whom it was negotiated as a holder in due course, against an indorser whose instruction as to a coindorser, and as to the amount to be filled in blanks left for that purpose, were not followed by the one to whom it was intrusted for delivery, and he was held not to be within the section of the act providing that as between immediate parties the delivery, to be effectual, must be by or under authority of the party making, drawing, accepting, or indorsing, as the case may be.

The payee of a corporate check signed by the corporate treasurer, which was delivered to the payee by a third person, and under his direction credited to an account owing from such third person to the payee, is stated in *National Invest. & Secur. Co. v. Corey* (1916) 222 Mass. 453, 111 N. E. 357, an action by the corporation against the payee to recover the amount of the checks which had been collected in the usual course of business, on the ground that its treasurer

had no authority to sign and deliver them, to be a holder in due course.

It is stated in *Colonial Fur Ranching Co. v. First Nat. Bank* (1917) 227 Mass. 12, 116 N. E. 731, that the payee of a corporate check, signed by an officer whose individual debt was canceled by the check, may be a bona fide holder. The action was one by an assignee of the corporation to recover the amount of the check, which had been collected in the usual course of business.

In *Bergstrom v. Ritz-Carlton Restaurant & Hotel Co.* (1916) 171 App. Div. 776, 157 N. Y. Supp. 959, an action by the drawee bank, which had paid a forged check, against the payee thereof, to recover the amount thus paid, the payee of the check is stated to be a holder in due course and for value, in answer to the contention of the plaintiff that the rule that the drawee of a forged check, who had by mistake paid the same, could recover of anyone except a holder in due course and for value.

It is held that a creditor, to whom his debtor has procured a note to be made payable by a third person, may be a bona fide holder of the note so as not to be affected by a failure of consideration as between the debtor and the third person, in *Brown v. Brown* (1915) 91 Misc. 220, 154 N. Y. Supp. 1098.

The payee of a promissory note may be a holder in due course, so as to preclude an accommodation indorser of the defense that blanks in the note were not filled in accordance with the agreement. *Johnston v. Knipe* (1918) 260 Pa. 504, L.R.A.1918E, 1042, 103 Atl. 957.

A number of cases in England and Canada have involved the liability of an indorser of the instrument to the payee. In England, under the decision in *Steele v. McKinlay* (1880) L. R. 5 App. Cas. 754, 43 L. T. N. S. 358, 29 Week. Rep. 17, 4 Eng. Rul. Cas. 218, a stranger who indorsed a bill before the payee was not liable to the payee, and this rule was not changed by the fact that the indorsement was made before delivery to the payee. The rule announced in the

Steele Case was held not to have been changed by the Bills of Exchange Act. *Jenkins & Sons v. Coomber* [1898] 2 Q. B. (Eng.) 168, 67 L. J. Q. B. N. S. 780, 78 L. T. N. S. 752, 14 Times L. R. 425, 47 Week. Rep. 48. But in *Glenie v. Smith* [1908] 1 K. B. (Eng.) 263, 77 L. J. K. B. N. S. 193, 98 L. T. N. S. 515, 24 Times L. R. 177, it is held that the Bills of Exchange Act does change this rule—at least, in some instances, and that one to whom a blank bill, indorsed by a stranger and accepted by the drawees, was intrusted, and who thereafter filled it up, making himself drawer, and making the bill payable to himself, might recover of the indorser upon dishonor. Both judges (Cozens-Hardy, M. R., and Fletcher Moulton, L. J.) expressly state that the plaintiff was a holder of the bill in due course by virtue of § 30 of the Bills of Exchange Act, which provides that every holder is *prima facie* deemed to be a holder in due course. The instrument in this case was, however, filled up by the party to whom it was intrusted within the limits of his authority, and Fletcher Moulton, L. J., states: "Therefore a party, even though he knew all the circumstances of the case, and even though he became a party to it while it was still incomplete, is entitled to all the rights of a holder in due course of an ordinary bill, if he occupies that position with regard to this bill." He then adds, immediately following: "I cannot see why Glenie did not occupy that position. He was admittedly the holder; and a holder is to be deemed *prima facie* the holder in due course. It is suggested that evidence can be brought to show that he was not the holder in due course. To what does that evidence relate? It is evidence of the variation of the order in which these operations were performed. That is the very point which the section says that the defendant may not raise. The delivery of the blank sheet of paper with his name on, and stamped, authorized those operations to be done in any order, and he is estopped from saying that they were not done in the proper order." That the Canadian

Bills of Exchange Act changes the rule of *Steele v. McKinlay* is held in the cases in that jurisdiction. In Canada the court in *Robinson v. Mann* (1901) 31 Can. S. C. 484, in allowing a recovery by the payee of a note, against an indorser who had written his name thereon before indorsement by the payee, cites § 56 of the Bills of Exchange Act, which provides that "where a person signs a bill otherwise than as a drawer or acceptor, he thereby incurs the liability of an indorser to a holder in due course, and is subject to all the provisions of this act respecting indorsers," and says: "Then, when the bank took the note, was it not entitled to the benefit of the respondent's liability as indorser? Certainly it was, for by force of the statute the indorsement operated as what has long been known in the French commercial law as an 'aval,' a form of liability which is now by the statute adopted in English law. The argument for the appellant, as I understand it, is that this indorsement, at most, amounted only to a guaranty, and that, there being no consideration expressed in writing, the Statute of Frauds would have been an answer if the bank had sued the respondent. . . . Here, however, the note was negotiated, and the bank was holder in due course, and consequently the 56th section of the act applies and creates a liability as indorser, independently altogether of the principle of guaranty. If the section referred to is to have any effect, it must apply to a case like this." *Robinson v. Mann* was followed in *McDonough v. Cook* (1909) 19 Ont. L. Rep. 267, a case having similar facts, after the Canadian act had been recast, but without change in the substance of the section under which *Robinson v. Mann* was decided. *Robinson v. Mann* was followed, also, in *Knechtel Furniture Co. v. Ideal House Furnishers* (1910) 19 Manitoba L. R. 652, a case having similar facts.

If the payee knows the instrument was executed in blank, he cannot acquire the rights of a bona fide holder. *Boston Steel & I. Co. v. Steuer* (1903) 183 Mass. 140, 97 Am. St. Rep. 426,

66 N. E. 646. The contrary holding in *Glenie v. Smith* [1908] 1 K. B. (Eng.) 263, 77 L. J. K. B. N. S. 193, 98 L. T. N. S. 515, 24 Times L. R. 177, cannot be supported. Whatever may be the rule as to a payee being a holder in due course, it cannot be that a payee to whom the instrument in blank has been intrusted, and who thereupon fills it up, can be such.

It thus appears that opinion is quite evenly divided on the question under annotation. A logical construction of the Negotiable Instruments Act supports the conclusion reached by those courts which hold that the payee in whose hands the instrument has its inception cannot be a holder in due course under the act. The provisions of the act which have been involved in the discussion heretofore had on the question are as follows:

Sec. 191. "In this act, unless the context otherwise requires: . . . 'Holder' means the payee or indorsee of a bill or note, who is in possession of it, or the bearer thereof. . . . 'Issue' means the first delivery of the instrument, complete in form, to the person who takes it as a holder."

Sec. 30. "What constitutes negotiation.—An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. If payable to bearer it is negotiated by delivery; if payable to order it is negotiated by the indorsement of the holder completed by delivery."

Sec. 52. "What constitutes a holder in due course.—A holder in due course is a holder who has taken the instrument under the following conditions: (1) That it is complete and regular upon its face. (2) That he became the holder of it before it was overdue, and without notice that it has been previously dishonored, if such was the fact. (3) That he took it in good faith and for value. (4) That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."

Sec. 57. "Rights of holder in due course.—A holder in due course holds

the instrument free from any defect of title of prior parties, and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon."

Sec. 59. "Presumption—burden of proof—exception.—Every holder is deemed prima facie to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course. But the last-mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title."

Throughout the act a holder in due course is treated as one to whom the instrument has been negotiated by one in whose hands it was an obligation. *Vander Ploeg v. Van Zuuk* (1907) 135 Iowa, 350, 13 L.R.A.(N.S.) 490, 124 Am. St. Rep. 275, 112 N. W. 807; *Builders Lime & Cement Co. v. Weimer* (1915) 170 Iowa, 444, 151 N. W. 100, Ann. Cas. 1917C, 1174; *Southern Nat. Life Realty Corp. v. People's Bank* (1917) 178 Ky. 80, 198 S. W. 543; *St. Charles Sav. Bank v. Edwards* (1912) 243 Mo. 553, 147 S. W. 978; *Bank of Gresham v. Walch* (1915) 76 Or. 272, 147 Pac. 534; *Britton Mill. Co. v. Williams* (1921) — S. D. —, 184 N. W. 265; *Lewis v. Clay* (1897) 67 L. J. Q. B. N. S. (Eng.) 224, 77 L. T. N. S. 653, 14 Times L. R. 149, 46 Week. Rep. 319; *Herdman v. Wheeler* [1902] 1 K. B. (Eng.) 361, 5 B. R. C. 651, 71 L. J. K. B. N. S. 270, 50 Week. Rep. 300, 86 L. T. N. S. 48, 18 Times L. R. 190. The court in *Vander Ploeg v. Van Zuuk* (1907) 135 Iowa, 350, 13 L.R.A.(N.S.) 490, 124 Am. St. Rep. 275, 112 N. W. 807, after referring to the foregoing provisions of the Negotiable Instruments Act, says: "It seems to us, under these definitions and the application thereof, that the plaintiff was the holder of the note, but not a holder in due course. The latter term seems unquestionably to be used to indicate a

person to whom, after completion and delivery, the instrument has been negotiated. In the ordinary case the payee of the instrument is the person with whom the contract is made, and his rights are not, in general, dependent on any peculiarities in the Law of Negotiable Instruments. The peculiarities of that law distinguishing negotiable instruments from other contracts relate to a holder who has taken by negotiation, not as an original party. . . . In other words, we think that 'holder in due course' should be construed as applicable only to one who takes the instrument by negotiation from another who is a holder." "While the instrument is still in the hands of the original payee, the 'courier' has not started on its career without luggage." *St. Charles Sav. Bank v. Edwards* (1912) 243 Mo. 553, 147 S. W. 978. The court in *Bank of Gresham v. Walch* (1915) 76 Or. 272, 147 Pac. 534, after citing § 52 (L. O. L. § 5885), says: "The plaintiff bank is the original payee named in the note sued on. It has never been indorsed or transferred. Plaintiff is not a holder thereof in due course, within the meaning of the statute." The court in *Lewis v. Clay* (1897) 67 L. J. Q. B. N. S. (Eng.) 224, says, in answer to the argument that the payee of a note was a holder in due course under the Bills of Exchange Act: "Further, an examination of §§ 20, 21, 29, 30, and 38, relating expressly to bills, and §§ 83, 84, 88, and 89, relating to promissory notes, will make it quite clear that 'a holder in due course' is a person to whom, after its completion by and as between the immediate parties, the bill or note has been negotiated. In the present case the plaintiff is named as payee on the face of the promissory note, and therefore is one of the immediate parties. The promissory notes have in fact never been negotiated, within the meaning of the act."

The court in *Herdman v. Wheeler* [1902] 1 K. B. (Eng.) 361, 5 B. R. C. 651, says: "The real point in the present case, after all, is Can we hold that this note was 'negotiated' to the plaintiff within the meaning with

which the words are used in the proviso to the 20th section? And, as to this, we certainly have the opinion of the late Lord Chief Justice that a delivery to a payee for value is not a 'negotiating' within the meaning of the act. In the 31st section it is said: 'A bill is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder of the bill.' Does this mean only from one person who is holder, to another, or may the person transferring be an agent in possession of the bill otherwise than as holder, whose delivery constitutes the receiver a holder? And even if that cannot be the meaning in the 31st section, may it not be possible to say that, in the 20th section, 'negotiated to a holder in due course' means no more than delivered to a person in such a way that he thereupon becomes a holder in due course? . . . We have come to the conclusion that we should be unfairly straining the words, if we did not hold that 'negotiated,' in the proviso at the end of the 20th section, meant transferred by one holder to another. It is to be observed that the Bills of Exchange Act, in § 2, defines 'issue' as meaning 'the first delivery of the bill or note complete in form to a person who takes it as holder.' Here, Anderson clearly issued the note to the plaintiff within the meaning of this definition. There is, therefore, a technical word defined and used in the act to mean that which Anderson did here, and the appropriate words to have used in the proviso to § 20, if it had been intended to include this case, would have been: 'If such instrument, after completion, is issued or negotiated to a holder in due course.' Those are not the words, and although we think that the present case might possibly have been decided in the plaintiff's favor, before the Bills of Exchange Act was passed, we think that we cannot, consistently with the meaning of 'issue' and 'negotiate' in the act, say that the present case is covered by the words used in the proviso."

What is just stated to be true of the Bills of Exchange Act is true of the

Negotiable Instruments Act. Throughout the act the "issue" of an instrument is contrasted with its "negotiation." According to § 191: "'Issue' means the first delivery of the instrument, complete in form, to the person who takes it as a holder." According to § 30: "An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. If payable to bearer it is negotiated by delivery; if payable to order it is negotiated by the indorsement of the holder completed by delivery." So that, when, in defining a holder in due course in § 52, the act defines him to be a holder who has taken the instrument under the following condition (among others): "That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it," a person to whom the instrument is transferred from a previous holder is clearly meant. The court in *Southern Nat. Life Realty Corp. v. People's Bank* (1917) 178 Ky. 80, 198 S. W. 543, refers to § 190 of the act, which defines the word "issue," as used in the act, to mean "first delivery of the instrument complete in form to a person who takes it as a holder;" and also § 30, which declares that "an instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. . . . If payable to order it is negotiated by the indorsement of the holder completed by delivery," and says: "It is, therefore, apparent that, as used in the act, these words have a peculiar and restricted meaning. The promissory note involved here was issued to plaintiff, but it was never negotiated. . . . And as plaintiff was the payee to whom the note was issued, and the note was never negotiated, although a negotiable instrument, it is likewise apparent plaintiff was a holder, but not a holder in due course, who, under § 57, 'holds the instrument free from any defect of title of prior parties and free from defenses available to prior parties among themselves.'" This

construction is strengthened by the provision of § 57, which, in defining the rights of a holder in due course, says: "A holder in due course holds the instrument free from any defect of title of prior parties, and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon." There are no parties prior to a payee in whose hands the instrument has its inception as an obligation; the instrument is a contract between the maker and the payee, who are the original parties, between whom the ordinary rules as to contracts apply unless there is some estoppel outside the instrument.

The arguments in favor of the theory that the payee may be a holder in due course, under the Negotiable Instruments Act, are in the main set forth in *MERCHANTS' NAT. BANK v. SMITH* (reported herewith) ante, 430. All of the cases which hold that the payee may be a holder in due course under the Negotiable Instruments Act are of the opinion that at common law such was the rule. And these courts reason that, this being the rule at common law, the Negotiable Instruments Act was not intended to restrict the rights of the payee.

The court in *Ex parte Goldberg* (1914) 191 Ala. 356, L.R.A.1915F, 1157, 67 So. 839, says: "Keeping all this in mind, we cannot, upon a very full consideration of the language and provisions of the Commercial Code, assent to the view that it has withdrawn from a payee the status of a holder in due course, in those cases where he was so regarded and protected prior to its enactment. And we think and hold that subdivision 4 of § 5007, defining a holder in due course, must be construed as applicable to a holder if he be a negotiatee, and not as excluding from the general class all who are not holders by negotiation. It is clear that if subdivision 4 of § 5007 does not, by necessary implication, exclude a payee in every case from the status of 'holder in due course,' there is nothing else in the Code which even suggests that result.

And even if we could not construe subdivision 4 as above indicated, we think it would still be perfectly consonant with reason, and with the general language and purpose of law, to hold that the definition of a 'holder in due course,' as expressed in the entire section (5007), was framed with regard only to the usual and ordinary case of negotiatees, and that the occasionally exceptional status of a payee, as such, is simply a *casus omissus* contemplated and provided for by § 5143: 'In any case not provided for in this chapter, the rules of the law merchant shall govern.'

The court in *Ex parte Goldberg* (Ala.) supra, says: "It might be conceded that 'negotiate,' as used throughout the act, means always only the transfer from one holder to another after the instrument has been 'issued,' as held in *Herdman v. Wheeler* [1902] 1 K. B. (Eng.) 361, 5 B. R. C. 651, 71 L. J. K. B. N. S. 270, 50 Week. Rep. 300, 86 L. T. N. S. 48, 18 Times L. R. 190, and *Vander Ploeg v. Van Zuuk* (1907) 135 Iowa, 350, 13 L.R.A.(N.S.) 490, 124 Am. St. Rep. 275, 112 N. W. 807, supra,—which, however, we do not now attempt to decide,—without affecting our judgment in this case."

It is stated in *Liberty Trust Co. v. Tilton* (1914) 217 Mass. 462, L.R.A. 1915D, 144, 105 N. E. 605, that a promissory note, complete as to form and payable to a named person, may be negotiated to that person by being sold to him or taken by him for value. The court then refers to the word "negotiation," as defined in § 47 of the act, wherein it is provided that an instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof, and says that the remaining sentence of § 47, namely: "If payable to bearer, it is negotiated by delivery; if payable to order it is negotiated by the indorsement of the holder completed by delivery," was not intended to include all the ways in which an instrument might be negotiated, nor to restrict the comprehensive terms of the preceding sentence, but that clearly,

under these two sections, a negotiable instrument payable to a named payee is negotiated when physical possession of it is handed for value to the person named as payee.

The payees of these instruments were held not to be "immediate parties" within the meaning of the provision of the Negotiable Instruments Act that, as between immediate parties, the delivery, to be effectual, must be made by or under the authority of the party making, drawing, accepting, or indorsing, as the case may be. *Liberty Trust Co. v. Tilton* (Mass.) supra; *National Invest. & Secur. Co. v. Corey* (1916) 222 Mass. 453, 111 N. E. 357, supra.

A number of the courts holding the payee may be a bona fide holder rely upon the provision of § 59 that every holder is deemed prima facie to be a holder in due course. This, together with the definition of "holder" in § 191, to the effect that "holder" includes the payee, is regarded as showing that the payee is presumed to be a holder in due course. But § 191 defines a "holder" as including the payee in the act, "unless the context otherwise requires." The context of § 59 clearly requires otherwise.

The holding of these courts that the payee of a negotiable instrument may be a holder thereof in due course seems to have arisen from a failure to discriminate between a holder in due course under the Negotiable Instruments Act, and a bona fide holder as applied to the law generally. The protection that is afforded bona fide holders is not confined to negotiable instruments. Equity will not grant relief from fraud as against a bona fide purchaser without notice of secret claims; such a purchaser is protected against such claims. 1 Story, Eq. Jur. 14th ed. §§ 542, 573, et seq. Equity will not grant relief from accident as against a bona fide purchaser for a valuable consideration, and without notice. 1 Story, Eq. Jur. 14th ed. § 152. These instances might be multiplied, but the above are sufficient to show that the term "bona fide purchaser" is not confined to the Law of Negotiable Instruments. In fact, it

has been said that "there seems no reason to distinguish the meaning of 'purchaser for value in good faith without notice, in the Law of Negotiable Instruments, and in the Law of Sales.'" Williston, Sales, § 621. That a bona fide holder is a favorite of the law generally being true, the decisions in these cases should more properly have been based upon the general theory than upon the Negotiable Instruments Act.

The protection that is afforded a bona fide holder in the law generally rests upon an estoppel. In the application of this doctrine it was held in *Lloyd's Bank v. Cooke* [1907] 1 K. B. (Eng.) 794, 5 B. R. C. 666, 76 L. J. K. B. N. S. 666, 96 L. T. N. S. 715, 23 Times L. R. 429, 8 Ann. Cas. 182, on facts very similar to those involved in *Herdman v. Wheeler* [1902] 1 K. B. (Eng.) 361, 5 B. R. C. 651, 71 L. J. K. B. N. S. 270, 50 Week. Rep. 300, 86 L. T. N. S. 48, 18 Times L. R. 190, *supra*, that the maker was estopped to deny his liability to the payee. Some limitations are placed upon the theory of estoppel as applied to such cases, by the subsequent decision in *Smith v. Prosser* [1907] 2 K. B. (Eng.) 735, 5 B. R. C. 682, 97 L. T. N. S. 155, 23 Times L. R. 597, 12 Ann. Cas. 191, but it is believed that in the ordinary case, where the equities require it, an estoppel can be worked out. Unless the obligor sought to be held liable to the payee has in some way estopped himself to deny his liability, it seems clear that he should not be held liable. It seems clear that most, if not all, of the cases sustaining the payee's right to recovery, might have been based on the theory of estoppel, and some denying the right to recover might have

been decided otherwise, had the court considered the theory.

The difficulties in the way of basing a decision on the theory that the payee is a holder in due course are well illustrated in the two English decisions and *Talbot v. Von Boris* [1911] 1 K. B. (Eng.) 263, 77 L. J. K. B. N. S. 193, 98 L. T. N. S. 515, 24 Times L. R. 177, and *Talbot v. Von Bori* [1911] 1 K. B. (Eng.) 854, 80 L. J. K. B. N. S. 661, 104 L. T. N. S. 524, 27 Times L. R. 266, 55 Sol. Jo. 290. In the *Glenie Case*, although it was not necessary to the decision, both judges who write opinions expressly state that a payee who filled in the blanks in the instrument involved was a holder in due course. Whatever may be the rule as to the character of a payee who had no knowledge that the instrument was executed in blank, it seems clear that a payee who has such knowledge cannot be a holder in due course. In the *Talbot Case*, both *Vaughan Williams, L. J.*, and *Farwell, L. J.*, approve of the theory that under the first part of § 30, sub. 2, of the Bills of Exchange Act, a payee may be a holder in due course, but hold that under the latter part of the above section, relating to the shifting of the burden of proof, the payee should not be so regarded (see *supra*). In other words, the payee is permitted to be a holder in due course for the purpose of avoiding defenses good as against other than holders in due course, but having reached this point, he can then assume a character other than that of a holder in due course, for the purpose of avoiding burdens cast upon such holders. This seems to be a *reductio ad absurdum*.
W. A. E.

MAMIE PETERSON
v.
MAYME HEDRICK CLEAVER et al., Appts.

Nebraska Supreme Court — December 23, 1920.

(— Neb. —, 181 N. W. 187.)

Libel — communication by officer of society.

1. When a publication is made by a chief officer of a fraternal insurance association, addressed to the members of the association, concerning a subject-matter which affects the general welfare of the association, such communication, although containing words which are libelous per se, is qualifiedly privileged, and is a complete defense unless it is shown by plaintiff by a preponderance of the evidence that the publication was made with express malice.

[See note on this question beginning on page 453.]

Associations — liability for libel.

2. A fraternal beneficiary association, organized under the laws of this state without capital stock, is liable to a member of such association for libel published by its officers, acting within the scope of their authority and in the discharge of its business.

[See 17 R. C. L. 382.]

Libel — liability of author.

3. The author of an article which is libelous, and which is published at his instance, is liable with the pub-

lisher in an action brought by the person defamed.

[See 17 R. C. L. 378.]

Trial — instructions — sufficiency.

4. Instructions examined, and held to be without error to the appellant.

Evidence — malice.

5. Evidence examined, and held sufficient to submit to the jury the question of express malice.

— sufficiency.

6. Evidence examined, and held to sustain the verdict.

Headnotes by DAY, J.

APPEAL by defendants from a judgment of the District Court for Douglas County (Estelle, J.) in favor of plaintiff in an action brought to recover damages for the publication of an alleged libel. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Matthew Gering and William J. Hotz, for appellant Cleaver:

The publication was privileged.
25 Cyc. 390.

Messrs. Stiner & Boslaugh, for appellant Degree of Honor:

Defendant Degree of Honor of the State of Nebraska is a fraternal beneficiary association, and it not liable for a publication made by its officers in reference to one of its members.

2 Bacon, Life & Acci. Ins. § 612, p. 1521; Gilbert v. Crystal Fountain Lodge, 80 Ga. 284, 12 Am. St. Rep. 255, 4 S. E. 905; De Sénancour v. Société la Prévoyance, 146 Mass. 616, 16 N. E. 553; 29 Cyc. 7; 19 R. C. L. 1180; 7 C. J. 1051; Lake v. Minnesota Masonic Relief Asso. 61 Minn. 96, 52 Am. St. Rep. 548, 63 N. W. 261.

The statements made were true, published on a lawful occasion without malice, and were privileged.

Kirkpatrick v. Eagle Lodge, 26 Kan. 384, 40 Am. Rep. 316; Shurtleff v. Stevens, 51 Vt. 501, 31 Am. Rep. 698; Andrews v. Gardiner, 224 N. Y. 440, 2 A.L.R. 1371, 121 N. E. 341; Putnal v. Inman, 76 Fla. 553, 3 A.L.R. 1580, 80 So. 316; Pokrok Zapadu Pub. Co. v. Zizkovsky, 42 Neb. 64, 60 N. W. 358; Piper v. Woolman, 43 Neb. 280, 61 N. W. 588; Greenwood v. Cobbey, 26 Neb. 449, 42 N. W. 413; Holmes v. Royal Fraternal Union, 222 Mo. 556, 26 L.R.A.(N.S.) 1089, 121 S. W. 100; Sunderlin v. Bradstreet, 46 N. Y. 191, 7 Am. Rep. 322; Sullivan v. Strathan-Hutton-Evans Commission Co. 152 Mo. 268, 47 L.R.A. 859, 53 S. W. 912;

Byam v. Collins, 111 N. Y. 143, 2 L.R.A. 129, 7 Am. St. Rep. 726, 19 N. E. 75; Holmes v. Clisby, 121 Ga. 241, 104 Am. St. Rep. 117, 48 S. E. 934; 17 R. C. L. 369; 25 Cyc. 885; 18 Am. & Eng. Enc. Law, 2d ed. 1035; Barrows v. Bell, 7 Gray, 311, 66 Am. Dec. 479; Philadelphia, W. & B. R. Co. v. Quigley, 21 How. 203, 15 L. ed. 73; Hatch v. Lane, 105 Mass. 394; Gattis v. Kilgo, 140 N. C. 106, 52 S. E. 249; Kleizer v. Symmes, 40 Ind. 562; Landis v. Campbell, 79 Mo. 433, 49 Am. Rep. 239.

The writing did not lose its privileged character because it reached persons other than members of the order.

Mertens v. Bee Pub. Co. 5 Neb. Unof. 593, 99 N. W. 847; Redgate v. Roush, 61 Kan. 480, 48 L.R.A. 236, 59 Pac. 1050; Hatch v. Lane, 105 Mass. 394; De Sénancour v. Société la Prévoyance, 146 Mass. 616, 16 N. E. 533; Philadelphia, W. & B. R. Co. v. Quigley, 21 How. 202, 15 L. ed. 73; Barrows v. Bell, 7 Gray, 311, 66 Am. Dec. 479; Farnsworth v. Storrs, 5 Cush. 412; Gattis v. Kilgo, 140 N. C. 106, 52 S. E. 249.

Truth, when published with good motives and for justifiable ends, cannot constitute a libel.

Pokrok Zapadu Pub. Co. v. Zizkovsky, 42 Neb. 64, 60 N. W. 358; Wertz v. Sprecher, 82 Neb. 834, 118 N. W. 107, 17 Ann. Cas. 758; Larson v. Cox, 68 Neb. 44, 93 N. W. 1011.

The court erred in instructions given to the jury.

Kirkpatrick v. Eagle Lodge, 26 Kan. 384, 40 Am. Rep. 316; Andrews v. Gardiner, 224 N. Y. 440, 1 A.L.R. 137, 121 N. E. 341; Greenwood v. Cobbe, 26 Neb. 449, 42 N. W. 413; Bryant v. Modern Woodmen, 86 Neb. 372, 27 L.R.A.(N.S.) 621, 125 N. W. 621, 21 Ann. Cas. 365; Samuelson v. Gale Mfg. Co. 1 Neb. Unof. 815, 95 N. W. 809; Jensen v. Halstead, 61 Neb. 249, 85 N. W. 78.

Messrs. Anson H. Bigelow and Weaver & Giller, for appellee:

The qualifications of qualified privileges are for the jury.

Townshend, Libel & Slander, 4th ed. § 288; Dickson v. Wilton, 1 Fost. & F. 419; Wise v. Brotherhood of Locomotive Firemen & Enginemen, 164 C. C. A. 469, 252 Fed. 961.

The defendant Degree of Honor, as an incorporated fraternal insurance society, is liable for a libelous publication made by its chief executive and published by it in its official journal.

Holmes v. Royal Fraternal Union, 222 Mo. 556, 26 L.R.A.(N.S.) 1080, 121 S. W. 100; Wise v. Brotherhood of Locomotive Firemen & Enginemen, supra; Niblack, Mut. Ben. Soc. § 84.

Day, J., delivered the opinion of the court:

The plaintiff recovered a judgment in the district court for Douglas county for \$1,500 against the defendants in an action for libel. Defendants have appealed.

The defendant the Degree of Honor of the State of Nebraska is a fraternal organization doing a fraternal insurance business, having also social features, and composed of a grand lodge with subordinate lodges. It is a corporation organized under the special provisions of our statute relating to fraternal benefit societies.

At the time in question the defendant Mayme Hedrick Cleaver held the post of Grand Chief of Honor, which was the chief executive office of the society. The Degree of Honor owned and controlled a paper known as the Degree of Honor Journal, which was the official organ of the society, in which were published communications from the officers to the members as well as news items of special interest to the membership. This paper circulated only among the members and a few of its advertisers.

Among the subordinate lodges of the association was Washington Lodge No. 27, located at Omaha, in which the plaintiff held the position of financier. As such officer it was the duty of the plaintiff to collect dues and assessments from the several members of lodge No. 27, and turn the money so collected over to the treasurer of such lodge, for which service she was paid 4 cents per capita.

As the outgrowth of some difficulties in the affairs of lodge No. 27, reference to which will be hereinafter made, Mrs. Cleaver, as Grand Chief of Honor, prepared and had published in the Degree of

Honor Journal the article which forms the basis of this action. The communication is quite lengthy, and we set out only that portion of which complaint is made, omitting innuendoes: "The financial affairs of the order were placed in the hands of John M. Gilchrist, certified public accountant, who found the treasurer's books \$1,266 short, and the financier's not only short, but in such condition that more than 140 members were suspended during the time between December 28 and March 7, who did not know of nor suspect their suspension. The former treasurer of the lodge has assisted in every way possible to straighten out the affairs of the order, and has promised to make good her shortage, but the former financier has not only refused to assist in straightening out her books, but has persisted in communicating with and collecting assessments and dues from the members, and has also tacitly refused to make good her shortage. I have issued three official letters. In my last I explained that from and after May 13 any member who paid assessments to anyone excepting those whom I have designated would be suspended individually. According to the expert accountant's report, Washington Lodge No. 27, suspended, was paying a salary to the financier computed on a basis of 739 members, while in fact they actually had only 569 members. If the plaintiffs in this case had met with the overtures of the Grand Lodge officers, this might all have been amicably settled by April 1, and it is earnestly to be hoped that better judgment will prevail very soon."

The petition avers that the article charges that plaintiff was short in her accounts as financier of her lodge, and also that she was receiving a salary based upon a per capita membership of 739, while in fact the lodge had but 569 members. The petition also contained the usual averments in actions for libel.

The answers of the defendants admitted the preparation and publi-

cation of the article in the Degree of Honor Journal, the official organ of the order, and by way of defense pleaded that it was a privileged communication, and made without malice or ill will, and made only for the purpose of informing all of the members of the conditions existing in the order. The answers also pleaded that the article was true and published with good motives and for justifiable ends. The reply denied the affirmative allegations of the answers.

In this state of the record the trial court, correctly we think, ruled that the article was libelous *per se*, and permitted evidence to be introduced as to the damages the plaintiff had sustained. There being no dispute in the testimony as to the occasion of the publication, the court ruled that it was qualifiedly privileged, and that the qualified privilege was a Libel—complete defense communication by officer of society. established by a preponderance of the testimony that the publication was made with express malice.

We think the theory upon which the case was tried was the proper one, in harmony with the evidence and supported by the law.

In the brief for defendants it is urged that the publication was privileged, and hence a complete defense. The word "privileged," as applied to libel, is a general term. For the sake of clearness of application it is often divided into two classes, viz., absolute privilege and conditional or qualified privilege. Townshend, in his work on Slander & Libel, 4th ed. § 209, says: "By an absolutely privileged publication is not to be understood a publication for which the publisher is in nowise responsible, but it means a publication in respect of which, by reason of the occasion upon which it is made, no remedy can be had in a civil action of slander or libel. A conditionally privileged publication is a publication made on an occasion which furnishes a *prima facie* legal excuse for the making of

it, and which is privileged, unless some additional fact is shown which so alters the character of the occasion as to prevent it furnishing a legal excuse. The additional fact which, in the majority of cases, is required to be shown to destroy this conditional privilege, is malice, meaning bad intent in the publisher; i. e., an intent to injure the person whom or whose affairs the language concerns."

Newell, *Slander & Libel*, 3d ed. § 496, states the rule as follows: "A communication made in good faith upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, either legal, moral, or social, if made to a person having a corresponding interest or duty, is qualifiedly privileged, and the burden of proving the existence of malice is cast upon the person claiming to have been defamed."

See *Wise v. Brotherhood of Locomotive Firemen & Enginemen*, 164 C. C. A. 469, 252 Fed. 961; *Finley v. Steele*, 159 Mo. 299, 52 L.R.A. 852, 60 S. W. 108.

Tested by this rule, it is clear that the defendants would be protected in making the publication, provided that in so doing they did not act maliciously.

But it is urged on behalf of defendant the Degree of Honor that an action for libel will not lie against it at the instance of one of its members. It is pointed out that it is a corporation organized under special provisions of our statute authorizing fraternal societies to be created without capital stock, and privileged to insure its members, and to conduct its business for the sole benefit of the members. It is argued that such organizations can hardly be classed as corporations or copartnerships. We are not willing to assent to this proposition.

Notwithstanding the fact that it is organized under special provisions of the statute, without capital stock, it is none the less a corporation, having a distinct entity, apart from its members. It is an artificial person

created by statute, in which capacity it may sue and be sued. The mere fact that it does not make dividends for its members, or that there may not be funds out of which a judgment could be paid, does not, in our judgment, exempt it from being sued. A libel is a wrongful act, a tort, and there seems to be no good reason why a corporation of this character should not respond in an action for libel brought by one of its members, the same as in any other tort.

The cases cited by counsel for either side are hardly to the point now being considered. Neither has our considerable research been rewarded in finding one. In *Gilbert v. Crystal Fountain Lodge*, 80 Ga. 284, 12 Am. St. Rep. 255, 4 S. E. 905, it was held that a member of a mutual aid association cannot maintain an action against the association, sued as a partnership, for slanderous words spoken of and concerning him by the association, while a member of it. In discussing the question the court said: "After diligent search, we have been unable to discover any authority supporting the theory that a man can slander himself, either when he speaks directly as an individual, or when he speaks indirectly through a partnership of which he is a member. Upon principle, we do not see how he could charge the partnership assets with the damages that might be recovered, he having an interest in the assets as part owner of the same."

In *De Sénancour v. Société la Prévoyance*, 146 Mass. 616, 16 N. E. 553, the case was decided upon the point that there was no evidence of publication by the society. In *Holmes v. Royal Fraternal Union*, 222 Mo. 556, 25 L.R.A. (N.S.) 1080, 121 S. W. 100, a communication containing libelous matter was written by the president of a fraternal order to members at a certain place concerning the plaintiff, who was also a member. The case was decided upon the point that the communication was qualifiedly privileged, and that

Associations—
liability for
libel.

there was not sufficient evidence to show express malice. In *Wise v. Brotherhood of Locomotive Firemen & Enginemen*, supra, the plaintiff was a member of the brotherhood. The secretary of the defendant organization wrote the libelous letter which formed the basis of the suit, in which the plaintiff was nonsuited. The defense was that the communication was privileged. The judgment was reversed for the reason that the court failed to submit the question of malice to the jury. In *Kirkpatrick v. Eagle Lodge*, 26 Kan. 384, 40 Am. Rep. 316, it was held that the sustaining of a demurrer on the ground that the petition did not state a cause of action was error. In these cases, as well as others which might be cited, it was assumed rather than decided that an action by a member would lie against the association, when the association was a corporation.

We do not understand counsel for the defendant to challenge the general rule that a corporation is liable in an action for libel committed by its authorized agents while acting within the scope of their employment. Numerous cases are readily found supporting this general proposition. *Newell, Slander & Libel*, 3d ed. 436; *Evening Journal Assn. v. McDermott*, 44 N. J. L. 430, 43 Am. Rep. 392; 17 R. C. L. 382, § 134; *Odgers, Libel & Slander*, p. 592; *Johnson v. St. Louis Dispatch Co.* 65 Mo. 539, 27 Am. Rep. 293; *Aldrich v. Press Printing Co.* 9 Minn. 123, Gil. 123, 86 Am. Dec. 84.

This court, while not passing in terms upon the question, has recognized the liability of corporations in actions for libel. *Bee Pub. Co. v. Shields*, 68 Neb. 750, 759, 94 N. W. 1029, 99 N. W. 822; *Bee Pub. Co. v. World Pub. Co.* 59 Neb. 713, 82 N. W. 28; *Estelle v. Daily News Pub. Co.* 101 Neb. 610, 164 N. W. 558.

In the case at bar it is clear that in making the publication Mrs. Cleaver was acting as the chief officer of the Degree of Honor. Her acts were within the scope of her powers as

such officer. She was acting for it in its affairs, and for its benefit. The Degree of Honor cannot be excused upon the ground that she exceeded her authority. Perhaps in no case do corporations or individuals authorize their agents to commit torts, and yet they are held answerable for the acts of their agents while acting within the scope of their employment, and while engaged in the furtherance of the master's business.

The questions then arise whether there was sufficient evidence of malice to be submitted to the jury, and whether the evidence is sufficient to support the verdict. The record shows that dissensions of a serious nature had arisen in the affairs of Washington Lodge No. 27, which became so acute as to threaten disruption of the lodge. At this stage of the disorder Mrs. Cleaver appeared at a meeting of the lodge, and, in the exercise of her power as Grand Chief of Honor, placed herself in the presiding officer's chair and announced that she suspended Lodge No. 27 "for insubordination on the part of your financier for not sending out those cards." She ordered the charter taken from the wall, and appointed temporary officers to take the place of the regularly elected officers of the lodge, and directed that the books, records, and funds be turned over to the newly appointed officers. Plaintiff, who was present with her books and records, refused to turn her books over until they were audited. There is a dispute in the testimony as to what occurred. The plaintiff's testimony was to the effect that, upon plaintiff's refusal to give up her books, Mrs. Cleaver "run across from the station and shook her fist at me," and said, "Mrs. Peterson, I have put up with you for six years; turn those books over or I will have a policeman accompany you home." Another witness testified, "She [Mrs. Cleaver] was shaking her fist at her, and said, 'Well, we will get you.'" Other testimony of a similar import was offered. Following this episode, the plaintiff sur-

rendered her books, records, and cash. Later plaintiff and other members of the lodge joined in court action to prevent interference on the part of defendant Mrs. Cleaver in the affairs of Lodge No. 27. While the transactions occurring in the lodge just alluded to were denied on the part of the defendants, we think the testimony on the question of malice was clearly within the province of the jury to determine. Following these several difficulties, the article in question was prepared by Mrs. Cleaver, signed by her in her official capacity, and ordered published in the official organ as a communication to the members.

Under all of the circumstances, we think the testimony on the question of express malice was properly submitted to the jury, and that the verdict of the jury is sustained by the evidence.

The defendants urge that there was error in the giving of instructions Nos. 2, 3, 4 and 7. Instructions Nos. 4 and 7 are in identical language, respectively, as instructions 9 and 7 requested by the defendants. Having requested these instructions, they are in no position to now complain. Instruction No. 2 is as follows: "Unless you find from the evidence that the libelous matter was true and published with good motives and for justifiable ends, or you fail to find that the libelous matter was a privileged communication, as hereinafter defined, then your verdict should be for the plaintiff; but, if you find the libelous matter was true, or find that it was a privileged communication, then your verdict should be for the defendant."

There is nothing in this instruction which gives the defendants ground to complain. The first part is based upon § 5, art. 1, of our Constitution, which pro-

vides: "In all trials for libel, both civil and criminal, the truth when published with good motives, and for justifiable ends, shall be a sufficient defense."

The latter part of the instruction, "but, if you find the libelous matter was true, . . . then you should find for the defendant," is perhaps faulty in not adding, following the word "true," "and was published with good motives, and for justifiable ends." The instruction given affords the defendants no ground for complaint, for it was more favorable to them than they were entitled to receive.

The defendants also complain of the giving of instruction No. 3. This instruction in substance charged that the members of the order had the right to know how the affairs of each lodge were being conducted, and that defendant, through its official organ, had the right to give such information to the several members, and that if, when the article was published, the defendants believe, or had reasonable ground to believe, that the statements therein were true, then and in such event the defendants would not be liable to the plaintiff in any sum whatsoever, unless the plaintiff has established by a preponderance of the testimony that the publication was made with express malice. This instruction is responsive to the facts, and is in no wise prejudicial to the defendants.

There are other errors complained of in the briefs which will not be considered further than to say that we have examined them carefully, and do not find any prejudicial error to the appellants.

The judgment of the District Court is accordingly affirmed.

Rose, J., not participating in the decision.

**Evidence—
malice.**

—sufficiency.

**Trial—
instructions—
sufficiency.**

**Libel—liability
of author.**

ANNOTATION.

Libel and slander: privilege of communication in relation to member, or prospective member, of society other than church.

This question was considered in the annotation following *Berot v. Porte*, 3 A.L.R. 1654.

For communications between different offices of corporation as constituting publication or privilege, see annotation to *Prins v. Holland-North America Mortg. Co.* 5 A.L.R. 455.

It will be observed that in the reported case (*PETERSON v. CLEAVER*, ante, 447) it was held that a publication made by a chief officer of a fraternal insurance association, addressed to members, concerning an officer and relating to a subject-matter

which affected the general welfare of the association, was qualifiedly privileged, although it contained words libelous per se, and that the privilege was a complete defense, unless it was shown by the plaintiff by a preponderance of the evidence that the publication was made with express malice. This conclusion is in harmony with the general rule stated in the earlier annotation.

No additional cases passing on the question since the preparation of the earlier note supplemented have been disclosed.
J. T. W.

JORDAN ISRAEL, Appt.,

v.

STATE OF TEXAS.

Texas Court of Criminal Appeals — May 4, 1921.

(— Tex. Crim. Rep. —, 230 S. W. 984.)

Homicide — murder — assisting in jail delivery.

1. One assisting in overpowering an attendant to effect a jail delivery is guilty of murder if the attendant is shot by another participant, although there was no express agreement to take the life of the attendant.

[See note on this question beginning on page 456.]

Evidence — experiment — criminal prosecution.

2. In a homicide case evidence is admissible of an experiment by a witness in placing himself in the position with relation to the crime, claimed

to have been occupied by witnesses, to determine whether or not he could see the occurrence from such position.

[See 10 R. C. L. 1001, 1002; see note in 8 A.L.R. 51.]

On Petition for Rehearing.

Evidence — opinion — statement as to possibilities.

3. A statement by a person placing himself in a position claimed to have been occupied by witnesses to a

homicide, that from such position a person "could see" the persons engaged in the conflict, is not opinion evidence.

[See 11 R. C. L. 593.]

APPEAL by defendant from a judgment of the District Court for Falls County (Oltorf, J.) convicting him of murder. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. W. E. Rogers for appellant.

Mr. R. H. Hamilton, Assistant Attorney General, for the State:

Testimony of witnesses as to an experiment made by the sheriff to determine whether or not one could see through the door and grates of the jail was admissible.

Brown v. State, 74 Tex. Crim. Rep. 356, 169 S. W. 437; *Morton v. State*, — Tex. Crim. Rep. —, 71 S. W. 281; *Schauer v. State*, — Tex. Crim. Rep. —, 60 S. W. 249; *Rupe v. State*, 42 Tex. Crim. Rep. 477, 61 S. W. 929; *Clark v. State*, 38 Tex. Crim. Rep. 33, 40 S. W. 992.

Lattimore, J., delivered the opinion of the court:

Appellant was convicted in the district court of Falls county of the murder of Oscar Sharp, and his penalty fixed at death.

This is a companion case to that of *Flores v. State*, — Tex. Crim. Rep. —, 231 S. W. 786. The facts are substantially the same in each case, except in so far as they are detailed by the respective appellants. Mr. Sharp, deceased, was deputy sheriff and jailer of Falls county. Appellant, José Flores, Pete Sanchez, and a number of other persons were prisoners in said jail at the time of the homicide. According to appellant's testimony, there had been a plan on foot, and discussed by a number of said prisoners, having for its object a jail delivery, for some time. Flores was a trusty, and upon him rested the burden of taking the initiative in the execution of said plan. On the occasion in question deceased came up to feed the prisoners at noon. After opening the door to the run-around, which was called by the witnesses the "bull pen," deceased stood holding his keys while Flores came to where he could get the food and convey it to the prisoners. As Flores approached deceased, he sprang upon him, and seems to have pinned his arms down, at the same time getting hold of the pistol of deceased. At almost the same moment appellant and Sanchez

witnesses testify that, while appellant and Sanchez held deceased, appellant having him by the throat and Sanchez by the legs, Flores stepped back and shot deceased with the latter's pistol, which he, Flores, had obtained in the struggle. Another shot was fired by Flores, and the death of Mr. Sharp was the speedy result.

There is but one bill of exceptions in this record. From the testimony of some of the state witnesses, it appeared they were sitting on their bunks in the jail when the first shot was fired, and there is testimony indicating that after the first shot was fired one or two of said witnesses got under their bunks. However, they stated that from their positions they could see what was taking place between Mr. Sharp and his assailants. There seemed little or no dispute in the testimony as to where deceased was located at any time during the fatal occurrence. The question being raised as to the ability of said state witnesses to see what took place from on their bunks and under their bunks, the sheriff of the county, Mr. Moore, was permitted, over objection, to state that he had gone into the said cells and placed himself both on and under said bunks, in about the positions testified to by said witnesses, and that from each of said positions he could see the place where the struggle occurred, and where deceased was shot. The only objection to this testimony appearing in said bill of exceptions was that it called for a conclusion and the opinion of the witnesses. No question was raised as to the correctness of the positions taken by Mr. Moore in his experiments, and no other objection was raised, except as stated. This is by no means a new question. Mr. Branch, in his Ann. P. C. § 128, collates many authorities upholding the admissibility of evidence as to the results of such experiments, if made under conditions similar or approximately similar to those existing at the time under investiga-

tion. We see no error in the action of the trial court in overruling the objection made and in refusing the special charge instructing the jury not to consider such testimony.

Appellant insists that the evidence failed to show such acting together as would make him guilty as a principal, it being conceded that the fatal shot was fired by José Flores, and not by appellant himself. The charge of the court was in the approved form, stating that the jury must find from the evidence beyond a reasonable doubt that Flores, with malice aforethought, shot and killed deceased, and that appellant was present, and, knowing the unlawful intent of Flores, aided him by acts or encouraged him by words or gestures to so shoot deceased, before a conviction would be justified. The court also submitted the law applicable to the appellant's contention that he did not know of any purpose on the part of Flores to kill deceased, or inflict upon him serious bodily injury, and the jury were told that if appellant did not agree to take the life of deceased, and that he did not intend, or know of any intent on the part of Flores, to do more than to seize and lock up deceased, or if they had a reasonable doubt as to such being his attitude in the case, the jury should acquit. A review of the facts at any length would be of no value. There is no question from the testimony of all the state witnesses but that, at the time deceased was shot by Flores, appellant had him by the throat and Sanchez had him by the legs. This would appear to make it conclusive that Flores and appellant acted together in the commission of the offense. Appellant admitted, on cross-examination, that Flores had gotten the pistol of deceased from him at the time he (appellant) grabbed deceased. He also admitted that Flores had said before the difficulty began that if he got hold of the gun of deceased and anybody came up to help him he was going to shoot

him. The act of Flores in shooting deceased would appear to be one of the reasonable consequences of the admitted design of the parties; and, if this were true, it would make appellant guilty, though there be no evidence of an express agreement to take the life of deceased. Kirby v. State, 23 Tex. App. 13, 5 S. W. 165; Bowers v. State, 24 Tex. App. 542, 5 Am. St. Rep. 901, 7 S. W. 247; Isaacs v. State, 36 Tex. Crim. Rep. 505, 38 S. W. 40. Upon what appears to be a fair presentation of the law applicable to the facts, the jury have concluded all of the issues submitted to them against appellant, and we see no reason to disturb their verdict.

Homicide—
murder—
assisting in jail
delivery.

The judgment is affirmed.

A petition for rehearing having been filed, Morrow, P. J., on May 25, 1921, handed down the following additional opinion:

In his motion for rehearing, appellant says, in substance, that he does not controvert the correctness of the ruling of the trial court and this court of that part of the testimony of the witness Moore wherein he described what he saw from the positions he took in the jail when experimenting, but insists that a part of Moore's testimony consisted of his opinion; that is, where he used the expressions:

"I have made an examination to see whether or not a man sitting on the top bunk . . . could see, . . . and I find that you can."

"One sitting in that position could see what took place in front of the door. A person or prisoner, if they are under the bunk, . . . could look out through the cell door and see one or more persons in front of the door."

These expressions of the witness Moore were in connection with his description of what he did while experimenting to determine whether it was possible to observe the movements of those connected with the tragedy, from positions in the cell which were occupied by certain

witnesses who were inmates of the jail at the time of the homicide, and who, by their testimony, declared that they saw the appellant and others engage in the conflict which resulted in the death of the deceased.

We hardly think it sound to characterize the testimony given as opinion testimony. It but represented the result

**Evidence—
opinion—state-
ment as to
possibilities.**

of the experiment made by the witness. It is said by a text-writer: "When the opinion is the mere shorthand rendition or crystallization of the facts, then the opinion can be given, subject to the cross-examination, as to the facts on which it is based." 1 Whart. Crim. Ev. § 458.

On the trial, there was evidence descriptive of the interior of the jail where the deceased was killed. There were also photographs portraying its condition. The witness Moore testified, describing in detail the various positions he took, and declared that from that he could see into the corridor, and in connection therewith made also the statements quoted.

The part of the evidence complained of, we think, was but a shorthand rendition of the facts, within the meaning of that term. The precedents in this state appear to support this view. This is notably true in the case of *Martin v. State*, 40 Tex. Crim. Rep. 666, 51 S. W. 912.

The central controverted fact was whether the shot was fired from the window of appellant's house or from a point in his yard. Various experiments were made, and the court disposed of the legal questions presented in the following language: "After detailing these experiments, defendant proposed to prove by him that after making these experiments the shot holes in the fence could not have been made by anyone firing from the window as testified by the state's witnesses. We believe, under the circumstances of this case, this testimony should have been admitted. It is sometimes practically impossible for the witness to detail facts and circumstances so as to convey a correct idea of the facts sought to be proved by him,—as, for instance, comparing the tracks upon the ground with the shoes found upon the accused. This is denominated by the writers as being a shorthand rendering of the facts, and under such circumstances this character of testimony is generally admissible."

See also *Hamilton v. State*, 74 Tex. Crim. Rep. 219, 168 S. W. 538; *Crumes v. State*, 28 Tex. App. 516, 19 Am. St. Rep. 853, 13 S. W. 868.

We are unable to concur in the view that, under the record as presented, error is shown to have been committed in receiving the testimony complained of.

The motion is overruled.

ANNOTATION.

Responsibility of persons participating in jail delivery for homicide committed by one of their number.

The general rule is that where several persons conspire to escape, or to assist another in escaping, from jail, and agree, either expressly or by act or conduct, to use such force as is necessary to accomplish that purpose, and, in the furtherance of the common design, one of the conspirators commits murder, each is guilty of the same crime.

California.—*People v. Wood* (1905) 145 Cal. 659, 79 Pac. 367; *People v.*

Creeks (1915) 170 Cal. 368, 149 Pac. 821.

Connecticut.—*State v. Allen* (1879) 47 Conn. 121.

Mississippi.—*Tolbert v. State* (1893) 71 Miss. 179, 42 Am. St. Rep. 452, 14 So. 462.

Missouri.—*State v. Vaughan* (1906) 200 Mo. 1, 98 S. W. 2, followed on second appeal in (1907) 203 Mo. 663, 102 S. W. 644.

New York.—*People v. Flanigan*

(1903) 174 N. Y. 356, 66 N. E. 988, 17 N. Y. Crim. Rep. 300.

Oklahoma. — *Reeves v. Territory* (1900) 10 Okla. 194, 61 Pac. 828.

Texas.—*Washington v. State* (1877) 1 Tex. App. 647; *Kirby v. State* (1887) 23 Tex. App. 13, 5 S. W. 165; *Kipper v. State* (1903) 45 Tex. Crim. Rep. 377, 77 S. W. 611. And see the reported case (*ISRAEL v. STATE*, ante, 453).

Canada.—*Rex v. Rice* (1902; C. A.) 4 Ont. L. Rep. 223, 5 Can. Crim. Cas. 509.

This rule is based on the principle that where a criminal act is committed by one of several persons, all engaged in a common unlawful purpose, the act is considered as being specifically committed by each individual. Thus in *State v. Allen* (Conn.) supra, it appeared that two prisoners conspired together to escape, and armed themselves with weapons for the purpose of killing anyone who should resist them. While attempting to escape one of the prisoners shot and killed a watchman. It was held that both prisoners were guilty of murder in the first degree. It was further held that, though one of the prisoners abandoned the attempt to escape before the fatal shot was fired by his confederate, he was none the less guilty, if such abandonment was not made known to the prisoner who did the shooting.

So, in *People v. Creeks* (Cal.) supra, wherein it appeared that one of two convicts shot and killed a guard while in the act of escaping from jail, pursuant to a conspiracy to escape and to use such force as was necessary to accomplish that purpose, it was held that each convict was guilty of murder. The court said: "Under such circumstances, Creeks would be equally guilty with Phelps of the murder of Drewry, even if he did not personally inflict any wound on him, for under the law the acts of Phelps in the matter were the acts of the defendant also. The verdict of the jury in this regard is not only sufficiently sustained by the evidence, but we do not see how any other verdict could have been given." And see the reported case (*ISRAEL v. STATE*).

Similarly, in *People v. Flanigan* (N.

Y.) supra, wherein it appeared that a person was killed by one of two prisoners while they were in the act of escaping from prison, it was held that each was guilty of murder in the first degree, irrespective of their intention to take life, the court saying: "If the defendant, as the evidence strongly tended to show, was engaged with Emerson in the act of escaping from prison by force, or in an attempt to escape, after lawful commitment of a felony, and the two men, acting in concert, whether either intended to take life or not, with a common purpose, struck the keeper at the same time, and as the result of the blows thus inflicted he was killed, each was guilty of murder in the first degree. . . . Under such circumstances the law does not separate the blows, nor measure their force to see which was mortal, but holds each man liable for the acts of both. The one who aids and abets the common purpose is as guilty as the one who strikes the fatal blow."

In *People v. Wood* (1905) 145 Cal. 659, 79 Pac. 367, it appeared that several prisoners conspired together to escape from prison and agreed to kill any person who should attempt to recapture them. After their escape and while being pursued by a posse, one of the escaping convicts shot and killed one of the pursuers. It was held that all those who were present at the time of the shooting, aiding and abetting in the escape, were equally guilty of murder.

Likewise, in *State v. Vaughan* (1906) 200 Mo. 1, 98 S. W. 2, followed on second appeal in (1907) 203 Mo. 663, 102 S. W. 644, it appeared that one of several prisoners who were in the act of carrying out a conspiracy to escape shot and killed two of the prison guards. It was held that each of the conspirators was guilty of murder in the first degree.

In *Kirby v. State* (1887) 23 Tex. App. 13, 5 S. W. 165, it appeared that the appellant and two other prisoners conspired to escape from prison. There was no agreement among the conspirators to kill in the accomplishment of that purpose. The appellant,

however, obtained and concealed a piece of iron, which was afterwards used by one of the other conspirators in killing the jailer. The court held that the evidence was sufficient to hold the appellant guilty of second-degree murder. The court also sustained a charge that if there was no agreement, either expressly or impliedly, among the conspirators, to commit murder in accomplishing the escape, the conspirator, who, while in the act of escaping, actually committed the homicide, would be guilty of a greater degree of murder than the other conspirators. And see the reported case (*ISRAEL v. STATE*, ante, 453), wherein a similar charge was sustained.

It was held in *Reeves v. Territory* (1900) 10 Okla. 194, 61 Pac. 828, that a person who assisted prisoners in escaping by furnishing them with pistols was guilty of murder, where the prisoners in making the escape shot and killed a peace officer, although no premeditated design to kill was shown.

In *Kipper v. State* (1903) 45 Tex. Crim. Rep. 377, 77 S. W. 611, it appeared that a murder was committed by one of several conspirators while in the act of attempting to release a prisoner from jail. The court said: "The evidence here establishes beyond any question that appellant and the other parties named conspired together to go from their barracks to the city jail in El Paso, and there release one Dyson, who was confined in said jail on a charge of misdemeanor. Now, if their design embraced within its scope the determination to use whatever force might become necessary to consummate their purpose,

even to the taking of human life, then all the parties engaged in the conspiracy, and who were present at the time, were guilty of murder.

In *Rex v. Rice* (1902; C. A.) 4 Ont. L. Rep. 223, 5 Can. Crim. Cas. 509, it appeared that three prisoners were being conveyed, in the custody of two officers, from the courthouse where they were being tried, to the prison. In the course of the journey some revolvers were thrown into the vehicle in which they were riding, by an unknown person. The prisoners armed themselves with the revolvers, and a struggle ensued, resulting in one of the officers being killed. It was not shown who fired the fatal shot, but the jury found that before the shot was fired the prisoners all resolved to escape from the custody of the officers. It was held that under the circumstances each prisoner would be responsible for the acts of the others, and the prisoner was properly convicted of murder.

In *Washington v. State* (1877) 1 Tex. App. 647, wherein it appeared that four prisoners while working on a farm killed their guard in order to escape from the imprisonment, it was held that all four of the prisoners were guilty of murder in the first degree.

So, in *Tolbert v. State* (1893) 71 Miss. 179, 42 Am. St. Rep. 452, 14 So. 462, it appeared that a convict had escaped from prison and sometime thereafter, while in the act of resisting capture, the convict or his brother, who was assisting him, shot and killed one of the pursuers. It was held that both the convict and his brother were guilty of murder. L. W. B.

STATE OF CONNECTICUT

v.

JOHN GAETANO, Appt.

Connecticut Supreme Court of Errors — June 1. 1921.

(— Conn. —, 114 Atl. 82.)

Evidence — of witness at preliminary hearing.

1. The constitutional provision that accused shall be confronted by the witnesses against him does not prevent reproduction on trial of

accused, by use of the stenographer's minutes, of testimony of a witness before a committing magistrate, given when accused was present and cross-examined the witness, who cannot be found at time of trial.

[See note on this question beginning on page 495.]

Constitutional law — Federal Constitution — applicability in states.

2. The 6th Amendment to the United States Constitution, providing that an accused shall be confronted with the witnesses against him, does not apply to proceedings in state courts.

[See 6 R. C. L. 247; 8 R. C. L. 84,85.]

Evidence — effect of additional accusation before committing magistrate.

3. That an examination before a committing magistrate included charges for offenses in addition to that for which he is on trial does not prevent the use of testimony of a witness before such magistrate, who has subsequently disappeared, from being reproduced at the trial, if it is limited

to such portion as bears upon the accusation before the court.

Criminal law — keeping house of ill fame — necessity of knowledge.

4. Knowledge is not necessary to conviction of one under a statute providing punishment for everyone who shall keep a house of ill fame.

Evidence — house of ill fame — calls at neighbor's.

5. Upon the question whether or not a place is a house of ill fame, evidence is admissible that the next-door neighbor was called to the door in the night by men asking for girls, and if the place was that kept by the one accused of keeping the house of ill fame.

[See 9 R. C. L. 225.]

APPEAL by defendant from a judgment of the Criminal Court of Common Pleas for New Haven County (Simpson, J.) convicting him of keeping a house of ill fame. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Walter J. Walsh and Thomas R. Fitzsimmons, for appellant:

The court was in error in allowing testimony of witness Blair to be read to the jury under the circumstances.

Montgomery v. Com. 99 Va. 833, 37 S. E. 841; Brogy v. Com. 10 Gratt. 722; Brown v. People, 145 Ill. App. 263; Cline v. State, 36 Tex. Crim. Rep. 320, 61 Am. St. Rep. 850, 36 S. W. 1099, 37 S. W. 722; People v. Newman, 5 Hill, 295; Finn v. Com. 5 Rand. (Va.) 701.

In some jurisdictions it is only where the witness is dead, or his absence was procured by connivance of the accused, that the testimony is admitted.

Rex v. Barber, 1 Root, 76; Motes v. United States, 178 U. S. 474, 44 L. ed. 1156, 20 Sup. Ct. Rep. 993; Collins v. Com. 12 Bush, 271, 2 Am. Crim. Rep. 282; State v. Nicholas, 149 Mo. App. 121, 130 S. W. 96; State v. Wing, 66 Ohio St. 407, 64 N. E. 514, 15 Am. Crim. Rep. 634; Com. v. McKenna, 158 Mass. 207, 33 N. E. 389.

The only presumption in a criminal case is that of innocence, and there surely can be no presumption of knowledge in a criminal case merely from having the means of knowledge.

Knower v. Cadden Clothing Co. 57

Conn. 202, 17 Atl. 580; State v. Ebbeler, 283 Mo. 57, 222 S. W. 396; State v. Alpert, 88 Vt. 191, 92 Atl. 32.

Mr. Edwin S. Pickett, for the State:

Testimony of Ruth Blair from the original stenographer's notes, taken in the city court of New Haven, upon the trial of accused for the same offense as the present one, and at which trial she had been a witness for the state and had been cross-examined by the accused, was admissible.

Roy v. Moore, 85 Conn. 160, 82 Atl. 233; Rex v. Barber, 1 Root, 76; State v. Glidden, 55 Conn. 81, 3 Am. St. Rep. 23, 8 Atl. 890; Greenl. Ev. 16th ed. § 163; 2 Wigmore, Ev. § 1399; Underhill, Crim. Ev. chap. 21.

Curtis, J., delivered the opinion of the court:

Upon the trial of the accused it was proved that he was arrested on September 30, 1920, and on October 9, 1920, tried in and by the city court for the city and town of New Haven on three distinct charges, viz.: Harboring a female for purposes of prostitution, accepting earnings of a female by prostitution, and keeping a house of ill fame.

At the conclusion of the trial in the city court, the accused was bound over to the superior court on the first two charges; and the charge of keeping a house of ill fame was nolle by the city attorney. The accused was subsequently arrested on a bench warrant issuing from the court of common pleas for New Haven county, and the information filed against him in that court was in all respects the same, and for the same offense as the one which was nolle in the city court. During the trial in the city court, the state called as a witness Ruth Blair, who was arrested in defendant's house at the same time defendant was first arrested, and she testified in behalf of the state, and was fully cross-examined by the attorney for the accused.

Following the trial in the city court, Ruth Blair was detained by the authorities in the Children's Building, in the city of New Haven, as a material witness, and on November 9, 1920, escaped from said building. Upon discovery that she had escaped, the superintendent of said Children's Building immediately notified the police of the city of New Haven, who in turn notified the prosecuting attorney of the court of common pleas, and efforts were undertaken and made for her location and apprehension. These efforts included searches in and about New Haven, and visits to Meriden, Waterbury, and Bridgeport, and Springfield and Pittsfield, in the state of Massachusetts, at which places they had reason to believe she might be known and found. In Waterbury, the parents of Ruth Blair were seen and interrogated as to her probable whereabouts, and the assistance of the local police was engaged in different cities in endeavoring to locate the witness; and, although the search and inquiries continued to be made up to the time of the trial, she was unable to be found and produced in the trial court.

The state thereupon offered her testimony as given in the city court,

and the court, over the objection of defendant's counsel, being satisfied that all reasonable efforts had been made to locate her, and that she could not be found or produced in court, and it further appearing that her testimony, when given in the city court, had been taken down by a competent stenographer, admitted her testimony, in so far as it was relevant to the issues before the court, and the stenographer, being duly sworn as a witness, read from his original stenographic notes her testimony.

The accused objected to the testimony, because it was immaterial, irrelevant, and incompetent, and in contravention of the Constitutions of the United States and the state of Connecticut, in that he was not confronted by the witness, and also because the issues were not the same, in that the city court had no jurisdiction to determine the guilt or innocence of the accused, but acted only as committing magistrate. He also objected to the testimony being received and admitted in evidence, because it appeared that the defendant in the city court was being tried on two other distinct charges. The court ruled that only that portion of the testimony relevant to the issues in this case should be received, and, upon objection, excluded certain testimony which was not relevant to the issues before the court.

Defendant's counsel also objected to the testimony being received, because, for aught that appeared, Ruth Blair might still be within the jurisdiction of this court, and might be in the city of New Haven or Hartford, and the state had not shown, in view of the shortness of the time from November 9, 1920, the date of the escape, to the date of the motion, December 3, 1920, that it had made any reasonable efforts to locate her, and expressed his willingness to have the case continued for the purpose of allowing the state further time to locate the witness.

The court, however, was satisfied from the evidence that all reason-

able efforts had been made to locate the witness, and that there was no reason to believe that she could be found or located within the jurisdiction of the court at any reasonable time in the future.

We will first consider the objections to this evidence based upon constitutional grounds. The objection that its admission was in contravention of the 6th Amendment of the Constitution of the United States is not tenable.

This Amendment, which provides that an accused in a criminal prosecution shall be confronted with the

**Constitutional
law—Federal
Constitution—
applicability in
states.**

witnesses against him, does not apply to proceedings in a state court, but only to proceedings in

Federal courts. *West v. Louisiana*, 194 U. S. 262, 48 L. ed. 965, 24 Sup. Ct. Rep. 650. "The first ten amendments to the Federal Constitution contain no restrictions on the powers of the state, but were intended to operate solely on Federal government." *Brown v. New Jersey*, 175 U. S. 174, 44 L. ed. 119, 20 Sup. Ct. Rep. 78; *Barron v. Baltimore*, 7 Pet. 243, 8 L. ed. 672.

It is also claimed that the admission of this evidence was in contravention of § 9 of article 1 of the state Constitution. This section provides that in all criminal prosecutions the accused shall have a right to be confronted by the witnesses against him. The underlying reasons for the adoption of this right in the Federal Constitution and in state constitutions, and the principles of interpretation applying to this provision, are identical. In *Mattox v. United States*, 156 U. S. 242, 39 L. ed. 409, 15 Sup. Ct. Rep. 339, a case dealing with the admissibility of the former testimony of a person since deceased, the court states the purpose and scope of this provision:

"The primary object of the constitutional provision in question was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used

against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief. There is doubtless reason for saying that the accused should never lose the benefit of any of these safeguards, even by the death of the witness; and that, if notes of his testimony are permitted to be read, he is deprived of the advantage of that personal presence of the witness before the jury which the law has designed for his protection. But general rules of law of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case. To say that a criminal, after having once been convicted by the testimony of a certain witness, should go scot free simply because death has closed the mouth of that witness, would be carrying his constitutional protection to an unwarrantable extent. The law in its wisdom declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused.

"We are bound to interpret the Constitution in the light of the law as it existed at the time it was adopted, not as reaching out for new guaranties of the rights of the citizen, but as securing to every individual such as he already possessed as a British subject—such as his ancestors had inherited and defended since the days of Magna Charta. Many of its provisions in the nature of a Bill of Rights are subject to exceptions, recognized long before the adoption of the Constitution, and not interfering at all with its spirit. Such exceptions were obviously intended to be respected. A technical

adherence to the letter of a constitutional provision may occasionally be carried farther than is necessary to the just protection of the accused, and farther than the safety of the public will warrant. For instance, there could be nothing more directly contrary to the letter of the provision in question than the admission of dying declarations. They are rarely made in the presence of the accused; they are made without any opportunity for examination or cross-examination; nor is the witness brought face to face with the jury; yet from time immemorial they have been treated as competent testimony, and no one would have the hardihood at this day to question their admissibility. They are admitted, not in conformity with any general rule regarding the admission of testimony, but as an exception to such rules, simply from the necessities of the case, and to prevent a manifest failure of justice. As was said by the Chief Justice when this case was here upon the first writ of error (146 U. S. 140, 152, 36 L. ed. 917, 921, 13 Sup. Ct. Rep. 50), the sense of impending death is presumed to remove all temptation to falsehood, and to enforce as strict an adherence to the truth as would the obligation of an oath. If such declarations are admitted, because made by a person then dead, under circumstances which give his statements the same weight as if made under oath, there is equal, if not greater, reason for admitting testimony of his statements which were made under oath.

"The substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination. This, the law says, he shall under no circumstances be deprived of, and many of the very cases which hold testimony such as this to be admissible also hold that not the substance of his testimony only, but the very words of the witness, shall be proven. We do not wish to be un-

derstood as expressing an opinion upon this point, but all the authorities hold that a copy of the stenographic report of his entire former testimony, supported by the oath of the stenographer that it is a correct transcript of his notes and of the testimony of the deceased witness, such as was produced in this case, is competent evidence of what he said."

The constitutional provision under consideration was therefore designed to incorporate, in a way not subject to legislative change, the common-law principles in reference to criminal evidence to the effect that primarily such evidence "consists in facts within the personal knowledge of the witness, to be testified to in open court in the presence of the accused."

This primary rule was at common-law limited and controlled by subordinate rules, which render it safe and useful in the administration of justice, and the constitutional provision in question as intended to secure the primary principle, and also the established limitations, by incorporating them into the Constitution. *State v. McO'Brien*, 24 Mo. App. 402, 69 Am. Dec. 435.

In a note on *State v. Heffernan*, 24 S. D. 1, 140 Am. St. Rep. 764, 123 N. W. 87, found in 25 L.R.A. (N.S.) 868, the annotator states, in effect, that the overwhelming majority of courts hold that the testimony given at the preliminary examination by a witness who cannot be produced at the trial is admissible against an accused, if he had the opportunity to confront the witness and subject him to cross-examination in the proceeding in which the testimony was taken, provided he was present as the party charged with the offense which was being investigated, and the offense there charged and the one being tried are substantially the same.

Several state courts, which have interpreted this constitutional provision as if all the common-law exceptions to its strict application were barred by its terms, have been

constrained to overrule their first impressions and adopt an interpretation in accord with the principles stated above. See *State v. Hefferman*, 22 S. D. 513, 25 L.R.A. (N.S.) 868, 118 N. W. 1027, overruled by 24 S. D. 1, 25 L.R.A. (N.S.) 876, 140 Am. St. Rep. 764, 123 N. W. 87; *Cline v. State*, 36 Tex. Crim. Rep. 320, 61 Am. St. Rep. 850, 36 S. W. 1099, 37 S. W. 722, overruled by *Porch v. State*, 51 Tex. Crim. Rep. 7, 99 S. W. 1122.

The accused in the city court trial was charged with the identical offense for which he was prosecuted in the trial court.

Evidence—of witness at preliminary hearing.

He was present, and by his counsel cross-examined Ruth

Blair. The trial court properly found that diligent and reasonable search had been made for the witness to secure her attendance on the trial, and that there was no reason to believe that she could be found and procured as a witness at any reasonable time in the future, and that the state was not at fault in her escape from detention as a witness. The accused in the city court trial was also charged with two other offenses. The trial court limited the portion of the testimony of Ruth Blair given in the city court to be read at the trial below, to that portion relevant to the issues then on trial. Under the above circumstances the trial

—effect of additional accusation before committing magistrate.

court properly held that the stenographic notes of the testimony of Ruth

Blair in the city court, in so far as relevant to the offense charged in the trial court, were admissible, upon the oath of the stenographer in the city court that the notes read were a correct transcript of his notes and of the testimony of Ruth Blair as given in the city court. See 1 Greenl. Ev. 16th ed. (163f); Underhill, Crim. Ev. chap. 21; 2 Wigmore, Ev. §§ 1395 et seq.; 1 Whart. Crim. Ev. 10th ed. §§ 228 et seq.; 1 Chamberlayne, Ev. §§ 458 et seq.

The accused does not press his ob-

jection that the evidence was not admissible because taken in the city court acting as a committing magistrate, or because two other offenses were also charged against the accused in the city court. There was no error in the admission of this evidence as claimed in the second and third assignments of error.

In the eleventh, twelfth, thirteenth, fourteenth, and fifteenth assignments of error the accused claims, in effect, that the court erred in not charging the jury that the accused could not be found guilty unless the state proved beyond a reasonable doubt that he knew that the house he maintained was in fact a house of ill fame. Among the facts which the accused claimed to have proved was the following: "The house, No. 62 College street, kept by the defendant, had been occupied by him under a lease from the owners for a period of some six years, and was kept and maintained by him as a dining and rooming house."

The accused, therefore, admitted that he kept the house. The statute involved (Gen. Stat. § 6384) provides that "every person who shall keep a house which is, or is reputed to be, a house of ill fame, or which is resorted to, or is reputed to be resorted to, for the purposes of prostitution or lewdness . . . shall be fined. . . ."

In *Cadwell v. State*, 17 Conn. 472, we say in effect that the essential elements of the crime charged in an information of this kind are as follows: First, that the accused kept the house in question; second, that the reputation of the house was that of a house of ill fame; third, that the house was in fact a house of ill fame.

The statutory definition of the crime does not contain the word "knowingly," or its equivalent. This omission, however, is not conclusive upon the question whether or not the state must prove that the accused knew that the house he kept was a house of ill fame. Stephen's History of Criminal Law, vol. 2, p. 113, states the law as follows:

"Whether 'knowingly' is or is not to be implied in the definition of a statutory crime, where it is not expressed, must be determined from the general scope of the act and from the nature of the evils to be avoided."

See *State v. Nussenholtz*, 76 Conn. 96, 55 Atl. 589.

Clark on Criminal Law, pp. 92 and 93, says: "There are many statutes in the nature of police regulations for the protection of the morals of the community . . . under which, either because it is impracticable . . . to prove knowledge, or because it is regarded as reasonable under the circumstances that the doers of the act should take the risk of knowing, it is generally held that the prohibited act is criminal notwithstanding the ignorance of the accused."

In *Barnes v. State*, 19 Conn. 398, we held that, in a prosecution for selling spirituous liquors to a common drunkard, it was not necessary to prove that the defendant knew that the person to whom the liquor was sold was a common drunkard.

In *State v. Kinkead*, 57 Conn. 173, 17 Atl. 855, we held that a statute forbidding a licensed dealer in liquors to allow any minors to loiter on the premises where such liquor is sold was violated, if a minor was allowed to loiter on the premises, although the licensed seller believed he was of age.

In *Com. v. Boynton*, 2 Allen, 160, the court held that a person may be convicted of being a common seller of intoxicating liquor, although he did not know or suppose the liquor sold by him to be intoxicating. We are satisfied that "knowingly" is not to be implied as an essential part of the crime defined in Gen. Stat. § 6384, because this act is a police regulation for the protection of the morals of the community, and it is reasonable to require that whoever in fact keeps a house which is a house of ill fame

should take the risk of knowing the facts.

The court did not err in failing to charge the jury that it was an essential element of the crime charged, which must be proved by the state beyond a reasonable doubt, that the accused knew that the house he kept was, in fact, a house of ill fame.

In the sixth, seventh, eighth, ninth, and tenth assignments of error the accused claims, in effect, that the charge of the court was inadequate in defining the burden of proof resting upon the state in this criminal case. The charge of the court contained the substance of most of the requests of the accused. It was adequate to the situation presented. There was no specific fact essential to the guilt of the accused which the accused claimed, or which reasonably required to be specifically pointed out to the jury, as requiring proof beyond a reasonable doubt, as in *State v. Brauneis*, 84 Conn. 222, 79 Atl. 70.

The accused also claimed error in certain rulings upon evidence in his first, fourth, and fifth assignments of error.

The state called as a witness a Mrs. Margaret E. Foster, who testified on direct examination that she lived at No. 60 College street, being one half of the building the other half of which was conducted by the defendant, and that she had lived there approximately two years, and that the place conducted by the defendant had the reputation of being a house of ill fame.

On cross-examination, she testified that she was the housekeeper at No. 60 College street, which was also a rooming house; she was then interrogated with reference to whom she had talked with reference to the place kept by defendant being a house of ill fame, and as to what she knew with regard to what took place inside of defendant's house; and, upon redirect examination, was further inquired of by the state whether she had observed anything in reference to 62 College street (Gaetano's place). She replied that she had

Criminal law—
keeping house
of ill fame—
necessity of
knowledge.

been called in the night to answer the door bell between 11 and 2 o'clock, by men asking for girls, and asking if her home was 62 College street, and if Johnny Gaetano lived there. Counsel for the accused objected to this evidence, on the ground that it was hearsay, and, upon its admission, duly excepted.

Under the information, evidence of the reputation of the tenement 62 College street, as to whether or not it was a house of ill fame, was admissible. Also evidence was admissible to show that the Gaetano place was resorted to by lewd persons for the purposes of prostitution, as tending to prove its real character. *Cadwell v. State*, 17 Conn. 467.

The fact that late at night the next-door neighbor of the accused was called to the door by men and boys asking for girls, and asking if her place was the

Evidence—house of ill fame—calls at neighbor's.

place of the accused, Johnny Gaetano, was admissible as tending to show that Gaetano's place was visited by lewd persons for the purpose of prostitution or lewdness.

There was no error in the admission of this evidence. The remaining assignments of error are so obviously untenable as not to require discussion.

There is no error.

The other Judges concur.

NOTE.

The use in criminal cases of testimony given on a former trial or preliminary examination by a witness not available at the present trial is treated in the annotation following *SMITH v. STATE*, post, 495.

WILL BLACKWELL et al., Plffs. in Err.,

v.

STATE OF FLORIDA.

Florida Supreme Court — May 10, 1920.

(— Fla. —, 86 So. 224.)

Appeal — evidence taken at former trial — admission.

1. Under the statute authorizing the use in a subsequent trial of the evidence incorporated in a bill of exceptions taken at a former trial, when the testimony of the same witness "cannot be had" at the subsequent trial, it is not error to admit such bill of exceptions, when it is "made to appear to the satisfaction of the court" that the witnesses are sick, and most probably could not appear to testify for more than two weeks, when the accused had met the witnesses against him face to face, and was given full opportunity to examine them at the former trial, when the bill of exceptions was taken.

[See note on this question beginning on page 495.]

Criminal law — custody of jury — special bailiff.

2. It is not indispensable that the jury in a capital case should be committed to the charge of a bailiff spe-

cially sworn for the occasion. It is sufficient if they be put in charge of the sheriff, or his deputy, who has taken the oath of office.

[See 16 R. C. L. 325, 326.]

Headnotes by WILLIS, C. J.

15 A.L.R.—30.

New trial — intoxication of counsel.

3. Where, in a criminal prosecution, the evidence adduced does not clearly sustain a ground of a motion for a new trial, asserting that counsel for the defendants were so intoxicated during the trial as to substantially deprive the defendants of their right to be properly represented by counsel, and the record discloses no lack of efficiency of the counsel, the motion on that ground is properly denied.

Appeal — instruction on effect of flight.

4. A portion of a charge, that "the fact of flight is a circumstance to be considered by the jury as tending to increase the probability of the defendant being the guilty person," being abstract, is harmless, when coupled in the same paragraph with other statements of the law on the subject, and under all the circumstances of the case the defendants could not reasonably have been prejudiced by the quoted charge.

[See 2 R. C. L. 257; 14 R. C. L. 783.]

— refusal of duplicate instructions.

5. It is not error to refuse to give instructions that have already been given substantially, though couched in different language.

— argument of assignments.

6. In order to merit consideration by this court, assignments of error must be argued, unless the error complained of is so glaring or patent that no argument is needed to demonstrate it.

[See 2 R. C. L. 178.]

— denying new trial.

7. Where one of the assignments of error is based upon the overruling of the motion for a new trial, an appellate court will consider only such grounds of the motion as are argued.

[See 2 R. C. L. 179.]

— instructions on alibi.

8. Proper charges on the subject of "alibi" discussed.

— abstract instruction — error.

9. Where a portion of a charge is abstract, and, even if not entirely correct, it is manifestly harmless, it is not reversible error to refuse to give a more appropriate charge on the subject, that is requested by the interested party.

Constitutional law — use of evidence taken at former trial.

10. Chapter 5897, Acts 1909 (Comp. Laws 1914, § 1523), authorizing the use at a subsequent trial of the evidence adduced and incorporated in a bill of exceptions at a former trial, where on the subsequent trial it is "made to appear to the satisfaction of the court" that the testimony of the same witnesses "cannot be had," is not in conflict with the organic provision that in all criminal prosecutions the accused shall have the right "to meet the witnesses against him face to face."

[See 8 R. C. L. 88.]

Evidence — at former trial — right to use.

11. In criminal prosecutions the use of evidence adduced and incorporated in a bill of exceptions may, under chapter 5897, Acts 1909 (Comp. Laws 1914, § 1523), be used as evidence in a subsequent trial, only when the accused had on the former trial met the particular witnesses against him face to face and had full opportunity to cross-examine them, and when it is "made to appear to the satisfaction of the court" that the witnesses "cannot be had" to testify in person at the subsequent trial.

[See 8 R. C. L. 88.]

Appeal — affirmance of conviction.

12. Where there is ample competent evidence to sustain a verdict found, and it does not appear that the jury were not governed by the evidence in making their finding, and no material or harmful errors of law or procedure appear in the record, a judgment of conviction will be affirmed.

(Brown, Ch. J., and Taylor, J., dissent.)

ERROR to the Circuit Court for Bay County (Jones, J.) to review a judgment convicting defendants of murder in the first degree and sentencing them to death. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. J. Ed. Stokes, for plaintiffs in error:

Before a conviction can be had on circumstantial evidence the evidence

must be of a conclusive nature and must not only be consistent with the guilt of the accused, but must be inconsistent with innocence, and must

produce moral certainty to the exclusion of every reasonable doubt.

Walker v. State, 134 Ala. 86, 32 So. 703; Jones v. State, 141 Ala. 55, 37 So. 390; Myers v. State, 43 Fla. 500, 31 So. 275; Kennedy v. State, 31 Fla. 428, 12 So. 858.

Everyone accused of crime has the right to be confronted by the witnesses.

Anderson v. State, 89 Ala. 12, 7 So. 429; Coley v. State, 67 Fla. 178, 64 So. 751.

Messrs. Van C. Swearingen, Attorney General, and D. Stuart Gillis, Assistant Attorney General, for the State:

The sheriff may act as bailiff of the jury without a special oath.

Cato v. State, 9 Fla. 163; O'Connor v. State, 9 Fla. 215.

Drunkenness of counsel during a trial is not ground for a new trial.

O'Brien v. Com. 115 Ky. 608, 74 S. W. 666; Territory v. Clark, 13 N. M. 59, 79 Pac. 708.

Refusal of the court to instruct the jury that the testimony of an accomplice should be received with great caution is not necessarily harmful.

Presley v. State, 63 Fla. 37, 57 So. 605; Minor v. State, 55 Fla. 71, 45 So. 816.

The motion for a change of venue and affidavits in support thereof, together with the ruling of the trial court thereof, should have been evidenced here for review by the record proper and not in the bill of exceptions.

Keen v. Brown, 46 Fla. 487, 35 So. 401; Curry v. State, 17 Fla. 683; Williams v. Robles, 22 Fla. 95; Robertson v. State, 64 Fla. 437, 60 So. 119.

In the matter of impaneling a jury, the trial court's discretion is one involving the right to reject, and not the right to select.

Peardon v. State, 46 Fla. 124, 35 So. 204; Walsingham v. State, 61 Fla. 67, 56 So. 195.

Willis, Circuit Judge, delivered the opinion of the court:

Will Blackwell and Robert Blackwell, brothers, were jointly indicted in Okaloosa county, Florida, in two separate indictments, for the murder of M. M. Davis and his wife, Nancy Davis, and on May 7, 1917, were put upon trial under the indictment charging them with the murder of Nancy Davis. During the course of the trial the defendant Will Blackwell escaped from cus-

tody, thereby necessitating an order of mistrial. After a lapse of about three weeks he was recaptured, and on July 2, 1917, the defendants were placed on trial for the murder of M. M. Davis, were convicted of murder in the first degree, and sentenced to death. The case then went to the supreme court on a writ of error and was reversed (see 76 Fla. 124, 1 A.L.R. 502, 79 So. 731) and a new trial awarded.

After the reversal of the case it was transferred to the circuit court of Bay county, Florida, where the defendants were again placed upon trial in the circuit court of Bay county, Florida, for the murder of M. M. Davis, on the 17th day of December, A. D. 1918, and were again convicted of murder in the first degree and sentenced to death, and from this judgment defendants sue out writ of error.

Plaintiff in error contends in the second assignment of error that the court erred in permitting R. A. Rice to act as bailiff for the jury sworn to try the case, without requiring him to take a special oath. The record discloses the fact that the said Rice was a regularly appointed deputy sheriff, and that when designated to act as bailiff to the jury he was called up by the judge in the presence of the defendants and their counsel and admonished by the judge as to his duties while in charge of the jury. The record fails to show any improper conduct on the part of said Rice while in charge of said jury, nor is there any intimation by the defendants that there was, and, even if it had been proper that he should have taken an additional oath to the one as deputy sheriff, the failure to take such oath would be harmless error, and no grounds for reversal.

But we do not concede that, where a sheriff or deputy sheriff acts as bailiff, any additional oath is necessary. This

Criminal law—
custody of jury—
special bailiff.

court, in the case of Cato v. State, 9 Fla. 163, said: "It is not indispensable that the jury, in a capital case, should be committed to the charge

of a bailiff specially sworn for the occasion. It is sufficient if they be put in charge of the sheriff, or his deputy, who has taken the oath of office."

Counsel in their brief cite the case of *Nicholson v. State*, 38 Fla. 99, 20 So. 818. Upon a careful reading of this case we find nothing in conflict with the authority above cited:

Another ground contained in the motion for new trial was that they (defendants) were not properly represented, because their attorneys became intoxicated during the trial. The only evidence relied upon to maintain this ground is the affidavit of the two defendants, and there was a counter affidavit of eight or nine persons, who were present in the court room throughout the trial, denying the fact that the attorneys of the defendants were drunk during the trial, or under the influence of liquor. The judge who presided at the trial, and who had continual observation of said attorneys, after considering the affidavit presented at the time of the motion for new trial, overruled the motion for a new trial, which he certainly would have granted had he believed that the defendants had not had a fair and impartial trial by reason of the intoxication of their

New trial—
intoxication of
counsel.

lawyers. There is certainly no evidence in the voluminous record brought here of any intoxication or lack of mental activities on the part of defendants' counsel during the trial.

The third assignment of error, as given in the motion for new trial, is as follows: "If you find that the defendants, at or about the time the charge contained in the indictment was preferred against them, fled to another place, and that such flight was induced by the charge, you may consider such flight in determining the guilt or innocence of the defendants. The flight is a circumstance to be considered by the jury, as tending to increase the probability

of the defendants being the guilty persons."

Counsel contend that under such charge as complained of the natural assumption of the jury would be that it was prima facie evidence of the guilt of the accused, and it might possibly be open to this criticism if that were the entire charge. The charge complained of as erroneous must not be determined on, as to its correctness, by segregated parts, but as a whole. The charge complained of in its entirety meets the contention of counsel against it. The charge in words was as follows: "If you find that the defendants, at or about the time the charge contained in the indictment was preferred against them, fled to another place, and that such flight was induced by the charge, you may consider such flight in determining the guilt or innocence of the defendants. The fact of flight is a circumstance to be considered by the jury, as tending to increase the probability of the defendant being the guilty person. It does not give rise to a legal presumption, but he may rebut any inference which may be drawn from such flight by proper testimony which may tend to explain the same."

The flight of a person accused of crime raises no presumption of guilt, but is a circumstance that goes to the jury, to be considered by them with all the other testimony and circumstances, and given such weight as the jury may determine it entitled to. The rule is that, when a suspected person in any manner endeavors to escape, or evade a threatened prosecution, by flight, concealment, resistance to a lawful arrest, or other ex post facto indication of a desire to evade prosecution, such fact may be shown in evidence as one of a series of circumstances from which guilt may be inferred. *Whart. Crim. Ev.* 9th ed. § 750, and citations; *Carr v. State*, 45 Fla. 11, text 16, 34 So. 892.

Appeal—
instruction on
effect of flight.

The fourth and fifth assignments complain of the refusal of the judge

to give charges upon circumstantial evidence. From our view of this case the state relied not only upon circumstances, but upon alleged confessions, and it would not have been error for the judge to have failed or refused to have given any charge upon circumstantial evidence; but the judge did, in the charge given upon his own motion, fully and correctly give in charge the law of circumstantial evidence, and it was not error to refuse additional charges, when the substance of such requested charges had already been given.

—refusal of
duplicate
instructions.

"It is not error to refuse to give instructions that have already been given substantially, though couched in different language." *Higginbotham v. State*, 42 Fla. 573, 89 Am. St. Rep. 237, 29 So. 410.

The sixth assignment of error is that the court erred in refusing to give the following charge, requested by the defendants: "Gentlemen of the jury, this has been and is a very notorious case, and there has been more or less excitement over it, and that feeling may possibly have crept into the trial to some extent. I am not saying that it has, but for fear that it has, and in an abundance of caution, that nothing but justice may be done, I deem it my duty to instruct you and caution you against convicting the defendants, or either of them, through prejudice of witness who may have testified in this case, or upon insufficient evidence, and to caution you that in your deliberations you should not be influenced one whit by what is commonly called public sentiment, nor should you be influenced by any act or actions of any officer or officers, if there be such act or acts, that appear to be hostile to the defendants, or either of them. In other words, you must consider the evidence that has been given you on the witness stand, and that alone, in arriving at your verdict."

The court of its own motion had given the following charge: "A

fair and impartial trial is absolutely essential to the due and proper administration of justice, and it is of prime importance that this truth be constantly borne in mind both by courts and juries. If the courts are to retain the respect and the confidence of the people, and properly perform the important duties and exercise the great powers invested in them by the Constitution, in accordance with its spirit and purpose, and carry out and perform the objects of their creation, they must obey the constitutional command respecting fair and impartial trials, and give to every case submitted to them for decision due, careful, and conscientious consideration, basing their judgment upon sworn, legal, and credible evidence, uninfluenced by other extraneous considerations. In the administration of justice, juries are intrusted with functions of supreme importance. They consider and weigh the evidence submitted, determine the credibility of witnesses, and find from the evidence the facts upon which the court passes its judgment. In deliberating upon and endeavoring to reach a correct and conscientious verdict, the jurors are required by the law to be guided by the sworn evidence in the case, to calmly and dispassionately weigh and consider it, uninfluenced by any impression or opinions respecting the guilt or innocence of the accused, and based entirely and exclusively upon such evidence."

This charge covers substantially the requested charge, and there was no error in the refusal to give the same.

The seventh assignment of error is based upon the refusal of the judge to give the following charge: "I charge you that an accomplice is one who participated in the commission of a crime as aider or abettor, —any person who is connected with the commission of the crime charged, whether they directly committed the act constituting the offense, or aided and abetted, coun-

seled or assisted, in planning its commission, and the law of this state is that the testimony of an accomplice should be received with great caution."

The judge of his own motion had given the following charge: "The state relies in part for a conviction upon the testimony of Will Boyd, an accomplice, and in part upon circumstantial evidence. You are instructed that an accomplice in crime is a competent witness against a coperpetrator of the crime, and his evidence should be weighed by the jury even though uncorroborated, and given such weight as the jury believes it entitled. If the testimony of an accomplice is corroborated by other testimony, it should be entitled to greater weight than if uncorroborated. While the testimony of an accomplice should be received with caution, especially if uncorroborated, still it should not be rejected, if not corroborated in every material statement, if the jury believe that it is entitled to any weight. The evidence of an accomplice should be received with caution, but you are the judges of the credibility of the evidence of the accomplice, and you should give it such weight as you believe that it should have, when taken and considered together with the whole evidence in the case."

This charge covers in substance the requested charge; hence there was no error in refusal to give the charge asked.

Assignments Nos. 8, 9, 10, 11, 12, not having been argued, under the established rules of this court, may be considered as abandoned.

An assignment of error not being argued, where a motion for new trial contains several grounds, only those argued will be considered.

"In order to merit consideration by this court, assignments of error must be argued, unless the error complained of is so glaring or patent that no argument is needed to demonstrate it. Where

one of the assignments of error is based upon the overruling of the ^{-denying new trial.} motion for a new trial, an appellate court will consider only such grounds of the motion as are argued." *Lindsey v. State*, 67 Fla. 111, 64 So. 501.

See also *Smith v. State*, 65 Fla. 56, 61 So. 120; *Revels v. State*, 62 Fla. 83, 56 So. 416; *Johnson v. State*, 55 Fla. 41, 46 So. 174; *Colson v. State*, 51 Fla. 19, 40 So. 183.

This case involving human life, we will depart from the usual custom and consider the eighth assignment of error, based on the refusal of the court to give the requested charge on the defense of an alibi, which was as follows: "The defense of an alibi has been offered, which means that the defendants were not there when the crime charged was committed, and consequently did not do it. If from the evidence in this case you have a reasonable doubt as to the alibi,—that is to say, whether the defendants were there or not,—then you should give them the benefit of such reasonable doubt, and find them not guilty."

The requested charge correctly stated the law of this case upon the question of the defense of an alibi; ^{-instructions on alibi.} but, if the requested charge was covered by other charges given, it would not be error to refuse it. The court of its own motion had instructed the jury as follows: "The defendants, under their plea of not guilty, set up as a defense what is known in law as an alibi. An alibi simply means that the accused were not present at the time and place of the commission of the crime, but were at another place, and therefore it was impossible for them to have committed the crime. A defendant has the right to prove by competent evidence that he was not present and could not have committed the crime, and if you believe from the evidence, or if you have a reasonable doubt from the evidence, that the defendants were not pres-

-argument of assignments.

ent at the time and place when M. M. Davis was killed, if you believe he was killed, then you must acquit them. The evidence of an alibi must cover the whole time when the presence of the accused was required. You must determine from the evidence whether the defendants proved that they were not there, or whether the evidence produced in your minds a reasonable doubt as to whether or not they were there. If, upon taking into consideration the evidence offered by the defendants to prove an alibi, with all the other testimony, you have a reasonable doubt as to whether or not they were there, you should find them not guilty. [The defense of an alibi is, of all other testimony, the most decisive when duly substantiated; but the evidence adduced in support of it requires to be minutely considered, and must be such as to render it impossible that the crime could have been committed by the party, who claims that he was not present and could not be guilty as charged.]

The requested charge was fully covered by the charge given by the court in that part of the charge not included within the brackets, and that part of the charge was correct on the defense of an alibi, and the only criticism of the charge that could be made was by the addenda within the brackets. Was this sufficient to destroy the former part of the charge, or mislead or confuse the jury? We quote from Words & Phrases, 2d series, vol. 1, p. 298:

"The defense known in law as an 'alibi' is that, at the time of the commission of the crime charged in the indictment, the defendant was at a different place, so that he could not have committed it. State v. McGarry, 111 Iowa, 709, 83 N. W. 719; State v. McGinnis, 158 Mo. 105, 59 S. W. 88; State v. Hale, 156 Mo. 102, 56 S. W. 882; State v. Taylor, 118 Mo. 153, 24 S. W. 451, 11 Am. Crim. Rep. 51; Com. v. Webster, 5 Cush. 295, 819, 52 Am. Dec. 711; Savage v. State, 18 Fla. 970, 974; People v. Levine, 85 Cal. 39, 22 Pac. 969, 24 Pac. 631; Wisdom v. People,

11 Colo. 170, 174, 17 Pac. 522; Dunn v. State, 118 Wis. 82, 94 N. W. 648."

"An 'alibi' in law simply means that the defendant was not there; or, to state it more definitely, a defendant who sets up an alibi shows such a state of facts surrounding his whereabouts at that particular time as would make it practically improbable or impossible for him to have committed the offense charged. State v. Child, 40 Kan. 482, 20 Pac. 276."

We cannot commend as a model for clearness on the defense of an alibi the charge as given, and think it would have been better to have omitted the part inclosed in brackets. The judge, after correctly charging upon the defense of an alibi, by the words inclosed in brackets charged an abstract proposition of law, the ~~—abstract instruction—~~ definition of an alibi, ~~error.~~ and we cannot say that it was so misleading or confusing to the jury as to constitute reversible error, on the judge refusing the requested charge.

The thirteenth and fourteenth assignments of error are based upon the admission in evidence of the testimony in bill of exceptions of Harrison Davis and Saphronia Holmes as given at the former trial of this case, upon the grounds that no sufficient predicate was laid for the introduction of such testimony. Dr. Porter Webb, a practising physician, testified that Harrison Davis was prostrate in bed, due to inflammatory rheumatism, and that it might last indefinitely and make him an invalid; that Saphronia Holmes was sick, and "not able to come to court, and that if she had good luck it might be two weeks at least before she could get there." The doctor, upon being asked by the court, "Do you think either of them will be able to get here in the next two weeks?" answered, "Oh, no; I don't think so, judge."

From the testimony of these absent witnesses as contained in the bill of exceptions, these witnesses had been, at the former trial, cross-

examined at great length, and, as further shown by the record in this case, there were a great number of witnesses, both for the state and the defense, present at the time the case was called for trial, and the defendant did not show or offer to show any further cross-examination of such witnesses. Under these cir-

—evidence taken at former trial—admission. cumstances we cannot say that there was any abuse of judicial discretion in permitting the admission of such testimony, and an appellate court will not reverse the discretion of the trial judge, unless there is a manifest abuse of such discretion.

There is some diversity of opinion among the courts as to whether temporary absence by reason of illness of a witness will permit the use of his testimony given at a former trial, but we think that the weight of authority and the better rule is that it is a matter resting in the sound judicial discretion of the trial judge.

"Any physical incapacity preventing attendance in court, except at the risk of serious pain or danger to the witness, should be a sufficient cause of unavailability; and this has been almost universally recognized by courts. Certain distinctions, however, have from time to time received special notice: (a) The duration of the illness need only be in probability such that, with regard to the importance of the testimony, the trial cannot be postponed; (b) as to the degree of the illness, the traditional phrase, 'so ill as not to be able to travel,' sufficiently indicates the requirements of common sense; and the 'ability' is to be considered with reference to the risk of pain or danger to the witness. That the illness should be such as to make it impracticable to take the witness's deposition at his home has been said by one court to be the correct limitation; but this is certainly incorrect, for a deposition obtained from a person during illness could not be any better than his former cross-examined testimony or deposition,

and would probably be much less trustworthy. There is no reason why the application of the general principle in a given instance should ever come before a court of appeal; to the trial court should be left the determination of the existence of the necessity in a particular case." 2 Wigmore, Ev. p. 1760, § 1406, and notes.

"Mitchell, J., in *Thornton v. Britton*, 144 Pa. 130, 22 Atl. 1048: "The determination of this question in each case as it arises rests largely in the discretion of the court. On a trial for murder, for instance, the judge presiding would feel it his duty to enforce the attendance of a witness having knowledge of the crucial facts, even at some risk to the witness's health or life; while in a civil action he might feel free to hold that a much smaller risk to the witness would be sufficient to excuse him from personal attendance." 2 Wigmore, Ev. § 1406, and note.

"It is obvious that the purpose of this act is to permit the introduction in evidence of a bill of exceptions containing evidence adduced at a former trial, upon the reversal of a judgment rendered thereat, when certain evidence given at such former trial cannot be had. In other words, provision was made for the admission of the bill of exceptions when the testimony of a witness who had testified at a former trial could not be had by reason of the death, sickness, or insanity of such witness, or by reason of the fact that he is out of the jurisdiction or cannot be found after diligent search. See the discussion in *Putnal v. State*, 56 Fla. 86, 47 So. 864." Bennett v. State, 68 Fla. 494, text 498, 67 So. 126.

In the case of *Putnal v. State*, 56 Fla. 86, in the body of the opinion, page 96, 47 So. 867, Shackleford, Ch. J., said: "Obviously it is for the trial court to pass upon and determine whether or not a sufficient and proper predicate has been laid for the introduction of such former testimony. In the case at bar the

trial court was of the opinion that such predicate had been laid, and, upon the showing made to us, we do not feel called upon to disturb the ruling. We fully appreciate the necessity of requiring a compliance with the rule in such cases, and have no disposition or inclination for a relaxation of any of the safeguards that have been thrown around it."

In the earlier days the testimony of a witness given at a former trial was confined to cases where the witness was dead, or had become insane, or beyond the seas or the jurisdiction of the court; but the tendency of the modern decisions has been to enlarge the rule of evidence as to the admission of such testimony. Prior to 1893 (Fla.) Laws, chap. 4135, the testimony contained in the bill of exceptions was not admissible in evidence, but such testimony had to be proved by someone who was present at the trial and heard the witness testify; but § 1 of chapter 5897, Laws of 1909 (Comp. Laws 1914, § 1523), is as follows: "In case any judgment at law rendered by any court of the state of Florida shall be reversed and a new trial awarded, and it be made to appear to the satisfaction of the court that any evidence used at the former trial, whether oral or written, and incorporated in the bill of exceptions, cannot be had, then the bill of exceptions taken at the previous trial may be used as evidence upon any subsequent trial of the case, as to any matter in issue at the former trial: Provided, that no evidence given upon a former trial of any case pending in any of the courts of the state of Florida shall be used in evidence upon the trial of any cause in any of the courts in the state of Florida, except as herein provided."

Other states have adopted statutes upon this subject, but those that we have had access to have defined under what conditions, such as absence from the state, permanent illness, death, or insanity, and we have been unable to find any statute similar to ours which permits the introduction of such evidence used

at the former trial when it is "made to appear that it cannot be had." It seems from the broad language used that the legislative intent was to vest in the trial judge a discretion under the circumstances of each particular case as to the admission or rejection of such former testimony contained in the bill of exceptions.

Ordinarily the court will not pass on the constitutionality of a statute, unless the statute is expressly attacked as unconstitutional; but there has been some discussion whether or not the objection to the admission of so much of the bill of exceptions as contained the testimony of the absent witnesses given at a former trial did not necessitate the passing upon the constitutionality of chapter 5897, Laws of Florida 1909, which is as follows: "In case any judgment at law rendered by any court of the state of Florida shall be reversed and a new trial awarded, and it be made to appear to the satisfaction of the court that any evidence used at the former trial whether oral or written, and incorporated in the bill of exceptions, cannot be had, then the bill of exceptions taken at the previous trial may be used as evidence upon any subsequent trial of the case, as to any matter in issue at the former trial: Provided, that no evidence given upon a former trial of any case pending in any of the courts of the state of Florida shall be used in evidence upon a trial of any cause in any of the courts in the state of Florida, except as herein provided."

The writer of this opinion, prior to the enactment of the amendment to this statute, as a trial judge, admitted over objection of the defendant testimony of a deceased witness, the chief witness for the state, taken upon a habeas corpus proceeding, where the defendants charged with murder were represented by counsel and cross-examined this state witness. There was a conviction of manslaughter, and upon appeal to this court the admission of such testimony was assigned as error, but

not passed upon, as the record of the case (not in the opinion) shows that it was not argued, and was considered as abandoned. *Bexley v. State*, 59 Fla. 6, 51 So. 278.

"Because of the universal constitutional right of the accused to confront the witnesses, it is absolutely necessary, in order that the testimony of a deceased or absent witness may be admissible at a subsequent trial against the accused, that the party against whom it is offered should have had an opportunity of cross-examining him at the earlier trial. If the accused has once enjoyed his right to confront witnesses, his constitutional right to meet the witnesses against him face to face is not violated by the admission of the testimony of such a witness, who is absent, at a subsequent trial. Hence, if the defendant was represented by counsel at the preliminary examination and has had an opportunity of cross-examining the witnesses, he has enjoyed his right to meet his accusers face to face, and no objection exists to receiving the testimony of deceased or insane witnesses." *Underhill*, Crim. Ev. 2d ed. § 265.

"In the United States, most of the Constitutions have given a permanent sanction to the principle of confrontation, by provisions requiring that in criminal cases the accused shall be 'confronted with the witness against him' or 'brought face to face' with them. The question thus arises whether these constitutional provisions affect the common-law requirement of confrontation, otherwise than by putting it beyond the possibility of abolition by an ordinary legislative body. The only opening for argument lies in the circumstance that these brief provisions are unconditional and absolute in form; i. e., they do not say that the accused shall be confronted 'except when the witness is deceased, ill, out of the jurisdiction, or otherwise unavailable,' but imperatively prescribe that he 'shall be confronted.' Upon this feature the argument has many

times been founded that, although the accused has had the fullest benefit of cross-examining a witness now deceased or otherwise unavailable, nevertheless, the witness's presence before the tribunal being constitutionally indispensable, his decease or the like is no excuse for dispensing with his presence.

"That this argument is unfounded cannot be doubted; and the answer to it may be put in several forms: (1) There never was at common law any recognized right to an indispensable thing called confrontation, as distinguished from cross-examination. There was a right to cross-examination as indispensable, and that right was involved in and secured by confrontation; it was the same right under different names. This much is clear enough from the history of the hearsay rule (*ante*, § 1364), and from the continuous understanding and exposition of the idea of confrontation (*ante*, § 1395). It follows that, if the accused has had the benefit of cross-examination, he has had the very privilege secured to him by the Constitution."

"In dealing with depositions and former testimony, our courts have almost unanimously received them in criminal prosecutions, as not being obnoxious to the constitutional provision. The leading opinions were rendered chiefly between 1840 and 1860. Up to 1886, apparently the only contrary precedent not overruled was an early Virginia case, afterwards often cited, which professed to decide the question merely on English precedents, and not on constitutional grounds, and proceeded on the authority of an earlier English treatise, which in turn went upon the authority of Fenwick's *Trial*, 13 How. St. Tr. 537,—a parliamentary decision precisely to the opposite effect, and misunderstood by the writer of the treatise. This early Virginia ruling, of so little weight in itself, served, however, to keep a doubt alive, and in the last generation a few ill-considered rulings in other jurisdictions have fol-

lowed it. Apart from these rulings, it is well and properly settled that such evidence—assuming always that there has been a due cross-examination—is admissible for the state in a criminal prosecution, without infringing the Constitution.”

“The question, then, whether there is a right to be confronted with opposing witnesses, is essentially a question whether there is a right of cross-examination. If there has been a cross-examination, there has been a confrontation. The satisfaction of the right of cross-examination (under the rules examined ante, §§ 1371–1393) disposes of any objections based on the so-called right of confrontation.

“Nevertheless, the secondary advantage, incidentally obtained for the tribunal by the witness’s presence before it,—the demeanor evidence,—is an advantage to be insisted upon wherever it can be had. No one has doubted that it is highly desirable, if only it is available. But it is merely desirable. Where it cannot be obtained, it need not be required. It is no essential part of the motion of confrontation; it stands on no better footing than other evidence to which special value is attached; and just as the original of a document (ante, § 1192), or a preferred witness (ante, § 1308), may be dispensed within case of unavailability, so demeanor evidence may be dispensed with in a similar necessity.” 2 Wigmore, Ev. §§ 1397, 1398, 1396.

“It has long been a settled rule of evidence, as one of the exceptions to the general rule excluding hearsay, that the testimony of a witness given in a former action, or at a former stage of the same action, is competent in a subsequent action, or in a subsequent proceeding of the same action, where it is shown that such witness is dead, has become insane or disqualified, is beyond the jurisdiction of the court (that is, out of the state), cannot conveniently be found, or has been kept away by the opposite party, where it is also

shown that the former giving of such testimony was under oath, and that opposing party cross-examined, or was afforded an opportunity to cross-examine, such witness. This rule has been generally applied in criminal causes, and has been held not to be in conflict with article 6 of the United States constitutional amendments, providing that ‘in all criminal prosecutions the accused shall enjoy the right to be confronted with witnesses against him,’ nor in conflict with the state Constitution, such as ours (art. 6, § 7), which provides that ‘in all criminal prosecutions the accused shall have the right to meet the witnesses against him face to face;’ it being held that, where the defendant has once, at some proper stage of the proceeding, been confronted with and met such witness face to face, has cross-examined him, or been given the privilege to do so, the provisions of these Constitutions have been satisfied, and that such evidence is not objectionable on that account. Elliott, Ev. § 503; Jones, Ev. § 339; Wigmore, Ev. §§ 1365–1395; 12 Cyc. 543; 16 Cyc. 1091; *Mattox v. United States*, 156 U. S. 237, 39 L. ed. 409, 15 Sup. Ct. Rep. 337; *Bishop, Crim. Proc.* 1194; *State v. Mannion*, 19 Utah, 505, 45 L.R.A. 638, 75 Am. St. Rep. 753, 57 Pac. 542.” *State v. Heffernan*, 25 L.R.A. (N.S.) 868 [24 S. D. 2, 140 Am. St. Rep. 765, 123 N. W. 88].

The case note in the above case is as follows:

“The objection generally raised to the admission at a trial of testimony given at the preliminary examination, by a witness who cannot be produced at the trial, is that the accused person would thereby be denied the right guaranteed by the Constitution of the United States, and by the constitutional or statutory provisions in most of the statutes, of being confronted with the witnesses against him, which includes the right of cross-examination; it being contended that this right is denied unless the accused is

actually confronted with the witnesses against him at the trial which is to determine his guilt or innocence. On the other hand, it is contended that the accused person is afforded this right, if he has had the opportunity to confront the witnesses against him and subject them to cross-examination in the proceeding in which the testimony was taken, provided he was present as the party charged with the offense which was being investigated, and the offense there charged and the one being tried are substantially the same.

"This latter view is taken by an overwhelming majority of the courts, but the real basis for the admission of such testimony seems to be the necessity for its admission to prevent the miscarriage of justice, and the instances in which it is admitted are in reality exceptions to (sometimes recognized as such by the court), rather than in compliance with, the rule that the accused is entitled to be confronted with the witness against him.

"As to the effect of the admission of such testimony upon the rights guaranteed to an accused person by the Federal Constitution, it was held in *West v. Louisiana*, 194 U. S. 258, 48 L. ed. 965, 24 Sup. Ct. Rep. 650, affirming 109 La. 603, 33 So. 618, that the constitutional provision giving the accused the right 'to be confronted with the witnesses against him,' does not apply in prosecutions in state courts, and that the reading, according to a state statute, of depositions taken at the examination of a witness who has permanently removed from the state, does not deprive the accused of liberty without due process of law, or violate any provision of the Federal Constitution."

Section 11 of the Declaration of Rights of this state is as follows: "In all criminal prosecutions the accused shall have the right to a speedy and public trial, by an impartial jury, in the county where the crime was committed, and shall be heard by himself or counsel or both.

to demand the nature and cause of the accusation against him, to meet the witnesses against him face to face, and have compulsory process for the attendance of witnesses in his favor, and shall be furnished with a copy of the indictment against him."

Section 11 of the Declaration of Rights was not intended by the framers of the Constitution either to enlarge or abridge the privileges of rights of persons accused of crime, but to prevent the impairment of such rights or privileges by legislation as existed at common law.

"An important canon of construction is that constitutions must be construed with reference to common law, and although there is no common law of the United States in the sense of a national customary law, as distinguished from the common law of England, adopted by the several states, in interpreting the Federal Constitution, recourse may still be had to the aid of the common law of England. It has been said that without reference to this common law the language of the Federal Constitution could not be understood. This is due to the fact that this instrument and the plan of government of the United States were founded on the common law as established in England at the time of the Revolution. Phrases in the Bill of Rights taken from the common law, therefore, must be construed in reference to the latter." 6 R. C. L. p. 53.

Having this rule of construction before us, we must determine what the common law was upon this subject of the right of the accused to meet the witnesses against him "face to face."

"Our common law on the subject comes from two ancient English statutes, which were accepted as of common-law force in Pennsylvania, in Maryland, and probably in the other states generally. They are 1 & 2 Phil. & M. chap. 13, §§ 4, 5, and 2 & 3 Phil. & M. chap. 10. By them,

justices of the peace, committing or bailing one on a charge of felony, were to 'take the examination of the said prisoner, and information of them that bring him, of the fact and circumstances thereof,' and reduce to writing 'the same or as much thereof as shall be material thereof to prove the felony,' and certify it to the court before which the further proceedings were to occur." 1 Bishop, New Crim. Proc. § 1198, p. 733.

Again, the same author sums up the common law:

"Epitomized is the common-law doctrine as to depositions before committing magistrates, taken under statutes like the former English ones, in the later 11 & 12 Vict. chap. 42, § 17, thus: 'If, upon the trial,' it appears 'that any person whose deposition shall have been taken as aforesaid is dead, or is so ill as not to be able to travel, and if also it be proved that such deposition was taken in the presence of the person so accused, and that he or his counsel or attorney had a full opportunity of cross-examining the witness, then, if such deposition purport to be signed by the justice by or before whom the same purports to have been taken, it shall be lawful to read such deposition as evidence in such prosecutions, without further proof thereof, unless it shall be proved that such deposition was not in fact signed by the justice purporting to sign the same.'" Section 1201.

"Sec. 1204. Constitutional—'Face to Face.'—The law, as expounded in the foregoing sections, is not in conflict with the constitutional guaranty, to an indicted person, of the right 'to meet the witnesses against him face to face.' At his already explained opportunity to cross-examine them, he does or may thus meet them."

It may be inquired: "Did the legislature have the power by statute to prescribe that the testimony as set out in the bill of exceptions should be the exclusive manner of

proving the evidence of a witness given at a former trial, who is dead, insane, or unable to be had? We answer this in the affirmative. There being no constitutional prohibition, as we hold, to the introduction of such testimony upon the ground that the witness did not meet the accused face to face, it is clearly within the power of the legislature to provide the only manner or mode in which the testimony of such absent witness could be shown.

Constitutional law—use of evidence taken at former trial.

In the case of *Sanford v. State*, 143 Ala. 78, 39 So. 370, the court held that, where the testimony had been taken down in writing of a witness at a preliminary trial, it was error to allow the justice who had taken such testimony to testify as to what the witness had said, and the law requiring the testimony of witnesses on a preliminary trial to be taken by a justice of the peace, that the writing was the best evidence, and in the headnote to the above-cited case stated the law to be: "Where a magistrate, on the preliminary trial of a defendant charged with a felony, takes down in writing the testimony given therein by a witness, he cannot, on the trial by jury, testify as to what such witness said on examination in the preliminary trial, as the written notes of his testimony is the best evidence thereof."

We cite from the case of *Jackson v. State*, 81 Wis. 127, text 132, 51 N. W. 91, as follows: "In speaking of criminal cases, Mr. Cooley says: 'If the witness was sworn before the examining magistrate, or before a coroner, and the accused had an opportunity then to cross-examine him, or if there were a former trial on which he was sworn, it seems allowable to make use of his deposition, or of the minutes of his examination, if the witness has since deceased, or is insane, or sick and unable to testify, or has been summoned but appears to have been kept away by the opposite party.' Cooley, Const. Lim. 6th ed. 387, cit-

ing numerous cases. The attorney general cites numerous cases under similar constitutional provisions to the same effect.

"Of course, to be admissible, such former testimony should be established or identified with reasonable certainty. Here the stenographer testified, in effect, that while he did not recollect the fact, yet that he thinks he took down all the questions put to the witness, and his answers, and that he believed they were substantially correct. Counsel contend that this was not sufficient to authorize such admission, within the rule of *Zitske v. Goldberg*, 38 Wis. 216, and *Elberfeldt v. Waite*, 79 Wis. 284, 48 N. W. 525. In neither of 284, 48 N. W. 525. In neither of those down by the official court reporter. In each it was taken down by a justice of the peace. In the former it was said by the present chief justice that 'the minutes of testimony taken by a justice of the peace on a trial before him are subjected to no such scrutiny [as in a bill of exceptions], and possess none of these important and essential elements of verity. On the contrary, they are made in the haste and confusion of trials, generally by men who are quite unused to the business, and no power to make corrections after the trial is vested in anyone. Hence the reasons for admitting such testimony, when it is found in a settled case or bill of exceptions, entirely fail when the offered testimony is contained in the justice's minutes.'

It is an elementary rule of evidence that the best evidence that the nature of the case permits should be resorted to, to prove a fact, and how any higher or better evidence of what a deceased or absent witness swore at a former trial can be produced than that contained in the bill of exceptions prepared by the defendant or his counsel, and receiving the sanction and approval of the trial judge as being correct, we cannot imagine.

We know of no better way of expressing our conclusion on the admissibility of such testimony in the

manner prescribed by the statute than by quoting from the opinion in the case of *United States v. Greene* (D. C.) 146 Fed. 787, text pages 799, 800 and 801, as follows:

"It is, however, urged that it is not competent in any criminal case to admit the testimony of a witness given on a previous trial unless the witness himself can be brought before the court. As tersely stated by the assistant district attorney, Mr. Akerman: 'The contention of the learned counsel would perhaps be better founded if the Supreme Court of the United States had not decided the precise question against him.'

"This decision is found in the *Mattox Case*, 146 U. S. 140, 36 L. ed. 917, 13 Sup. Ct. Rep. 50. There two witnesses on a former trial, Thomas Whitman and George Thornton, had since died. A transcribed copy of the reporter's stenographic notes was admitted by the court and constituted the strongest proof against the accused. The accused were charged with the capital crime of murder. There it was insisted, as here, that the constitutional provision, that the accused shall be confronted with the witnesses against him, was infringed by permitting the testimony of witnesses sworn upon the former trial to be read. Said the Supreme Court, Mr. Justice Brown rendering the opinion [on rehearing in 156 U. S. 240, 39 L. ed. 410, 15 Sup. Ct. Rep. 337]: 'The idea that this cannot be done seems to have arisen from a misinterpretation of a ruling in the case of *Sir John Fenwick*, 13 How. St. Tr. 537, 579.'

"This case was a parliamentary proceeding by bill of attainder. It was the last trial by bill of attainder among the English-speaking people. The charge was high treason. We gather from the luminous and brilliant pages of Macaulay's *History of England* that, though convicted, the prisoner would have been pardoned by William III. had his offense merely comprised a plot for the assassination of that monarch; but the King could not forgive a

gross and public insult which Fenwick had offered the Queen, the beloved and amiable Mary. There, however, the witness had not died. The wife of the accused had spirited him away, and, notwithstanding the bitterness of the Parliament, with that high regard for law which has characterized the English-speaking race, the testimony was excluded. But in that case there had been no opportunity for cross-examination on a former trial between the same parties. Nevertheless, the case misled a writer on evidence to state that it was authority for the proposition that the testimony of a deceased witness cannot be used in a criminal prosecution, and it possibly had the same effect upon the learned counsel for the defendants in this case.

"The Supreme Court, however, had declared the rule in England to be clearly the other way, citing a number of notable precedents and an eminent text author. 2 Starkie, Ev. p. 208. And, said the learned justice delivering the opinion as to the practice in this country: 'We know of none of the states in which such testimony is now held to be inadmissible.' Certainly this is true in our own state. In that Code of our state which has made copious drafts, not only upon the English, but the Roman, law, whose first and perhaps most illustrious codifier, that noble Georgian, T. R. R. Cobb, has left the people whom he loved a juridical monument in its inestimable pages not less valuable to them than the Code Napoléon to the people of France, we find in § 1001 the provision following, which should satisfy the jurists and the people of this state:

"The testimony of a witness, since deceased, or disqualified, or inaccessible for any cause, given under oath on a former trial, upon substantially the same issue and between substantially the same parties, may be proved by anyone who heard it and who professes to remember the substance of the entire testimony, as to the particular matter about which he testifies."

"In some cases, recited by the Supreme Court in the Mattox Case, where witnesses who had testified on a former trial were not dead, but were out of the state, and for similar reasons the testimony has been excluded; but said the Supreme Court: 'Upon the other hand, the authority in favor of the admissibility of such testimony, where the defendant was present either at the examination of the deceased witness before a committing magistrate, or upon a former trial of the same case, is overwhelming.'

"There are, of course, grave reasons wherever it is possible that the witness who testifies against the accused should be present. These are recapitulated by the Supreme Court in the case just cited. But said that great tribunal:

"But general rules of law of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case. To say that a criminal, after having once been convicted by the testimony of a certain witness, should go scot-free simply because death has closed the mouth of that witness, would be carrying this constitutional protection to an unwarrantable extent. The law in its wisdom declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused."

"And in the same case it is further declared that 'the substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination.'

"It adds that 'all the authorities hold that a copy of the stenographic report of his entire former testimony, supported by the oath of the stenographer that it is a correct transcript of his notes and of the testimony of the deceased witness, such as was produced in this case, is competent evidence of what he said.'

"See also *United States v. Macomb*, 5 McLean, 286, Fed. Cas. No. 15,702; *Rice*, Ev. pp. 345 et seq.; *Starkie*, Ev. 409; *Greenl.* Ev. 163; *Roscoe*, *Crim. Ev.* p. 66; *Reynolds v. United States*, 98 U. S. 145, 25 L. ed. 244.

"There is a learned discussion of the entire topic in *Wigmore on Evidence*, vol. 2, §§ 3905 et seq., and many authorities cited, leading the learned writer to the conclusion, as stated in § 1397, that such an argument as that presented by the counsel for the defendants is wholly unfounded. The contention is utterly inconsistent with the exigencies of society, and, reduced to its last analysis, might even exclude on the trial the dying declarations of the innocent victim of unprovoked and secret murder or unnamable outrage."

For an interesting discussion of the subject see *State v. McO'Brien*, 24 Mo. 402, 69 Am. Dec. 435. See also 8 R. C. L. p. 88; *Spencer v. State*, 132 Wis. 509, 122 Am. St. Rep. 989, 112 N. W. 462, 13 Ann. Cas. 969; *State v. Heffernan*, 22 S. D. 513, 25 L.R.A. (N.S.) 868, 873, 118 N. W. 1027; *People v. Droste*, 160 Mich. 66, 125 N. W. 87; 16 Cyc. 1101; *State v. Nelson*, 68 Kan. 566, 75 Pac. 505, 1 Ann. Cas. 468, notes.

The constitutionality of § 1, chapter 5897, Acts of 1909 (§ 1523, *Compiled Laws 1914*), is not argued by counsel for plaintiff in error, and its validity was expressly recognized in *Johnson v. State*, 68 Fla. 528, 67 So. 100; *Coley v. State*, 67 Fla. 178, 64 So. 751. The statute is as follows: "In case any judgment at law rendered by any court of the state of Florida shall be reversed and a new trial awarded, and it be made to appear to the satisfaction of the court that any evidence used at the former trial, whether oral or written, and incorporated in the bill of exceptions, cannot be had, then the bill of exceptions taken at the previous trial may be used as evidence upon any subsequent trial of the case, as to any matter in issue at the former

trial: Provided, that no evidence given upon a former trial of any case pending in any of the courts of the state of Florida shall be used in evidence upon the trial of any cause in any of the courts in the state of Florida, except as herein provided."

The Constitution, in § 11 of the Declaration of Rights, provides that "in all criminal prosecutions the accused shall have the right . . . to meet the witnesses against him face to face."

"The object of this provision manifestly is to exclude testimony by depositions, by requiring it to be given orally, in the presence of the accused, on the trial. The admission of testimony by depositions against the accused in a criminal cause would often afford the prosecutor great advantages over him, as well as furnish, at times, opportunities for abuses beyond the reach of detection by the defendant. Deprived of this right, the accused would often be without the opportunity of cross-examination, without the means of seeing, hearing, or knowing the persons who testify against him, and without the advantage of an oral examination of the witnesses before the jury which is to decide upon his case. But important as this right is, as established at common law and secured by the Constitution, it has application to the matter of the personal presence of the witness on the trial, and not to the subject-matter or competency of the testimony to be given. The requirement that the accused shall be confronted, on his trial, by the witnesses against him, has sole reference to the personal presence of the witnesses, and it in no wise affects the question of the competency of the testimony to which he may depose. When the accused has been allowed to confront, or meet face to face, all the witnesses called to testify against him on the trial, the constitutional requirement has been complied with." *Summons v. State*, 5 Ohio St. 325, text 340.

Where a defendant has been confronted with the witnesses against him in a former trial of the same cause, and an opportunity was afforded to the defendant to fully cross-examine the witnesses, the testimony given by witnesses on such former trial may be proved in the manner provided by law at a subsequent trial as secondary evidence, if it is satisfactorily shown that the witnesses have since died, become insane, left the jurisdiction of the court, or are sick and unable to attend or to testify; and the admission of such evidence under the circumstances does not violate the organic right of an accused to meet the witnesses against him face to face. *Hawkins v. United States*, 3 Okla. Crim. Rep. 651, 108 Pac. 561; 2 Wigmore, Ev. §§ 1397, 1406, pp. 1754, 1766.

The constitutional right to meet witnesses face to face is thus explained in 1 Greenleaf on Evidence, § 163f: "The constitutional clause purported merely to adopt the general principle of the hearsay rule, that there must be confrontation—i. e., the power of cross-examination—for infrajudicial witnesses; but it did not purport to enumerate all the exceptions and limitations to that principle. There were then a number of well-established exceptions, and there might be others in the future; the Constitution indorsed the general principle, subject to these exceptions, merely naming and describing it sufficiently to indicate the principle intended, just as the brief constitutional sanction for trial by jury did not attempt to enumerate the classes of cases to which that form of trial was appropriate, nor the precise procedure involved in it, and has always been construed as not absolute and universal in effect, but as subject to the limitations and unessential variations understood to accompany that institution. Thirdly (perhaps only as another aspect of the preceding reason), the constitutional require-

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ment is limited to the mode of taking testimony at the trial; it does not prescribe what kinds of testimony shall be given infrajudicially, but only what mode of procedure—i. e., not a secret or ex parte examination—shall be followed for such testimony as by the ordinary and existing law of evidence is required to be given infrajudicially. Such is the better reasoning accepted by most courts as here applicable. It follows that the constitutional requirement of confrontation is not violated by dispensing with the actual presence of the witness at the trial, if he has already been subject to cross-examination, or if his assertions are received under some recognized exception to the hearsay rule."

See 2 Wigmore, Ev. § 1397, and notes.

As the constitutional right of the accused to meet the witnesses against him face to face was, under the authorities, satisfied when he met the witnesses and was accorded full opportunity to cross-examine them on the former trial, the circumstances under which, and the means by which, evidence of the testimony of the absent witness given at the former trial may be adduced at the subsequent trial as secondary evidence, are regulated by the statute; and the circumstances of this case bring it within the statute, both as to the conditions under which, and the means by which, the secondary evidence was adduced.

Even were we to concede that the testimony of a witness at a former trial could only be given under the conditions imposed by the common law, and these conditions were continued by the Constitution, such conditions arise when the witness is dead, or insane, or beyond the jurisdiction of the court, or unable to travel, we think the evidence showed that the absent witnesses came under the last-mentioned class of cases as shown by the testimony before the court as to their condition, and that this class is among

Evidence—at
former trial—
right to use.

those included in the rules of the common law on the subject.

Appeal—
affirmance of
conviction.

The verdict is fully sustained by the evidence. Affirmed.

Whitfield and Ellis, JJ., concur.

West, J., disqualified.

Browne, Ch. J., dissenting:

I cannot concur in the conclusion reached by the majority of the court in this case, or the reasons given for it.

I think the charge on alibi was harmful error. The court, after correctly charging the law in relation to the defense of an alibi, destroyed its effect and changed the rule by giving this erroneous instruction: "The defense of an alibi is, of all other testimony, the most decisive when duly substantiated; but the evidence adduced in support of it requires to be minutely considered, and *must be such as to render it impossible that the crime could have been committed by the party who claims that he was not present and could not be guilty as charged.*"

The rule in relation to the defense of an alibi is: "It is enough if the proof adduced in support of it, viewed in connection with all the testimony in the case, creates such a probability of its own truth as to engender a reasonable doubt of the truth of the charge upon which the defendant is arraigned; and this might be effected, even though the jury did not feel positively assured of the veracity of the witnesses or of the correspondence of time. If, looking to all the evidence, *inculpatory and exculpatory, they entertain a reasonable doubt of the prisoner's presence at and participation in the crime, they should acquit.*" (The italics are mine.) 8 R. C. L. 224; Prince v. State, 100 Ala. 144, 46 Am. St. Rep. 28, 14 So. 409; Carlton v. People, 150 Ill. 181, 41 Am. St. Rep. 346, 37 N. E. 244, 9 Am. Crim. Rep. 62; French v. State, 12 Ind. 670, 74 Am. Dec. 229; State v. Hardin, 46 Iowa, 623, 26 Am. Rep. 174; State v. Ardoin, 49 La. Ann. 1145,

62 Am. St. Rep. 678, 22 So. 620; Polard v. State, 53 Miss. 410, 24 Am. Rep. 703; State v. Campbell, 210 Mo. 202, 109 S. W. 706, 14 Ann. Cas. 403; State v. McClellan, 23 Mont. 532, 75 Am. St. Rep. 558, 59 Pac. 924; Henry v. State, 51 Neb. 149, 66 Am. St. Rep. 450, 70 N. W. 924; Johnson v. State, 88 Neb. 565, 130 N. W. 282, Ann. Cas. 1912B, 965; Turner v. Com. 86 Pa. 54, 27 Am. Rep. 683; State v. Thornton, 10 S. D. 349, 41 L.R.A. 530, 73 N. W. 196.

On this subject the opinion of the majority of the court says: "We cannot commend as a model for clearness on the defense of an alibi the charge as given, and think it would have been better to have omitted the part inclosed in brackets. The judge, after correctly charging upon the defense of an alibi by the words inclosed in brackets, charged an abstract proposition of law,—the definition of an alibi,—and we cannot say that it was so misleading or confusing to the jury as to constitute reversible error on the judge refusing the requested charge."

I quite agree with the statement that this charge was not "confusing." On the contrary, it was quite clear and positive; that the evidence of an alibi must be such as to render it "impossible" for the defendant to have committed the crime. That has never been held to be the requirement of the evidence to support an alibi; but the rule given supra is the true rule. There is a vast difference between a rule that the evidence must be such as to render it impossible for the defendant to have committed the crime, and one that only requires it to raise a reasonable doubt of the prisoner's presence at and participation in the crime.

That is not only the general rule, but it has been the supposedly settled law of this state since the decision in Adams v. State, 28 Fla. 511, 10 So. 106.

In that case, as in this, the court gave an instruction that was in part correct, and unsound in part, and

that was one of the errors on which the Adams Case was reversed.

The wording of the instructions in the instant case and the Adams Case, *supra*, is almost identical. In the Adams Case the court charged the jury in part: "The evidence must be such as to render it impossible that the crime could have been committed by the person that claims he was not present, and that he could not be guilty as charged."

In the instant case the court charged that the evidence "must be such as to render it impossible that the crime could have been committed by the party who claims that he was not present and could not be guilty as charged."

In the Adams Case this court said that this instruction was error. In the instant case the majority of the court say it is not error. In the discussion of this charge in the Adams Case this court said:

"On the subject of an alibi the judge charged the jury as follows, viz.: 'If you find from the evidence and are satisfied the defendant was not present when the deceased was killed, you must find him not guilty. To make the defense of an alibi available as defense, the evidence of its existence must cover the whole time when the presence of the defendant was required; you must determine from the evidence whether the defendant has proven that he was not present when Moore was killed or not; if you have a reasonable doubt in your minds as to whether he was present at the time Moore was killed, you should find him not guilty; *when the defense of an alibi is clearly proven by reliable and truthful evidence, it is of all others the most decisive, because it is impossible for a man to be in two separate places at the same time; the evidence must be such as to render it impossible that the crime could have been committed by the person that claims he was not present, and that he could not be guilty as charged; the evidence in support of it and against, as well as all the other evidence in the case, demands*

your most careful and thoughtful consideration.' The portion of the charge in italics was excepted to by the accused.

"We think the proposition of law stated in the first clause of this charge is proper; that is, to the effect that, if the jury have a reasonable doubt as to whether the defendant was present at the scene of the homicide, he is entitled to the benefit of such doubt and should be acquitted. But we think that the subsequent portion of the charge, from its phraseology, may have a tendency to mislead the jury, and to obliterate from their minds the idea that a reasonable doubt, arising out of the evidence, as to the locus of the prisoner at the time of the killing, must work an acquittal. We think that the evidence in support of an alibi need not be absolutely clear; it is sufficient if there is enough to produce in the minds of the jury a reasonable doubt as to the presence of the prisoner at the scene of the killing. Neither do we think that the evidence of an alibi should in any case make it absolutely impossible for the prisoner to be present at the killing; it is sufficient if it raises a reasonable doubt in the minds of the jury, from all the circumstances, whether he was present or not. 1 Greenl. Ev. § 81b; State v. Waterman, 1 Nev. 543; Turner v. Com. 86 Pa. 54, 27 Am. Rep. 683; People v. Fong Ah Sing, 64 Cal. 253, 28 Pac. 233, 11 Am. Crim. Rep. 33; Landis v. State, 70 Ga. 651, 48 Am. Rep. 588; Pollard v. State, 53 Miss. 410, 24 Am. Rep. 703; Means v. State, 10 Tex. App. 16, 38 Am. Rep. 640; State v. Lewis, 69 Mo. 92; People v. Pearsall, 50 Mich. 233, 15 N. W. 98; Houston v. State, 24 Fla. 356, 5 So. 48; Kerr, Homicide, §§ 512, 522."

I think the instruction in relation to flight is erroneous and harmful, because it charges on the effect of the testimony. The court said: "The fact of flight is a circumstance to be considered by the jury as *tending to increase the probability* of the defendant being the guilty person." (The italics are mine.)

Here we have a statement by the court that there is a "probability" of the prisoner's guilt, which the testimony as to his flight tends to increase.

I think the court erred in admitting in evidence, over the objection of the defendant, the testimony of Harrison Davis and Saphronia Holmes, given at a former trial of the case and incorporated in the bill of exceptions.

Prior to 1893, the evidence incorporated in a bill of exceptions could not be used as evidence upon a subsequent trial of the same case. Then was enacted chapter 4135: "That in case any judgment at law rendered by a circuit court shall be reversed and a new trial awarded, and it be made to appear to the satisfaction of the court that any evidence used at the former trial, whether oral or written, and incorporated in the bill of exceptions, cannot be had, then the bill of exceptions taken at the previous trial may be used as evidence upon any subsequent trial of the case, as to any matter in issue at the former trial."

There is internal evidence in the act itself that it was not intended to apply to criminal cases. At the time it was passed the Constitution authorized the creation of criminal courts with jurisdiction of all criminal cases not capital, and where such criminal courts were established the jurisdiction of circuit courts in criminal cases was limited to those not cognizable by inferior courts.

The limitation in the statute of the use of evidence incorporated in a bill of exceptions to cases tried in the circuit courts prescribed the use of such testimony in any criminal case not capital, in counties where criminal courts were established. If, therefore, this act was intended to be applicable to criminal cases, we would have the remarkable, if not the monstrous, proposition that a man on trial for his life might be convicted and executed on a transcript of the testimony used on a former trial, but a person on trial

for an offense less than capital could only be convicted on testimony given in his presence in open court.

I am not commenting upon the power of the legislature to make this discrimination, if it had the power to make the law apply to criminal cases at all, but to show from its extreme unreasonableness that it was not the legislative intent for the law to apply to criminal cases.

It is true that in 1909 this act was amended, and the words "any court of the state of Florida" substituted for "a circuit court;" but, if the original act did not apply to criminal cases, this amendment would not have that effect.

Examining further into the language of the statute, we find that in both the acts the use of testimony incorporated in a bill of exceptions can only be used "in case any judgment at law . . . shall be reversed and a new trial awarded." If the legislature meant to include criminal as well as civil cases, the words "at law" are superfluous. We must, however, give weight to every word in the statute, and it is apparent that the purpose of the legislature in using the words "at law" was to make a distinction between a class of cases where the testimony contained in a bill of exceptions might be used, and those when it should not be used. Certainly the words "at law" were not intended to distinguish common-law from chancery causes, because the word "judgment" of itself makes that distinction. So, also, of the words "new trial awarded," and "bill of exceptions," as none of these is applicable to a chancery cause. Therefore, had the legislature intended to include criminal cases, it would have omitted the words "at law," which are words of limitation.

The distinction between cases "at law" and "criminal cases" is made in the Constitution. In § 5, art. 5, we find: "The supreme court shall have appellate jurisdiction in all cases at law and in equity originating in circuit courts, . . . and in

all criminal cases originating in the circuit courts."

Section 11 of article 5 provides: "The circuit courts shall have exclusive original jurisdiction in all cases in equity, also in all cases at law . . . and of all criminal cases not cognizable by inferior courts."

Section 17 of the same article ordains: "The county judge shall have original jurisdiction in all cases at law . . . and of such criminal cases as the legislature may prescribe."

Section 18 of the same article: "The legislature may organize, in such counties as it may think proper, county courts which shall have jurisdiction of all cases at law in which the demand or value of the property involved shall not exceed \$500, . . . and of misdemeanors."

Section 22 of the same article: "In each county where there is no county court, as provided for in § 18 of this article, the justices of the peace shall have jurisdiction in cases at law in which the demand or value of the property involved does not exceed \$100 . . . and in such criminal cases, except felonies, as may be prescribed by law."

Another indication that the provisions of this act were to apply to civil and not to criminal cases is that, in referring to the evidence that may be used at a subsequent trial if incorporated in a bill of exceptions, the act says that such testimony may be so used, "whether oral or written." In civil causes the testimony may be either oral or by depositions in writings. As this was not then permitted in criminal cases, it is further internal evidence of the intention of the legislature that the act should apply only to civil causes.

The opinion says: "In the earlier days the testimony of a witness given at a former trial was confined to causes where the witness was dead, or had become insane, or beyond the seas or the jurisdiction of the court; but the tendency of the modern decisions has been to enlarge

the rule of evidence as to the admission of such testimony."

The question here involved is not a rule of evidence, but a solemn constitutional provision, that no court or legislature may rightfully change or enlarge.

In the Florida statute under consideration practically no restriction is placed on the use of testimony incorporated in a bill of exceptions; merely that it "cannot be had." This is so uncertain as to mean nothing. The decision in this case holds that the power to permit this is lodged in the legislature and that it is not in conflict with article 11 of the Bill of Rights. It follows, therefore, that the legislature may permit the use of all the testimony incorporated in a bill of exceptions in the discretion of the court, or the state's attorney, and under any and all circumstances.

The legislature, therefore, in order to save the expense of a second trial, may enact "that in case any judgment rendered in a civil or criminal cause in any court of the state of Florida shall be reversed and a new trial awarded, any evidence taken at the previous trial incorporated in a bill of exceptions may be used as evidence upon any subsequent trial of the case, as to any matter in issue at the former trial."

The only limitation in the statute is where the evidence "cannot be had;" but this limitation is a matter of legislative discretion, and under the doctrine of this case the legislature may eliminate these words and permit the use of all the evidence incorporated in the bill of exceptions, at the discretion of the state's attorney. When this is done, we may have the spectacle of a man put on his second trial for a capital offense, convicted, and executed, without a single witness appearing in the court room to testify before the jury that convicted him.

It is entirely a question of power. If the legislature has the power to permit the use of testimony incorporated in a bill of exceptions, when

in the discretion of the judge "it cannot be had," it has the power to remove this restriction, and permit its use under all circumstances. It is no answer to say that this would not be done. If the power is there, it may be done.

As was said by Chief Justice Marshall: "Questions of power do not depend on the degree to which it may be exercised. If it may be exercised at all, it must be exercised at the will of those in whose hands it is placed. . . . We are told that such wild and irrational abuse of power is not to be apprehended, and is not to be taken into view, when discussing its existence. All power may be abused; and if the fear of its abuse is to constitute an argument against its existence, it might be urged against the existence of that which is universally acknowledged, and which is indispensable to the general safety." *Brown v. Maryland*, 12 Wheat. 419, 6 L. ed. 678.

It may not be amiss to say here that the writer was a member of the legislature when chapter 4135 was enacted. In that body were many members of the old-school strict constructionists, jealous of any attempts to change, modify, or destroy constitutional rights, who would have resisted to the end the passage of this act, if it had been intended to apply to criminal prosecutions.

It is true that this court has considered this statute as applying to criminal cases (*Putnal v. State*, 56 Fla. 86, 47 So. 864; *Coley v. State*, 67 Fla. 178, 64 So. 751; *Johnson v. State*, 68 Fla. 528, 67 So. 100), but the questions here presented were not discussed, and do not appear to have been urged. If a more careful consideration of the subject induces a different conclusion, the doctrine of stare decisis should not deter us from so announcing. This court did not hesitate to do this when the question involved was the measure of damage for failure to transmit and deliver a telegraphic message in cipher. *Western U. Teleg. Co. v. Wilson*, 32 Fla. 527, 22 L.R.A. 434,

37 Am. St. Rep. 125, 14 So. 1, overruling *Western U. Teleg. Co. v. Hyer Bros.* 22 Fla. 637, 1 Am. St. Rep. 222, 1 So. 129.

In *Pollock v. Farmers' Loan & T. Co.* 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673, it was held: "The doctrine of stare decisis is a salutary one, and is to be adhered to on proper occasions, in respect of decisions directly upon points in issue; but this court should not extend any decision upon a constitutional question, if it is convinced that error in principle might supervene."

The facility with which the doctrine of this decision may be extended in future constitutional construction, far beyond the consequences of this case, makes the words of Mr. Chief Justice Fuller of peculiar applicability.

In *Denney v. State*, 144 Ind. 503, 31 L.R.A. 726, 42 N. E. 929, it was said:

"More than this, no property right of contract between the parties being involved, it will not be considered that the rule of stare decisis requires that, in deciding so grave a matter as that of the constitutionality of an act of the legislature, we should be bound by even our own former decisions.

"In such a case, as forcibly said by Chief Justice Bleckley, in *Ellison v. Georgia R. & Bkg. Co.* 87 Ga. 691, 13 S. E. 809, 14 Am. Neg. Cas. 167, the maxim for a supreme court, 'supreme in the majesty of duty as well as in the majesty of power,' is not 'stare decisis,' but 'fiat justitia.' Let this decision be right, whether other decisions were right or not."

I am much impressed with the force and wisdom and courage displayed by United States District Judge Prentiss, in overruling a former decision: "An opposite decision having been recently pronounced in a neighboring circuit, I am now called upon to re-examine the question; and I can very freely say that it is not at all a subject of regret that an opportunity is thus afforded me to review my former

opinion, and to overrule it, if found to rest on mistaken principles, or unsound reasoning. When Lord Hardwicke, having reason to alter his opinion on a particular occasion, said he was not ashamed of doing so, for he always thought it a much greater reproach in a judge to continue in his error than to retract it, he exhibited an example of true wisdom and real elevation of character, which it would be well for all judges to take as a guide." *Re Welman*, 20 Vt. 653, Fed. Cas. No. 17,407.

Conceding, however, that the legislature intended this act to include criminal as well as civil cases, it is repugnant to § 11 of the Bill of Rights of our Constitution: "In all criminal prosecutions the accused shall have the right . . . to meet the witnesses against him face to face."

This language is so clear and unambiguous as to make the resort to construction, to change its palpable meaning, not only unnecessary, but iconoclastic.

In order to sustain the constitutionality of this act, however, this court seeks and finds support in decisions that have construed away the constitutional right of an accused person, and when it is through all that is left of what has been always regarded as a bulwark of defense for a person accused of crime is that "in one criminal prosecution he shall have the right to cross-examine the witnesses against him."

As that is a right that he would have without this constitutional guaranty, its purpose in the Constitution is by this decision made perfunctory.

The entire discussion of the majority of the court, and of those courts that sanction the nullification of this constitutional protection, is that this provision of the Constitution is to be limited to such rights as the prisoner had under the common law. Then why was it put in the Constitution?

Is it not more reasonable to say that the framers of the Constitution, being familiar with the common-

law right of a prisoner to cross-examine the witnesses against him, wrote this provision, not for the mere pastime of expressing that right, but because they intended a greater right,—one very essential to the protection of life and liberty,—and they wrote it in the Constitution as plainly as language is capable of.

The opinion in this case quotes approvingly from the note to *State v. Heffernan*, 25 L.R.A. (N.S.) 868, as follows: "This latter view is taken by an overwhelming majority of the courts, but the real basis for the admission of such testimony seems to be the necessity for its admission to prevent the miscarriage of justice, and the instances in which it is admitted are in reality exceptions to (sometimes recognized as such by the court), rather than compliance with, the rule that the accused is entitled to be confronted with the witness against him."

This extract, which is incorporated in the opinion, says that the instances in which the Constitution is not obeyed are "exceptions to, rather than compliance with, the rule that the accused is entitled to be confronted with the witnesses against him." I again call attention to the fact that it is not a "rule" that we are considering, but a constitutional mandate; this court having adopted the doctrine that is thus summed up in the case note, the doctrine of this case is that the courts and the legislature may make exceptions to constitutional inhibitions, by designating them "rules."

In time to come, when the exigencies of some peculiar condition, or "the prevailing morality or strong and preponderant opinion" demands, this case will be cited as authority for disregarding some other constitutional mandate, on the ground that exceptions may be made thereto.

In order to sustain the constitutionality of the statute as applied to criminal cases, the court has not only to change these words of the Constitution from "meet the wit-

nesses against him face to face" to "cross-examine them," but to change the word "all" to "one," so that the Constitution will read: "In one criminal prosecution, the accused shall have the right to cross-examine the witnesses against him."

The word "all" has so positive and clear a meaning, and is so comprehensive, that the exigencies must be very strong to prompt an attempt to construe it. The defendant in this case has been prosecuted twice. The word "all" in the Constitution covers both prosecutions, but this court says, "No; it means only one."

Robert Blackwell is not here complaining that he was deprived of his constitutional right in a prosecution where no harm befell him, but that he was deprived of that right in the prosecution whereby his life was forfeited. The answer of this court is: "Because you were not deprived of your constitutional right in another prosecution, from which you escaped harmless, you cannot be heard to complain if you are deprived of that constitutional right in a prosecution whereby your life is to be forfeited."

Much of the opinion of the majority of the court is devoted to giving reasons for its conclusion that the clause of the Constitution that we are considering does not mean just what it says.

A strict constructionist (a class that is becoming fewer under onslaughts on the Constitution) does not approve of seeking a reason for constitutional mandates, when they are plain and unequivocal. I shall therefore not attempt to give reasons why I believe that the provisions of § 11 of the Bill of Rights should be strictly enforced, but will point out some of the consequences which must follow the denial of them.

Under the practice sanctioned by this decision the jury trying a prisoner is deprived of the benefit of seeing and hearing the witnesses and thereby judging their credibility. *Baggott v. Otis*, 65 Fla. 447, 62 So.

362; *Baxter v. Liddon*, 62 Fla. 428, 56 So. 410.

Juries have been known to refuse to render a verdict against an accused, because some of the members would not believe a witness on account of his demeanor when giving his testimony. At a subsequent trial of that cause the testimony of such a discredited witness, incorporated in a bill of exceptions, could be used before another jury, freed from the indicia of its falseness.

The reason is advanced that the now-recognized right to admit dying declarations justifies the construction placed upon § 11 of the Bill of Rights by this decision. There seem to be two fallacies in this proposition,—one, that, conceding that the rule admitting dying declarations is an abridgment of a constitutional right, it therefore furnishes a reason for further abridgment; the other, that only by a strained construction can it be held that testimony concerning dying declarations comes within the constitutional inhibition under consideration.

Dying declarations do not prove themselves, but must be established by witnesses whom the accused has a right to meet "face to face." It is a fiction that calls a dead man a witness. The witness is the person who is sworn and testifies in court before the jury on the trial of the accused to certain facts and circumstances. Among these are dying declarations, statements by the accused, reports of firearms, groans, screams, footprints, finger prints, etc. These latter are frequently referred to as "mute witnesses," but that is figurative rather than legal language. The witness whom a prisoner has the constitutional right to meet face to face is the person who takes the stand and testifies in court under oath with regard to these several facts and circumstances.

The history of criminal trial furnishes abundant instances of witnesses testifying falsely at one hearing, and at a subsequent trial recanting and telling the truth, or de-

clining to take the stand and repeat their former false testimony. Under such circumstances, if a witness should absent himself, rather than again testify falsely, his former false testimony could be used against the prisoner.

Section 11 of the Bill of Rights guarantees other rights to the accused than the one under discussion.

As to one of these guaranties, this court says that it does not mean that "in all criminal prosecutions" he shall have these rights, but it is sufficient if he has enjoyed such right once. Applying this doctrine to the other rights guaranteed by § 11, and there is no escape from the conclusion that, if a prisoner has once had a "speedy" trial, he cannot be heard to complain if thereafter he remains in confinement for an indefinite period; that, having once had a "public trial," the second trial need not be public; that, having once been tried "in the county where the crime was committed," he may at the caprice of the state be tried elsewhere; that, having once been "heard by himself, counsel, or both," he may at a subsequent trial be deprived of this right. These rights—to have a speedy trial, a public trial, to be tried in the county where the crime was committed, to be heard by himself, or counsel, or both, to meet the witnesses against him face to face—are on a parity, and the reasoning by which the conclusion is reached that, having once met the witnesses against him face to face, the guaranty of the Bill of Rights has been secured to him, applies with equal force to each of the other rights enumerated.

We say that, having once exercised his right to meet his witnesses against him face to face, the requirements of the Constitution have been complied with, and he cannot demand that right at a subsequent trial. It follows, therefore, if he has had one public trial, the second trial may be a star chamber proceeding, and he cannot be heard to complain, because he has once been granted the privilege that the Con-

stitution guarantees him; he may be tried by a hostile, partial jury, and cannot be heard to complain if he has once had a trial by an impartial jury; he may on a second trial be refused "compulsory process for the attendance of witnesses in his favor," and cannot be heard to complain if at a former trial compulsory process was granted him.

This decision does not say this, but it is the logic of the case.

We do not bite so large a piece out of the Constitution at one time, but afford authority to nibble it away piecemeal.

The decision contains copious citations from text-writers and court decisions to sustain the doctrine that the supposed protection afforded by § 11 of the Bill of Rights is in fact and in law only the idle iteration of a common-law right that existed before the adoption of the Constitution; no more, and no less. These and similar decisions, nibbling away constitutional rights, have had much to do with the scant respect for the Constitution that is entertained by many in this country, and arouses lovers of constitutional government to the necessity of returning to the Constitution as the foundation and fortress of the rights of persons and the rights of property, and led the National Security League to establish September 17th as Constitution day.

In vain were the ceremonies observed on that day, in vain were addresses delivered and papers read urging a back to the Constitution movement, if courts adhere to decisions that destroy its safeguards. One of the papers prepared for the celebration of Constitution day began with these words: "In 1875, the famous German historian, Von Holst, reproached the American people for the sin of worshipping their own Constitution. His words sound strange to-day. 'From the close of the century . . . the Constitution has been the political Bible of the people.' It is now 1919, and we are keenly conscious that conditions have changed. No repu-

table scholar would to-day say that our people worship their Constitution. No leader would complain that they were compelling him to offer it adoration. Instead of soft sounds of adoring voices chanting praise, the air is rent with the strident tones of harsh and hostile criticism. And, as we listen, we seem again to catch the accent of the German tongue, no longer critical, but exultant: "The worship of the Constitution has ceased. Its altars are deserted. Its banner touches the dust. Its adorers are casting longing eyes after new and strange gods." The taunt stings like the insult of a blow. Truth gives it power; for it is partly true. The love of our Constitution is fading."

One courageous decision, refusing to follow the latitudinarian constructions of the past, may be the advance guard of a line of decisions overruling those that have lightly ignored it, or construed away its solemn guaranties. It has been well

said: "What the courts uphold to-day is not the measure of what they will uphold to-morrow. Their entire history shows that courts advance with, or a little behind, the advance of civilization. One or two of them are a little ahead—are leaders."

This court might well have taken a stand among the leaders—a little in advance—of a movement that must come if the Constitution is to survive; to get back to a strict construction of constitutional limitations upon the exercise of legislative, executive, and judicial powers.

Taylor, J., concurs.

NOTE.

The use in criminal cases of testimony given on a former trial or preliminary examination by a witness not available at present trial is the subject of the annotation following *SMITH v. STATE*, post, 495.

JACK SMITH, Plff. in Err.,

v.

STATE OF GEORGIA.

Georgia Supreme Court — February 22, 1918.

(147 Ga. 689, 95 S. E. 281.)

Evidence — testimony on former trial.

1. The testimony of a witness who was examined on a former trial of a criminal charge, where opportunity of cross-examination was afforded, is admissible in evidence on a subsequent trial of the same defendant upon the same charge, upon proof that the witness has removed from the state and has refused to return and testify in the case.

[See note on this question beginning on page 495.]

—affidavits.

2. Upon the trial of a criminal case upon the issue of guilty or not guilty, ex parte affidavits are not admissible either for or against the accused.

[See 8 R. C. L. 85.]

Witness — supporting character.

3. Until the character of a witness is attacked by the adverse party, evi-

dence tending to support that character is not admissible when offered by the party producing the witness.

[See 28 R. C. L. 650.]

Homicide — justification — necessity.

4. It is error, upon the trial of one indicted for murder, so to instruct the jury as to make the defense of justifiable homicide interposed by the defendant depend both upon an actual

Headnotes by ATKINSON, J.

necessity to kill and upon the sufficiency of the circumstances to justify the fears of a reasonable man that it

was necessary for him to kill the deceased in order to save his own life.
[See 13 R. C. L. 815, 817.]

ERROR to the Superior Court for Oglethorpe County (Worley, J.) to review a judgment convicting defendant of homicide, and overruling his motion for a new trial. *Reversed.*

The facts are stated in the opinion of the court.

Mr. Joel Cloud, for plaintiff in error:

Admission of testimony of Ola Chambers, delivered upon a former trial of the defendant, over his objection, was a vital error, requiring a new trial.

Pittman v. State, 92 Ga. 480, 17 S. E. 856; Robinson v. State, 128 Ga. 255, 57 S. E. 315; Swift v. Oglesby, 8 Ga. App. 543, 70 S. E. 97; Holt v. State, 2 Ga. App. 383, 58 S. E. 511; Atlanta & B. Air-Line R. Co. v. McManus, 1 Ga. App. 302, 58 S. E. 258; Motes v. United States, 178 U. S. 459, 44 L. ed. 1150, 20 Sup. Ct. Rep. 993.

The alleged stenographic report of the testimony of Ola Chambers was improperly admitted because not legally proven to be correct.

Jones v. State, 128 Ga. 23, 57 S. E. 313.

It is sufficient, in order to make the defense of justifiable homicide available, if it appears that the circumstances were sufficient to excite the fears of a reasonable man that a felony was about to be committed upon his person, and that the party killing acted upon those fears, and not in a spirit of revenge.

Roberts v. State, 114 Ga. 450, 40 S. E. 297; Cumming v. State, 99 Ga. 662, 27 S. E. 177; Johnson v. State, 105 Ga. 665, 31 S. E. 399; Stubbs v. State, 110 Ga. 917, 36 S. E. 200.

Messrs. W. M. Howard, E. P. Shull, Sibley & McWhorter, John R. Cooper, and W. W. Armistead also for plaintiff in error.

Messrs. Thomas J. Brown, J. M. Pitner, Paul Brown, A. S. Skelton, Clifford Walker, Attorney General, and M. C. Bennet, Assistant Attorney General, for the State.

Atkinson, J., delivered the opinion of the court:

1. On the trial of Jack Smith for the murder of Mike Martin, the court admitted in evidence, over objection, a paper purporting to be the report of the testimony of Ola

Chambers, a witness for the state, delivered on a former trial of the case in the same court, as reproduced from the notes made by the official court stenographer; also the testimony of certain witnesses who professed to have heard and remembered the substance of the testimony above mentioned, so delivered on the former trial, stating from memory what the witness had testified. Preliminary to the introduction of the evidence, it was shown that Ola Chambers had since removed to another state, and that at the time of the last trial she was residing in that state, and refused to come to this state to testify in the case. The court stenographer gave testimony as to the accuracy and truthfulness of his report of her testimony on the former trial. An objection to the admission of this report was that its correctness was not sufficiently shown. Against the admission of the testimony of the witnesses who testified from memory to what Ola Chambers had formerly testified, the following objections were urged: "(1) Because under the Constitution of the state of Georgia, art. 1, § 1, ¶ 5, the defendant was entitled to be confronted with the witness against him when on trial for his life; (2) because the manner and demeanor of a witness are important parts of the testimony of a witness, to the consideration of which the jury are entitled, and the reading of said testimony deprived the defendant of the benefit of having the said demeanor and manner of testifying before the jury; (3) because the defendant thereby was deprived of the benefit of cross-examining the witness on her conduct, statements, and other occurrences affecting her credit down to

the time of the trial; (4) because, there being no law providing for the taking of depositions of a witness in a murder case, the reading of said testimony tends to deprive the defendant of his life and liberty without due process of law, contrary to article 1, § 1, ¶ 3, of the Constitution of this state, and to the 14th Amendment of the Constitution of the United States."

In *Burnett v. State*, 87 Ga. 622, 13 S. E. 552, it was held: "Code, § 4696, requires the evidence given in on the trial of a felony to be taken down; and by § 4696(a) the official stenographic reporter is the officer to perform this duty. His report, proved by him to be correct, although he may not remember the testimony, is competent evidence in another case of what a witness swore upon the trial at which the report was made, in so far as the same may be pertinent and otherwise competent."

A careful examination of the stenographer's testimony as to the accuracy and correctness of his report of the testimony of Ola Chambers delivered on the former trial shows its sufficiency to lay the foundation for introducing the copy offered in evidence. This leaves for consideration the remaining objections to the admissibility of the evidence. It is declared by statute now expressed in both the Civil and Penal Codes of this state: "The testimony of a witness, since deceased, or disqualified, or inaccessible for any cause, given under oath on a former trial, upon substantially the same issue and between substantially the same parties, may be proved by anyone who heard it, and who professes to remember the substance of the entire testimony, as to the particular matter about which he testifies." Penal Code, § 1027; Civil Code, § 5773.

Applying this statute, it was held in the case of *Smith v. State*, 72 Ga. 114, all of the justices concurring: "Where a witness for the state in a criminal case testified on the committing trial, but at the time of the

trial in the superior court is in a foreign state and inaccessible, his testimony given in the committing trial may be proved by anyone who heard it, and who professes to remember the substance of the entire testimony as to the particular matter about which he testifies; and this may be shown by parol, although it has been reduced to writing under the order of the committing court."

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former trial.*

In that case the testimony held admissible was delivered before the committal court, and to that extent only the question differs from that now under consideration, where the testimony was delivered before the superior court after the accused had been placed in jeopardy. If the evidence was admissible in the case cited, it would equally be admissible in the case under consideration. In the later case of *Pittman v. State*, 92 Ga. 480, 17 S. E. 856, all the justices concurring, it was held: "The better opinion seems to be that, though the death of a witness who has testified at the commitment trial will render what he then testified admissible in evidence in behalf of the state on the final trial of the accused for the same offense, yet the removal of the witness from the state and consequent inability to procure his attendance, the accused doing nothing to prevent his attendance, will not, the witness being still alive, render such testimony admissible. The Code, § 3782, which is general in its provisions, should be construed, touching criminal cases, in conformity with the principle or distinction just indicated, since doing so will harmonize it with both the letter and spirit of the constitutional provision that the accused shall be confronted with the witnesses against him. *Hall v. State*, 6 Baxt. 522; *People v. Newman*, 5 Hill, 295; *Brogy v. Com.* 10 Gratt. 722; *Collins v. Com.* 12 Bush, 271, 2 Am. Crim. Rep. 282; *Owens v. State*, 63 Miss. 450; *Bergen v. People*, 17 Ill. 426, 65 Am. Dec. 672; *United States v. Angell* [C. C.] 11

Fed. 34; Wharton, *Crim. Ev.* § 229; 3 Rice, *Ev.* 350 et seq."

It will be perceived that, though in direct conflict, this case does not refer to the older case of *Smith v. State*, supra. Ordinarily the earlier case would be controlling; but a request has been made to review and overrule it, and to follow the ruling of the later case of *Pittman v. State*, supra. In the Constitution of this state, article 1, § 1, ¶ 5, of the Bill of Rights (Civil Code, § 6361), it is provided as follows: "Every person charged with an offense against the laws of this state shall have the privilege and benefit of counsel, . . . shall be confronted with the witnesses testifying against him."

Smith v. State had reference to admissibility of testimony of a witness delivered at a former trial, the witness being inaccessible at the time of the main trial, on account of his residence in another state; and, while holding the evidence admissible, the above provision of the Constitution was not expressly mentioned. This court has decided in criminal cases, both before and since *Smith v. State*, supra, that where the witness is dead, his testimony delivered at a former trial of the case, when properly proved, is admissible. *Robinson v. State*, 68 Ga. 833, and citations; *Jones v. State*, 128 Ga. 23, 57 S. E. 313 (5). *Pittman v. State*, supra, pronounces the same doctrine, but draws a distinction where the witness is still alive and inaccessible on account of residence in another state, and holds that in such case, on account of the constitutional requirement of confronting the accused with the witnesses against him, evidence of testimony of an inaccessible living witness delivered at a former trial is inadmissible. The distinction sought to be drawn is not recognized in the Constitution, and none exists; for, whether the witness testifying at the former trial be absent because of death or because he is beyond the jurisdiction of the state, it is equally impossible to bring him before the jury to confront the accused at the

final trial. It is inconsistent to hold that confrontation requires actual presence of the witness before the jury at the final trial in the one case, and not in the other. The case of *Mattox v. United States*, 156 U. S. 237, 39 L. ed. 409, 15 Sup. Ct. Sup. 337, involved admissibility of evidence of the testimony of a witness since deceased, delivered at a former trial of the accused. Referring to the provision of the Federal Constitution requiring confrontation by the witness, it was said: "The primary object of the constitutional provision in question was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury, in order that they may look at him and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief. There is doubtless reason for saying that the accused should never lose the benefit of any of these safeguards, even by the death of the witness, and that, if notes of his testimony are permitted to be read, he is deprived of the advantage of that personal presence of the witness before the jury which the law has designed for his protection. But general rules of law of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case. To say that a criminal, after having once been convicted by the testimony of a certain witness, should go scot-free simply because death has closed the mouth of that witness, would be carrying his constitutional protection to an unwarrantable extent. The law in its wisdom declares that the rights of the public shall not be wholly sacrificed in order

that an incidental benefit may be preserved to the accused."

In the case of *State v. Simmons*, 78 Kan. 852, 98 Pac. 277, it was held: "The state may use the evidence of a witness upon the second trial of a felony, when the evidence given by the witness on the first trial was reduced to writing and properly identified, and at the time of the second trial the witness was dead, or was not within the boundaries of the state."

In the course of the opinion it was said: "The defendant had been confronted with the witness, and had had the opportunity of cross-examining her, and to hold that at each successive trial the defendant must again be confronted with each witness would result frequently in the defeat of justice. The necessities of the case are the same where the witness at the time of the second trial is beyond the jurisdiction of the court, as where he is dead. The state can neither produce him personally nor introduce his deposition, if it were taken."

By the great weight of authority the rule thus stated is applied, whether the witness is dead, or he yet lives, but is beyond the jurisdiction of the court. *State v. Nelson*, 68 Kan. 566, 75 Pac. 505, 1 Ann. Cas. 468; *Spencer v. State*, 132 Wis. 509, 122 Am. St. Rep. 989, 112 N. W. 462, 13 Ann. Cas. 969; *Robertson v. State*, 63 Tex. Crim. Rep. 216, 142 S. W. 533, Ann. Cas. 1913C, 440, and cases cited in the notes. See also 8 R. C. L. § 211. For the reasons indicated, the ruling in *Smith v. State*, supra, upon review, is reaffirmed, and the ruling in *Pittman v. State*, supra, is disapproved and overruled. Another contention is that admission of the evidence was violative of the due process clause of the Constitutions of this state and of the United States. In *West v. Louisiana*, 194 U. S. 258, 48 L. ed. 965, 24 Sup. Ct. Rep. 650, it was held: "The reading, in accordance with the law of the state, on a criminal trial in a state court,

of a deposition taken before the committing magistrate in the presence of the accused, of a witness who had been cross-examined by the counsel for accused, and who was permanently absent from the state, does not deprive the accused of his liberty without due process of law, and is not violative of any provision in the Federal Constitution or any of the Amendments thereto."

There was no error in admitting the evidence.

2. The ruling announced in the second headnote requires no elaboration.

3. The defendant offered to prove by a witness sworn on his behalf: "I have served as a foreman of the grand jury in my county." Upon objection by the state that this testimony was irrelevant, the court excluded it, and complaint is made of this ruling. The testimony offered could have relevancy only as showing the good character of the witness. It does not appear from the record that any attack had been made upon the character of the witness, and, in the absence of such attack, supporting evidence of his character was not admissible. *Anderson v. Southern R. Co.* 107 Ga. 500, 33 S. E. 644, and cases cited.

4. The defendant, in his statement on the trial, set up that he slew the deceased under circumstances which would authorize the jury to find that the killing was done either on account of an actual necessity to prevent a felony from being committed upon him, or that it was done under the fears of a reasonable man that a felony was about to be committed upon his person. While instructing the jury the judge charged: "If you believe that at the time the mortal blow was given that the deceased was endeavoring by violence or surprise to commit a felony on the defendant, and that the defendant was acting under the fears of a reasonable man in good faith, believing that there was a felonious assault being made

or about to be made upon him, and that he killed to protect himself from such felonious assault being made or about to be made upon him, and that he killed to protect himself from such felonious assault, then he would not be guilty of any offense."

By the use of the conjunctive "and" instead of the disjunctive "or," the court confused the two principles of the law of justifiable homicide mentioned above, and the charge was calculated to lead the jury to conclude that before they could acquit the accused on the ground of self-defense

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it would be necessary to find that the killing was done on account of both actual necessity to kill to prevent a felony from being committed upon him, and under the fears of a reasonable man that a felony was about to be committed upon him. The error was not corrected in other portions of the charge, and it is cause for reversal. Grounds of the motion for new trial, complaining of other portions of the charge, show no cause for reversal.

Judgment reversed.

All the Justices concur, except Fish, Ch. J., absent.

ANNOTATION.

Use in criminal case of testimony given on former trial, or preliminary examination, by witness not available at present trial.

- I. The rule in England, 495.
- II. The effect of the American constitutions:
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I. The rule in England.

To be able to pass an intelligent judgment upon the conflicting claims with respect to the question whether or not, under the American constitutions, the testimony of a witness at a

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- V. Methods of proof:
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former trial or a preliminary examination can be reproduced at the trial of one accused of crime, it is necessary to know the state of the law in England at the time these constitutions were adopted.

In Magna Charta, 9 Hen. III. chap. 29, it is enacted that no freeman shall be taken or imprisoned . . . nor will we pass upon him or condemn him but by lawful judgment of his peers, or by the law of the land.

In commenting upon this, Lord Coke says (2 Inst. p. 49, written shortly after 1600) that by the word law three things are implied: (1) That this manner of trial was by the law before this statute; (2) that their verdict must be legally given, wherein principally it is to be observed (1) that the lords ought to hear no evidence but in the hearing and presence of the prisoner.

In the reign of Edw. VI., there are provisos to certain of the statutes which have been regarded as giving the right to confront the witnesses face to face. Of these, the provision found in chapter 11, § 12, of the statute passed in the fifth and sixth years of the reign of that monarch, in the year 1552, is a good example. It reads: Provided always . . . that no person or persons shall be indicted, arraigned, condemned, convicted, or attainted of any of the treasons or offenses aforesaid, or for any other treasons that now be or hereafter shall be which shall hereafter be perpetrated, committed, or done, unless the same offender or offenders be thereof accused of two lawful accusers, which said accusers, at the time of the arraignment of the party accused, if they be then living, shall be brought in person before the presence of accused, and avow and maintain that that they have to say against the said party to prove him guilty of the treasons or offenses contained in the bill of indictment laid against the party arraigned.

The Statute of 1 & 2 Philip & Mary, chap. 13 (1553), provides for the taking of information by the justice of peace, and the same, or as much thereof as may be material to prove the felony, shall be put in writing, which certain examination the justice shall certify at the next general jail delivery held within the limits of his commission.

There is very little definite author-

ity prior to the Statute of Philip & Mary bearing on the question, and there are indications that even down to a much later period individual rights were given very little consideration when they came into conflict with the interests of the Crown or of the public.

In Morley's Case (1666) 6 How. St. Tr. 769, where accused was tried for murder before the House of Lords, the judges assembled before trial to consider such things as might in point of law fall out in the trial, and it was resolved, *inter alia*, that in case any of the witnesses who were examined before the coroner were dead, or unable to travel, and oath made thereof, the examination might be read, the coroner first making oath that such examinations are the same which he took upon oath, without any addition or alteration whatsoever; or, if it should appear that a witness was detained by procurement of the prisoner; but that the mere fact that a witness could not be found upon full endeavor to do so is not sufficient to authorize the admission of the testimony. It will be noticed that nothing is stated here about the necessity of the examination having been had in the presence of the accused.

Fenwick's Case (1696) 13 How. St. Tr. 538, was a bill of attainder for treason in conspiring against the reigning sovereign to bring in a French force and invade the Kingdom. Among the evidence presented against him was an examination of Cordel Goodman, taken when accused was not present and had no chance for cross-examination. The evidence was admitted by the House of Commons by a vote of 218 to 145. The bill was then passed by the House and sent to the House of Lords for concurrence. That body concurred by a vote of 66 to 60, and accused was executed. The dissenting lords filed a protest, among the grounds of which was the receipt of the Goodman examination, 'on the ground that it was inadmissible for want of his appearing face to face with the accused as required by law. The protest read: "It would be of very dangerous conse-

quence that any person so accused should be condemned; for by this means a witness who shall be found insufficient to convict a man shall have more power to hurt him in his absence than he could have if he were produced viva voce against him."

In *Bromwich's Case* (1667) 1 Lev. 180, 83 Eng. Reprint, 358, which was a prosecution against an accomplice of Lord Morley, the same ruling was made with respect to the reading of depositions of witnesses, since deceased, as was held proper in that case.

It will be noticed that the Statute of Philip & Mary did not provide for the use in evidence of testimony preserved as directed by it; but in 2 Hawk, P. C. chap. 46, § 6, it is stated that it seems to be well settled that the examination of an informer, taken on oath and subscribed by him before a coroner upon an inquisition of death, or before a justice of the peace upon a warrant or commitment for any felony, may be given in evidence at the trial of such inquisition, or an indictment for such felony, if it be shown on oath to the satisfaction of the court that the informer is dead, unable to travel, or kept away by connivance of the prisoner, and that the examination is the same that was sworn before the coroner or justice, without any alteration whatsoever.

But in § 7 it is stated that a showing on oath of prosecutor that they have used all their endeavors to find the absent witness, but are unable to do so, is not sufficient.

And in § 8 it is stated that depositions before a coroner, taken upon inquisition of death *super visum corporis*, cannot be given in evidence upon appeal for the same death, because it is a different prosecution from that in which they were taken.

And in § 12 it is said that evidence given by a witness in one trial could not be given against defendant in another trial, after the death of the witness, but it does not appear whether the second trial was for the same offense.

The text-writers indicate that the practice was settled after the passage

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of the above-mentioned statutes, of admitting testimony taken according to the provisions of the statutes, when it was impossible to secure attendance of the witnesses at the trial. But there certainly was some confusion in the minds of the judges as to just what testimony could be reproduced, and when.

In *Rex v. Eriswell* (1790) 3 T. R. 722, 100 Eng. Reprint, 823, which involved the question of admission, upon the question of poor settlement, of a deposition of a deceased witness, Grose, J., in argument, said: "Before the Statute of Philip & Mary, a deposition taken before a justice of the peace of a county where a murder was committed was not evidence, even though the person died, or was unable to travel. Why? Because, although the justice had jurisdiction to inquire into the fact, the common law did not permit a person accused to be affected by an examination taken in his absence, because he could not cross-examine; and therefore the statute was made.

But Buller, J., in the same case, said the deposition before the coroner has long been settled to be good evidence, though the person accused be not present when it is taken. Where an act is judicially done, it is not necessary that the person to be affected by it should be present in order to make it evidence against him, and therefore depositions taken by a justice of the peace, of a person who afterwards dies, though taken in the absence of the prisoner, must be read.

If, at so late a period as 1790, so great a judge as Buller thought that depositions could be read, although not taken in the presence of the accused, there must have been much uncertainty upon the subject in the minds of the people generally. However, the current of decisions seems to have established the principle more and more firmly that accused must have been present, to justify the reproduction of the testimony in case the presence of the witness could not be secured.

There never, however, seems to have been any doubt that the evidence could

be reproduced if the witness was kept out of the way by accused.

In *Reg. v. Guttridge* (1840) 9 Car. & P. 471, where it merely appeared that the witness did not appear when called, without anything to show the circumstances under which her deposition was taken, or the cause of her absence, Parke, B., said if she had been kept out of the way by accused he would have allowed her deposition to be given in evidence; but that was not proved.

In *Rex v. Baker* (1746) 2 Strange, 1240, 93 Eng. Reprint, 1156, a conviction seems to have been sustained upon testimony of witnesses taken by the examining magistrate in the absence of accused, and merely read to him at the trial, against the objection of counsel that accused would thereby lose the benefit of cross-examination.

But in *Woodcock's Case* (1789) 1 East, P. C. 356, it was held that, to be admissible, the depositions must have been taken in the presence of accused.

And in *Rex v. Radbourne* (1787) 1 Leach, C. L. 457, it is held that a deposition before a magistrate in the presence of accused may be read.

In *Rex v. Vipont* (1761) 2 Burr. 1163, 97 Eng. Reprint, 767, it was held that the evidence must be produced in the presence of accused, that he may have had an opportunity to cross-examine.

In *Rex v. Westbeer* (1739) 1 Leach, C. L. 12, it appeared that a deposition was taken under the Statute of Philip & Mary, and upon death of deponent it was offered in evidence. Objection was made on the ground that by admitting it accused would lose the benefit which would otherwise have arisen from cross-examination. The deposition was, however, admitted.

In *Rex v. Russell* (1832) 1 Moody, C. C. 356, which was a prosecution for being accessory to a murderer, a deposition taken by a justice in the absence of accused, and afterwards read over and reaffirmed in his presence, was admitted at his trial, although there is no discussion of its admissibility.

In several cases the question at issue was whether or not the full dep-

osition must be taken in the presence of accused, or whether it was sufficient to read it over to the witness in his presence, and have it reaffirmed.

In *Rex v. Johnson* (1846) 2 Car. & K. 394, where, on a charge of felony, witnesses making the depositions on which accused was committed were examined by the clerk before the magistrates and accused arrived, and then, after their arrival, the depositions were read over in the presence of accused, and he was asked if he had any questions to ask of the witnesses, the proceeding was held to be improper, because not giving the accused a proper opportunity to cross-examine witnesses, the court saying he should hear all of the questions put and answered.

In *Reg. v. Walsh* (1850) 5 Cox, C. C. 115, where the prisoner was not present during the entire time of taking the deposition, though it was all re-read, and he asked several questions of the witnesses, it was held that the deposition was not admissible, because accused was not present from the commencement of the examination.

In *Rex v. Forbes* (1817) Holt, N. P. 599, where part of the deposition was taken before accused was present, and the whole was read over in his presence, the part not taken in his presence was excluded, and the remainder admitted, the court holding the intent of the Statute of Philip & Mary to be that accused should be present while the witness actually delivers his testimony.

And because certain changes in the wording of the statute were made by the Statute of 7 Geo. IV. chap. 64, § 32, which provided that the justice "shall take the examination of such person, and the information on oath of those who shall know the facts and circumstances of the case, and shall put the same, or so much thereof as shall be material, into writing," it was contended by the prosecution in *Erington's Case* (1838) 2 Lewin, C. C. 142, that it was the intention of the legislature to alter the law in that respect; but Patteson, J., held that "the reason for requiring the prisoner's presence at the examination is

. . . that he may have an opportunity of cross-examining the witness, and, if that be so, it equally applies under the new statute as under the old."

But in *Rex v. Smith* (1817) 2 Starkie, 208, Russ. & R. C. C. 339, where the deposition was partly taken before the accused was brought in, and was then reread, and the balance taken and the whole signed and subscribed in his presence, the witness being resworn after the accused came in, and the accused was then asked if he had any questions to put to the witness, it was held that the deposition was admissible, because accused had an opportunity to cross-examine the witness.

And in the report in 1 Holt, N. P. 614, it appeared that the deposition of one for whose murder accused was on trial was taken, all but three lines, before accused was brought into the presence of the witness, but it was then read over to him in the presence of the witness. The court admitted the deposition, saying: The decisions establish the principle that the prisoner ought to be present that he might cross-examine. But here he had that advantage offered him, but he omitted to use it. The deceased was resworn in his presence, and reasserted what he had before said by assenting to the deposition when slowly read over to him.

In *Rex v. Crowther* (1785) 1 T. R. 125, 99 Eng. Reprint, 1009, 1 Revised Rep. 162, a conviction was quashed because a witness was not sworn and examined in the presence of defendant, it not being sufficient to read over the deposition in defendant's presence.

And in *Reg. v. Calvert* (1848) 2 Cox, C. C. 491, it was held that a deposition taken by the clerk, in the room adjoining that in which the magistrates sit, in the presence of the prisoners, without the witness being sworn, and afterward read over before the magistrates, in the presence of the witness, who was then sworn as to its truth, was admissible, but the practice was disapproved. In *Rex v. Woodcock* (1789) 1 Leach, C. L. 500, a dep-

osition was taken of a dying woman by a justice of the peace in a manner not authorized by statute. The court ruled that it could not be admitted under the statute, saying: "This last species of deposition, if the deponent should die between the time of examination and the trial of the prisoner, may be substituted in the room of that *viva voce* testimony which the deponent, if living, could alone have given, and is admitted of necessity as evidence of the fact, . . . [but the deposition in question] was not taken, as the statute directs, in a case where the prisoner was brought before him in custody; the prisoner, therefore, had no opportunity of contradicting the facts it contains."

And the same ruling was made in *Rex v. Dingler* (1791) 2 Leach, C. L. 561, which was a similar case.

In *Rex v. Paine* (1696) 5 Mod. 163, 87 Eng. Reprint, 584, it was held that the deposition of a witness taken *ex parte* before a magistrate, in an examination concerning a misdemeanor, cannot be read at the trial after the death of the witness, because defendant did not have an opportunity for cross-examination.

And it was intimated in that case that the statute did not apply to misdemeanors cases, in any event.

Lord Raymond's report of the case (1 *Ld. Raym.* 729, 91 Eng. Reprint, 1387) does not mention the fact that there was no opportunity to cross-examine, but states that such deposition may be read under the statute in cases of felony, thereby indicating that, in such cases, opportunity to cross-examine was not necessary, but that in informations for misdemeanors no such deposition can be given in evidence.

In 1 Salk. 281, 91 Eng. Reprint, 246, it is stated that, upon trial for murder, depositions taken before the coroner may be given in evidence if the witness is dead.

And testimony taken at a coroner's inquest in the presence of accused was held admissible at the trial, where the witness was dead, in *Reg. v. Plummer* (1824) 1 Car. & K. 600, 8 Jur. 921.

In *Reg. v. Scaife* (1851) 17 Q. B.

238, 117 Eng. Reprint, 1271, 2 Den. C. C. 281, 20 L. J. Mag. Cas. N. S. 229, it was held that under the statute the testimony of a witness who was absent by the procurement of accused was admissible, but where several prisoners were being tried for the same offense, and only one was responsible for the absence of the witness, the testimony was admissible only as against such defendant.

An examination upon an accusation of assault to murder may be read in evidence upon a subsequent prosecution for murder after death of the witness. *Rex v. Smith* (1817) Russ. & R. C. C. 339.

There is a note of *Buckworth's Case* in (1669) T. Raym. 170, 83 Eng. Reprint 90, involving an information for perjury in ejectment, where to prove the perjury evidence was offered to prove what one, since dead, swore in the ejectment suit. The evidence was admitted against the contention of Chief Justice Kelyng that it was betwixt other parties.

In *Rex v. Hogg* (1833) 6 Car. & P. 176, where it was shown that the prosecutrix was an old woman and bedridden, so that there was no probability of her ever being able to leave the house, it was held that her deposition as taken at the examination was admissible.

Where the prosecuting witness was bedridden and not likely ever to be able to attend trial, his deposition taken before a committing magistrate in the presence of accused was admissible. *Reg. v. Wilshaw* (1841) Car. & M. 145.

Temporary sickness of the witness was held in *Reg. v. Harney* (1850) 4 Cox, C. C. 441, to be sufficient ground for the admission of his testimony as taken at the examination, although the witness could probably have been procured by postponing the trial.

In *Reg. v. Marshall* (1841) Car. & M. 147, the court said that, if the witness was actually insane at the time of the trial, his deposition was admissible, but if merely suffering from delirium and depression of spirits, in consequence of the blow on the head affecting his intellect, but from which he

would probably recover, his deposition taken at the examination would not be admissible.

Lord Kenyon, in considering the question whether or not there was sufficient evidence before the court to support an information for misdemeanor, says in *Rex v. Jolliffe* (1791) 4 T. R. 285, 100 Eng. Reprint, 1022, that the evidence which a witness gave at a former trial may be used on a subsequent one, if he dies in the interim.

In *Reg. v. Austin* (1855) 7 Cox, C. C. 55, *Dears. C. C.* 612, 2 Jur. N. S. 95, 25 L. J. Mag. Cas. N. S. 48, 4 Week. Rep. 237, it was held that a deposition of a witness taken at an examination in the presence of accused, who had an opportunity to cross-examine him, was not admissible, though the witness was a foreigner and absent in a foreign country. That case arose under the Statute 11 & 12 Vict., and, not being within the literal terms of the statute, it was contended that the evidence was admissible at common law the same as though the witness were dead. There is an intimation in the case that it was not admissible under the common law, but it appeared that no attempt had been made to secure the attendance of the witness, and Coleridge says it seems in this case that the facts themselves exclude the deposition. It does not appear that anything was done to procure the attendance of the witness.

In *Reg. v. Scaife* (1851) 17 Q. B. 238, 117 Eng. Reprint, 1271, 2 Den. C. C. 281, 20 L. J. Mag. Cas. N. S. 229, it was held not to be a ground for the admission of testimony taken at an examination that the witness could not be found. That case arose under the Statute 11 & 12 Vict. chap. 42, § 17, which provided that if at a trial it is shown that any person whose deposition shall have been taken is dead, or so ill as not to be able to travel, and the deposition was taken in the presence of accused, and he or his counsel had full opportunity to cross-examine, the deposition could be read in evidence. In commenting upon this, Coleridge, J., said: I always understood, before the late statute, that if a

witness was dead or insane, or kept away by the procurement of the prisoner, his deposition was admissible, if properly taken; but that other absences were all under one category, and were not grounds for admitting the evidence. The late act takes one case out of the category, namely, that of disability by sickness. But, if a mere unavoidable absence of the witness had been sufficient excuse, that provision would have been superfluous; sickness was an innocent cause of absence, and the absence necessary. Therefore this enactment is, negatively, a strong declaration against the admissibility of depositions on the ground here taken.

In *Reg. v. Ledbetter* (1851) 3 Car. & K. 108, it was held that a deposition taken on a charge of assault is not receivable on a trial for feloniously wounding, though on both charges the transaction was the same.

Under the Statute of 11 & 12 Vict., which provided that the deposition is admissible if accused had full opportunity to cross-examine, a deposition taken upon a charge for feloniously wounding is admissible upon a subsequent indictment for murder of the same person. Alderson, B., says the question is not whether the charges are exactly the same, but whether the charge before the magistrate was such as to give the person accused full opportunity of cross-examination. *Reg. v. Beeston* (1854) 18 Jur. 1058, Dears. C. C. 405, 3 C. L. R. 82, 24 L. J. Mag. Cas. N. S. 5, 3 Week. Rep. 56, 6 Cox, C. C. 425, 29 Eng. L. & Eq. Rep. 527.

Under the Statute of Vict., it is not sufficient proof that a witness is unable to travel to show that witness saw him in bed five days before the time of trial, and that he was under the care of a physician, and appeared to be ill. The judge says that the testimony of the physician is necessary to show inability to travel, and, if no physician was in attendance, there must be direct evidence of inability by persons who know the facts. *Reg. v. Riley* (1851) 3 Car. & K. 116.

In *Reg. v. Dilmore* (1852) 6 Cox, C. C. 52, the question was raised whether a deposition taken on a charge of stab-

bing the witness could be read upon a trial for his murder, the witness having died from the stabbing; but as defendant was acquitted it was not necessary to decide the question.

In *Reg. v. Lee* (1864) 4 Fost. & F. 63, it was held that the deposition of a deceased who was robbed, which was taken on a charge of robbery, was admissible in a subsequent trial for murder, not as a dying declaration, but as made in the presence of the prisoner with opportunity for cross-examination.

There was a direct objection that the evidence was not admissible because it was on another charge, but Pollock, C. B., said that that makes no difference.

While the magistrate or his clerk should be called to prove the deposition of a witness who is ill at the time of the trial, when it is convenient to do so, it is not necessary; but it may be proved by some other person who was present. *Reg. v. Wilshaw* (1841) Car. & M. 145.

II. *The effect of the American constitutions.*

a. Federal Constitution.

It appearing from the preceding subdivision that at the time the American constitutions were adopted the theoretical practice in England was that evidence taken on one trial could be reproduced at a second trial, if the presence of the witness could not be secured, and that testimony before a magistrate at a preliminary examination could be used at the trial under the same conditions, if accused was present and had an opportunity of cross-examining the witness, and that these practices were not definitely established by positive law, but depended upon judicial construction of statutes, and that, in some instances at least, evidence had been admitted, even in capital cases, of testimony of witnesses whom the accused never had the opportunity of confronting, the Federal Constitution, in Amendment 6, states that in all criminal prosecutions the accused shall enjoy the right to be confronted with the witnesses against him. The actual decisions which have

dealt with this provision are few in number, because the provision has been held not to be applicable to proceedings in state courts. *People v. Penhollow* (1886) 42 Hun (N. Y.) 103.

The provisions of the 6th Amendment to the Constitution of the United States concerning the rights of an accused person to be confronted with the witnesses against him are not applicable to trials under state jurisdiction. And this conclusion is not affected by the statement, contained in the Code of Civil Procedure, that the written law of the state is contained in its Constitution and statutes and the Constitution and statutes of the United States. *People v. Wilson* (1915) 26 Cal. App. 336, 146 Pac. 1048.

So, as to the effect of the admission of such testimony upon the rights guaranteed to an accused person by the Federal Constitution, it was held in *West v. Louisiana* (1904) 194 U. S. 258, 48 L. ed. 965, 24 Sup. Ct. Rep. 650, affirming (1903) 109 La. 603, 33 So. 618, that the constitutional provision giving the accused the right "to be confronted with the witnesses against him" does not apply in prosecutions in state courts, and that the reading, according to a state statute, of depositions taken at the examination of a witness who has permanently removed from the state, does not deprive the accused of liberty without due process of law, or violate any provision of the Federal Constitution.

And in *People v. Williams*, 35 Hun (N. Y.) 516, and *People v. Fish* (1890) 125 N. Y. 136, 26 N. E. 319, it was also held that the provision in the Federal Constitution giving the accused the right to be confronted with the witnesses against him does not apply to trials in state courts, and that the statute making the testimony of a witness at the preliminary hearing of accused admissible when the witness is dead, insane, or cannot with due diligence be found in the state, is constitutional and valid, and not in conflict with the state Bill of Rights, giving accused the right to be confronted with the witnesses against him.

But it is authoritatively settled by

the United States courts that the reproduction of testimony of witnesses at previous trials does not violate this constitutional provision.

"The admissibility of this species of evidence depends upon the necessity of the case, and upon a well-established exception to the rule which excludes hearsay, if, indeed, we may not, in one sense, regard it as original testimony. We receive it because it comes up to one of the demands of the law; it is the best evidence which can be produced. Though the witness has been once confronted with the defendant, and, in his presence, been sworn and cross-examined, it may be admitted it is more satisfactory to have him again produced before a jury at a second trial; but, being dead, it is impossible, and we resort to the next best source of truth—his sworn statements already made." *United States v. Macomb* (1851) 5 McLean, 292, Fed. Cas. No. 15,702.

The Constitution of the United States does not guarantee an accused person against the legitimate consequences of his own wrongful acts. It grants him the privilege of being confronted with the witness against him, but if he voluntarily keep the witness away he cannot insist upon his privilege. When absent by his procurement, and the evidence of the witness is supplied in some lawful way, he is in no condition to assert that his constitutional rights have been violated. So, where a witness is absent at the instigation of defendant, testimony of such witness given at a former trial, for the same offense, but under a different indictment, is properly admitted. *Reynolds v. United States* (1879) 98 U. S. 145, 25 L. ed. 244, affirming (1875) 1 Utah, 319.

And so it has been held, in *Mendenhall v. United States* (1911) 6 Okla. Crim. Rep. 436, 119 Pac. 594, that permitting reproduction of testimony before committing magistrates does not infringe the constitutional right to be confronted by witnesses.

b. State constitutions.

1. In general.

Some of the state constitutions

adopted the language of the Federal Constitution, giving the accused the right to be confronted by the witnesses against him, and others used the language: Accused shall have the right to meet the witnesses against him face to face. There has been some contention that the latter expression was stronger than the former, and prevented the use of secondary evidence, and the right to produce the testimony of absent witnesses has been established only over the vigorous protest of dissenting judges, and by the overruling of some cases which held that the introduction of such evidence contravened the constitutional provisions.

The rule has been settled now in practically every jurisdiction that the reproduction of testimony taken at a former trial or in the presence of accused at a preliminary hearing, when the presence of the witness cannot be secured, does not contravene the constitutional right of an accused to confront the witnesses against him, in whatever language such right has been given.

United States.—*Mattox v. United States* (1894) 156 U. S. 239, 39 L. ed. 409, 15 Sup. Ct. Rep. 337; *Reynolds v. United States* (1879) 98 U. S. 145, 25 L. ed. 244; *Motes v. United States* (1900) 178 U. S. 458, 44 L. ed. 1150, 20 Sup. Ct. Rep. 993; *United States v. Greene* (1906) 146 Fed. 796.

Alabama.—*Davis v. State* (1850) 17 Ala. 354; *Lowe v. State* (1888) 86 Ala. 47, 5 So. 435; *Wray v. State* (1908) 154 Ala. 36, 15 L.R.A.(N.S.) 493, 129 Am. St. Rep. 18, 45 So. 697, 16 Ann. Cas. 362; *Woodward v. State* (1912) 5 Ala. App. 202, 59 So. 688; *Langham v. State* (1915) 12 Ala. App. 46, 68 So. 504, affirmed in (1915) 192 Ala. 687, 68 So. 1019.

Arkansas.—*Hurley v. State* (1874) 29 Ark. 17; *Dolan v. State* (1883) 40 Ark. 455; *Sneed v. State* (1886) 47 Ark. 185, 1 S. W. 68.

Connecticut.—*STATE v. GAETANO* (reported herewith) ante, 458.

Florida.—*Putnal v. State* (1908) 56 Fla. 86, 47 So. 864; *BLACKWELL v. STATE* (reported herewith) ante, 465.

Illinois.—*Barnett v. People* (1870) 54 Ill. 325.

Iowa.—*State v. Fitzgerald* (1884) 63 Iowa, 268, 19 N. W. 202; *State v. Kimes* (1911) 152 Iowa, 240, 132 N. W. 180.

Kansas.—*State v. Nelson* (1904) 68 Kan. 568, 75 Pac. 505, 1 Ann. Cas. 468; *State v. Harmon* (1904) 70 Kan. 476, 78 Pac. 805.

Kentucky.—*Kean v. Com.* (1873) 10 Bush, 190, 19 Am. Rep. 63, 1 Am. Crim. Rep. 199; *Johnson v. Com.* (1902) 24 Ky. L. Rep. 842, 70 S. W. 44.

Louisiana.—*State v. Harvey* (1876) 28 La. Ann. 105; *State v. Alphonse* (1882) 34 La. Ann. 9; *State v. Bollero* (1904) 112 La. 850, 36 So. 754; *State v. Banks* (1903) 111 La. 22, 35 So. 370.

Maine.—*State v. Herlihy* (1906) 102 Me. 310, 66 Atl. 643.

Massachusetts.—*Com. v. Richards* (1836) 18 Pick. 434, 29 Am. Dec. 608.

Michigan.—*People v. Case* (1895) 105 Mich. 92, 62 N. W. 1017.

Missouri.—*State v. McO'Brien* (1857) 24 Mo. 402, 69 Am. Dec. 435; *State v. Baker* (1857) 24 Mo. 437; *State v. Harman* (1858) 27 Mo. 120; *State v. Moore* (1900) 156 Mo. 204, 56 S. W. 883; *State v. Barnes* (1918) 274 Mo. 625, 204 S. W. 267.

Nebraska.—*Hair v. State* (1884) 16 Neb. 601, 21 N. W. 464, 4 Am. Crim. Rep. 127.

Nevada.—*State v. Johnson* (1877) 12 Nev. 121.

New York.—*People v. Gilhooley* (1905) 108 App. Div. 234, 19 N. Y. Crim. Rep. 541, 95 N. Y. Supp. 636, affirmed in (1907) 187 N. Y. 551, 80 N. E. 1116; *People v. Elliott* (1902) 172 N. Y. 146, 60 L.R.A. 318, 64 N. E. 837, 15 Am. Crim. Rep. 627.

Oregon.—*State v. Bowker* (1894) 26 Or. 313, 38 Pac. 124, 9 Am. Crim. Rep. 365; *State v. Walton* (1909) 53 Or. 557, 99 Pac. 431, 101 Pac. 389, 102 Pac. 173.

Pennsylvania.—*Brown v. Com.* (1873) 73 Pa. 321, 13 Am. Rep. 740.

South Carolina.—*State v. DeWitt* (1834) 20 S. C. L. (2 Hill) 282, 27 Am. Dec. 371.

Tennessee.—*Johnston v. State* (1821) 2 Yerg. 58; *Kendrick v. State* (1849) 10 Humph. 479.

Texas.—*Johnson v. State* (1876) 1

Tex. App. 333; *Black v. State* (1876) 1 Tex. App. 381; *Ray v. State* (1878) 4 Tex. App. 455; *Dunlap v. State* (1880) 9 Tex. App. 188, 35 Am. Rep. 736; *Simms v. State* (1881) 10 Tex. App. 166; *Potts v. State* (1888) 26 Tex. App. 664, 14 S. W. 456; *McGee v. State* (1892) 31 Tex. Crim. Rep. 74, 19 S. W. 764; *Bennett v. State* (1893) 32 Tex. Crim. Rep. 216, 22 S. W. 684; *Ex parte Meyers* (1894) 33 Tex. Crim. Rep. 216, 26 S. W. 196; *Clark v. State* (1889) 28 Tex. App. 195, 19 Am. St. Rep. 817, 12 S. W. 729; *Parker v. State* (1885) 18 Tex. App. 90; *Johnson v. State* (1888) 26 Tex. App. 640, 10 S. W. 235; *Peddy v. State* (1893) 31 Tex. Crim. Rep. 548, 21 S. W. 542; *Scruggs v. State* (1896) 35 Tex. Crim. Rep. 623, 34 S. W. 951; *Conner v. State* (1887) 23 Tex. App. 383, 5 S. W. 189; *Garcia v. State* (1882) 12 Tex. App. 340; *Porch v. State* (1907) 51 Tex. Crim. Rep. 7, 99 S. W. 1122; *Hobbs v. State* (1908) 53 Tex. Crim. Rep. 71, 112 S. W. 316; *Somers v. State* (1908) 54 Tex. Crim. Rep. 475, 130 Am. St. Rep. 901, 113 S. W. 533; *Hobbs v. State* (1909) 55 Tex. Crim. Rep. 299, 117 S. W. 611; *Mitchell v. State* (1912) 65 Tex. Crim. Rep. 545, 144 S. W. 1006; *Sanchez v. State* (1913) 69 Tex. Crim. Rep. 184, 153 S. W. 1133; *Young v. State* (1917) 82 Tex. Crim. Rep. 257, 199 S. W. 479; *Robbins v. State* (1918) 82 Tex. Crim. Rep. 650, 200 S. W. 525; *Robertson v. State* (1911) 63 Tex. Crim. Rep. 216, 142 S. W. 533, Ann. Cas. 1913C, 440.

Utah.—*State v. King* (1902) 24 Utah, 482, 91 Am. St. Rep. 808, 68 Pac. 418.

Washington. — *State v. Cushing* (1897) 17 Wash. 544, 50 Pac. 512.

Wisconsin.—*Jackson v. State* (1892) 81 Wis. 127, 51 N. W. 89.

In addition to the cases cited above, which have more or less directly passed upon the constitutional question, practically all the cases cited in the succeeding subdivisions have assumed that there was no constitutional objection to the admissibility of such testimony, in dealing with matters relating to the proper practice in its admission.

Two considerations are deemed of importance to an accused, in holding

that he is entitled to be confronted with the witnesses against him: (1) The right to cross-examine them, and (2) the right to have the jury see the demeanor of the witness when giving his testimony. The former consideration has received the most attention from the courts, in considering whether or not the Constitution permits the reproduction of the testimony of unavailable witnesses. If the witnesses were, or might have been, cross-examined at a former trial or preliminary examination, the mere fact that by permitting reproduction of their testimony accused is deprived of the right further to cross-examine them would not seem to be of sufficient importance to deprive him of his constitutional rights. Furthermore, if the witness was present at the former trial, and the jury, after observing his demeanor, gave a verdict against accused, it would seem that accused could not insist that his rights were infringed by depriving a second jury of the opportunity to see such demeanor. But when the examination is before a committing magistrate, there is more reason for insisting that the accused is deprived of a substantial right if the testimony is reproduced, since accused is deprived of the privilege of having the jury see the demeanor of the witness. The absence of this element in presenting his case to the jury has, in a few instances, been strongly insisted on as a deprivation of constitutional rights, but the courts have not sustained the contention. It may be strongly questioned whether a ruling denying such privilege can be sustained on the soundest principles.

The Supreme Court of the United States has said: "The primary object of the constitutional provision in question was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to

face with the jury in order that they may look at him, and judge by his demeanor upon the stand, and the manner in which he gives his testimony, whether he is worthy of belief. There is doubtless reason for saying that the accused should never lose the benefit of any of these safeguards, even by the death of the witness; and that, if notes of his testimony are permitted to be read, he is deprived of the advantage of that personal presence of the witness before the jury which the law has designed for his protection. But general rules of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case. To say that a criminal, after having once been convicted by the testimony of a certain witness, should go scot-free simply because death has closed the mouth of that witness, would be carrying his constitutional protection to an unwarrantable extent. The law in its wisdom declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused." *Mattox v. United States* (1895) 156 U. S. 237, 39 L. ed. 409, 15 Sup. Ct. Rep. 337.

In *State v. McO'Brien* (1857) 24 Mo. 402, 69 Am. Dec. 435, in answer to the contention that permitting the reproduction of the testimony violated the constitutional right to be confronted by the witnesses, the court said: "The great security of the accused, however, after all, is in the fundamental principle of the common law that legal evidence consists in facts, testified to by some person who has personal knowledge of them, thus excluding all suspicions, public rumors, second-hand statements, and generally all mere hearsay testimony, whether oral or written, from the consideration of the jury—the usual test of this hearsay evidence being that it does not derive its value solely from the credit to be given to the witness who is before them, but partly from the veracity of some other individual. . . . The people have incorporated

into their frame of government a great living principle of the common law under which they and their ancestors had lived, and it is the duty of the court so to construe it as to make it effectual to answer the great purpose they had in view. And this principle, we think, is no other than the principle of the common law, in reference to criminal evidence, that it consists in facts within the personal knowledge of the witness, to be testified to in open court in the presence of the accused. This principle, however, was nowhere written down on parchment. It is not to be found in *Magna Charta*, or in the *English Bill of Rights*, but it existed in the living memory of men, and was always a part of the common law, although in bad times it was trodden under foot by bad men in high places. It is not, however, a stiff, unbending rule, extending to every case, without exception, falling within its letter, but is limited and controlled by subordinate rules, which render it safe and useful in the administration of public justice, and are as well established as the great principle itself, which, with all its exceptions and limitations, was taken from the existing law of the land and incorporated into the Constitution. The purpose of the people was not, we think, to introduce any new principle into the law of criminal procedure, but to secure those that already existed as part of the law of the land, from future change, by elevating them into constitutional law. . . . Whether these exceptions be wise or unwise is not submitted to our judgment. They were well established at the time, and, we think, went into the Constitution as part of the great principle of criminal evidence adopted by the clause now under consideration." *Ryland, J.*, dissenting, said: "We must not forget that this provision in our *Bill of Rights* does not make a new rule of evidence; it does not declare what may be, or may not be, proper and lawful evidence on the trial of a criminal prosecution; it relates to the position of the witness in lawfully detailing such facts as may be lawfully submitted to the jury in a

criminal prosecution. The status of the witness is affected. He must be in court. So must the accused. He shall not detail his knowledge of the facts in a dark or secret chamber, in the absence of the accused, to be afterwards read against the accused before the jury." He then asks: Can "the examination before a petty magistrate, with no power to impanel a jury in the case, be called a criminal prosecution—and one, too, where, if the accused be privileged to meet the witness, it forever satisfies the constitutional right of meeting the witnesses face to face in all prosecutions? Who that has ever practised his profession for five years does not know that in many cases the accused and his counsel never pretend to make his defense, or to show the grounds of it, before the examining court—seldom cross-examine a witness, but wait until they come before the triers and the court with jurisdiction to punish, before they open or explain the nature of the defense? The injured persons are generally the witnesses for the prosecution before the examining court; they detail the evidence smarting under the injury. Policy then dictates to the accused to do but little in the way of cross-examination. Often one-sided statements are permitted to be made without an effort to correct them. Let such examinations be afterwards considered lawful evidence, in case the witness be dead, or be out of the state, or cannot be found, and who can tell the amount of injury to follow in the administration of the criminal law? . . . The power of cross-examination was not the only right secured, but the right that the prisoner and the jury might both see the countenances and manner of the witnesses, and that the witnesses might feel this vast moral power compelling them to testify the truth, the whole truth, and nothing but the truth."

In *Davis v. State* (1850) 17 Ala. 354, it is said that it is well settled that in several cases it is permissible to prove what a deceased witness swore on a former trial of the same case between the same parties. "And I see no reason why such evidence should

be excluded in criminal cases. The same tests to elicit the truth had been, or might have been, applied to the testimony of the witness, whether he was examined in a civil or a criminal case; that is, the witness was duly sworn by competent authority, and the accused had the opportunity of cross-examining him."

In *Reynolds v. United States* (1879) 98 U. S. 145, 25 L. ed. 244, the court said: "The Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; but if a witness is absent by his own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away. The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts. It grants him the privilege of being confronted with the witnesses against him; but if he voluntarily keeps the witnesses away, he cannot insist on his privilege. If, therefore, when absent by the procurement, their evidence is supplied in some lawful way, he is in no condition to assert that his constitutional rights have been violated. . . . The rule has its foundation in the maxim that no one shall be permitted to take advantage of his own wrong; and consequently, if there has not been in legal contemplation a wrong committed, the way has not been opened for the introduction of the testimony. We are content with this long-established usage, which, so far as we have been able to discover, has rarely been departed from. It is the outgrowth of a maxim based on the principles of common honesty, and, if properly administered, can harm no one."

In *Hurley v. State* (1874) 29 Ark. 17, where objection was made to the reproduction of testimony before a committing magistrate, taken in the presence of accused, on the ground that it violated provisions of the Constitution giving witnesses the right to meet face to face, the court said: "The admission of the deposition was no violation of this old landmark of the criminal law. He had been legal-

ly sworn and examined before the committing magistrate, in the presence of the appellant, and where he had an opportunity of cross-examination; his testimony had been reduced to writing, read to and subscribed by him, and delivered to the clerk by the magistrate, and the witness was out of the jurisdiction of the court when his deposition was offered in evidence on the trial, and was admissible as secondary evidence."

Upon the question of the right to reproduce the testimony of a deceased witness given at a preliminary hearing, against the objection that it violated the constitutional right to meet the witnesses face to face, the court in *Com. v. Richards* (1837) 18 Pick. (Mass.) 434, 29 Am. Dec. 608, said the defendant did meet the witness who was deceased, face to face, and might have cross-examined him before the magistrate touching this accusation. "We do not think that the case falls within the constitutional objection. That provision was made to exclude any evidence by deposition which could be given orally in the presence of the accused, but was not intended to affect the question as to what was, or was not, competent evidence to be given face to face according to the settled rules of the common law. In trials for murder, for example, the dying declarations of the party as to the fact of having received the death wound from the party accused, and the circumstances attending, have been proved by persons who were present and heard and could make oath to such declarations. They are not considered as hearsay evidence, for, being made under the apprehension of immediate death, they are justly supposed to be entitled to all the credit which would be given to them, if the declarant made them upon oath."

In *People v. Elliott* (1902) 172 N. Y. 146, 60 L.R.A. 318, 64 N. E. 837, 15 Am. Crim. Rep. 627, the question was whether or not the reading, at a second trial, of testimony of a witness who died after the first trial, infringed a statute which enacted a Bill of Rights and gave accused the right to be confronted with the witnesses

against him, and the court said: "It seems to have been the universal rule that the evidence of a deceased witness could be read on the second trial in civil cases. It has been debated to some extent whether the rule should be extended to criminal trials. It is safe to say that the great weight of authority is in favor of such extension. The object of all trials, civil and criminal, is to arrive at the truth and do justice; and it would certainly tend to an opposite result if testimony carefully taken upon a former trial, at which the accused was represented by counsel who was permitted the right of cross-examination, is to be excluded by the mere accident of the death of the witness, which is liable to occur in all prolonged litigations. . . . There is little doubt that the practice in civil cases in this regard has been adopted by the criminal courts as matter of course, which accounts for the fact that the question has not been presented to this court, so far as we are advised. . . . It is very clear that the right of confrontation has been carefully guarded in this and other states, by only admitting such testimony or depositions as were taken in the presence of the accused, represented by counsel, exercising the full right of cross-examination."

In *Wray v. State* (1908) 154 Ala. 36, 15 L.R.A. (N.S.) 493, 129 Am. St. Rep. 18, 45 So. 697, 16 Ann. Cas. 362, there is a dictum to the effect that the constitutional right to be confronted by the witness has been held not to apply, where, on a previous investigation in a prosecution against the accused, the opportunity was open or availed of by the accused to cross-examine a witness who has since passed out of the jurisdiction of the court, or died, or become incapable of giving testimony.

The right of every litigant to meet the important witnesses of his adversary face to face, whenever and wherever their evidence is likely to affect his material interests, is recognized by all practising lawyers to be of inestimable value. This is especially true of defendants in criminal cases, and they should receive reasonable

protection in this respect, even when, as in this case, their constitutional right to meet the witnesses against them face to face has been exercised by a cross-examination of the witnesses at his previous examination. The right to have all adverse witnesses testify personally exists independent of the Constitution, and the spirit of common fairness, which pervades all courts of justice, is a sufficient guaranty that it will be recognized and enforced. In legal theory it may be presumed that witnesses will always tell the same story when under oath, but in practice we know they do not. Mental confusion, lapse of memory, and other circumstances existing when a witness testifies, may give color to his evidence which subsequent reflection will change materially. Because of this fact, familiar to all lawyers, parties often prefer to use the former testimony of a witness rather than take the hazard of a re-examination. This should not be permitted when the witness can be produced. *State v. McClellan* (1908) 79 Kan. 11, 98 Pac. 209, 17 Ann. Cas. 106. In *State v. Bowker* (1894) 26 Or. 313, 38 Pac. 124, 9 Am. Crim. Rep. 365, where it appeared that because of the illness of a material witness accused consented to have her evidence taken by deposition, at the taking of which he and his counsel were present, and that after the death of the witness he objected to the reading of the deposition because it contravened his constitutional right to meet the witnesses face to face, the court said: "This requirement is satisfied when, at some stage of the case against him, in a proceeding authorized by law, he is confronted with the witness, and given an opportunity to cross-examine him. The defendant in this case did meet the witness face to face at the time her deposition was taken, and cross-examined her, so that there was no infringement of the constitutional guaranty. Whether a defendant in a criminal prosecution can be required, without his consent, to submit to the taking of a deposition of a witness against him, it is not now necessary for us to consider, for no such ques-

tion is presented by this record. But all the authorities agree that he may waive the right to be confronted with the witnesses on the trial, and some of the cases hold that he may waive this right altogether."

"The right of the accused 'to meet the witness face to face' is next in importance and value to the right of trial by jury, and it should be fully conceded and secured to him, according to the true intent and meaning of the Constitution. . . . But in what manner does the admission of such proof violate the right of the accused to meet the witness against him face to face? The evidence of the deceased witness was given on oath before the committing court, in the presence of the accused, who had the right to cross-examine; he is again present when that evidence is proved by the oath of other witnesses, and has the right to cross-examine. The objection to the admission of such evidence might be urged with stronger reason, as would seem, to the admission of dying declarations on trials for homicide, where the declarations admitted for proof are not made in the presence of the accused, are not on oath, and there is no right to cross-examine. It is perfectly well settled, however, that such evidence is admissible on a charge of felonious homicide; and yet is not admissible in any mere civil suit. . . . But reverse the case, and suppose the death of a material and only witness for the accused,—and such an accident may not infrequently occur,—how important it is to the life, liberty, and reputation of the citizen that he have the benefit of such evidence, when wrongfully accused. The admission of such evidence is more important to the accused than to the prosecution. The state could dispense with the punishment of an occasional offender, without any material public injury, but the success of the defense is all important to the individual accused. And when it is considered that the effect of all evidence is to reflect light and truth on the matter in issue, to enable the forum before which it is tried to arrive at a just and true result, it would seem the more

reasonable and proper course to favor its admission, where it is valuable in itself and not under the ban of well-guarded legal objection." *Kendrick v. State* (1850) 10 *Humph. (Tenn.)* 479.

In *People v. Case* (1895) 105 *Mich.* 92, 62 *N. W.* 1017, objection was made to the introduction of an examination before the committing magistrate as a basis for impeaching the state's witnesses, on the ground that it violated the constitutional right of the accused to be confronted by witnesses. But the court said that, the witness having been cross-examined before the magistrate, the objection was not available, for it has been sufficient to permit the introduction of testimony to prove substantive facts where the witness was dead.

In *Woodward v. State* (1912) 5 *Ala.* App. 202, 59 *So.* 688, it is said, upon these principles of expediency or necessity, it is held that there are exceptions to the general rule that accused must be confronted by the witnesses, and that it does not contravene the various constitutions to admit the evidence of a witness on a former trial, who has since died, become insane, or left the state.

In *State v. DeWitt* (1834) 20 *S. C. L.* (2 *Hill*) 282, 27 *Am. Dec.* 371, the court states that "the rule that what a deceased witness has sworn on a former trial of the same case, between the same parties, may be received in evidence on a second trial, is a very familiar one, and of almost daily application."

In *Johnston v. State* (1821) 2 *Yerg. (Tenn.)* 58, where it was held that, under a statute permitting the taking and preservation of depositions by committing magistrates, they might be introduced in evidence against accused in case of the death of the witness, and that such practice did not violate the constitutional right to meet the witnesses face to face, the court said a contrary holding would render the death of the witness tantamount to an acquittal; and the inducement to procure such death would be precisely as great as that to effectuate an acquittal.

In *People v. Gilhooley* (1905) 108 *App. Div.* 234, 95 *N. Y. Supp.* 636, 19 *N. Y. Crim. Rep.* 541, affirmed without opinion in (1907) 187 *N. Y.* 551, 80 *N. E.* 1116, the court says: "It is sufficient if one accused of having committed a crime has been once confronted by the witnesses against him, in any stage of the proceedings, upon the same accusation, and has had an opportunity of a cross-examination by himself or by counsel in his behalf."

In *Motes v. United States* (1900) 178 *U. S.* 458, 44 *L. ed.* 1150, 20 *Sup. Ct. Rep.* 993, the court says: "We are unwilling to hold it to be consistent with the constitutional requirement that an accused shall be confronted with the witnesses against him, to permit the deposition or statement of an absent witness (taken at an examining trial) to be read at the final trial, when it does not appear that the witness was absent by the suggestion, connivance, or procurement of the accused, but it does appear that his absence was due to the negligence of the prosecution."

The testimony of a witness taken at the application for bail, when he was cross-examined by accused, may be read at the trial without infringing the right to meet him face to face, since that privilege has already been enjoyed. The admission of the evidence is to prevent a failure of justice. *Sneed v. State* (1886) 47 *Ark.* 185, 1 *S. W.* 68.

The rule is founded upon a principle of necessity, rather than upon any ideas of mere convenience. Parties should not lose the benefit of evidence, taken on a former trial when the same issues were involved and there was full opportunity of examination and cross-examination, because events or contingencies have arisen which render the personal presence of the witness impossible, or, if possible, his examination impracticable, or because the witness is without the jurisdiction of the court, and his personal presence cannot be compelled. *Thompson v. State* (1894) 106 *Ala.* 67, 17 *So.* 512, 9 *Am. Crim. Rep.* 199.

"Some cases base this doctrine upon a construction given to the Constitu-

tion as a matter of compelling necessity, to avoid a failure of justice, . . . or upon the ground that the constitutional provision in this regard is but declaratory of the common law, under which this practice was allowed. . . . Others hold that the provision in question is met by the defendant being confronted by the witness who undertakes to state the testimony formerly given by the person since deceased, leaving to be determined only the competency of that kind of evidence. The great majority of courts that have permitted such evidence at all have done so either upon this ground, or upon the theory that, when the defendant has once met a witness face to face and had an opportunity to cross-examine him, the constitutional requirement has been satisfied, and no necessity exists, so far as the Constitution is concerned, for again producing that witness in court." *State v. Nelson* (1904) 68 Kan. 566, 75 Pac. 505, 1 Ann. Cas. 468.

In *Langham v. State* (1915) 12 Ala. App. 46, 68 So. 504, the court states that it seems to be reasonably well settled, although the authorities are not entirely uniform, that the testimony of a witness given at a preliminary examination is admissible if the right of cross-examination had been exercised, or full opportunity afforded therefor: "(1) Where the witness is dead; (2) is insane or mentally incapacitated; (3) is shown to be beyond the seas; (4) is kept away by the contrivance of the opposite party; (5) has gone beyond the jurisdiction of the court, or his personal attendance is unobtainable by the exercise of due diligence; and (6) where the witness is alive and his personal attendance may be obtained, if he has been rendered incompetent as a witness by subsequently occurring facts for which the party offering the testimony is not responsible, and over which he had no control."

In *Pratt v. State* (1908) 53 Tex. Crim. Rep. 281, 109 S. W. 138, the defense made the novel contention that the cross-examination of the absent witness should not have been introduced at the subsequent trial, inas-

much as defendant's counsel would have the right to waive the questions asked upon the former trial, and could not in the subsequent trial be forced, over their objections, to propound the same questions or draw out or introduce before the jury the same testimony offered upon a former trial, and that a great many of such questions could not be propounded by the state's counsel under the rules of law, and that such testimony would be inadmissible upon the part of the state. In other words, that to permit the introduction of the record of the cross-examination of the deceased witness by the state was in effect to permit the state to cross-examine its own witness. The court, however, refused to accept this contention, and held that, if material, the testimony was admissible, whether elicited upon direct or cross examination.

In some cases the question of the admission of reproduced evidence of a witness at a former trial, or preliminary examination, has been discussed as though it was a breach of the rule against hearsay evidence; but it has been held that the admission of the testimony of an absent witness, as given at a former trial, is not a violation of the hearsay rule. *Putnal v. State* (1908) 56 Fla. 86, 47 So. 864.

There are a few early decisions which hold that the testimony of witnesses at former trials, or preliminary hearings, cannot be reproduced, when their presence at the trial cannot be secured; but practically all of these cases have been overruled.

In *State v. Foulk* (1896) 57 Kan. 255, 45 Pac. 603, it was held that the production of the testimony of a witness as given on a former trial was a violation of the right of the accused to confront the witnesses against him. In that case the attempt was made to read notes of the testimony of a witness at a former trial, without anything to show why he was not produced before the court. The court held that this violated the constitutional right of accused to meet the witnesses against him face to face.

But in *State v. Nelson* (Kan.) *supra*, it was said of that case: "There it

was held to be error to admit in evidence, over the objection of defendant, the testimony given by a witness in a former trial, but the record disclosed the fact that one objection made to it was that the whereabouts of the witness were known to the state, and no reason had been shown why he was not produced. It was agreed that he was confined in the penitentiary, but this did not necessarily prevent his being brought into court. His imprisonment made him an incompetent witness, but this is an objection the defendant might have waived, and apparently was disposed to waive. A reading of the opinion shows that the question whether such testimony might be received when, for any reason, the attendance of the witness could not be procured, was neither determined nor discussed by this court."

In *State v. Atkins* (1807) 1 Overt. (Tenn.) 229, it was held that evidence given at a former trial by a witness since deceased was not admissible at the subsequent trial, as such admission would violate the defendant's right to confront the witness, but this case was expressly mentioned and in effect overruled in the subsequent case of *Kendrick v. State* (1850) 10 Humph. (Tenn.) 479, involving the admission of testimony taken at a preliminary examination.

In *Cline v. State* (1896) 36 Tex. Crim. Rep. 320, 61 Am. St. Rep. 850, 36 S. W. 1099, 37 S. W. 722, in a very exhaustive and able opinion, it was held that the admission of testimony of a deceased witness, given at the examination, violated defendant's constitutional right to be confronted with the witness against him. This case was followed in *Cox v. State* (1896) — Tex. Crim. Rep. —, 36 S. W. 435, but was overruled by *Porch v. State* (1907) 51 Tex. Crim. Rep. 7, 99 S. W. 1122, which disapproved the prevailing opinion in *Cline v. State*, and held, in accordance with the able dissenting opinion in that case, that the constitutional right of the accused to be confronted with witnesses against him is not violated by the admission of testimony taken at the examination of a witness since deceased.

Subsequently in *Kemper v. State* (1911) 63 Tex. Crim. Rep. 1, 138 S. W. 1025, the opinion of which was written by a special judge in the absence of one of the regular judges, who was disqualified in the particular case, and the majority of the court, as so constituted, held that the testimony of a witness taken in an examining trial, or in a habeas corpus proceeding, or any other preliminary investigation where the witness, subsequent to giving testimony, but before trial of the accused upon indictment, dies or removes from the jurisdiction of the state without any responsibility therefor being chargeable against the accused, is not admissible against the defendant in a trial upon an indictment for a felony, no matter how the testimony may have been taken and preserved. However, when the question next arose before the court as regularly constituted, in *Robertson v. State* (1911) 63 Tex. Crim. Rep. 216, 142 S. W. 533, Ann. Cas. 1913C, 440, the court reverted to its former trend of decisions, and virtually overruled the *Kemper* Case, holding that the constitutional provision entitling accused to confront the witnesses against him is satisfied if he has the opportunity to confront them on the first trial, and therefore evidence taken at the time may be used against him on a second trial.

The conflict of opinion in Texas results from difference of opinion as to whether or not the adoption of the common law, so far as it was adopted, included the statutes which permitted reproduction of this class of evidence. Since those statutes did not expressly permit the reproduction of evidence, but merely provided for its perpetuation, and the admission of the evidence was upon judicial construction, it would seem that it was part of the common law, and that, therefore, the test against such practice, on the ground that it was statutory, was ill advised.

Some other courts have held that the right of accused to be confronted with the witnesses against him is not afforded by conferring the right at the preliminary hearing. Thus, in *United State v. Angell* (1881) 11 Fed. 34, and

State v. Potter (1899) 6 Idaho, 584, 57 Pac. 431, overruling *Territory v. Evans* (1890) 2 Idaho, 651, 7 L.R.A. 646, 23 Pac. 232, it was held that the admission at the trial of testimony taken at the preliminary examinations violates the constitutional right of accused to be confronted with witnesses against him.

The Angell Case is out of harmony with later cases in the Federal court, so that the only court which seems to be committed, at the present time, to the rule that reproduction of testimony of an unobtainable witness violates the provision of the Constitution, seems to be Idaho.

But attention may also be called to *People v. Chung Ah Chue* (1881) 57 Cal. 567, and *People v. Qurise* (1881) 59 Cal. 343, where the evidence was held not admissible under the California statutes; and *Finn v. Com.* (1827) 5 Rand. (Va.) 701, where absence from the state was held not sufficient to permit reproduction of the evidence.

In *State v. Collins* (1871) 32 Iowa, 36, the state attempted to introduce in a murder case the testimony of a witness taken by the committing magistrate. There was nothing to show why the witness was not present at the trial, but the evidence was objected to as incompetent. The court held that, under the constitutional provision that accused should be confronted with the witnesses against him, the evidence was inadmissible. The court said: "Here is a clear and express declaration of the right of the defendant 'in a criminal prosecution' 'to be confronted with the witnesses against him.' This right to have them brought into court, where he can see them while they give evidence against him, is secured by this constitutional provision. Their testimony can be given only upon the trial of the cause, and face to face with the accused; and any act of the legislature purporting to authorize depositions of witnesses, taken out of court, to be used against a party on trial in a criminal case, would be in conflict with this section of the Constitution, and therefore void."

In *Barron v. People* (1848) 1 N. Y. 391, where the statute authorized the admission of the reproduction of testimony, and there was no constitutional provision to prevent it, Bronson, J., says that the requirement of the Constitution that accused shall have the right to be confronted with witnesses against him "means something more than that the accused shall have the right to stand face to face with his accuser out of court; it means that they shall be confronted on the trial, so that the judge and jury may have the opportunity of observing the appearance and manner of the witness, as well as hearing what he has to say—the former sometimes proving a complete antidote to the latter, as is well known to every nisi prius lawyer. We cannot very well overestimate the importance of having the witness examined and cross-examined in presence of the court and jury."

Again, in *Oliver v. State* (1840) 5 How. (Miss.) 14, the court merely states that depositions taken before the committing magistrate are not evidence at the trial.

Where the testimony of a witness on a former trial was not offered for the purpose of proving the prior trial and conviction of defendant, the fact that, as one of the incidents of the introduction of such testimony, it casually becomes known to the jury that defendant had already been tried, would not afford ground for setting aside the second verdict. *State v. Thompson* (1903) 109 La. 296, 33 So. 320.

2. Presence and cross-examination.

(a) In general.

The cases permitting the reproduction of testimony of a deceased or absent witness are all based on the theory that accused has been present when the testimony was given, and had the opportunity of cross-examining the witness. Therefore, if such opportunity did not exist, the testimony is inadmissible. *Collier v. State* (1853) 13 Ark. 676.

So, where the testimony was given upon application for a warrant, and the witness has since died, such testi-

mony is not admissible at the trial. *State v. Hill* (1835) 20 S. C. L. (2 Hill) 607, 27 Am. Dec. 406. The court said: "No rule would be productive of more mischief than that which would allow the *ex parte* depositions of witnesses, and especially in criminal cases, to be admitted in evidence. Charges for criminal offenses are most generally made by the party injured, and under the influence of the excitement incident to the wrong done; and however much inclined the witness may be to speak the truth, and the magistrate to do his duty in taking the examination, his evidence will receive a coloring in proportion to the degree of excitement under which he labors, which the judgment may detect, but which it is impossible exactly to describe; and we know, too, how necessary a cross-examination is to elicit the whole truth from even a willing witness; and to admit such evidence, without the means of applying the ordinary tests, would put in jeopardy the dearest interests of the community."

And in *Carpenter v. State* (1893) 58 Ark. 233, 24 S. W. 247, it was held that where it did not appear from the magistrate's certificate or other competent evidence that the defendant was present at the examination, and had an opportunity to cross-examine the witness, the deposition of a deceased witness was not admissible, and headings in the deposition—"cross-examination," "redirect examination"—were insufficient to establish that fact.

So, in *Collier v. State* (Ark.) *supra*, it was held that the deposition of a witness since deceased, taken by magistrates acting as an examining court, before the accused was arrested, and not in his presence, was not admissible, because in violation of the right of accused to confront witnesses.

In *Byrd v. State* (1888) 26 Tex. App. 374, 9 S. W. 759, it was held that, as a predicate for the admission of such testimony, it must be shown not only that defendant was present at the examining trial, but that he was the defendant in the proceeding, and was afforded the privilege of cross-examining the witness.

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On a trial of one for perjury alleged to have been committed at the preliminary examination of another on the charge of murder, testimony of another witness at such preliminary examination tending to contradict the testimony given by defendant was inadmissible, as defendant was not a party in that case, was not present when such witness was examined, and had neither the opportunity nor the right to cross-examine him. *Barre v. State* (1911) 99 Ark. 629, 139 S. W. 641.

In *State v. Campbell* (1844) 30 S. C. L. (1 Rich.) 124, it was held that the testimony of a witness taken at a coroner's inquest, signed by the witness, and returned to the clerk, was not admissible, after the death of the witness, at a trial of defendant for murder, inasmuch as defendant was not present at the inquest, and therefore had no opportunity to confront and cross-examine the witness.

In *Nixon v. State* (1908) 53 Tex. Crim. Rep. 325, 109 S. W. 931, one of the grounds given for rejecting such testimony was that it did not definitely appear that it was taken in the presence of the accused, with an opportunity for cross-examination.

In *State v. Wilson* (1880) 24 Kan. 189, 36 Am. Rep. 257, testimony taken at an examination held in the room of the injured party was held to be admissible, the attorney for defendant being present, but defendant being absent by choice.

And in *Ex parte Meyers* (1894) 33 Tex. Crim. Rep. 204, 26 S. W. 196, it is held that where, by statute, one arrested, charged with causing the death of a person, may be compelled to attend the inquest by the justice, who may hold an examining court while holding the inquest, and the accused is so compelled against his protest, and is represented by counsel, and given an opportunity to cross-examine a witness, but declines to do so, and the witness dies, his testimony is admissible at any subsequent trial of accused for the killing.

The mere fact that the accused had notice of the taking of a deposition will not warrant its reproduction, in

case of the death of the witness, if accused was not present at the time. *United States v. French* (1902) 117 Fed. 976.

Before the testimony of the witness at a former trial can be reproduced, it must be shown that accused had the opportunity of cross-examining him. *Betts v. State* (1912) 65 Tex. Crim. Rep. 358, 144 S. W. 677.

In *State v. Webb* (1794) 2 N. C. (1 Hayw.) 103, the attempt was made to introduce a deposition taken in the absence of accused, and the court says the statute clearly implies that it must be taken in his presence. It is a rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the opportunity to cross-examine.

To permit the reproduction of the testimony of a witness at the preliminary examination after his death, it is absolutely necessary that the accused should have been present and had the opportunity of cross-examining him. *State v. Campbell* (1844) 30 S. C. L. (1 Rich.) 124. The court says it is only in the examination and cross-examination that the knave can be detected, errors of fact exposed, or false imaginations expunged, and the whole narrative of the witness reduced down to the measure of exact truth and legal application to the particular case before the court. The dissenting judge, however, after showing that the early English cases permitted reproduction of the testimony of the deceased witness, although there had been no opportunity for cross-examination, said: "I attach no consequence to the presence of the prisoner, or his right of cross-examination. Neither of them is of any intrinsic consequence to truth."

Where, upon the first appeal from a conviction, the court ruled that error was committed in excluding a question asked of a witness upon cross-examination, and such witness was absent at the second trial, and his testimony at the first trial was used, the court held that, inasmuch as upon the first appeal the testimony was presented to the court in narrative form, and upon second appeal, in consider-

ing the whole testimony, it appeared that the particular question was substantially answered in other parts of the witness's testimony, it could not be said that defendant was denied the full right to cross-examine the witness, and there was no error in receiving the testimony of the witness, upon a showing that he was absent from the state at the time of the second trial. *State v. Moeller* (1912) 24 N. D. 165, 138 N. W. 981.

See also *Rex v. Eriswell* (1790) 3 T. R. 722, 100 Eng. Reprint, 823, on the admissibility of depositions in evidence where the defendant did not have an opportunity for cross-examination.

(b) Waiver.

The courts have held that an accused might waive his right to be present and cross-examine the witness, so as to render admissible testimony taken in his absence. *People v. Schultz-Knighten* (1917) 277 Ill. 238, 115 N. E. 140.

It is the defendant alone who can raise the question of admissibility of testimony of a witness given at a former trial, on the ground that the admission of such testimony violates the provision of the Constitution regarding confrontation of witnesses. *Smith v. State* (1912) 66 Tex. Crim. Rep. 593, 148 S. W. 722.

In *Bostick v. State* (1842) 3 Humph. (Tenn.) 344, it was held that the deposition of a deceased witness, taken by the magistrate as part of the commitment proceedings, was admissible at the trial of the defendant for homicide, where he knew that the deposition was being taken, and had an opportunity to cross-examine the witness, but declined to be present.

In *Wells v. State* (1891) — Ark. —, 16 S. W. 577, where the prosecution offered testimony given at a former trial by a witness too sick to attend, and defendant objected to its admission, and insisted that the testimony as given at the preliminary examination be read instead, but objected generally after it was partly read, it was held that he had waived the presence of the witness.

And in *People v. Arthur* (1892) 93 Cal. 536, 29 Pac. 126, where defendant introduced part of the written testimony as given at the examination, it was held not to be error to permit the prosecution to introduce a preceding part on substantially the same subject, explanatory and illustrative of that introduced by defendant.

But the fact that defendant waived examination, or objected to the proceeding, will not make such testimony inadmissible. Thus, in *Com. v. Keck* (1892) 148 Pa. 639, 24 Atl. 161, it was held that testimony given at the preliminary hearing by a witness since deceased, who was cross-examined by defendant's counsel, was admissible, although defendant waived examination.

An accused cannot waive examination so as to prevent the use of evidence taken by the committing magistrate from being used at his trial, if the witness has left the state. *Percy v. State* (1899) 125 Ala. 53, 27 So. 844.

Testimony of an absent witness, given at an examining trial, is not rendered inadmissible by the fact that defendant waived examination, as the statute makes it the duty of a justice to examine into the facts of the case before him, and a waiver by defendant does not defeat his jurisdiction to proceed with the inquiry. *Eyer v. State* (1914) 112 Ark. 37, 164 S. W. 756, Ann. Cas. 1916B, 30.

(c) *Presence of counsel.*

It is not essential to the admission of such testimony that the accused be actually represented by counsel at the examination. Thus, in *Bulter v. State* (1907) 83 Ark. 272, 103 S. W. 382, it was held that the fact that accused, who was present at the examination, was not represented by counsel, did not make the testimony of an absent witness inadmissible, the constitutional guaranty that accused be confronted with the witnesses being fulfilled by his being present when the testimony was given.

Where the defendant was present at the preliminary examination and heard the testimony of the witnesses, and was given the opportunity to cross-examine them, and did propound

some questions, the fact that he was not represented by counsel will not render the testimony inadmissible at the trial. *Poe v. State* (1910) 95 Ark. 172, 129 S. W. 292.

In *McNamara v. State* (1895) 60 Ark. 400, 30 S. W. 762, it was held that the deposition of a witness who has since removed beyond the jurisdiction, taken by a coroner acting as a committing court, was admissible, accused being present in custody of the authorities, and being told of his right to cross-examine witnesses, though he was not at the time represented by counsel, he not having asked so to be represented.

And in *People v. Gilhooley* (1905) 108 App. Div. 234, 95 N. Y. Supp. 636, 19 N. Y. Crim. Rep. 541, affirmed without opinion in (1907) 187 N. Y. 551, 80 N. E. 1116, it was held that testimony of a witness who could not be produced at the trial was admissible, it appearing that the witness was examined in the presence of the accused, who had an opportunity, but chose not to have counsel.

In *Com. v. Lenousky* (1903) 206 Pa. 277, 55 Atl. 977, such testimony was held not admissible, where defendant was present, but did not have counsel, and was not informed of his right to cross-examine the witnesses.

The Canadian statute makes presence of counsel before the committing magistrate necessary to authorize reproduction of a deposition taken by him at the trial, in case of the death of the witness. And the court in *Rex v. Snelgrove* (1906) 12 Can. Crim. Cas. 189, held that the provision of the statute was conclusive.

Counsel must be present during the entire time of taking the deposition. If the session is interrupted, and then proceeds in absence of counsel, so that he has no opportunity to cross-examine as to a portion of the testimony, the testimony cannot be reproduced. *Rex v. Trevane* (1902) 6 Can. Crim. Cas. 124, 4 Ont. L. Rep. 475.

III. *What circumstances will justify reproduction of testimony.*

a. *Death of witness.*

While there has been more or less

opposition to the rule that the testimony of absent witnesses might be reproduced, the subdivision of the rule which relates to the testimony of dead witnesses met with less opposition than some of the others, and there seems to be no dissenting voice at the present time, so that it may be regarded as settled that, in case of the death of a witness whom accused had the opportunity to cross-examine, his testimony may be reproduced at the trial.

United States.—*Mattox v. United States* (1895) 156 U. S. 237, 39 L. ed. 409, 15 Sup. Ct. Rep. 337; *United States v. Greene* (1906) 146 Fed. 795.

Alabama.—*Horton v. State* (1875) 53 Ala. 488; *Roberts v. State* (1881) 68 Ala. 515; *Floyd v. State* (1886) 82 Ala. 16, 2 So. 683; *Jones v. State* (1911) 174 Ala. 85, 57 So. 36; *Bone v. State* (1915) 13 Ala. App. 5, 68 So. 702.

Arkansas.—*Green v. State* (1881) 38 Ark. 304; *Redd v. State* (1898) 65 Ark. 475, 47 S. W. 119.

California.—*People v. Murphy* (1872) 45 Cal. 137.

Colorado.—*Young v. People* (1913) 54 Colo. 293, 130 Pac. 1011.

District of Columbia.—*Miller v. United States* (1913) 41 App. D. C. 52, writ of certiorari denied in (1913) 231 U. S. 755, 58 L. ed. 468, 34 Sup. Ct. Rep. 323.

Illinois.—*Stern v. People* (1882) 102 Ill. 540.

Iowa.—*State v. Kimes* (1911) 152 Iowa, 240, 132 N. W. 180.

Kentucky.—*O'Brian v. Com.* (1869) 6 Bush, 563; *Kean v. Com.* (1873) 10 Bush, 190, 19 Am. Rep. 63, 1 Am. Crim. Rep. 199; *Fuqua v. Com.* (1904) 118 Ky. 578, 81 S. W. 923; *Austin v. Com.* (1906) 124 Ky. 55, 98 S. W. 295; *Johnson v. Com.* (1902) 24 Ky. L. Rep. 842, 70 S. W. 44; *Thomas v. Com.* (1892) 14 Ky. L. Rep. 288, 20 S. W. 266.

Louisiana.—*State v. Cook* (1871) 23 La. Ann. 347; *State v. Thompson* (1903) 109 La. 296.

Maine.—*State v. Herlihy* (1906) 102 Me. 310, 66 Atl. 643.

Michigan.—*People v. Sligh* (1882) 48 Mich. 54, 11 N. W. 782; *People v. Dowdigan* (1888) 67 Mich. 95, 38 N. W. 920.

Minnesota.—*State v. Georgia* (1895) 60 Minn. 503, 63 N. W. 100.

Mississippi.—*Lipscomb v. State* (1898) 76 Miss. 223, 25 So. 158.

Missouri.—*Garrett v. State* (1839) 6 Mo. 1; *State v. Able* (1877) 65 Mo. 357; *State v. Elliott* (1886) 90 Mo. 350, 2 S. W. 411; *State v. Moore* (1900) 156 Mo. 204, 56 S. W. 883.

Montana.—*State v. Byers* (1895) 16 Mont. 565, 41 Pac. 708, distinguishing *State v. Lee* (1893) 13 Mont. 248, 33 Pac. 690.

Nebraska.—*Hair v. State* (1884) 16 Neb. 601, 21 N. W. 464, 4 Am. Crim. Rep. 127.

Nevada.—*State v. Johnson* (1877) 12 Nev. 121.

New York.—*People v. Elliott* (1902) 172 N. Y. 146, 60 L.R.A. 318, 64 N. E. 837, 15 Am. Crim. Rep. 627, affirming (1901) 66 App. Div. 179, 73 N. Y. Supp. 279; *People v. Vitusky* (1913) 155 App. Div. 139, 140 N. Y. Supp. 19; *People v. Penhollow* (1886) 42 Hun, 103; *People v. Qualey* (1914) 210 N. Y. 202, 104 N. E. 138, Ann. Cas. 1916A, 1108, affirming (1913) 157 App. Div. 916, 142 N. Y. Supp. 1136.

North Carolina.—*State v. Taylor* (1868) 61 N. C. (Phill. L.) 508.

Oklahoma.—*Mendenhall v. United States* (1911) 6 Okla. Crim. Rep. 436, 119 Pac. 594; *Washmood v. United States* (1913) 10 Okla. Crim. Rep. 254, 136 Pac. 188; *Stealer v. State* (1914) 10 Okla. Crim. Rep. 460, 138 Pac. 395; *Carnes v. State* (1918) 14 Okla. Crim. Rep. 585, 179 Pac. 475.

Ohio.—*Summons v. State* (1856) 5 Ohio St. 325.

Oregon.—*State v. Walton* (1909) 53 Or. 557, 99 Pac. 431, rehearing denied in (1909) 53 Or. 566, 101 Pac. 389, 102 Pac. 173.

Tennessee.—*Johnston v. State* (1821) 2 Yerg. 58; *Nelson v. State* (1852) 2 Swan, 237.

Texas.—*Irving v. State* (1912) 67 Tex. Crim. Rep. 588, 150 S. W. 611; *Sweat v. State* (1915) 77 Tex. Crim. Rep. 287, 178 S. W. 554; *English v. State* (1919) 85 Tex. Crim. Rep. 450, 213 S. W. 632; *Black v. State* (1876) 1 Tex. App. 368; *Arnwine v. State* (1908) 54 Tex. Crim. Rep. 213, 114 S. W. 796; *Roquemore v. State* (1909)

59 Tex. Crim. Rep. 568, 129 S. W. 1120; Potts v. State (1883) 26 Tex. App. 663, 14 S. W. 456; Cox v. State (1889) 28 Tex. App. 92, 12 S. W. 493; Pratt v. State (1908) 53 Tex. Crim. Rep. 281, 109 S. W. 138; McCue v. State (1914) 75 Tex. Crim. Rep. 137, 170 S. W. 280, Ann. Cas. 1918C, 674; Millner v. State (1914) 75 Tex. Crim. Rep. 22, 169 S. W. 899; Russell v. State (1921) — Tex. Crim. Rep. —, 232 S. W. 809.

Washington. — State v. Cushing (1897) 17 Wash. 544, 50 Pac. 512.

Wisconsin.—Jackson v. State (1892) 81 Wis. 127, 51 N. W. 89.

In United States v. Greene (1906) 146 Fed. 795, it was held that testimony given before a United States commissioner in a proceeding for the return of prisoners from that judicial district to the district where the indictments were pending, and in which the question was whether there was probable cause of their guilt so that they ought to be removed to that district for trial, was admissible after the death of the witnesses at the trial upon the indictment.

The testimony introduced at a former trial as a predicate for the introduction of a dying declaration is admissible with the dying declaration, and as a predicate therefor, at a subsequent trial, the witness having since died. Roquemore v. State (1909) 59 Tex. Crim. Rep. 568, 129 S. W. 1120.

b. Absence of witness.

1. In general.

The courts did not accept the principle that testimony of an absent witness could be reproduced as readily as they did the proposition that death was a ground of permitting such reproduction. And as the rule has been accepted, various conditions have been made which have required time to overcome, and they are not entirely overcome even at the present time. It seems logical to hold that, if death permits the reproduction of the testimony of the witness, his absence beyond the jurisdiction of the court, so that his presence cannot be secured at the trial, would require the same result. The courts have quite generally adopted such ruling. But some of the

courts require evidence that he is permanently or indefinitely beyond the jurisdiction. Others hold that the mere fact that his whereabouts cannot be discovered is not sufficient to admit the testimony. Most of the cases state the rule that if he is absent by procurement of accused the evidence is admissible, but the cases are comparatively few where that question has squarely arisen for decision.

The prevailing rule at the present time, however, is that absence of the witness will justify reproduction of his testimony.

Alabama.—Perry v. State (1888) 87 Ala. 30, 6 So. 425; Knight v. State (1893) 103 Ala. 48, 16 So. 7; Burton v. State (1896) 115 Ala. 1, 22 So. 585; Pate v. State (1907) 158 Ala. 1, 48 So. 388; Francis v. State (1914) 188 Ala. 39, 65 So. 969; South v. State (1888) 86 Ala. 617, 6 So. 52; Pope v. State (1913) 183 Ala. 61, 63 So. 71; Jacobi v. State (1901) 133 Ala. 1, 32 So. 158; Matthews v. State (1892) 96 Ala. 64, 11 So. 203; Brown v. State (1914) 11 Ala. App. 321, 66 So. 829; Tyra v. State (1919) 17 Ala. App. 92, 82 So. 631.

Arkansas. — Vaughan v. State (1894) 58 Ark. 353, 24 S. W. 885; Poe v. State (1910) 95 Ark. 172, 129 S. W. 292; Eyer v. State (1914) 112 Ark. 37, 164 S. W. 756, Ann. Cas. 1916B, 30; Rogers v. State (1918) 136 Ark. 161, 206 S. W. 152.

California. — People v. Devine (1873) 46 Cal. 45.

Colorado.—Young v. People (1913) 54 Colo. 293, 130 Pac. 1011; Henwood v. People (1914) 57 Colo. 544, 143 Pac. 373, Ann. Cas. 1916A, 1111.

Florida.—Putnal v. State (1908) 56 Fla. 86, 47 So. 864.

Georgia.—Hunter v. State (1918) 147 Ga. 823, 95 S. E. 668; SMITH v. STATE (reported herewith) ante, 490.

Indiana.—Wilson v. State (1911) 175 Ind. 458, 92 N. E. 609; Levi v. State (1914) 182 Ind. 188, 104 N. E. 765, Ann. Cas. 1917A, 654, rehearing denied in (1914) 105 N. E. 898.

Iowa.—State v. Brown (1911) 152 Iowa, 427, 132 N. W. 862; State v.

Nagel (1919) 185 Iowa, 1038, 170 N. W. 289.

Kansas.—State v. Nelson (1904) 68 Kan. 566, 75 Pac. 505, 1 Ann. Cas. 468; State v. Simmons (1908) 78 Kan. 852, 98 Pac. 277; State v. Gentry (1912) 86 Kan. 534, 120 Pac. 352.

Louisiana.—State v. Stewart (1882) 34 La. Ann. 1037; State v. Jordan (1882) 34 La. Ann. 1219; State v. Maddison (1898) 50 La. Ann. 679, 23 So. 622.

New Mexico. — Territory v. Ayer (1910) 15 N. M. 581, 113 Pac. 604.

New York.—People v. Bruno (1917) 220 N. Y. 702, 115 N. E. 1004; People v. Gilhooly (1905) 108 App. Div. 234, 95 N. Y. Supp. 636, affirmed in (1907) 187 N. Y. 551, 80 N. E. 1116.

Oklahoma.—Warren v. State (1911) 6 Okla. Crim. Rep. 1, 34 L.R.A.(N.S.) 1121, 115 Pac. 812; Hawkins v. United States (1910) 3 Okla. Crim. Rep. 651, 108 Pac. 561; Smallwood v. State (1917) 14 Okla. Crim. Rep. 125, 167 Pac. 1154; Kearns v. State (1917) 14 Okla. Crim. Rep. 142, 168 Pac. 242; Beshirs v. State (1918) 14 Okla. Crim. Rep. 578, 174 Pac. 577; Liddell v. State (1920) — Okla. Crim. Rep. —, 193 Pac. 52; Fitzsimmons v. State (1917) 14 Okla. Crim. Rep. 80, 166 Pac. 453.

Oregon.—State v. Walton (1909) 53 Or. 567, 99 Pac. 431, rehearing denied in (1909) 53 Or. 566, 101 Pac. 389, 102 Pac. 173; State v. Meyers (1911) 59 Or. 537, 117 Pac. 818.

South Dakota.—State v. Heffernan (1908) 22 S. D. 513, 25 L.R.A.(N.S.) 868, 118 N. W. 1027.

Texas.—Garcia v. State (1882) 12 Tex. App. 336; Cowell v. State (1884) 16 Tex. App. 58; Gilbreath v. State (1888) 26 Tex. App. 315, 9 S. W. 618; Crook v. State (1889) 27 Tex. App. 198, 11 S. W. 444; Ozark v. State (1907) 51 Tex. Crim. Rep. 106, 100 S. W. 927; Long v. State (1908) 55 Tex. Crim. Rep. 55, 114 S. W. 632; Hobbs v. State (1909) 55 Tex. Crim. Rep. 299, 117 S. W. 811; Grant v. State (1912) 67 Tex. Crim. Rep. 155, 42 L.R.A.(N.S.) 428, 148 S. W. 760; Hughes v. State (1912) 68 Tex. Crim. Rep. 584, 152 S. W. 912; Pace v. State (1913) 69 Tex. Crim. Rep. 27, 153 S. W. 132; Modello v. State

(1919) 85 Tex. Crim. Rep. 291, 211 S. W. 944; Brent v. State (1921) — Tex. Crim. Rep. —, 232 S. W. 845.

Utah.—State v. Vance (1910) 38 Utah, 1, 110 Pac. 434; State v. Greene (1910) 38 Utah, 389, 115 Pac. 181; State v. Inlow (1914) 44 Utah, 485, 141 Pac. 530, Ann. Cas. 1917A, 741; State v. Hillstrom (1915) 46 Utah, 341, 150 Pac. 935.

Wyoming.—Meldrum v. State (1915) 23 Wyo. 12, 146 Pac. 596; Ivey v. State (1916) 24 Wyo. 1, 154 Pac. 589.

As seen in subd. VI. *infra*, many of the states have enacted statutes which more or less strictly govern the reproduction of the testimony of absent witnesses. If the statute prescribes the terms on which such reproduction may be had, it, of course, governs, and some of the cases cited in this subdivision are doubtless governed by statutory provisions, while the statute is not expressly referred to as the controlling authority. Therefore, it is necessary to know what the statute is in any particular state, before it can be known whether or not a decision from that state is out of harmony with the common-law rule as announced in other states. For example, there are statutes which permit the reproduction of the testimony of absent witnesses only when they are permanently or indefinitely outside the jurisdiction, and cases which emphasize the necessity of permanent or indefinite nonresidence are doubtless controlled by statute.

The evidence is admissible if the witness has left the state permanently, or for an indefinite time. Matthews v. State (1892) 96 Ala. 64, 11 So. 203.

In *State v. Heffernan* (S. D.) *supra*, the court held: "Constitutional and statutory provisions to the effect that an accused has a right to be confronted with the witnesses against him in the presence of the court, and to meet them face to face, do not prevent the reading at the trial of testimony of witnesses given before the committing magistrate, should they leave the state since giving the same, where accused had an opportunity to cross-examine them, and it is immaterial that

the complaint before the magistrate, and the information before the court, lay the offense on different days, if the precise time is immaterial and the offenses charged are shown by the record to be one and the same." This conclusion was reached upon a rehearing, the court having, upon the first hearing, held that the admission of the evidence was in conflict with the provisions of the statute that accused should be entitled to be confronted with witnesses against him, in the presence of the court. The court says the rule which it adopts seems to have come into existence of necessity, by reason of the fact that to hold otherwise would often result in a failure or miscarriage of justice. "Formerly, according to the history of these provisions of the state and Federal Constitutions and like statutes, defendants in criminal actions were prosecuted and convicted upon ex parte depositions and affidavits, taken in the absence of the defendant and his counsel; and to remedy this evil such constitutional provisions and statutes were brought into existence, the intended effect of which was to secure to the defendant the right or privilege of cross-examination of the witnesses against him, that he might propound or have propounded to such witnesses, personally, questions which they were required to answer on oath in his presence." (1909) 24 S. D. 1, 25 L.R.A. (N.S.) 876, 140 Am. St. Rep. 764, 123 N. W. 87. The court further says: If there has been cross-examination there has been confrontation. The satisfaction of the right of cross-examination disposes of any objection based upon the so-called right of confrontation. The advantage of having the jury see the demeanor of the witness is no essential part of the notion of confrontation. Demeanor, even, may be dispensed with in case of necessity.

If the witness is out of the state, or is absenting himself at the instance of accused, his testimony may be reproduced. *Ozark v. State* (1907) 51 Tex. Crim. Rep. 106, 120 S. W. 927.

SMITH v. STATE (reported herewith) ante, 490, overrules an earlier case, and

establishes the law of the state to be that the rule permitting the reproduction of the testimony applies as well where the witness is living beyond the jurisdiction as when he is dead.

In *State v. Oliver* (1891) 43 La. Ann. 1003, 10 So. 201, it was held that the fact that a witness was out of the state was not ground for admitting his testimony taken at a former trial, the court saying that the only safe rule was to limit the admission of such testimony to cases of death. But in *State v. Maddison* (1898) 50 La. Ann. 679, 23 So. 622, testimony taken at a preliminary examination was admitted upon a showing that the witness was out of the state, no reference being made to the *Oliver Case*.

Testimony before a committing magistrate may be reproduced at the trial, if accused was present and had an opportunity to cross-examine, and the witness cannot be found within the state at the time of the trial. *People v. Gilhooley* (1905) 108 App. Div. 234, 95 N. Y. Supp. 636, affirmed in (1907) 187 N. Y. 551, 80 N. E. 1116.

The evidence may be reproduced when it is shown that the personal attendance of the witness is unobtainable, although it is not affirmatively shown that he is dead, insane, or beyond the jurisdiction of the court. *Pope v. State* (1913) 183 Ala. 61, 63 So. 71.

Where testimony given by a witness at a coroner's inquest was typewritten, and, at the subsequent preliminary examination of defendant for murder before a justice of the peace, was read to the witness, and he stated under oath that it was his testimony, and signed the same, defendant being present and having an opportunity to cross-examine him, evidence of what such witness testified to was properly admitted on the subsequent trial, the witness then being without the jurisdiction, although the method of examination was unusual. *Eyer v. State* (1914) 112 Ark. 37, 164 S. W. 756, Ann. Cas. 1916B, 30.

In *People v. Bruno* (1917) 220 N. Y. 702, 115 N. E. 1004, it was held that,

the trial court having found upon sufficient evidence that it was satisfactorily shown that the witness whose deposition taken at a preliminary examination was received in evidence could not with due diligence be found within the state, that question could not be reviewed on appeal.

Many of the cases cited above hold that the witness must be shown to be beyond the jurisdiction of the court in order to permit reproduction of his testimony. But there would seem to be no ground for distinction between such a witness and one who could not, after due diligence, be found, even though it should ultimately prove that he was within the jurisdiction, but was in hiding.

In *Paxton v. State* (1913) 108 Ark. 316, 157 S. W. 396, and *Fitzsimmons v. State* (1917) 14 Okla. Crim. Rep. 80, 166 Pac. 453, it is held that where the state shows that a witness cannot with due diligence be found, his testimony taken at a preliminary examination may be admitted at the trial.

The true position of the courts with respect to the showing which must be made to permit reproduction of the testimony of an absent witness, is set out in subdivision IV. *infra*. There have been decisions which denied the right to reproduce the testimony of a witness unless he was shown to be dead, even though he had gone beyond the jurisdiction of the court. *Collins v. Com.* (1876) 12 Bush (Ky.) 271, 2 Am. Crim. Rep. 282; *Owens v. State* (1886) 63 Miss. 450; *State v. Nicholas* (1910) 149 Mo. App. 121, 130 S. W. 96, the opinion adopted in (1912) 163 Mo. App. 527, 143 S. W. 1198; *People v. Newman* (1843) 5 Hill (N. Y.) 295; *Pittman v. State* (1893) 92 Ga. 480, 17 S. E. 856.

In *United States v. Angell* (1881) 11 Fed. 34, the court says that, under the constitutional provision that in all criminal cases the accused shall enjoy the right to be confronted with the witnesses against him, a witness, if living, must be produced, and the mere fact that he is beyond the jurisdiction is immaterial. The court

further says that it cannot fairly be maintained that, if the witness has once been confronted with accused before the committing magistrate, the requirements or guaranties of the Constitution are answered. "It is little better than an evasion of the matter to say that if the witness has been present at the preliminary examination, when the real question is whether the accused shall be held for the action of the grand jury, that therefore, when he is indicted, and life, liberty, or property are at stake, that right no longer exists. As well might it be said that if, in the complaint before the magistrate, the accused was informed of the nature and cause of the accusation, the subsequent indictment need not state the accusation again. The fair meaning of the Constitution is that, wherever and whenever he is put on his final trial, he shall be confronted with the witnesses against him, if they be alive."

In *Fuqua v. Com.* (1904) 118 Ky. 578, 81 S. W. 923, the court says: "Where the witness is deceased, the authorities hold, in uniform accord, that proof of his testimony upon a second trial is admissible. This rule is bottomed upon necessity, and its aim is to prevent the defeat of justice. Upon the other hand, to admit proof of the testimony of an absent living witness given upon a former trial would be to dignify secondary evidence, and to disregard that provision of the Constitution which guarantees to the defendant the right to be confronted by the witnesses."

In *State v. Wing* (1902) 66 Ohio St. 407, 64 N. E. 514, 15 Am. Crim. Rep. 634, and *State v. Huffman* (1912) 86 Ohio St. 229, 99 N. E. 295, Ann. Cas. 1913B, 677, it was held that the testimony of witnesses who were out of the state was not admissible unless it was shown that the witnesses were dead or absent by the procurement or connivance of accused.

Testimony taken upon preliminary examination cannot be reproduced, even though the witness was out of the state by procurement of accused.

Bergen v. People (1856) 17 Ill. 426, 65 Am. Dec. 672.

In *Dukes v. State* (1902) 80 Miss. 553, 31 So. 744, 15 Am. Crim. Rep. 644, *supra*, the court held that such testimony was admissible only when the witness has died, but recommended that a statutory provision be adopted, making it admissible in other cases where the witness cannot be produced, and this recommendation is repeated, though dissented from by one judge, in *Holfield v. Laurel* (1909) 96 Miss. 59, 50 So. 488, the court holding that evidence taken at a trial in police court, from which an appeal was taken to the circuit court, was inadmissible where the witness was absent. And in *Dupree v. State* (1859) 33 Ala. 380, 73 Am. Dec. 422, it was held that testimony taken before a coroner on inquest, of a witness who has since moved from the state, is not admissible.

And in *State v. Lee* (1893) 13 Mont. 248, 33 Pac. 690, it was held that such testimony was not admissible where the witness was out of the jurisdiction, under a constitutional provision giving the defendant the right "to produce witnesses in his behalf, and to be confronted with witnesses against him in the presence of the court," though the later case of *State v. Byers* (1895) 16 Mont. 565, 41 Pac. 708, admits such testimony, if the witness is dead.

In *State v. Houser* (1858) 26 Mo. 431, the court refused to extend the rule laid down in *State v. McO'Brien* (1857) 24 Mo. 402, 69 Am. Dec. 435, to cases where the witness was beyond the jurisdiction.

In *Pittman v. State* (1893) 92 Ga. 480, 17 S. E. 856, the court said that, though the death of the witness is ground for the admission, at the trial, of his testimony as taken at the examination, the better opinion is that removal from the state, and consequent inability to procure his attendance, the accused doing nothing to prevent his attendance, will not render such testimony admissible.

In *Hall v. State* (1873) 6 Baxt. (Tenn.) 522, it was held that the testimony taken at the examination

was not admissible, where the witness was living, but a resident of another state.

In *Finn v. Com.* (1827) 5 Rand. (Va.) 701, such evidence was held not admissible in a criminal trial where the witness had left the state.

In *Sullivan v. State* (1879) 6 Tex. App. 339, 32 Am. Rep. 580, the court, in dealing with the claim that the mere fact that the witness is not within the jurisdiction of the court is not sufficient to permit reproduction of his testimony, said: "It is not perceived that the reason of the rule which admits proof of what a deceased witness had on some former occasion, between the same parties, on an examination into the same criminal charge on a former trial, testified to, as admissible on a subsequent trial of the same case, does not apply with equal force to one who, though not dead, is beyond the reach of the process of the court. The testimony of the deceased witness is admitted on the idea that the deceased had been confronted with the witness on the former trial,—had met him face to face,—and that the witness had testified before a competent tribunal, under the sanction of an oath, and an opportunity afforded for cross-examination. . . . Yet, inasmuch as this species of testimony is admitted as a sort of judicial necessity, the proof of the facts which constitute the necessity for the departure from general rules ought to be clearly established, before the testimony is admitted; as that the witness is dead, that diligent inquiry has been made for him where it is most likely he would be found, or that the defendant had caused his absence. The proof on this subject should be complete and satisfactory, as the question of the sufficiency of this proof would necessarily be confided largely to the discretion of the judge, and not be revisable on appeal, when properly exercised." But the court concluded that the absence of the witness was not sufficiently accounted for, where there was no showing of proper effort to induce him to attend the trial.

In *State v. Wing* (1902) 66 Ohio St. 407, 64 N. E. 514, 15 Am. Crim. Rep. 634, in which the court held that the testimony of a witness given at the preliminary hearing, who was absent at the time of the trial, was inadmissible unless such absence was by the procurement or connivance of accused, the court gave as another consideration that by an adjournment or continuance of the case the witness might have been found and produced in court, and said: "The state should not be given undue advantage of a prisoner, and it may be that, in the hurried examinations which sometimes are practised before magistrates in a large city, a cross-examination is greatly restricted, while, if the witness appears in the court of common pleas, the latitude of a full cross-examination might properly increase the legitimate opportunities for a fair trial and acquittal. There, the process of sifting the evidence and ascertaining the truth are far superior to those available before a justice of the peace, or other examining magistrate. Hence, great caution should be exercised in allowing one to repeat at the final trial what a material witness may have said on the former hearing, and it should not be done except in clear and well-recognized cases of necessity."

If part of the former testimony would have been inadmissible if the witness was testifying, such part may be objected to when offered at a subsequent trial. *Sweat v. State* (1915) 77 Tex. Crim. Rep. 287, 178 S. W. 554.

When a part of the testimony of an absent witness is incompetent as hearsay, objection must be made to that part specifically, an objection to the whole being insufficient. *Hughes v. State* (1912) 68 Tex. Crim. Rep. 584, 152 S. W. 912.

2. Illness or insanity.

If the right to reproduce the testimony depends on the inability to produce the witness, then his illness to the extent that he could not attend court, or his insanity, should furnish sufficient grounds for permitting such

reproduction. Some cases permit the evidence to be so reproduced. *Valentine v. State* (1921) 16 Okla. Crim. Rep. 76, 194 Pac. 254; *Spencer v. State* (1907) 132 Wis. 509, 122 Am. St. Rep. 989, 112 N. W. 462, 13 Ann. Cas. 969 (holding such testimony admissible when the witness is ill with no hope of recovery); *People v. Droste* (1910) 160 Mich. 66, 125 N. W. 87 (holding such testimony admissible when a witness is unable to attend the trial because of temporary illness, the court saying: "We are unable to appreciate any good reason why the people or respondent should have the benefit of such evidence in cases where the witness is dead, or permanently ill, and be denied that benefit when the witness is only temporarily ill. In all three cases the important fact is identical—the witness cannot be produced in person to testify before the jury"); *Marler v. State* (1880) 67 Ala. 55, 42 Am. Rep. 95 (holding the testimony of an accomplice given at the examination to be admissible at the trial, he having been adjudged insane in the meantime). And in *Harris v. State* (1913) 71 Tex. Crim. Rep. 463, 160 S. W. 447, testimony taken at a former trial was admitted, where it was shown that the witness was paralyzed so that he could not attend court, or could not have testified, if present.

These apparent exceptions are justified on the ground that they were well recognized at the time of the adoption of our Constitution, and that the Constitution does not grant the right of trial by jury, but simply secures the right as it existed of old. The textbooks quite generally state broadly that the evidence of a witness given at a former trial or examination between the same parties may be introduced if the witness has since died, become insane, or sick, and hence unable to testify, is out of the jurisdiction, or has been kept away from the trial by the opposite party. As to criminal prosecutions, however, the authorities do not justify such a broad statement, except where the witness has died or has been kept away from the trial by the opposite

party. In these cases the authorities are very numerous, and practically uniform, that the testimony may be received. In the case of illness, or insanity, or other physical or mental disability, there has been considerable contrariety of opinion. Our examination of the authorities brings us to the conclusion that the English rule in criminal cases was that mere temporary illness or disability of the witness, where there was prospect of recovery, was not sufficient to justify the reception of the former testimony, but that it must appear that the witness was in such a state, either mentally or physically, or both, that in all reasonable probability he would never be able to attend the trial. When this fact satisfactorily appeared it was considered that the situation was practically the same as if the witness were dead. There is much reason in this rule. The accused has met the witness face to face. He has had the opportunity to cross-examine. The witness is to all intents and purposes dead. Why should not the evidence already given be admitted for the same reason that it would be admitted if the witness were in fact physically dead? We see no logical ground of distinction. It is true that there is a remote distinction. It is true that there is a remote possibility that the court may be imposed upon by a feigned illness, but, on the other hand, there is far more danger that justice may miscarry or fail entirely if the testimony be excluded. The evidence of the sick or insane witness may be absolutely essential to conviction, and he may linger along for years until other essential evidence has disappeared, and thus a serious crime may go unpunished. *Spencer v. State* (Wis.) supra.

And in *Walkup v. Com* (1892) 14 Ky. L. Rep. 337, 20 S. W. 221, testimony taken at a former trial was admitted, where the witness was insane at the time of the second trial.

But, on the other hand, some strong courts refuse to extend the rule to admit the reproduction of the testimony merely because the witness is too ill to attend court.

Thus, *Com. v. McKenna* (1893) 158 Mass. 207, 33 N. E. 389, held that mere illness of the witness does not justify secondary evidence of his testimony at a former trial.

In *State v. Staples* (1866) 47 N. H. 113, 90 Am. Dec. 565, where the witness was ill and unable to attend, the court said: "We have not known a practice in this state, where the witness is alive and within the jurisdiction of the court, and in criminal proceedings, to allow the former statements of the witness to be used. Such testimony is admitted at any time only upon urgent necessity, and in violation of the familiar rule that the best testimony is to be used, and it would be an anomaly in our practice to introduce the produced former statements of a living witness, through a copyist or a bystander. The evidence of a witness in the same cause, and at a former trial, is not admissible, until it has been first proved that he is dead."

And in Connecticut the rule apparently is that only in the case of death of a witness is testimony admissible against the objection of defendant. *State v. Brauneis* (1911) 84 Conn. 222, 79 Atl. 70.

In *State v. Rogers* (1915) 101 S. C. 280, 85 S. E. 636, in which it was held to be error to permit the introduction of the testimony of an absent witness who did not come within any of the exceptions that render such testimony admissible, it appears in the headnote only that the only excuse for the witness not testifying in person was that he was too ill to make the trip.

And in *Wray v. State* (1908) 154 Ala. 36, 15 L.R.A.(N.S.) 493, 129 Am. St. Rep. 18, 45 So. 697, 18 Ann. Cas. 362, the lower court refused to permit the reading of stenographic notes taken at the hearing, of the testimony of a witness who was too ill to be examined at the trial, unless defendant would consent; but this question was not passed on in the supreme court.

Where the statute permits depositions taken at the examination to be read at the trial in certain cases, the fact that the witness was too ill to attend was insufficient, this not being

one of the statutory grounds. *People v. Bojorquez* (1880) 55 Cal. 463.

The inability of a witness to appear at the trial because of sickness is not sufficient ground for the admission of his testimony taken at the examination, it appearing that he could probably be present at the next term. *State v. Wheat* (1904) 111 La. 860, 35 So. 955.

3. Witness in prison.

The mere fact that the witness is confined in prison does not justify the reproduction of his testimony, if there is ample provision for obtaining the testimony of such persons. *Hayden v. Com.* (1910) 140 Ky. 634, 131 S. W. 521.

One serving a term of years in the state penitentiary is not civilly dead, and such confinement is not a sufficient basis for the introduction of his testimony given at a former trial. *State v. Conway* (1896) 56 Kan. 682, 44 Pac. 627.

Where, after the examination and trial, a witness is convicted of murder and sentenced to imprisonment in another state, which fact renders him an incompetent witness, his testimony may be reproduced or not according to whether or not the law of the state makes such disqualification antedate the conviction. *Hawkins v. United States* (1910) 3 Okla. Crim. Rep. 651, 108 Pac. 561.

4. Absence by procurement of accused.

One of the earlier grounds mentioned by courts and text-writers for the admission against an accused of a reproduction of the testimony of an absent witness was that the absence was by procurement of accused. This was upon the theory that accused could not profit by his own wrong, and there seems to have been little dissent from the holding, although the cases where the question actually arose are comparatively few.

The reproduction was held proper in *United States v. Reynolds* (1876) 1 Utah, 319, affirmed in (1879) 98 U. S. 145, 25 L. ed. 244.

In the early case of *Rex v. Barber* (1775) 1 Root (Conn.) 76, where a witness testified before a justice,

and the minutes of his testimony were taken, and the defendant procured him to go away, so that he could not testify at the trial, the court permitted another witness to relate what he had testified to before the justice.

In *State v. Houser* (1858) 26 Mo. 431, supra, there is a dictum to the effect that testimony taken at an examination would be admissible, if the witness was out of the jurisdiction by procurement of accused.

In *Williams v. State* (1855) 19 Ga. 402, which was a prosecution for larceny, it was held that proof of a settlement of the case between the defendant and the complaining witness, and a statement by the state's attorney that he had used all diligence to procure the attendance of the witness, was not sufficient to show absence by procurement.

In *Bergen v. People* (1856) 17 Ill. 426, 65 Am. Dec. 672, the court said: "Here the witness was not dead, but beyond the jurisdiction of the court by the procurement of the defendant; and we think the rules of evidence do not permit, in such case, the admission of the testimony given on the former occasion. . . . Some of the authorities hold that, in a criminal proceeding, this kind of evidence is not admissible, although the witness be dead; but it is not necessary for us here to decide this question. It is true, if a party in any case spirits away his adversary's witness, he ought not to profit thereby; or, at least, suitable penalties should be provided against such conduct, but it is for the legislature to correct the evil."

5. Claim or privilege.

In *State v. Stewart* (1911) 85 Kan. 404, 116 Pac. 489, it was held that the testimony of the husband of the accused taken at a preliminary examination was admissible, although he was present at the trial, but claimed the statutory privilege of declining to testify against his wife.

6. Identity of crimes.

In *Simmons v. State* (1900) 129 Ala. 41, 29 So. 929, it was held that evi-

dence of a deceased or absent witness given upon a former trial is only admissible upon the second trial between the same parties, or their privies, and in relation to the same subject-matter; so evidence of a witness since deceased, which was given at a previous trial of another person for the murder of the same party, was inadmissible.

But the objection that the proceedings before the committing magistrate, and before the court, are different, is not valid. *State v. Hooker* (1845) 17 Vt. 658.

In *Baldock v. State* (1919) 16 Okla. Crim. Rep. 203, 182 Pac. 265, the headnote by the court says that, where a witness for the state whom the defendant had an opportunity to cross-examine is without the state, a transcribed copy of the stenographer's notes of the testimony of such witness, given on the preliminary examination of the defendant, is admissible in evidence as against the defendant upon his subsequent trial, notwithstanding it had not been filed in the trial court. In that case, it appeared that the husband of the witness killed her alleged paramour, and was tried and convicted. The opinion states that the testimony sought to be introduced was taken at his preliminary hearing. Subsequently, the action in which the testimony was sought to be reproduced was begun against accused as an alleged accomplice. 'There is nothing in the case to show that he was a party to the first proceeding. The conviction was reversed so that the ruling as to the admissibility of the evidence becomes immaterial, but the opinion certainly sets out no facts which would render the testimony in the preliminary examination against the husband admissible, in a subsequent proceeding against his accomplice.

In *Williams v. People* (1899) 26 Colo. 272, 57 Pac. 701, testimony given at a previous trial of another person was held to be inadmissible, on the ground that defendant was not a party to that trial, and also that there was no showing that the witness was dead

or beyond the jurisdiction of the court.

The mere fact that the preliminary examinations of codefendants were held at the same time, at which part of the evidence given by a deceased witness related to the charge against the codefendant, and a part thereof was concerning the offense charged against defendant, did not deprive the prosecution of the right, under the statute, to introduce such parts of the deposition as constituted competent evidence upon the trial of defendant. *People v. Harrison* (1912) 18 Cal. App. 288, 123 Pac. 200.

In Georgia, under a statute providing for the admission of former testimony, the testimony must have been given on a former trial upon substantially the same issues and between substantially the same parties. *Mitchell v. State* (1883) 71 Ga. 128.

In *People v. Canale* (1915) 166 App. Div. 961, 154 N. Y. Supp. 932, it was held error to admit testimony taken upon a former trial of defendant, in a trial under a different accusation, the nature of the former accusation not appearing in the brief report of the case.

Where the different crimes, or different degrees of the same crime, were based on the same act, the following accusations have been held sufficiently similar to make testimony at the examination of the one admissible at the trial of the other, provided the other requisites for admission are established: Assault with intent to kill, and murder (*Dunlap v. State* (1880) 9 Tex. App. 179, 35 Am. Rep. 736; *Hart v. State* (1883) 15 Tex. App. 202, 49 Am. Rep. 188); assault and robbery, and murder (*Rex v. Smith* (1817) 2 Starkie (Eng.) 208, Holt, N. P. 614, Russ. & R. C. C. 339); assault and battery, and murder (*State v. O'Brien*, 81 Iowa, 88, 46 N. W. 752); wounding with intent to do grievous bodily harm, and murder (*Reg. v. Beeston* (1854) 6 Cox, C. C. (Eng.) 425); obtaining money under false pretenses, and uttering forged promissory note (*Reg. v. Williams* (1871) 12 Cox. C. C. (Eng.) 101); violation of city gambling ordinance, and same offense

under state statute (*Lowe v. State* (1888) 86 Ala. 47, 5 So. 435).

Where the defendant was arraigned before the magistrate upon a charge of grand larceny, and at the close of the hearing the magistrate held him to answer to the charge of embezzlement, the testimony of a witness given at the hearing was admissible in a subsequent trial for embezzlement. *People v. Hart* (1915) 28 Cal. App. 335, 152 Pac. 947.

Since the charge of murder necessarily includes a charge of manslaughter, the fact that the charge at the preliminary hearing was murder, while the trial is for manslaughter, does not prevent admission of the testimony taken at the preliminary hearing. *Lee v. State* (1921) 124 Miss. 398, 86 So. 856.

Where accused was under arrest upon a charge for assault with intent to kill at the time the preliminary examination occurred, the fact that it was afterwards changed to an indictment for murder, upon death of the victim, does not prevent admission of the testimony at the trial. *State v. Wilson* (1880) 24 Kan. 189, 36 Am. Rep. 257. The court says the act, the subject of inquiry, was the same, and, while the charge is different, the difference results from matters occurring after the giving of the testimony, and in no manner changed the actual facts of inquiry.

In *State v. Von Klein* (1914) 71 Or. 159, 142 Pac. 549, Ann. Cas. 1916C, 1054, the court admitted, in a prosecution for polygamy, testimony given at a former trial of defendant on the charge of larceny, it having been shown on a former trial that defendant married the woman with whom he was charged with committing polygamy, for the purpose of obtaining her jewelry, which he was charged with stealing on that trial, the parties being the same, and the evidence taken on that trial relating to the matter in controversy on the trial for polygamy.

Evidence of a witness since deceased, given at a former trial of defendant on a charge of being an accessory to the crime of murder is

admissible in a subsequent trial of defendant on the charge of being an accessory to the crime of robbery, the robbery and the murder being all parts of the same transaction, committed by the same persons, at the same time, for the same purpose, the identity of the issues being complete, and there being no well-founded reason why the testimony taken on the first trial should not be read as evidence on the second trial. *Fox v. State* (1912) 102 Ark. 393, 144 S. W. 516.

And in *Collier v. State* (1853) 13 Ark. 676, though the court found the deposition inadmissible on other grounds, it implied that it would not be admissible because the accusation before the court of inquiry was, at most, maiming, or assault with intent to murder, while the accusation at the trial was murder.

In *Nordan v. State* (1904) 143 Ala. 13, 39 So. 406, the court, though recognizing the general rule to be that in admitting evidence of the testimony of a witness on a former trial, who has since died, it must be shown that the testimony of deceased witness was given in a case where the parties and issues were the same as in the case in which it is proposed to prove the testimony, held that, while the main issue in the former case, in which deceased witness testified, was entirely different from the main question in the present case, nevertheless, as to the particular evidence offered,—the genuineness of certain letters,—the issue in the two cases was identical, the parties were the same in both cases, the particular issue upon which the evidence was offered was the same, and therefore the rule was satisfied and the evidence properly admitted.

But in *Dukes v. State* (1902) 80 Miss. 353, 31 So. 744, 15 Am. Crim. Rep. 644, the court said that the issues must be substantially the same, so that the questions asked to make out the one offense would be the same to make out the other, and that a charge of robbery at the examination was not substantially the same as a charge of murder at the trial, though the

blow inflicted in effecting the robbery was the same which caused the subsequent death.

In *Somers v. State* (1908) 54 Tex. Crim. Rep. 475, 130 Am. St. Rep. 901, 113 S. W. 533, the testimony was held to be inadmissible where the examination was for larceny of a diamond, and the trial for larceny of a pocket-book.

In *State v. Eastham* (1912) 240 Mo. 241, 144 S. W. 492, it was held that the testimony of a witness taken at the trial of another for the same offense was not admissible, although the witness was dead.

In *People v. Brennan* (1898) 121 Cal. 495, 53 Pac. 1098, where defendant was charged with three separate crimes, and at the hearing on one a stipulation was made that the evidence should be considered as taken on each of the three charges, it was held that, the witness having died, so much of the evidence as related to the charges not being heard was not, by virtue of the stipulation, admissible at the trial of the charge examined.

In *United States v. Penn* (1876) 13 Nat. Bankr. Reg. 464, Fed. Cas. No. 16,025, such evidence was admitted where one of the counts in the indictment was the same in both proceedings.

In *Brown v. People* (1908) 145 Ill. App. 263, affirmed in (1912) 254 Ill. 260, 98 N. E. 535, it was held that the rule applicable to the testimony of absent witnesses given at a former trial of the same case is applicable to testimony of absent witnesses given in a disbarment proceeding, when such testimony is offered in a subsequent trial of defendant for perjury, the parties being the same and the issue the same in both cases.

IV. Predicate.

a. In general.

Before the testimony of an absent witness given at a former trial, or at a preliminary examination, can be reproduced, a proper predicate must be laid. What this predicate shall be depends upon the rule in the state where it is offered, with respect to the circumstances which will justify

the reproduction of such testimony. If the courts of the state hold that nothing but death will permit such reproduction, then death must be shown by satisfactory evidence. So with respect to absence from the state, and illness, insanity, or inability to locate the witness.

In Texas, it has been held that, to warrant the reproduction of testimony of an absent witness, the predicate must be laid either by showing his death or removal from the state. *White v. State* (1918) 83 Tex. Crim. Rep. 252, 202 S. W. 737.

In *Allen v. State* (1907) 84 Ark. 178, 105 S. W. 70, the court said that, before admitting such testimony, the trial court should have diligent inquiry made as to the witness's absence, or be satisfied from competent proof that inquiry would do no good.

Where the state has made no attempt to lay the predicate of death of the absent witness, or that he is beyond the jurisdiction of the court, his testimony given at a preliminary examination is inadmissible. *Gamboa v. State* (1913) 69 Tex. Crim. Rep. 635, 155 S. W. 249.

In the absence of a showing in the record that the witness whose testimony, given at a former trial, was admitted at the second trial, was dead, beyond the jurisdiction of the court, insane, or kept away from court by connivance of defendant, or that defendant had the opportunity to cross-examine the witness, its admission will be held to have been error. *Betts v. State* (1912) 65 Tex. Crim. Rep. 358, 144 S. W. 677.

To permit the reproduction at the trial of testimony taken before the committing magistrate it must appear that it was given under oath on a preliminary hearing for the offense for which accused is on trial before a magistrate of competent jurisdiction where there was a right of cross-examination and that the whereabouts of the witness is unknown and his presence is not obtainable by due diligence. *Wigginton v. State* (1920) 205 Ala. 147, 87 So. 700.

In *Barre v. State* (1911) 99 Ark.

629, 139 S. W. 641, the admission in evidence against one who was charged with perjury, of the testimony of a witness given at a preliminary examination of another for murder, was error, inasmuch as it was not shown that the witness was dead, beyond the jurisdiction, or could not be found, and it was not given in a case in which defendant was a party, so that he was not present and had no opportunity to cross-examine the witness.

When it is not shown that a witness is dead or out of the jurisdiction, his testimony given at a preliminary examination is inadmissible. *Echols v. State* (1914) 75 Tex. Crim. Rep. 369, 170 S. W. 786.

And in *Pace v. State* (1911) 61 Tex. Crim. Rep. 436, 135 S. W. 379, where no evidence was produced except a want of knowledge on the part of witnesses as to the whereabouts of the witness, no sufficient predicate was laid for the admission of his testimony at a former trial.

The sufficiency of the showing of the existence of facts making such testimony admissible at the trial is for the court to determine. *Hardaman v. State* (1919) 17 Ala. App. 49, 81 So. 449; *People v. Leavens* (1909) 12 Cal. App. 178, 106 Pac. 1103; *People v. Lewandowski* (1904) 143 Cal. 574, 77 Pac. 467; *State v. Wiggins* (1898) 50 La. Ann. 330, 23 So. 334; *Reg. v. Stephenson* (1862) 9 Cox, C. C. (Eng.) 156.

Where the trial court has held that the predicate was sufficient to justify the admission of the testimony given at a former trial, on the ground that the witness cannot be found, every reasonable presumption must be indulged in favor of that ruling, and unless the evidence, when considered in connection with the presumption of correctness accorded to the ruling of the trial court, does not show that by the exercise of proper diligence the witness could have been found and his personal attendance obtained, the appellate court will not be justified in putting the trial court in error for admitting the testimony. *Harwell v. State* (1915) 12 Ala. App. 265, 68 So. 500.

b. Proof of death, insanity, or illness.

In *People v. Plyler* (1899) 126 Cal. 379, 58 Pac. 904, it was held that the death of a witness must be proved at the trial the same as any other fact, and cannot be established by an *ex parte* affidavit of a relative of the witness.

Merely referring to the witness as deceased is not sufficient to show that he has died so as to permit reproduction of his testimony. *Johnson v. Com.* (1902) 24 Ky. L. Rep. 842, 70 S. W. 44.

In *Driggers v. United States* (1908) 21 Okla. 60, 1 Okla. Crim. Rep. 167, 129 Am. St. Rep. 823, 95 Pac. 612, 17 Ann. Cas. 66, it was held that the death of the witness was not sufficiently established by the officer's return on the subpoena that the witness was dead, there being no legal provision for such return, and by the testimony of others that they had been told that the witness was dead.

And in *State v. Wright* (1886) 70 Iowa, 152, 30 N. W. 388, it was held that the death of the witness was not sufficiently shown by testimony of one witness that he had heard that the witness was dead, and of another witness that he had so heard, and that such was the general report.

In *Marler v. State* (1880) 67 Ala. 55, 42 Am. Rep. 95, it was held that the insanity of the witness was provable by any competent evidence satisfactory to the court.

Mere proof that the witness has been adjudged insane is not enough to permit reproduction of former testimony since he is competent to testify if he has sufficient understanding to comprehend the obligation of an oath, and is capable of giving a correct account of matters which he has seen or heard in reference to the question at issue. *Com. v. Loomis* (1921) 270 Pa. 254, 113 Atl. 428.

An unverified physician's certificate that the witness "is in such physical condition that she should not leave home," without more, will not permit reproduction of the testimony. *De Bose v. State* (1921) — Okla. Crim. Rep. —, 197 Pac. 176.

Where it was shown by the prosecu-

tion that a witness at the preliminary examination was 40 miles distant in another county, confined to his room, which he was, and had been, unable to leave for some months on account of a serious illness which had destroyed the sight of one of his eyes and left him a chronic invalid, a sufficient predicate was shown for the admission of his testimony under a statute making provisions for the admission of such testimony, when by reason of bodily infirmity such witness cannot attend. *Collins v. State* (1887) 24 Tex. App. 141, 5 S. W. 848.

a. Proof of absence of witness.

1. In general.

As has been seen in subd. III. b, there is some uncertainty as to whether or not the absent witness must be shown to be out of the state to warrant reproduction of his testimony, or merely that he cannot be found by due diligence.

The question whether or not it has been satisfactorily shown that a witness whose deposition was taken at the preliminary examination cannot, with due diligence, be found within the state, is a question of fact that is addressed to the trial court, to be determined by it from the evidence introduced before it, and the appellate court will not interfere with the trial court's exercise of discretion in the absence of abuse. *People v. Poo On* (1920) — Cal. App. —, 192 Pac. 1090.

If the court requires a showing of absence from the state, then there is no sufficient predicate unless the witness is shown to be out of the state at the time of the trial. *Ripley v. State* (1910) 58 Tex. Crim. Rep. 489, 126 S. W. 586.

The testimony of absent witnesses cannot be reproduced until it is shown that they are out of the jurisdiction, so that their attendance cannot be procured. This cannot be done by showing that they cannot be found after a hurried search. *Gray v. State* (1920) 143 Ark. 201, 220 S. W. 39.

If the evidence offered to show the absence of the witness excludes the

idea that he is beyond the jurisdiction of the court, his testimony cannot be reproduced. *Wyatt v. State* (1910) 58 Tex. Crim. Rep. 115, 137 Am. St. Rep. 926, 124 S. W. 929.

But it is sufficient that the witness is shown to have left the state permanently or for an indefinite time. *Pate v. State* (1907) 153 Ala. 1, 48 So. 388.

If the witness has taken up his residence outside the state, secondary evidence of his testimony may be given at the second trial, although he offers to come and testify if his expenses are paid. *Brunke v. State* (1920) — Neb. —, 180 N. W. 560.

Showing residence in another state is a sufficient predicate to permit reproduction of the testimony of the witness at the former trial. *Revels v. State* (1920) — Tex. Crim. Rep. —, 224 S. W. 689.

But the mere fact that a witness is in another state does not authorize the reproduction of his testimony if it was his intention to attend the trial, and the only reason he is not present is because he was not summoned. *Thompson v. State* (1894) 106 Ala. 75, 17 So. 512, 9 Am. Crim. Rep. 199.

But if inability to produce the witness is sufficient to permit reproduction of his testimony, then the whereabouts of the witness must be shown to be unknown. *Maloney v. State* (1909) 91 Ark. 485, 134 Am. St. Rep. 83, 121 S. W. 728, 18 Ann. Cas. 480.

2. Sufficient predicate.

The absence of a witness from the state has been held sufficiently established to permit reproduction of his testimony,—

— where the witness had gone to a distant state about two weeks previously, for an indefinite period, *Lowe v. State* (1888) 86 Ala. 47, 5 So. 435;

— the mere fact that one whose present home is in another state intends to return at some indefinite future time does not prevent reproduction of his testimony, *Brent v. State* (1921) — Tex. Crim. Rep. —, 232 S. W. 845;

— where a witness testified that the

absent witness "left about two months ago, and went to the state of Arkansas, as I was informed. Said Bates is still absent from the state," *Pruitt v. State* (1890) 92 Ala. 41, 9 So. 406;

— where the witness was a traveling man who had stated that he lived in another state, and had left the county immediately after recovering his stolen property, and a subpoena for him had been returned "not found," *Burton v. State* (1894) 107 Ala. 68, 18 So. 240;

— where the witness was a traveling man living in another state, had been out of the county for a year, and the sheriff had been unable to find him, *Wilson v. State* (1903) 140 Ala. 43, 37 So. 93;

— where, at the time of the hearing, witness declared that he was the resident of another state, and had been seen there about two months before the trial, and the sheriff could not find him in the county, *Lett v. State* (1899) 124 Ala. 64, 27 So. 256;

— where the witness lived in another state and when last seen was at his home there, *Shirley v. State* (1905) 144 Ala. 35, 40 So. 269;

— where the district attorney stated on oath that the witness intended to leave the state, and is absent therefrom to the best of his knowledge and belief, and could not with diligence be produced, *People v. Nelson* (1890) 85 Cal. 421, 24 Pac. 1006;

— where there was testimony that witness intended to leave the state for a course of study, and subpoenas had been issued to practically every sheriff in the state without result, while a special unavailing search had been made in the immediate vicinity of his former residence, *People v. Johnson* (1921) — Cal. App. —, 197 Pac. 135;

— where the absent witness telegraphed and wrote to the district attorney from another state that he could not be present at the trial, and a subpoena for him was returned not found within the county, *People v. Monroe* (1893) 4 Cal. Unrep. 66, 33 Pac. 776;

— where the prosecution had acted

in good faith in trying to find defendant in all the places where their information indicated he might be, and there was no direct evidence that he was in the state, or had gone to a county where a subpoena was not sent, *People v. Riley* (1888) 75 Cal. 98, 16 Pac. 544, 7 Am. Crim. Rep. 600;

— where the father of the witness testified that she was and had been for two months in the state of Mexico, *People v. Buckley* (1904) 143 Cal. 375, 77 Pac. 169; see also *People v. Moran* (1904) 144 Cal. 48, 77 Pac. 777, which was a trial of a codefendant where the same objection was raised;

— where one witness testified that the absent witness was in another state, another, that to the best of his knowledge she was in the other state, having been there the last time he had heard from her, and that the chief of police of that city had notified him that she was there, and the sheriff's return on subpoena showed her not found in the county, *People v. Grill* (1907) 151 Cal. 592, 91 Pac. 515;

— where the officer, who knew witness, certified on the subpoena that, after diligent search, he could not find him, and it was shown that the witness was an old man, that the place where he formerly boarded was closed, and its former occupants did not know where he had gone, and diligent efforts to find him in all parts of the city where he would likely be found had been unsuccessful, *People v. Reilly* (1895) 106 Cal. 648, 40 Pac. 13;

— where the witness lived out of the state, and, after testifying at the examination, left on a train, presumably for his residence, and had not been seen or heard of in the state since, *State v. Coudier* (1884) 36 La. Ann. 291; *State v. Riley* (1890) 42 La. Ann. 995, 8 So. 469; *State v. Bolden* (1902) 109 La. 484, 33 So. 571;

— where the witness, a physician, had moved from the state, and a witness testified that he had received a letter from him postmarked in another state, stating that he was practising there, *Post v. State* (1881) 10 Tex. App. 579;

—where the witness, at the time of the preliminary examination, was in the state on temporary duty as an officer in the Army, his command being outside of the state, for which place he left after the examination, and, since leaving, a telegram from him had been received announcing his arrival at his post, *Conner v. State* (1887) 23 Tex. App. 378, 5 S. W. 189;

—where a witness testified that the absent witness had removed from the state, and he had seen him there a week before the trial, having gone there to get the witness to return and testify at the trial, which he refused to do, *Parker v. State* (1887) 24 Tex. App. 61, 5 S. W. 653;

—where the affidavit was made that the witness was out of the state, and was the resident of another state, *Kerry v. State* (1884) 17 Tex. App. 179, 50 Am. Rep. 122;

—where an affidavit was made that "witnesses reside out of the state of Texas, and are residents of the Indian territory," *Ballinger v. State* (1881) 11 Tex. App. 323;

—where the witness was seen leaving the state on a train, and said he was going to another state, *Scruggs v. State* (1896) 35 Tex. Crim. Rep. 622, 34 S. W. 951;

—where it was shown that the witnesses were residents of another state, and were merely passing through the state at the time of the examination, and a letter had been received from them by the district attorney, from their address in the other state stating that they would be unable to attend the trial, *Somers v. State* (1908) 54 Tex. Crim. Rep. 475, 180 Am. St. Rep. 901, 113 S. W. 533;

—where it was shown that the witness, who was a woman seventy years old, left the state for Alabama, taking her furniture, and stating that she was going to make her home there, and had resided there some time, and a letter had recently been received from the party with whom she was living, containing a message from her, and that a party had written to her to come for the trial at a certain date, which was past, *Peddy v. State* (1893) 31 Tex. Crim. Rep. 547, 21 S. W. 542;

—where a brother-in-law of the witness testified that the witness had left with his family for another state, and he had since received a letter from the wife of witness postmarked in that state, and witness's stepfather testified that he had left, stating that he was going to the other state, but would return if he did not like the country, *Parker v. State* (1885) 18 Tex. App. 72;

—where witness stated to an officer when subpoenaed that he was going away, but would return, and another officer was informed that he was going to another state, and his roommate had not seen him for three weeks, when he stated to him that he was going to another state, and a second subpoena was returned showing that the witness could not be found, and that his whereabouts were unknown, *State v. King* (1902) 24 Utah, 482, 91 Am. St. Rep. 808, 68 Pac. 418;

—where it was shown that the witness was a permanent resident of another state, and he had not been subpoenaed, *Morris v. State* (1906) 146 Ala. 66, 41 So. 274;

—where the officer having a subpoena testified that, after following every clue as to the whereabouts of the witness, he was informed by acquaintances of the witness that he had left the state, and it could not be told when he would return, though one person said he was liable to return on business at any time, *People v. McIntyre* (1899) 127 Cal. 423, 59 Pac. 779;

—where witness was placed under recognizance, but forfeited it, and could not be found by the officers after diligent search, *Shackelford v. State* (1878) 33 Ark. 539;

—where subpoenas for witness, a farm laborer, were issued for the county where the court was held and four adjoining counties, and were all returned unserved, and the officer testified that inquiry had been made of every farmer of prominence he could see in the county, *People v. Davis* (1894) 4 Cal. Unrep. 524, 36 Pac. 96;

—where witness could not be found in the county, and subpoenas had been

issued to the sheriffs of every county in the state, forty-six of which had been returned that he could not be found, *People v. Witty* (1903) 138 Cal. 576, 72 Pac. 177;

—where, after considerable search for witness in and about the place he formerly frequented, the officers had been unable to find him, *People v. Melandrez* (1906) 4 Cal. App. 396, 88 Pac. 372;

—where a subpoena issued for a witness in an adjoining parish was not returned, and it was shown that he had left there, and that it was impossible to subpoena him, *State v. Allen* (1885) 37 La. Ann. 685;

—where subpoenas were issued, and a sheriff could not find witness in the parish or in the adjoining one, *State v. Tyler* (1894) 46 La. Ann. 1269, 15 So. 624;

—where witness was subpoenaed, and said he was going to his sister's, but would be in court on a certain date, and, on his failure to appear, the officer went to the home of the sister, but could not find witness, or learn anything as to his whereabouts, and he was unable to do so on further inquiry, *People v. Fish* (1890) 125 N. Y. 136, 26 N. E. 319;

—where the witness was a resident of another state, had left after the examination, and had not since been seen, *Lowery v. State* (1892) 98 Ala. 45, 13 So. 498;

—where the witness resided in another state and a witness testified that he had been at her house there, *Burton v. State* (1896) 115 Ala. 1, 22 So. 585;

—where a subpoena issued to the county of the former residence of the witness was returned with the notation that the officers were unable to find the witness, together with the testimony of a brother that the witness had made her home with her mother in that county, that the home had been entirely broken up and the mother had removed to another state, the witness preceding her, that he had a letter from the witness from such state, and the witness had told him before leaving the state that she would rather die than come back to

another trial and go through the same ordeal, *Jacobi v. State* (1901) 133 Ala. 1, 32 So. 158;

—where it appeared that the witness was under suspicion in connection with the crime, was kept in jail till the first trial, was not shown to have ever lived in any other county, had left shortly after the first trial, and had not since been seen, leaving crops in the ground; and his mother stated that she did not know where he was, and subpoenas issued in the county were returned "not found," *Pope v. State* (1913) 183 Ala. 61, 63 So. 71.

—where defendant's attorney admitted that the witness was out of the state, *Fuqua v. State* (1911) 2 Ala. App. 47, 56 So. 751;

—where it was shown that the absent witness was the resident of another state, *Phillips v. State* (1914) 11 Ala. App. 15, 65 So. 444;

—where there was evidence that the witnesses, who were husband and wife, left, taking their baggage and saying that they were going to another state, and that they had not come back, and the sheriff had made a search for them and could not find them, *Brown v. State* (1914) 11 Ala. App. 321, 63 So. 829;

—where a subpoena was regularly issued to a sheriff who made a return that the witness could not be found in the county, and it was shown that witness was under indictment for murder, and the sheriff had a capias for him, and a reward had been offered for his apprehension, and that his home had been in the county and it did not appear that he had any permanent residence elsewhere, *Harwell v. State* (1915) 12 Ala. App. 265, 68 So. 500, certiorari denied in (1915) 192 Ala. 689, 68 So. 1019;

—where a witness had testified on an application of defendant for bail, and a subpoena directed to the county of his residence at the time of the former trial, as well as to other counties to which it was supposed he had gone, had been returned "not found," *Sneed v. State* (1886) 47 Ark. 180, 1 S. W. 68;

—where two reputable witnesses

living at the place where witness formerly lived were called and testified that the witness had moved away, and from his relatives they understood he was residing in another state, although no subpoena was issued, *Vaughan v. State* (1894) 58 Ark. 353, 24 S. W. 885;

—where subpoenas were issued and diligent search made by the sheriff, who reported that both witnesses had departed from the state, and also that the witnesses lived in other states, and at the examination one of them had announced an intention of returning there, *Herman v. State* (1916) 125 Ark. 278, 88 S. W. 541; *Jordan v. State* (1916) 125 Ark. 597, 188 S. W. 542;

—where the trial was continued because of the absence of the witness from the state, and during the continuance reasonable efforts to serve a subpoena were made, but the only information the sheriff could obtain was that the witness was in another state, and this was also shown by testimony of the witness's wife, *People v. Goodrich* (1904) 142 Cal. 216, 75 Pac. 796;

—where a police officer testified that witness had bidden him good-by and said he was going to another state to go into business there, and that he had not since seen witness, though he had made inquiries and failed to find him; and a brother of witness testified that he resided in another state, and he had received a letter from him there about a week previously, *People v. Barker* (1904) 144 Cal. 705, 78 Pac. 266;

—where it appeared that the witness had left the state, and would not return, *People v. Pasqueria* (1916) 30 Cal. App. 625, 159 Pac. 173;

—where the prosecuting attorney and sheriff made diligent efforts to locate the witness, all subpoenas were returned "not found," and witnesses, who would be likely to know where he was, testified that they did not know, *Wilson v. State* (1911) 175 Ind. 458, 93 N. E. 609;

—where it is shown that the witness had left the state, though the prosecution may have neglected an oppor-

tunity to serve a subpoena or require a recognizance before the witness left, there being no evidence of bad faith on the part of the prosecution, *State v. Nelson* (1904) 68 Kan. 566, 75 Pac. 505, 1 Ann. Cas. 468;

—where the state has made every reasonable effort to locate the witness, *State v. Chadwell* (1915) 94 Kan. 302, 146 Pac. 420;

—where the state proves that the whereabouts of the witness were unknown and could not be ascertained after diligent search, *State v. Burton* (1917) 101 Kan. 62, 65 Pac. 847;

—where a witness testified that the absent witness told him he was going to another state to accept employment, and the sheriff made a return that the witness could not be found in the territory, and was now in another state, *Territory v. Ayer* (1911) 15 N. M. 581, 113 Pac. 604;

—where the witness was under subpoena and recognizance, and had defaulted, and the officers and bondsmen had been unable to find him, *Edwards v. State* (1913) 9 Okla. Crim. Rep. 306, 44 L.R.A.(N.S.) 701, 131 Pac. 956;

—where a witness, after service of a subpoena upon him, left the state and told business associates he would be absent some weeks, *Kearns v. State* (1917) 14 Okla. Crim. Rep. 142, 168 Pac. 242.

That the witness was a member of a regiment of soldiers temporarily stationed at the scene of the crime, and that the regiment has moved away, and the witness cannot be found within the jurisdiction, is sufficient to justify reproduction of his testimony. *Percy v. State* (1899) 125 Ala. 52, 27 So. 844.

Where the witness, after announcing his intention of joining the Army, could not by diligent search be found within the state, sufficient predicate is laid to permit reproduction of his testimony. *Hardaman v. State* (1918) 16 Ala. App. 408, 78 So. 324.

And the predicate is sufficient where a witness states that the last time he saw the absent witness he had on a soldier's uniform and that he had seen a letter from him written in a

foreign country. *Hardaman v. State* (1919) 17 Ala. App. 49, 81 So. 449.

And in *State v. Richardson* (1904) 113 La. 678, 37 So. 599, it is held that the fact that witness was a soldier, and, on inquiry at the barracks, an officer was informed that witness had been sent to another state for consumption, and would never return, was a sufficient showing of permanent absence.

In *State v. Aspara* (1905) 113 La. 940, 37 So. 883, it was held that permanent absence was sufficiently shown by the fact that witness claimed another state as his home, had been at the place of trial only as a sojourner, was in another state when last heard from, having left the jurisdiction owing money, and could not be found there after diligent search.

In *State v. Bollero* (1904) 112 La. 850, 36 So. 754, it was held that the permanence of the absence of witness was sufficiently established, by showing that he had gone to another state to reside and there was no present prospect of his return.

And see also *Long v. State* (1908) 55 Tex. Crim. Rep. 55, 114 S. W. 632, for a long statement of evidence held to be sufficient to admit the testimony of witnesses, taken at the examination, on the ground that they were absent from the state.

In some courts it is necessary to show that the absence of the witness from the state is permanent, in order to make his testimony given at the examination admissible at the trial. *State v. Banks* (1902) 106 La. 480, 31 So. 53; *Cooper v. State* (1879) 7 Tex. App. 194.

Proof that a witness at a former trial had gone to another state, and that a letter written there had been received from him within a week, is sufficient to permit reproduction of his testimony. *Wimberly v. State* (1909) 90 Ark. 514, 119 S. W. 668.

Absence from the state is sufficiently shown by testimony that the witness had gone to another state, and that a letter had been received from him written in such state. *Kelley v. State* (1918) 133 Ark. 261, 202 S. W. 49.

Where it appeared from the evi-

dence that the absent witness was of nomadic habits, that he drifted into the place on an excursion train, got drunk, remained there two or three days, and departed to places unknown, and that the sheriff had been unable to serve an attachment upon him and had no idea where he was, his former evidence was properly admitted. *Putnal v. State* (1908) 56 Fla. 86, 47 So. 864.

Where a witness on behalf of the prosecution testified that each of the former witnesses had left the state permanently, and it was shown that prior to the trial the people had subpoenas issued for the witnesses, directed to the sheriff of each county in the state, and the return thereof disclosed that neither witness could be found. *Henwood v. People* (1914) 57 Colo. 544, 143 Pac. 373, Ann. Cas. 1916A, 1111.

Where a witness who testified at a preliminary hearing was not present at the trial, and the state showed it had used due diligence to ascertain his whereabouts and serve a subpoena upon him, but had been unable to do so, he is to all intents and purposes beyond the jurisdiction of the court, and his former testimony may be read to the jury. *Jeffries v. State* (1917) 13 Okla. Crim. Rep. 146, 162 Pac. 1137.

Proof that a witness who had testified at a former trial had left the county, stating that he was going to another state, and a subpoena issued for him as a witness for the state had been returned indorsed by the sheriff that the witness could not be found in the county, was, in the absence of a showing that the witness was within the jurisdiction of the court, sufficient to make his former testimony admissible. *Henry v. State* (1913) 10 Okla. Crim. Rep. 369, 52 L.R.A. (N.S.) 113, 136 Pac. 982.

Where a trial was postponed on account of the absence of a witness, and the sheriff exercised due diligence in searching for him, and learned in the ordinary way that he was in another state, and, while he had been within the state temporarily, the sheriff did not know that fact until he

had returned, his testimony given on a former trial was properly admitted, as, it having been shown that he resided in another state, it will be presumed that such residence continued until the time of the trial, unless the contrary is shown. *State v. Meyers* (1911) 59 Or. 537, 117 Pac. 818.

Where it is shown that the absent witness was an officer in the United States Army and temporarily on duty in the state at the time his testimony was given, and that he has since returned to the post where his command is located, in another state, a sufficient predicate is established for the admission of his testimony. *Conner v. State* (1887) 23 Tex. App. 378, 5 S. W. 189.

Where it was proved that an absent witness resided in another state at the time of the examining trial, and of the present trial, a sufficient predicate was established for the introduction of the testimony given by such witness at the examining trial. *Crook v. State* (1889) 27 Tex. App. 198, 11 S. W. 444.

Testimony of a witness that he knew the absent witness, who was his son-in-law, and that such witness lives in another state, and is now in that place, and does not live or reside in Texas, and of another witness that he is a brother-in-law of the absent witness, that such absent witness lives in another state, and the witness has seen him there twice within the last month, is a sufficient predicate to authorize the reproduction of the testimony of the absent witness given at a previous trial. *Pace v. State* (1913) 69 Tex. Crim. Rep. 27, 153 S. W. 132.

Testimony of a witness that he knew the absent witness, and was with him on the day he and his family left for another state, and shipped his household goods, and knew that he was moving to the other state, and heard from him after he arrived there, receiving a letter and money order from him, was a sufficient showing that the witness had permanently left the state to authorize the introduction of his testimony given at a

former trial. *Whorton v. State* (1913) 69 Tex. Crim. Rep. 1, 152 S. W. 1082.

Where it was shown that the witness had been for many years a resident of another state and had been induced to return for the first trial, and that an effort was made to get her to attend the present trial, but she had informed the district attorney by letter, dated and postmarked ten days before the trial, that she could not attend it under any circumstances, as she was quarantined nursing her only daughter, who had a contagious disease, a sufficient predicate was shown for the introduction of her testimony. *Mitchell v. State* (1912) 65 Tex. Crim. Rep. 545, 144 S. W. 1006.

Testimony of a witness that the absent witness was her brother, that she lived in another state and the brother lived at the same place, and had been living there for two or three years, and that she left that place the day before and he was not there then, but had gone to another place in the same state, from which place she had received a letter from him the day before, and that he was now in that state, and not in Texas, was a sufficient predicate for the admission of his testimony given at a previous trial. *Pace v. State* (Tex.) *supra*.

Where the witness testified that the absent witness was his son, that he was not in Texas, but in Central America, from which place they had letters from him, and where he was employed, a sufficient predicate was established for the admission of his testimony at a former trial. *Sanchez v. State* (1913) 69 Tex. Crim. Rep. 134, 153 S. W. 1133.

Where letters were shown indicating that the absent witness was interned in a foreign country, and it was shown that the officers had used every reasonable means to locate him, and that he was a fugitive from justice, it was proper to admit his testimony given at an examining trial. *Millner v. State* (1913) 72 Tex. Crim. Rep. 45, 162 S. W. 348, second appeal in (1914) 75 Tex. Crim. Rep. 22, 169 S. W. 899.

3. *Insufficient predicate.*

The predicate to admit reproduction

of the testimony of an absent witness was held insufficient in the following cases:

— *Wingo v. State* (1921) — *Tex. Crim. Rep.* —, 229 S. W. 858, where the witness was not present, but no one knew where he was or why he was absent, although some effort had been made to locate him;

— *Nixon v. State* (1908) 53 *Tex. Crim. Rep.* 325, 109 S. W. 931, where it did not appear definitely that the witness was beyond the jurisdiction;

— *Dorman v. State* (1904) 48 *Fla.* 18, 37 So. 561, where it did not clearly appear that witness was dead, or that it was impossible to obtain his testimony by deposition or otherwise;

— *Percy v. State* (1899) 125 *Ala.* 52, 27 So. 844, where the witness, who had been a teamster for the Army, it being shown that teamsters were not enlisted, but employed generally in the locality where needed, had not stated where he lived, and no showing was made as to the diligence used by the officer;

— *Thompson v. State* (1894) 106 *Ala.* 67, 17 So. 512, 9 *Am. Crim. Rep.* 199, where it appeared that a minor witness, whose residence was with his father in the county, was absent from the state for a temporary purpose, with the intent to return for the trial although not summoned, though it was shown he had said two days before the trial that he had obtained employment, and intended to remain in the other state;

— *Mitchell v. State* (1896) 114 *Ala.* 1, 22 So. 71, where an officer who had a subpoena for a witness, and had returned it "not found," testified that he had searched for her in the county, but did not know that she had left the state, though by general report in her neighborhood she had done so;

— *Watkins v. State* (1901) 133 *Ala.* 88, 32 So. 627, in which a witness testified that the last time he saw the absent witness said witness told him he was going out of the state to work at a certain place, and remain till the trial was over, and that he believed, and had been told, that the witness was there, but could not swear to it of his own knowledge;

— *Bardin v. State* (1904) 143 *Ala.* 74, 38 So. 833, where the witness could not be found in the county of his residence, after a diligent search by officers having subpoena and capias;

— *Harwood v. State* (1896) 63 *Ark.* 130, 37 S. W. 304, where a witness testified that he supposed the absent witness to be in another state, and that he took a train in that direction;

— *People v. Ballard* (1905) 1 *Cal. App.* 222, 81 *Pac.* 1040, where the evidence did not show that diligence was used in searching for witness, and no inquiry was made at his last place of work outside of the county;

— *State v. Laque* (1889) 41 *La. Ann.* 1070, 6 So. 787, where witness was absent from the parish, it appearing that he was in an adjoining parish in the same judicial circuit;

— *McCollum v. State* (1890) 29 *Tex. App.* 162, 14 S. W. 1020, where it did not appear that the absent witness resided out of the state, and witnesses who testified had seen him oftener in Texas than elsewhere;

— *Martinas v. State* (1888) 26 *Tex. App.* 91, 9 S. W. 356, where the only showing made that witness had removed beyond the limits of the state was an affidavit of the district attorney that the witness at one time resided in the county, but was then absent, and had been for a year or more; that due diligence had been used to ascertain his whereabouts by causing attachments to be issued to every county in the state, all of which had been returned not executed; and that affiant had reason to believe, and did believe, that the witness was not within the state;

— *Tippett v. State* (1896) — *Tex. Crim. Rep.* —, 37 S. W. 860, where a new trial was granted because of the admission, over objection, of testimony of a witness at the examination, on a prima facie showing that a year before the trial witness resided outside the state, it being shown on motion for new trial that, for some months prior to the trial, witness resided in the state, which fact could have been ascertained by due diligence;

— *James v. State* (1893) 104 *Ala.* 20,

16 So. 94, where the state offered to prove the issuance of a subpoena, its return "not found," and that the witness's whereabouts were unknown;

—Wheat v. State (1895) 110 Ala. 68, 20 So. 449, where the only evidence of absence of the witness went to show that he was not in the county;

—Sims v. State (1903) 139 Ala. 74, 101 Am. St. Rep. 17, 36 So. 138, where there was a mere showing that the witness was absent from the state at the time of the trial, without any showing, inferentially or otherwise, that he had left the state permanently, or for such an indefinite time that his return was contingent and uncertain;

—Kirkland v. State (1904) 141 Ala. 45, 37 So. 352, where there was evidence that the witness had left the community where he had lived, that a summons to attend the trial had been issued, but the sheriff was unable to find him, and that a certain person had received a letter from him from another state during the month preceding the trial;

—Harwell v. State (1915) 12 Ala. App. 265, 68 So. 500, certiorari denied in (1915) 192 Ala. 689, 68 So. 1019, where it was shown that the witness lived in the county part of the time, but at one time was found in another county, and at the former trial testified he lived at another place, and no subpoena was issued to the other county, or search made at the place where he said he lived;

—People v. McFarlane (1903) 138 Cal. 481, 61 L.R.A. 245, 71 Pac. 568, 72 Pac. 48, where it merely appeared that the witness was absent from the county, and when last heard from was within the limits of the state;

—Dixon v. Mayer (1914) 186 Ill. App. 247, where the proof merely showed that the officer who tried to find witness on subpoena failed to find him;

—Levi v. State (1914) 182 Ind. 188, 104 N. E. 765, Ann. Cas. 1917A, 654, rehearing denied in (1914) 182 Ind. 197, 105 N. E. 898, Ann. Cas. 1917A, 658, where the authorities knew the witnesses resided outside the state and subpoenas issued were

useless, and no other effort was made to secure their attendance or obtain their depositions, although defendants consented to the taking of their depositions;

—State v. McClellan (1908) 79 Kan. 11, 98 Pac. 209, 17 Ann. Cas. 106, where there was merely a production of a subpoena with a return of "non est," without any showing when it was delivered to the sheriff, or what search was made to find the witness or where he resided;

—State v. Britton (1912) 131 La. 877, 60 So. 379, where there was no showing that the witness could not be brought into court then, or at a subsequent time when the case might be fixed for trial;

—People v. Long (1880) 44 Mich. 296, 6 N. W. 673, where no showing was made of efforts to secure the presence of the witness or obtain his deposition;

—Hardin v. State (1909) 57 Tex. Crim. Rep. 401, 123 S. W. 613, where it was shown that the witness was a small boy, that his father and family had shipped their goods to another state and bought tickets for there, and the father said they were going to such state;

—Ripley v. State (1910) 58 Tex. Crim. Rep. 489, 126 S. W. 586, where an affidavit was secured by the county attorney from a person by the same name as the witness in another state, to the effect that he was then and had been a resident of the other state for two years, in the absence of a showing that he was the former witness;

—where a witness testified that the absent witness called at his house one night, executed a deed of his homestead, and stated that, fearing he would be mobbed, he was going to leave the state the next day, and subsequently a showing was made that the witness had left the state and was then in another state, Dennis v. State (1897) 118 Ala. 72, 23 So. 1002.

See also, on this same question, the following cases:

—McMunn v. State (1896) 113 Ala. 86, 21 So. 418, for a long statement of facts held to be insufficient to establish absence of witness from the state;

—Pinkney v. State (1882) 12 Tex. App. 352, holding that where, by statute, an oath to certain facts is necessary to make the testimony of an absent witness at an examination admissible, proof of his absence in other ways is not sufficient to dispense with the oath;

—Bell v. State (1908) 156 Ala. 76, 47 So. 242, where it was not shown, by inference even, that witnesses were outside of the state, but only that the officer had been unable to locate them in a certain locality in the state and neighboring parts of an adjoining state, the court holding that the testimony was not admissible, and that, in the absence of a showing of the loss of a letter and envelop purporting to come from one witness, the fact of such letter having been sent could not be shown;

—Steagald v. State (1886) 22 Tex. App. 464, 3 S. W. 771, where affidavits were made by a party, according to statute, showing that the witness had removed from the state since the examining trial, but defendant objected, and asked that the affiant, who was present, be sworn and questioned as to his means of information, and it was held to be error for the court to refuse to have the affiant so examined;

—Harris v. State (1883) 73 Ala. 495, holding that evidence of this kind should be received only on a clear showing, and that mere proof of the departure of the witness from his place of residence was not sufficient.

The mere fact that the required witness was seen at work in another state, and had not been seen since, is not sufficient to admit his evidence, since it does not show that he had left the state permanently or for an indefinite time. Lucas v. State (1892) 96 Ala. 51, 11 So. 216.

Where no witness undertook to swear that the witness was absent from the state, the only evidence on that point being the testimony of a witness that the absent witness told him he was going to leave the state, and the return of the sheriff on the subpoena, no sufficient predicate was established for the introduction of the testimony of the absent witness, given

at a former trial. Smith v. State (1905) 48 Tex. Crim. Rep. 65, 85 S. W. 1153.

4. *Diligence or collusion of officers.*

In Jeffries v. State (1917) 13 Okla. Crim. Rep. 146, 162 Pac. 1137, the court said that the proposition in Driggers v. United States (1908) 1 Okla. Crim. Rep. 167, 129 Am. St. Rep. 823, 95 Pac. 612, that the absence of the witness from the state could not be proved by mere return of the subpoena by the officers, has never been followed, and is not the law.

In Driggers v. United States (1907) 7 Ind. Terr. 752, 104 S. W. 1166, it is held that the officer's return of the subpoena noting the death of the witness is sufficient, in the absence of impeaching testimony, to show death, so as to permit reproduction of the testimony.

Where the proof is sufficient to show that a witness whose testimony was taken at a preliminary hearing is in fact out of the state, it is not necessary to prove further that special effort was made to find the witness within the state, to authorize his testimony to be read in evidence at the trial. State v. De Pretto (1916) 48 Utah, 249, 155 Pac. 336.

Where the prosecution relied for its showing of diligence to warrant the introduction of the testimony given at the preliminary examination by the prosecuting witness, upon returns of the sheriffs of a number of counties in the state, including the county which was the last known place of residence of the desired witness, where those officials each certified that after due search and diligent inquiry they had been unable to find the witness, and it was further shown that a diligent search had been made for the witness in San Francisco where the crime occurred, and where the witness had been staying and had directed his letters, the former testimony was properly admitted. People v. Trent (1914) 25 Cal. App. 741, 145 Pac. 541.

Proof that the sheriff of a county had a subpoena issued for the absent witness several weeks before trial, and had searched for him, but was unable

to find him, and other subpoenas had been issued to the sheriffs of other counties, and had been returned "not served," and that the county sheriff had searched for him in other counties than his own, but was unable to find him, showed due diligence in efforts to secure the attendance of the witness. *People v. Mueller* (1914) 168 Cal. 526, 143 Pac. 750.

Where the officer in whose hand a subpoena for the witness was placed testified that he called at the witness's house, but found him out making a call, he being a physician, and that the next time he went he was told the doctor was going on a trip, and before he could get service upon him he had left the state, and it was made to appear that the witness was out of the state, and it did not appear when he would return, or was expected to return, sufficient diligence was shown. *State v. Hillstrom* (1915) 46 Utah, 341, 150 Pac. 935.

Where a subpoena for the witness was issued upon the day of trial, and an officer went to the address at which he lived at the time of the examination, and was informed that the witness had left that place, which was a boarding house, and said he was going to a certain other place, and the officer made three other attempts to find the witness at this boarding house, and another officer attempted to find him at the place to which he said he was going, and made inquiry at all the factories, restaurants, hotels, and saloons at those places, and found neither witness nor anybody that knew him, the showing of diligence was sufficient. *People v. Dene* (1912) 20 Cal. App. 137, 128 Pac. 339.

Where the return made by the sheriff showed his inability to serve a subpoena upon an absent witness, it, together with the sheriff's testimony upon the same matter, was sufficient to support the discretion of the trial judge in admitting testimony of such witness taken at a former trial. *People v. Wilson* (1915) 26 Cal. App. 336, 146 Pac. 1048.

In *State v. Douglass* (1882) 34 La. Ann. 523, where the sheriff's return showed that the witness was out of

the state, it was held that the testimony was admissible, and that the failure of the magistrate to require the witness to give recognizance for his appearance did not show such want of diligence as would exclude the testimony.

In *State v. Granville* (1882) 34 La. Ann. 1088, it was held that the return by the sheriff that he had been unable to serve the subpoena on the witness, and that he was reliably informed that he had left the parish, together with testimony that the witness was sick in a hospital, so that he could not attend the trial, was a sufficient showing to make his testimony at the examination admissible.

A mere showing that the witness cannot be found in the county after a diligent search is not sufficient to permit the reproduction of his testimony. *Bardin v. State* (1904) 143 Ala. 74, 38 So. 833.

The mere fact that the absent witness could not be found in the portion of the state where he was sought is not sufficient. *Bell v. State* (1908) 156 Ala. 76, 47 So. 242.

Reproduction of the testimony may be allowed where it is shown that the officers made several attempts, without success, to find the witness at the places where he was said to be. *People v. Dene* (Cal.) *supra*.

The constitutional provision for confronting the accused with witnesses against him is violated, by admitting at the trial testimony of a witness who is absent, not by the procurement of the accused, but through the negligence of the prosecution. *Motes v. United States* (1900) 178 U. S. 458, 44 L. ed. 1150, 20 Sup. Ct. Rep. 993.

In *Peddy v. State* (1893) 31 Tex. Crim. Rep. 547, 21 S. W. 542, it was held that the fact that the witness was taken from the state by the private prosecutor, a brother of the murdered man, was no ground for excluding the testimony given at the examination.

And in *Golden v. State* (1886) 22 Tex. App. 1, 2 S. W. 531, written testimony of witnesses as taken at the examination was objected to on the

ground that the witnesses were absent from the state by the aid and procurement of the prosecuting attorney. The prosecuting attorney admitted assisting the witnesses to return to their home in a distant state, but claimed that he did so because they were destitute women who had been swindled out of their means of support by defendant, after he had induced them to come to Texas, and for the purpose of enabling them to obtain subsistence, not to prevent their testifying in person at the trial; and the objection was overruled.

In *Hobbs v. State* (1909) 55 Tex. Crim. Rep. 299, 117 S. W. 811, which was a second trial, it was held that the testimony of a witness at the examination was not rendered inadmissible because the witness had returned and remained in the county for a considerable time between the trials, and had then removed permanently from the state, but was not served with process for appearance at the second trial, it not appearing that the officers knew, or had reason to believe, that the witness had returned.

In *People v. Flannery* (1906) 3 Cal. App. 41, 84 Pac. 461, it was held that the fact that the prosecution, at the time of the examination, knew the witness would be absent from the state at the time of trial, and failed to request the magistrate to place him under bond for his presence, was not such failure to exercise due diligence as to render his deposition inadmissible.

If it appears that the personal attendance of the witness might have been obtained by diligence on the part of the prosecution, the reproduction of the former testimony will not be allowed, and it it appears probable that the witness may be found and his examination had in open court within a reasonable time, the trial will ordinarily be delayed for that purpose. But the question of the reproduction of the testimony is largely within the discretion of the trial court, under all the circumstances of the case. *Koenigstein v. State* (1919) 103 Neb. 580, 173 N. W. 603.

Reproduction of testimony of an ab-

sent witness is not permissible where there has been a lack of diligence to procure the attendance of the witness himself, and no showing made that the witness is without the jurisdiction of the court, or that a diligent inquiry has been made and his whereabouts have not been ascertained. *Hicks v. State* (1919) — Ark. —, 215 S. W. 685.

Where the witness told the sheriff that he was going to another city to work, giving the address at which he expected to be, and the district attorney, knowing that he was going, did not detain him, believing he would have no trouble in finding him, but shortly before the trial the sheriff went to such city with a subpoena, and was unable to find him at the address given, or elsewhere, and subpoenas directed to his former residence and to neighboring counties were returned "not found," a sufficient showing of diligence was made. *People v. Kelly* (1911) 17 Cal. App. 447, 120 Pac. 46.

5. Authentication of testimony.

The correctness of a stenographer's report must be shown.

To permit reproduction of the testimony a sufficient predicate must be laid. And where it appears that the testimony was not transcribed by the stenographer until after the termination of the trial, when it was read over to, and signed by, the witness, and where the stenographer was not an official one, and does not authenticate the correctness of the transcript under oath, the evidence is not admissible. *Degg v. State* (1907) 150 Ala. 3, 43 So. 484.

In *Beets v. State* (1838) Meigs (Tenn.) 108, it appears that the mere production of an alleged written statement by the deceased witness is not enough. Either the one taking the statement must prove the words spoken by the deceased witness, or must show that he cannot recollect them, and swear that the paper produced contains a correct transcription of them.

In order to introduce evidence given by an absent witness at a former trial, whenever a stenographic report has been taken and that report is resorted

to, the correctness of the evidence as taken by the stenographer must be shown, and permitting the district attorney to testify that on a former trial the witness testified, and then allowing him to read before the jury what he said was a stenographic report of that testimony, is improper. *Franklin v. State* (1911) 62 Tex. Crim. Rep. 433, 138 S. W. 112.

While the written transcript of the testimony of a witness, made at a coroner's inquest and sworn to by the witness as his testimony at the examining trial, was not of itself of any probative force, where the magistrate who presided at the examining trial testified that he heard the statements read over to the witness, who signed and approved it, it was proper under those circumstances to permit the statements to be read to the jury. *Eyer v. State* (1914) 112 Ark. 37, 164 S. W. 756, Ann. Cas. 1916B, 30.

Where the stenographer who took down the testimony at the preliminary examination was not produced to prove its correctness, such testimony was properly rejected, it being merely hearsay or secondary evidence. *State v. Contarino* (1918) 91 N. J. L. 103, 102 Atl. 872.

A stenographer's minutes of the testimony of a deceased witness as given at a former trial, unexplained and not shown to be correct, are not admissible. *People v. Sligh* (1882) 48 Mich. 54, 11 N. W. 782.

A stenographer's shorthand notes of the former testimony are not admissible, unless they are transcribed so that they may be read, and shown to have been correct. *Harris v. State* (1913) 71 Tex. Crim. Rep. 463, 160 S. W. 447.

When the stenographer testifies that the witness was on the stand and testified at a former trial, the court will presume that the witness was sworn, the record showing nothing to the contrary. *Arnwine v. State* (1908) 54 Tex. Crim. Rep. 213, 114 S. W. 796.

When the testimony of a witness is taken at a preliminary examination by the official stenographer, it need not be signed by the witness, in the ab-

sence of statutory requirements. *Poe v. State* (1910) 95 Ark. 172, 129 S. W. 292.

Where several stenographers officiated at the preliminary trial, the fact that one stenographer, who was not shown to have taken any of the testimony of the absent witness, did not correctly certify her portion of the transcript, is no objection to its admission. *People v. Pembroke* (1907) 6 Cal. 588, 92 Pac. 668.

Where the substance of the testimony of the witness was reduced to writing at the hearing, by consent of defendant's counsel, by the attorney for the state, and read to and subscribed by the witness, the court held this writing to be admissible. *Hurley v. State* (1874) 29 Ark. 17.

Evidence of a witness taken down in writing by a clerk, read to and subscribed by the witness, is admissible where the magistrate identifies the writing and testifies that it correctly states the testimony as given at the examination. *Wilkins v. State* (1900) 68 Ark. 441, 60 S. W. 30.

Testimony of a deceased witness reduced to writing by direction of the witness, and in his language, was competent on proof of its correctness by the magistrate, though it was not signed by the witness. *Roberts v. State* (1881) 68 Ala. 515.

The testimony of the witness at the examination was sufficiently verified by showing that it was given through an interpreter who was duly sworn as such, and taken down by an official stenographer was certified that his transcript was correct. *State v. Bolden* (1903) 109 La. 484, 33 So. 571.

Where the testimony taken at an examination is admissible at the trial under certain circumstances, parol testimony of the committing magistrate and clerk who read the testimony is admissible to show that the depositions were taken according to the statute. *State v. Depoister* (1891) 21 Nev. 107, 25 Pac. 1000.

Kerry v. State (1884) 17 Tex. App. 179, 50 Am. Rep. 122, distinguishes a deposition of a witness taken on behalf of defendant, from testimony of the witnesses at the examining trial,

holding that the same particularity as to form of affidavit of an officer before whom it is taken is not required in the case of the latter, as in the former.

In *People v. Kelly* (1911) 17 Cal. App. 447, 120 Pac. 46, it was held that it must be presumed that the official reporter had duly qualified by taking his official oath faithfully to discharge his duties, so that it was not necessary that he be sworn at a preliminary hearing, to render the deposition taken by him admissible at the trial.

The transcript of the testimony is not admissible, if not properly identified. *Dowd v. State* (1908) 52 Tex. Crim. Rep. 563, 108 S. W. 389.

In the absence of statute, no particular form of certificate is required to be attached to the written testimony of deceased witness at an examination, to make it admissible. *McFadden v. State* (1889) 28 Tex. App. 241, 14 S. W. 128.

Clark v. State (1889) 28 Tex. App. 189, 19 Am. St. Rep. 817, 12 S. W. 729, holds a certificate as follows: "The foregoing testimony was sworn to and subscribed by me this October 16, 1888. J. T. Washington, J. P.," sufficient.

The reported evidence given at a former trial is not admissible, without its being identified by the stenographer or others as the testimony of the witness in question. *Eads v. State* (1914) 74 Tex. Crim. Rep. 628, 170 S. W. 145.

Where the deposition offered as the testimony taken at the preliminary examination of defendant, of a witness who could not be found at the time of the trial, was without title or cause, and was followed by a certificate of the reporter that it was a correct report of the testimony and proceedings upon the preliminary examination of the above-entitled cause, it was not admissible for want of identification. *People v. Dean* (1914) 23 Cal. App. 745, 139 Pac. 904.

The stenographer by whom the testimony of the absent witness was taken need have had no official character, nor need the notes have been certified by the magistrate, in order to render the testimony admissible.

State v. Barnes (1918) 274 Mo. 625, 204 S. W. 267. The court says that the fact that the testimony was taken down and transcribed is a prerequisite to the admissibility of such testimony only in so far as it insures the possibility of greater correctness than would the oral statement of a witness who heard the absent witness's testimony.

A mere discrepancy in the dates of the preliminary hearing, as they appear on the justice's docket and in the stenographer's minutes, does not prevent reproduction of the testimony. *State v. Will* (1918) 103 Kan. 59, 172 Pac. 1003.

6. Character of evidence and witnesses.

The absence of the witness must be proved by competent evidence in order to permit reproduction of his testimony. *Temple v. State* (1918) — Okla. Crim. Rep. —, 175 Pac. 733.

In *Johnson v. Com.* (1902) 24 Ky. L. Rep. 842, 70 S. W. 44, it was held that a mere reference in the bill of exceptions to the witness as being deceased was not a sufficient showing to admit his testimony at a former trial.

Absence of a witness from a state may be shown for the purpose of laying a predicate for the admission of the testimony of such witness, given at a former trial, by evidence of a proper and fruitless search for him in every county in which there was any apparent likelihood of his being found, from which an inference may reasonably be drawn that he is beyond the jurisdiction of the court, or, without resorting to such proof, it may be shown directly that he is in another state, under circumstances from which it is fairly inferable that his return is contingent, uncertain, and speculative. *Jacobi v. State* (1901) 133 Ala. 1, 32 So. 158, appeal dismissed in (1902) 187 U. S. 133, 47 L. ed. 106, 23 Sup. Ct. Rep. 48.

Although the handwriting of a letter purporting to have been received by a certain person from the absent witness, at a point in another state, was not identified as the handwriting of the witness, still that letter, in connection with other testimony, afforded

some grounds upon which the trial court might properly base its conclusion that the witness could not, with due diligence, be produced at the trial. *People v. Lederer* (1911) 17 Cal. App. 369, 119 Pac. 949.

In order to render admissible testimony given at a preliminary examination by a witness who is not available at the time of the trial because of absence from the state, it must be shown by a living witness present and testifying from the witness stand, confronting the defendant and subject to his cross-examination, that there was an examining trial, that the absent witness testified as a witness at such trial, that he was sworn, and that defendant was present and had an opportunity for cross-examination. *Hawkins v. United States* (1910) 3 Okla. Crim. Rep. 651, 108 Pac. 561. In that case the court says: "There was no evidence other than the writing itself showing that an examining trial was ever had in this case; that [the alleged witness] ever testified as a witness at such examining trial, if there was one; that he was sworn, if he did testify; or that the defendant was present and had opportunity for cross-examination. Proof of each and every one of these matters from the mouth of a living witness, present and testifying from the witness stand, confronting the defendant and subject to his cross-examination, was an indispensable prerequisite to the admission of this testimony under any phase of the case."

Letters purporting to be from an absent witness, showing that he is permanently in another state, will not prove themselves, and a motion to strike them from the record should be sustained unless the state introduces some proof that they are in the handwriting of the witness, or that the signature attached thereto is in fact his signature. *Anderson v. State* (1914) 74 Tex. Crim. Rep. 621, 170 S. W. 142.

Although the showing of facts necessary as a foundation for the admission of the former testimony of an absent witness should perhaps be made by oral testimony instead of by *ex parte* affidavit of the prosecuting

attorney, where the introduction and reading of the affidavit were not objected to, the only objection being after it had been read, on the ground that a sufficient foundation had not been laid, would be understood to refer to the sufficiency of the facts stated in the affidavit, and not to the competency of the affidavit itself to show such facts, and therefore the objection did not bring the admissibility of the affidavit before the court. *Ivey v. State* (1916) 24 Wyo. 1, 154 Pac. 589.

In *State v. Wright* (1886) 70 Iowa, 152, 30 N. W. 388, it was held that testimony by one witness that he had heard the required witness was dead, and by another that he had so heard and such was the general report, was insufficient to admit his testimony at a preliminary examination.

In *State v. Cook* (1871) 23 La. Ann. 347, it was held that the death of a witness who testified at the former trial may be proved by parol.

In *Morley's Case* (1666) 6 How. St. Tr. (Eng.) 770, the judges resolved that in a murder trial, in case any witness examined by a coroner was dead or unable to travel, and oath made to that effect, the examination might be read, the coroner first making oath that this examination was the same which he took upon oath, without additions or alterations; or, if witness was absent by procurement of the prisoner, so that, if the witness was absent and oath made that with all endeavors he could not be found, it was not sufficient to admit the reading of such examination.

As a predicate to the introduction of the written testimony of witnesses given at an examining trial, an affidavit of a witness relating the circumstances of such witnesses testifying, and that they have removed from the state and taken up their permanent residence in another state, is insufficient, where the witness is in court, as defendant is entitled to have the affiant called and sworn and tested as to the facts stated in his affidavit. *Steagald v. State* (1886) 22 Tex. App. 464, 3 S. W. 771.

A constitutional requirement that in

homicide cases the defendant shall be furnished, at least two days before the case is called, with a list of the witnesses who will be called in chief to prove the allegations of the indictment or information, together with their postoffice addresses, does not apply to witnesses who are called to testify to the residence of absent witnesses, and to identify the evidence given by the absent witnesses at the former proceeding, and show that defendant had been confronted by such witnesses and had an opportunity to examine them. Such witnesses are not used to prove a single allegation of the information, but their testimony is simply preliminary to the introduction of the testimony of the absent witnesses. *Warren v. State* (1911) 6 Okla. Crim. Rep. 1, 34 L.R.A.(N.S.) 1121, 115 Pac. 812; *Jeffries v. State* (1917) 13 Okla. Crim. Rep. 146, 162 Pac. 1137; *Fitzsimmons v. State* (1917) 14 Okla. Crim. Rep. 80, 166 Pac. 453.

d. Effect of other sources of proof.

In *Hobbs v. State* (1908) 53 Tex. Crim. Rep. 71, 112 S. W. 308, it was held that such testimony was not rendered inadmissible because other witnesses were present, and saw the same transaction, and testified at the trial concerning it, on the ground that this removed the necessity for producing the testimony of the absent witness.

The fact that a witness was present and testified at a former trial of the case does not prevent the introduction in evidence of the testimony given by him at the preliminary hearing. *Davis v. State* (1919) — Okla. Crim. Rep. —, 177 Pac. 625.

V. Methods of proof.

a. Oral testimony.

As has been seen from subd. I. *supra*, after the passage of the English statutes permitting the preservation of testimony at preliminary examinations, the notes taken by the magistrates were not the sole method of proving the testimony given, and, before the time when court stenographers became common, the only way of proving testimony given at a former

trial was by the memory of one who heard it, aided by such notes as he might have taken of the trial, which could not be read, but must be used, if at all, merely as an aid to memory. The result was that it early became settled that the testimony of a witness who could not be produced at the trial might be proved by parol. And this seems to be still the general rule.

United States. — *United States v. Macomb* (1851) 5 McLean, 286, Fed. Cas. No. 15,702.

Alabama. — *Davis v. State* (1850) 17 Ala. 354; *Marler v. State* (1880) 67 Ala. 55, 42 Am. Rep. 75; *Fuqua v. State* (1911) 2 Ala. App. 47, 56 So. 751.

Arkansas. — *Shackelford v. State* (1878) 33 Ark. 539; *Ary v. State* (1912) 104 Ark. 212, 148 S. W. 1032.

California. — *People v. Shortridge* (1918) 179 Cal. 507, 177 Pac. 458.

Georgia. — *Purvey v. State* (1879) 63 Ga. 692; *Robinson v. State* (1882) 68 Ga. 833; *Atkins v. State* (1882) 69 Ga. 595; *Hardin v. State* (1899) 107 Ga. 718, 33 S. E. 700; *Newberry v. State* (1920) — Ga. App. —, 102 S. E. 368.

Iowa. — *State v. O'Brien* (1890) 81 Iowa, 88, 46 N. W. 752; *State v. Conklin* (1911) 153 Iowa, 216, 135 N. W. 119.

Kansas. — *State v. Harmon* (1904) 70 Kan. 476, 78 Pac. 805.

Kentucky. — *Owens v. Com.* (1918) 181 Ky. 378, 205 S. W. 398.

Louisiana. — *State v. Cook* (1871) 23 La. Ann. 347.

Nebraska. — *Hair v. State* (1884) 16 Neb. 601, 21 N. W. 464, 4 Am. Crim. Rep. 127.

South Carolina. — *State v. DeWitt* (1834) 20 S. C. L. (2 Hill) 282, 27 Am. Dec. 371.

Tennessee. — *Kendrick v. State* (1850) 10 Humph. 479; *Wade v. State* (1872) 7 Baxt. 80.

Texas. — *Irving v. State* (1880) 9 Tex. App. 66; *Dunlap v. State* (1880) 9 Tex. App. 179, 35 Am. Rep. 736; *Potts v. State* (1883) 26 Tex. App. 663, 14 S. W. 456; *Gilbreath v. State* (1888) 26 Tex. App. 315, 9 S. W. 618; *Dowd v. State* (1908) 52 Tex. Crim. Rep. 563, 108 S. W. 389; *Harris*

v. State (1913) 71 Tex. Crim. Rep. 463, 160 S. W. 447; *Eads v. State* (1914) 74 Tex. Crim. Rep. 628, 170 S. W. 145; *Hammett v. State* (1919) 84 Tex. Crim. Rep. 635, 4 A.L.R. 347, 209 S. W. 661.

Vermont.—*State v. Hooker* (1845) 17 Vt. 658.

Washington. — *State v. Cushing* (1897) 17 Wash. 544, 50 Pac. 512.

Wisconsin.—*Spencer v. State* (1907) 132 Wis. 509, 122 Am. St. Rep. 989, 112 N. W. 462, 13 Ann. Cas. 969.

A witness who swears that he remembers the substance of the testimony of a deceased witness, as given at a former trial, may be permitted to testify as to what such testimony was. *Newberry v. State* (Ga.) *supra*.

The former testimony may properly be proved by a witness testifying to what was stated by the deceased witness. *State v. DeWitt* (S. C.) *supra*.

Such testimony may be proved by anyone who heard it, though not reduced to writing, provided the witnesses proving it will undertake to repeat the substance of all that was said by the deceased witness, both on direct and cross examination, and the fact that one witness details more of the testimony of the deceased witness than another is no objection to its admission. *Wade v. State* (Tenn.) *supra*.

The former testimony may be proved by the oral testimony of the magistrate, though he reduced the substance of it to writing at the time. *Shackelford v. State* (1878) 33 Ark. 539.

In *State v. Cushing* (Wash.) *supra*, where a witness at a former trial had testified and identified a piece of lath which he had picked up at the scene of the homicide, and such witness had since died, a witness who was present at the first trial, and heard such witness testify, was permitted to testify and identify the lath as the same one as identified by the deceased witness, and the lath was then admitted in evidence.

The testimony of a deceased accomplice taken at the examination may be proved at the trial, by one who heard it and professes to remember the substance of the entire testimony as to the particular matter about which he

testified. *Hardin v. State* (1899) 107 Ga. 718, 33 S. E. 700.

And in *Spencer v. State* (Wis.) *supra*, it was held to be proper to permit a magistrate to state the testimony, using the written testimony embodied in his return to refresh his recollection.

In *People v. Shortridge* (1918) 179 Cal. 507, 177 Pac. 458, it is held that where accused made a statement at the preliminary hearing which was taken down in writing, a person present might testify as to the statement made, against the objection that the writing was the best evidence. The court says that the statements were voluntarily made, and were subject to the same rules and mode of proof as though made elsewhere than at the preliminary hearing.

The stenographer's notes are not superior evidence to testimony of other witnesses who heard the absent witness. *Harris v. State* (1913) 71 Tex. Crim. Rep. 463, 160 S. W. 447.

Where the court reporter was placed upon the stand and testified that he was the reporter of the district, and was present and reported the evidence on the previous trial, that the deceased witness testified on that trial and his testimony was accurately reported, and was then permitted to read the questions and answers as they were given on the former trial, there was no substantial departure from the correct method of introducing such testimony, which would be, first, to ask the witness if he could state from memory the testimony of the deceased witness, and, if the answer should be in the negative, his memory could then be refreshed by the notes he had taken. *Hair v. State* (1884) 16 Neb. 601, 21 N. W. 464, 4 Am. Crim. Rep. 127.

In *State v. Cook* (1871) 23 La. Ann. 347, it was held not to be error for the state to prove the former testimony of a witness since deceased, by the recollection of the counsel for the accused, who was also counsel at the former trial, the court saying that his recollection of all the important facts in favor of his client would be presumed as good as that of any other

person hearing the declarations of the deceased witness.

In *State v. Conklin* (1911) 153 Iowa, 216, 133 N. W. 119, the testimony given before a justice of the peace at a former trial was held admissible upon a trial *de novo* on appeal to the district court, where such testimony was given by the justice of the peace, who refreshed his memory from notes taken at the former trial; and also by a juror at that trial who testified as to what the witness had said.

And where the testimony of an absent witness at a preliminary examination is proved by the oral testimony of one who heard it, the minutes of the examining trial need not be shown. *Ary v. State* (1912) 104 Ark. 212, 148 S. W. 1032.

Where defendant's attorney objected to the reading of the testimony of an absent witness as given at a former trial, by the official stenographer from his stenographic notes, on the ground that they had not been transcribed, and the testimony was excluded on that ground, he could not object to the calling of another witness who was present at the former trial, to give his recollection of the testimony of the absent witness, on the ground that the official stenographic notes were the best evidence. *Fuqua v. State* (1911) 2 Ala. App. 47, 56 So. 751.

In *Owens v. Com.* (1918) 181 Ky. 378, 205 S. W. 398, which related merely to the method of proving a statement made in court, the court said that oral testimony by one who heard the statement was competent, although, if the evidence had been taken down and a correct copy of it preserved, the written evidence would be preferable to the oral declaration.

However, in *Irving v. State* (1880) 9 Tex. App. 66, where the written statement of the testimony of the witness at an examination was produced, which purported to contain all the testimony, it was held to be error to admit parol evidence of other testimony alleged to have been there given by her.

In some cases parol evidence of the testimony of the witness at an examination is admitted, when that tes-

timony was at the time reduced to writing, but for some reason the written evidence cannot be produced at the trial. Such cases are:

—*Dunlap v. State* (1880) 9 Tex. App. 179, 35 Am. Rep. 736, where the deposition of the deceased witness at an examination was excluded because not properly authenticated;

—*Potts v. State* (1883) 26 Tex. App. 663, 14 S. W. 456, where it was shown that the written testimony was, in all probability, destroyed in a fire which burned the courthouse;

—*Robinson v. State* (1882) 68 Ga. 833, holding oral proof to be admissible when there was nothing to show that evidence of a deceased witness at the preliminary trial was reduced to writing.

In *Dowd v. State* (1908) 52 Tex. Crim. Rep. 563, 108 S. W. 389, it was held that, to admit parol proof of lost testimony, it must be shown that the utmost diligence was used to find the lost writing.

Where it was shown that the witnesses did not reside in the state, and that their depositions taken at the examining trial had been lost, it was proper to prove by the oral testimony of witnesses who were present at the examination, what the absent witnesses swore to at that time. *Gilbreath v. State* (1888) 26 Tex. App. 315, 9 S. W. 618.

A primary rule of evidence being that the best evidence must be produced, it would seem that, since practically all testimony is now taken by stenographers, a transcript of the stenographer's notes would be the best evidence, and that oral evidence would not be admissible when such transcript could be obtained. This rule has been adopted in Texas.

In *Hammett v. State* (1919) 84 Tex. Crim. Rep. 635, 4 A.L.R. 347, 209 S. W. 661, the court held that, where the testimony at the preliminary trial was reduced to writing, such writing was the best evidence of the testimony given, and persons present could not be asked to testify orally as to such testimony.

b. Notes of stenographer.

If the testimony was reduced to

writing, either by the magistrate before whom it was produced, or by the stenographer, such notes, or a transcript thereof, if properly authenticated, may, in some states, be introduced in evidence to reproduce the testimony of the absent witness.

Alabama.—*Roberts v. State* (1881) 68 Ala. 525; *Matthews v. State* (1892) 96 Ala. 62, 11 So. 203; *Sanford v. State* (1904) 143 Ala. 78, 39 So. 370; *Jones v. State* (1911) 174 Ala. 85, 57 So. 36; *Francis v. State* (1914) 188 Ala. 39, 65 So. 969.

Arkansas.—*Petty v. State* (1905) 76 Ark. 515, 89 S. W. 465; *Butler v. State* (1907) 83 Ark. 272, 103 S. W. 382.

California. — *People v. Murphy* (1872) 45 Cal. 137; *People v. Garnett* (1908) 9 Cal. App. 194, 98 Pac. 247.

Georgia.—*Jones v. State* (1907) 128 Ga. 23, 57 S. E. 313.

Indiana.—*Sage v. State* (1890) 127 Ind. 15, 26 N. E. 667; *Bass v. State* (1893) 136 Ind. 165, 36 N. E. 124; *Zimmerman v. State* (1921) — Ind. —, 130 N. E. 235.

Kansas.—*State v. Simmons* (1908) 78 Kan. 852, 98 Pac. 277; *State v. Gentry* (1912) 86 Kan. 534, 121 Pac. 352.

Kentucky.—*Fuqua v. Com.* (1904) 118 Ky. 578, 81 S. W. 923; *Hayden v. Com.* (1910) 140 Ky. 634, 131 S. W. 521; *Moore v. Com.* (1911) 143 Ky. 405, 136 S. W. 609; *Quinlan v. Com.* (1912) 149 Ky. 479, 149 S. W. 892; *Lake v. Com.* (1907) 31 Ky. L. Rep. 1232, 104 S. W. 1003.

Nebraska.—*Brunke v. State* (1920) — Neb. —, 180 N. W. 560.

Oklahoma.—*Stealer v. State* (1914) 10 Okla. Crim. Rep. 460, 138 Pac. 395; *Cowley v. State* (1921) — Okla. Crim. Rep. —, 194 Pac. 284.

Pennsylvania. — *Brown v. Com.* (1873) 73 Pa. 321, 13 Am. Rep. 740.

Texas.—*Arnwine v. State* (1908) 54 Tex. Crim. Rep. 213, 114 S. W. 796; *Pace v. State* (1913) 69 Tex. Crim. Rep. 27, 153 S. W. 132; *Mitchell v. State* (1920) 87 Tex. Crim. Rep. 530, 222 S. W. 983.

If the deposition was taken in the presence of accused, and the magistrate swears that it was correctly taken, it may be read in evidence, al-

though it was not signed by the witness. *Roberts v. State* (1881) 68 Ala. 525.

The testimony of a deceased witness may be proved by the stenographer's notes thereof. *Quinlan v. Com.* (1912) 149 Ky. 479, 149 S. W. 892.

The testimony may be proved by the transcribed notes of the stenographer who took them, if he deposes to their accuracy, although he was not under oath at the time he took them. *Jones v. State* (1911) 174 Ala. 85, 57 So. 36.

The testimony at the former trial may be proved by reading the notes of the official stenographer, if he testifies that he knows that at the time they were correct, although he cannot recollect the witness's testimony independently of the notes. *Brunke v. State* (1920) — Neb. —, 180 N. W. 560.

The testimony of the absent witness may be proved by a carbon duplicate of the stenographer's notes of the testimony which are proved to be correct. *Cowley v. State* (1921) — Okla. Crim. Rep. —, 194 Pac. 284.

In *Stealer v. State* (Okla.) *supra*, it was held that the testimony of a deceased witness, given at a preliminary examination, was sufficiently proved by the transcript of the stenographer's notes, supported by the stenographer's testimony.

Where notes were taken at the former trial of the testimony of the witness in question, such notes may be read in evidence after being properly authenticated and identified by the person who took them. *State v. Simmons* (1908) 78 Kan. 852, 98 Pac. 277; *State v. Gentry* (1912) 86 Kan. 534, 121 Pac. 352.

Where a magistrate takes down in writing testimony given by a witness, he cannot testify orally as to what the witness said, the writing being the best evidence. *Matthews v. State* (1892) 96 Ala. 62, 11 So. 203; *Sanford v. State* (1904) 143 Ala. 78, 39 So. 370.

While the written statement of the substance of the evidence of the witness as given at the examination is not in itself admissible, where the party who reduced it to writing at the request of the magistrate testifies,

from the paper and his present recollection, that it is a correct statement of the testimony, it may be read in evidence. *Petty v. State* (1905) 76 Ark. 515, 89 S. W. 465.

Writings which purported to be a statement of the absent witness were admissible, when the examining magistrate had identified them and testified that they contained the substance of all the testimony, which was reduced to writing in his and their presence, read over, and subscribed and sworn to by them. *Butler v. State* (1907) 83 Ark. 272, 103 S. W. 382.

In *People v. Garnett* (1908) 9 Cal. App. 194, 98 Pac. 247, it was held proper to read in evidence the deposition of an absent witness taken at a preliminary examination by a duly appointed stenographer, who testified that he personally transcribed a portion of the notes and dictated a portion to a typewriter, and compared all of the transcript with his original notes, and that it was correct.

In *Jones v. State* (1907) 128 Ga. 23, 57 S. E. 313, the transcription of shorthand notes taken by an official stenographer was held to be admissible when it was shown that such notes were correctly taken and transcribed.

In *Fuqua v. Com.* (1904) 118 Ky. 578, 81 S. W. 923, it was held that the former testimony of a deceased witness could be proven by the transcript of the official stenographer, the court saying that inasmuch as the stenographer is familiar with the testimony given by the witness, and might from mere recollection have detailed it to the jury, they could see no reason why he should not be permitted to read it from the transcript made from the stenographic notes taken by him at the time, and that manifestly it was and is more accurate than the memory of any human witness.

The official stenographer may prove the testimony given by a witness at a former trial, and since deceased, by reading from his transcript of the evidence, provided he can testify that such testimony was accurately taken down and accurately transcribed. *Hayden v. Com.* (1910) 140 Ky. 634,

131 S. W. 521; *Moore v. Com.* (1911) 143 Ky. 405, 136 S. W. 608.

Where the prosecuting witness died between the examination and trial, it was competent to permit the stenographer who took his testimony at the examination to read a transcript of the testimony to the jury, after testifying that he had accurately taken and transcribed it. *Lake v. Com.* (1907) 31 Ky. L. Rep. 1232, 104 S. W. 1003.

Where a hearing of the testimony of a witness since deceased was taken in writing by a clerk for the state's attorney, the notes so taken were admissible at the trial. *Brown v. Com.* (1873) 73 Pa. 321, 13 Am. Rep. 740.

Where the stenographer testified that the testimony as produced was a correct transcript of the testimony, it was properly admitted. *Pace v. State* (1913) 69 Tex. Crim. Rep. 27, 153 S. W. 132.

The mere fact that the original notes of the stenographer were lost does not prevent the reading of a transcript in evidence, if the stenographer testifies that they were correctly transcribed, and the counsel agreed that the statement of facts for the former appeal, which included such testimony, was correct. *Mitchell v. State* (1920) 87 Tex. Crim. Rep. 530, 222 S. W. 983.

Some cases hold that minutes of testimony of the absent witness are not admissible, but that the testimony must be proved from the recollection of the proving witness, who may use the minutes or memorandum he has taken to refresh his recollection. Thus, in *Wilson v. Com.* (1900) 21 Ky. L. Rep. 1333, 54 S. W. 946, it was held that the minutes of the officer who held the examination were not competent evidence, but that he might refresh his memory from them, and then state what the testimony was from his recollection.

In *State v. George* (1895) 60 Minn. 503, 63 N. W. 100, it was held to be proper for the stenographer to use his notes to refresh his memory, and then testify to what deceased witness testified to at the examination.

In *Adams v. Com.* (1880) 2 Ky. L. Rep. 388, it was held that the minutes

of the examining court were not competent evidence where a witness professed to give a detailed statement of what the deceased said, from hearing his evidence before the examining court.

In *United States v. Wood* (1818) 3 Wash. C. C. 440, Fed. Cas. No. 16,756, it was held that, while a witness might refresh his memory from notes taken of the former testimony where he could not recollect the words, yet they could not be introduced in evidence although the witness was confident he took them down exactly as the witness testified.

And in *Dixon v. Mayer* (1914) 186 Ill. App. 247, it was held to be error to admit the transcript of the evidence of a deceased witness, the abstract of the decision not showing the reason for such holding.

Where a stenographer took down in shorthand the testimony at a preliminary examination, and transcribed it for the grand jury, and the court ruled that such transcript was not admissible because not attached to the indictment, it was improper to permit the stenographer to read such testimony before the jury, where it appeared that she was relying wholly upon the transcript, and was unable to give such testimony from her recollection refreshed by the notes. *State v. Powers* (1917) 181 Iowa, 452, 164 N. W. 856.

In *Anderson v. State* (1918) 83 Tex. Crim. Rep. 276, 202 S. W. 953, notes of a private stenographer were rejected as proof of the testimony of the absent witness, the court stating that the witness could have testified to his recollection of the facts after reference to the notes, but that the fact could not be proved by the notes. The appellate court affirmed this ruling, not directly for the reason given by the trial court, but because the purpose of introducing the evidence did not appear, and it would have been detrimental to the complaining person, so that no prejudice could have resulted.

c. Bills of exception and similar documents.

At times, the only way of reproduc-

ing the testimony of absent witnesses is by the use of bills of exception, or similar documents, prepared at the time of trial.

Where the testimony at a trial was by the bill of exceptions made a part of the record in the former trial, and was duly authenticated, certified, and sealed by the trial judge as being all of the testimony of the witnesses both on direct and cross examination, and the bill of exceptions was further identified by the official stenographer, who also testified that it contained all the testimony of the witnesses, it was properly admitted. *Young v. People* (1913) 54 Colo. 293, 130 Pac. 1011.

In *State v. Hudspeth* (1900) 159 Mo. 178, 60 S. W. 138, it was held that evidence of a deceased witness, as shown by the bill of exceptions taken at the former trial, was properly read in evidence. And in *State v. Able* (1877) 65 Mo. 357, the evidence of a deceased witness given at a former trial, as contained in the bill of exceptions, was admissible when identified by witnesses who heard the testimony.

Where the only objection made below to the admission of testimony of a witness at a preliminary examination was that it was not shown that the witness was outside the jurisdiction of the court, the appellate court will not consider an objection to such testimony on the ground that it was read from the record kept by the examining magistrate, without further identification or proof showing that it was in fact the testimony of the witness. *Holland v. State* (1916) 122 Ark. 462, 183 S. W. 978.

But in *Stern v. People* (1882) 102 Ill. 540, it was held that a refusal to permit the testimony of a deceased witness as given at a former trial, as shown by the bill of exceptions, to be read in evidence, was proper, as witnesses should have been called to prove from recollection what the testimony of the deceased witness was. And in *Kean v. Com.* (1873) 10 Bush (Ky.) 190, 19 Am. Rep. 63, 1 Am. Crim. Rep. 199, it was held that the reading of the evidence of a deceased witness at a former trial from the bill of exceptions was improper, because it violated

the right of the accused to see or confront the witness by whom such evidence was repeated, the proper method of proving the former testimony being by living witnesses who speak from their own recollection of what the deceased witness said.

Where the only record made of the testimony of the witness at the examining trial was by an assistant county attorney, and he testified that he remembered the substance of the testimony as given in the writing which was in his possession, and that he could give the details better by reading the writing than by undertaking to recite it, it was not error to permit him to read it, as it was apparent that he was using the writing to refresh his memory and to enable him accurately to state the testimony given, such use of the writing being not its introduction, but the introduction of the recollection of the witness refreshed from the writing. *Young v. State* (1917) 82 Tex. Crim. Rep. 257, 99 S. W. 479.

d. Literalness of reproduction.

The tendency of the earlier cases was to hold that the testimony must be reproduced exactly as given by the witness.

In *United States v. Wood* (1818) 3 Wash. C. C. 440, Fed. Cas. No. 16,756, and *Com. v. Richards* (1836) 18 Pick. (Mass.) 434, 29 Am. Dec. 608, it was held that the witness must repeat the testimony of the absent witness exactly as it was given, and not merely in substance.

The testimony of a former witness should be placed before the jury as nearly as possible as the witness, if present, would have presented it. *People v. Sligh* (1882) 48 Mich. 54, 11 N. W. 782.

In *Mattox v. United States* (1894) 156 U. S. 237, 39 L. ed. 409, 15 Sup. Ct. Rep. 337, the court, expressly stating that it did not wish to be understood as expressing an opinion upon the position taken in some cases that not the substance merely of the testimony of the former witness, but the very words of such witness, should be proven, held that a copy of the stenographic report of the entire former

testimony, supported by the proof of the stenographer that it is a correct transcript of his notes and of the testimony of the deceased witness, was competent evidence of what he said.

But it now appears to be the general rule that it is not necessary to prove the testimony exactly as it was given by the witness, but that it may be proved by anyone who heard it and professes to remember the substance of the material parts as to which he testified.

United States.—*United States v. White* (1838) 5 Cranch, C. C. 457, Fed. Cas. No. 16,679.

Alabama.—*Jones v. State* (1911) 174 Ala. 85, 57 So. 36.

Georgia.—*Mitchell v. State* (1883) 71 Ga. 128.

Kentucky.—*Bush v. Com.* (1882) 80 Ky. 244; *Thomas v. Com.* (1892) 14 Ky. L. Rep. 288, 20 S. W. 226.

Maine.—*State v. Herlihy* (1906) 102 Me. 310, 66 Atl. 643.

Missouri. — *State v. Hammond* (1882) 77 Mo. 157.

Ohio.—*Donald v. State* (1900) 21 Ohio C. C. 124, 11 Ohio C. D. 483.

Texas.—*Black v. State* (1856) 1 Tex. App. 368; *Simms v. State* (1881) 10 Tex. App. 131; *Bennett v. State* (1893) 32 Tex. Crim. Rep. 216, 22 S. W. 684; *Harris v. State* (1913) 71 Tex. Crim. Rep. 463, 160 S. W. 447.

A witness reproducing the testimony of a deceased witness need not state his exact words, it being sufficient if he give the substance of the testimony. *Davis v. State* (1850) 17 Ala. 354.

The witness need not be able to give the exact words of the deceased witness. *State v. Hooker* (1845) 17 Vt. 658.

It is sufficient to prove the substance of the entire testimony on the particular subject it is attempted to prove. *Kendrick v. State* (1849) 10 Humph. (Tenn.) 479.

It may be so proved by a witness who is able to repeat the substance of the testimony as given at the examination by the absent witness. *United States v. Maccomb* (1851) 5 McLean, 286, Fed. Cas. No. 15,702.

The whole of what the deceased witness said should be proved. Some part of what was said and not recollected might certainly limit and qualify the meaning of words which are recollected. *Com. v. Richards* (1836) 18 Pick. (Mass.) 434, 29 Am. Dec. 608. The court says: "To be worth anything, the whole of what the deceased witness said upon the matter should be stated; and if you get the whole, it is very defective; for you cannot have a true representation of the countenance, manner, and expression of the deceased witness, which either confirmed or denied the truth of the testimony. The false witness cannot endure the stings of his wounded conscience, his countenance and his deportment will, in spite of his endeavors to the contrary, by signs as clear and intelligible as they are inexpressible, declare that the story which he has just sworn to is a lie. These considerations induce us to require full proof of all that the deceased witness swore to. His words, and not the synonymous words of him who states his testimony, are to be recited. . . . It is true that this strictness will generally exclude such testimony; for if the evidence of a deceased witness was minute and protracted, and related to a transaction which was of a complicated character, it would seem to be almost incredible that any person could with certainty recite it."

Where only twelve out of fourteen pages of testimony taken at a preliminary examination were offered, and the others were not accounted for or certified to by the magistrate, who said he could not give the substance of the evidence, the testimony was not admissible. *Gamblin v. State* (1903) 82 Miss. 73, 33 So. 724.

Where it is sufficient if a witness is able to state the substance of what was sworn to on the former trial by a witness who is since deceased, he must state in substance the whole of what was said on the particular subject which he is called to prove, and where a witness does not profess to remember, or to be able to state the substance of what the deceased witness

testified to in regard to the circumstances of the shooting, but singled out an isolated statement to which he said his attention was particularly attracted by the fact that it did not agree with the testimony of other witnesses upon the same subject, he was incompetent to testify upon the subject. *Foley v. State* (1903) 11 Wyo. 464, 72 Pac. 627.

In *Tharp v. State* (1849) 15 Ala. 749, where the magistrate testified that he reduced to writing so much of the testimony of deceased witness as he deemed material, which had become lost, he could not be allowed to testify as to the substance of that part so reduced to writing, without also proving the substance of the whole testimony.

In *Bush v. Com.* (1882) 80 Ky. 244, in speaking of the qualifications of a witness to testify as to the testimony given by a deceased witness, the court said that when the witness states that he remembers the substance of all the deceased witness testified to, both on direct and cross examination, he is a competent witness, and when the evidence is heard, if it does not clearly appear that the witness does not remember the substance of all the deceased person testified to, the evidence should be permitted to go to the jury, but, if it be manifest to the court that he does not so remember, the evidence should be rejected, and that the testimony of each witness who undertakes to give the former evidence must stand by itself, and any apparent or actual contradiction in the testimony of the witnesses who purport to relate the substance of the evidence given by the deceased witness goes not to the admissibility of the testimony, but only to its weight with the jury.

The fact that a witness is not able to give the substance of all the testimony of the deceased witness is not ground for ruling out his testimony, in the absence of a showing of the materiality of the portions that he was unable to give. *Summons v. State* (1856) 5 Ohio St. 325.

But it must be the substance of the testimony which is given, and not

the effect of or conclusion from such testimony. *Ibid.*

In *West v. State* (1913) 7 Ala. App. 145, 62 So. 290, it was held that a deputy sheriff was present at a former trial was incompetent to give the testimony of a witness given at that trial, but who was since deceased, where he could not say that he heard all of the testimony given by the witness, the court saying: "It is a matter of common experience for statements made by a witness at one stage of his examination, to be modified, or, indeed, the effect of them to be impaired or wholly destroyed, by what may be elicited from him in other stages of his examination. There can be no assurance at all that the substance of the testimony, as it was given by the deceased witness as to any matter in reference to which he was examined, is reproduced, if the person who undertakes to recite it claims no more than that he was present during part of the time when the deceased witness was undergoing examination. The recital of the testimony of the deceased witness as deposed to by such a person may be as incomplete, garbled, and misleading as would be the version of it given by one who deliberately suppresses or withholds portions of it material to the matter in issue. It cannot be said to be a repetition of testimony given in a former trial, as it is not shown to be more than a fragment of such testimony."

It is not error to charge the jury that, if they were satisfied that the witness had not stated the substance of all that the deceased witness had sworn to on the former trial, they should not for that reason exclude it from their consideration, providing that by taking his testimony in connection with the testimony of other witnesses they were satisfied that they had the substance of all the testimony given by the deceased witness on the former trial. *Summons v. State* (Ohio) *supra*.

VI. Effect of statutes.

a. Constitutionality.

Many of the states have enacted statutes, some of which merely repro-

duce the Statute of Philip & Mary set out in subd. I. *supra*, which merely provided for the preservation of evidence taken at the preliminary examination, while others have expressly provided for the use of such evidence at the trial in case the witness is inaccessible. Those states have done little more than enact the common law, and all considerations tending to show that the use of reproduced evidence at the trial does not violate constitutional rights apply equally to cases arising under such statutes.

Statutes providing that, in case the presence of the witness cannot be had at the second trial, the bill of exceptions taken at the previous trial may be used as evidence at the subsequent trial do not violate the constitutional provision that accused shall enjoy the right to meet the witnesses face to face. *BLACKWELL v. STATE* (reported herewith) *ante*, 465.

A statute providing that when any person has been examined as a witness, either for the commonwealth or for the defense, in any criminal proceeding conducted in or before a court of record, and defendant has been present and had an opportunity to examine or cross-examine, and such witness shall afterwards die, or be out of the jurisdiction so that he cannot be served with a subpoena, or if he cannot be found, or becomes incompetent to testify for any legally sufficient reason, notes of his examination shall be competent evidence upon a subsequent trial of the same criminal issue, is not in violation of the constitutional provisions of the state and Federal Constitutions, securing to an accused the right to meet the witnesses face to face. *Com. v. Cleary* (1892) 148 Pa. 26, 23 Atl. 1110.

In *State v. Frederic* (1879) 69 Me. 400, 3 Am. Crim. Rep. 78, the court says that the construction which the counsel of accused seeks to give to the constitutional provision that the accused shall have the right to be confronted by the witness against him would exclude all documentary evidence. Such is not the design or effect of the provision. The court held that the stenographer's notes of testi-

mony given at the former trial were documentary, and that the statute providing for their admission in evidence did not violate the Constitution, and, therefore, making a certified copy of them admissible in any future trial is not unconstitutional, even though inability to secure the attendance of the witness is not required.

In *People v. Chin Hane* (1895) 108 Cal. 597, 41 Pac. 697; *People v. Sierp* (1871) 116 Cal. 249, 48 Pac. 88; *People v. Cady* (1897) 117 Cal. 10, 48 Pac. 908, and *People v. Clark* (1907) 151 Cal. 200, 90 Pac. 549, it was held that the admission of depositions of absent witnesses, taken at a hearing in a homicide case, is not violative of the Constitution of California, § 13, art. 1, which is: "The legislature shall have power to provide for the taking, in the presence of the party accused and his counsel, of depositions of witnesses in criminal cases other than cases of homicide, when there is reason to believe that the witness, from inability or other cause, will not attend at the trial"—this provision being held to relate to ordinary depositions, not to judicial proceedings at a preliminary trial.

b. Scope of statutes.

The New York statute expressly provides for the preservation of the testimony of the committing magistrate and its use in case of death of the witness, and provides the manner of authenticating the testimony. And in *People v. Furlong* (1910) 127 N. Y. Supp. 422, it is held that the statute is complied with when the testimony is taken by a judge of the supreme court, sitting as a committing magistrate.

The Missouri statute provides for the preservation of the testimony by bills of exception and their use at the subsequent trial. But the evidence cannot be used if the witness is accessible. *State v. Coleman* (1906) 199 Mo. 119, 97 S. W. 574.

The Florida statute provides for the reproduction of testimony that cannot be secured because of absence of the witness by the use of the bill of exceptions taken at the preceding trial.

Bennett v. State (1914) 68 Fla. 494, 67 So. 125.

Under the California statute, before the testimony can be reproduced, it must be shown that the witness cannot, with due diligence, be found within the state. Therefore it is insufficient where the search is shown to have been merely perfunctory. *People v. Ballard* (1905) 1 Cal. App. 222, 81 Pac. 1040.

The Code of Criminal Procedure of Texas provides: "The deposition of a witness taken before an examining court or a jury of inquest and reduced to writing and certified according to law, in cases where the defendant was present when such testimony was taken and had the privilege afforded him of cross-examining the witness, may be read in evidence as is provided in the two preceding articles for the reading in evidence of depositions"—the conditions for reading of depositions referred to being that the witness has removed beyond the limits of the state, is dead, or has been prevented from attending court through the act or agency of defendant. *Kemper v. State* (1911) 63 Tex. Crim. Rep. 1, 138 S. W. 1025.

In *State v. Valentine* (1847) 29 N. C. (7 Ired. L.) 225, the court said: "There is no direct provision in the act or in the Statute of Philip & Mary, authorizing any use of the evidence when taken, or pointing out the mode how it is to be authenticated. Under the statute it has been the constant practice in the English courts to permit the deposition to be read in evidence, after the death of the witness; and such has been the uniform practice in this state, and, indeed, both acts evidently look to such a use of it. For they require that the deposition, taken according to their provision, 'shall be returned to the office of the court wherein the matter is to be tried.' To what purpose but to perpetuate them, and why perpetuate, but to provide for the contingency of the death of the witness, or to serve as a check upon him, if called into court as a witness thereafter?"

A statutory provision that testimony taken at a former trial "may be proven

by one who heard it, and who professes to remember the substance of the entire testimony as to the particular matter about which he testifies," applies to testimony given at a preliminary examination, and that such testimony may be proved by parol, though it was reduced to writing by the magistrate. *Smith v. State* (1883) 72 Ga. 114.

A statute providing that the deposition of a witness, taken before an examining court or a jury of inquest and reduced to writing and certified according to law, in cases where the defendant was present when such testimony was taken, and had the privilege of cross-examining the witness, may be read in evidence, does not apply to and make admissible testimony taken in a habeas corpus proceeding. *Childers v. State* (1891) 30 Tex. App. 160, 28 Am. St. Rep. 899, 16 S. W. 905.

In *People v. Restell* (1842) 3 Hill (N. Y.) 289, the court, in speaking of the statute authorizing the taking of depositions by the committing magistrate in the presence of the prisoner and certifying them to the court, says it is only when the witness is dead, and in some other cases, that such depositions can be read at the trial. The deposition must not only be taken in a judicial proceeding, but it must be taken when accused is present and has a right to cross-examine the witness. The court says: "It is said that depositions taken by the coroner on holding an inquest are evidence, although the defendant was not present when they were taken. This doctrine has been gravely questioned, and I am strongly inclined to the opinion that it cannot be maintained. The great principle that the accuser and accused must be brought face to face, and that the latter shall have the opportunity to cross-examine, can never be departed from with safety. Neither life nor liberty should ever be put in peril by listening to ex parte depositions. It is better that the guilty should sometimes go free than that the innocent should be subjected to such an ordeal."

c. Admissibility of evidence.

1. In general.

In 2 Hale, P. C. 284, it is said that the examination taken under the Statutes of Philip & Mary may be read in evidence against the prisoner, if the informer is dead, or so sick that he is not able to travel, and proper certificate be made.

The testimony cannot be reproduced unless the requirements of the statute are complied with, and it be made to appear that the witness is dead, or become disqualified, or inaccessible at the trial. *Tuggle v. State* (1920) 24 Ga. App. 655, 101 S. E. 767.

In *State v. Wilson* (1912) 158 N. C. 599, 73 S. E. 812, it was held that, under statutes providing for reducing the testimony of witnesses at a preliminary examination to writing and certification of such testimony to the trial court, the testimony of a deceased witness taken on a preliminary examination of defendant for assault, which was reduced to writing by the justice, and signed by the witness, and delivered to the justice who examined defendant on the charge of murder after the death of the witness, with directions to deliver to the clerk of the trial court, and on the trial identified by the justice who took it down, was properly admitted.

Where a statute gave a defendant in a criminal action the right to produce witnesses in his behalf and be confronted with the witnesses against him in the presence of the court, except that where the charge had been preliminarily examined before a city magistrate, and the testimony taken down by question and answer in the presence of defendant, who had, either in person or by counsel, cross-examined or had an opportunity to cross-examine the witness, the deposition of such witness might be read upon its being satisfactorily shown to the court that he was dead, or insane, or could not with due diligence be found within the state, it was held that the exception in favor of testimony taken at a preliminary examination excluded testimony taken on other occasions, and the testimony of an ab-

sent or deceased witness, as shown by the reporter's notes taken at the former trial, was inadmissible. *People v. Chung Ah Chue* (1881) 57 Cal. 567; *People v. Qurise* (1881) 59 Cal. 343; *People v. Gordon* (1893) 99 Cal. 227, 33 Pac. 901.

Under a statute providing for the admission of the testimony of a witness taken at a preliminary examination, provided he cannot with due diligence be found within the state, it was held that where it was shown that a witness had left the state a few days before the trial, and that a subpoena had been issued for the witness twenty-five days before the date of the trial, but no search had been made for him until a few days immediately before the trial, when it was found that he had left his customary place of abode and had informed his wife that he was going to Mexico, there was substantial evidence to support the conclusion of the trial court that due diligence was shown. *People v. Edwards* (1910) 14 Cal. App. 128, 111 Pac. 263.

To establish due diligence in endeavoring to produce a witness at a trial, so as to make the former testimony of the witness given at a preliminary examination admissible, under a statute permitting the introduction of such testimony when with due diligence the witness cannot be found within the state, it is not necessary that a subpoena be sent to every county in the state; and where diligent effort was made by a sheriff and his deputies to locate the witness within the county, and the sheriff telephoned to other places where he might possibly be, outside the county, and there was a suspicion that the witness might be connected with the crime in question, so that he would have a motive in avoiding cross-examination at the trial, it was held that the showing was sufficient. *People v. Boyd* (1911) 16 Cal. App. 130, 116 Pac. 323.

The California statute was amended in 1911 so as to make admissible testimony taken at a former trial, under the same circumstances which would have made it formerly admissible

when taken at a preliminary examination. *People v. Wilson* (1915) 26 Cal. App. 336, 146 Pac. 1048.

Under a special statute in Florida, the only method permissible of proving testimony given at a former trial by absent or deceased witnesses is by means of the bill of exceptions taken at that trial, and it is erroneous to permit the official stenographer to read such testimony from his stenographic notes. *Coley v. State* (1914) 67 Fla. 178, 64 S. 751.

Where, by a statute, the bill of exceptions taken at the previous trial is the only method provided for proving testimony of an absent witness given at that trial, it is error to permit the proof of such testimony by the certified copy of the bill of exceptions which has been filed in the appellate court. *Johnson v. State* (1914) 68 Fla. 528, 57 So. 100.

In *Fuqua v. Com.* (1904) 118 Ky. 578, 81 S. W. 923, it was held that a statute which provided that the testimony of witnesses taken by the official stenographer may be used in any subsequent trial of the same case between the same parties, where the testimony of such witness or witnesses cannot be procured, provided that in criminal cases such testimony shall be used only upon the consent of defendant, was not intended to apply where the former witness was dead, and in such case the testimony of such witness was admissible without the consent of defendant, the statute applying only to the testimony of living witnesses whose presence and oral testimony cannot be secured for use at the subsequent trial.

Under the statute it is only when it is shown that a person has permanently gone beyond the jurisdiction of the court that his testimony can be reproduced, a temporary absence not rendering it admissible. *Anderson v. State* (1914) 74 Tex. Crim. Rep. 621, 170 S. W. 142.

A witness is not shown to be inaccessible within the meaning of the statute, where it merely appears that he is absent from the county, but when last heard from was within the limits

of the state. *Taylor v. State* (1906) 126 Ga. 557, 55 S. E. 474.

Under a statute permitting testimony to be taken by a committing magistrate in presence of accused, and subsequently used at the trial in the absence of the witness, the prosecuting attorney must sufficiently account for such absence. *Barron v. People* (1848) 1 N. Y. 386; *People v. Hadden* (1846) 3 Denio (N. Y.) 220. And in the former case it was held not sufficient to admit the proof that the officer charged with serving the summons stated that he could not find the witness by inquiring at two hotels, where he had been informed the witness was in the habit of stopping.

A statute permitting the reproduction of the testimony if the witness is inaccessible, will permit reproduction of the evidence upon proof of inability to find the witness after due diligence. But due diligence is not shown by mere inquiry in the vicinity of the witness's home and receipt of information that he was in another state, where the officer did not go to the place in the state where the witness was last seen. *Robinson v. State* (1907) 128 Ga. 254, 57 S. E. 315.

A sufficient showing that one cannot, with due diligence, be found within the state, is made when it is shown that he is in a foreign country. *People v. Buckley* (1904) 143 Cal. 375, 77 Pac. 169.

In *Bebee v. People* (1843) 5 Hill (N. Y.) 32, there is a dictum to the effect that, even where the statute requires depositions of witnesses taken before the committing magistrate to be preserved and filed with the court, they cannot be read at the trial unless a proper foundation is laid by proving the witness's death, insanity, inability from sickness to attend the trial, or collusion with the prisoner.

In *State v. Moody* (1798) 3 N. C. (2 Hayw.) 31, 2 Am. Dec. 616, where the attempt was made to introduce a deposition taken by a justice of the peace at the preliminary examination, Haywood, J., says it may be a question whether it may not be received as an examination taken on oath before a justice of peace, pursuant to the act of

assembly prescribing for such depositions in case of felony. When regularly taken pursuant to the act, and the witness afterwards dies, it may be read in evidence, more especially if the person to be affected by the testimony was present at the examination.

That a witness is without the state in the military service of the United States is sufficient to sustain the reproduction of his testimony before the committing magistrate, under a statute providing that the deposition taken before such magistrate can be admitted in evidence, if it is satisfactorily shown that the witness is dead, or insane, or cannot, with due diligence, be found within the state. *People v. Caballero* (1919) 41 Cal. App. 146, 182 Pac. 321.

In Utah, the statute provides that in criminal prosecutions defendant shall be entitled to be confronted by the witnesses against him, except where the charge has been preliminarily examined before the committing magistrate, that their testimony shall be taken down by question and answer in the presence of defendant, who has, either in person or by counsel, cross-examined, or had an opportunity to cross-examine, them, and that the deposition of such a witness may be read upon it being satisfactorily shown to the court that he is dead, or insane, or cannot, with due diligence, be found within the state. *State v. DePretto* (1916) 48 Utah, 249, 155 Pac. 336.

The mere fact that the evidence was not reduced to writing, as required by statute, does not prevent its reproduction by testimony of anyone who remembers what it was, since the application to it of the statutes of evidence, in general, is what renders it admissible, and not the mere compliance with the requirements of the statute. *Davis v. State* (1850) 17 Ala. 354.

In *State v. Valentine* (1847) 29 N. C. (7 Ired. L.) 225, it was held that the purpose of a statute providing for the taking and authentication of the deposition of a witness at a preliminary examination, and its return to the office of the court wherein the matter is to be tried, was that it might be

used upon the trial, either in chief by either party, should the witness die, or upon cross-examination of the witness in court, and it was not error to admit the deposition of a codefendant who had been convicted and executed.

In *Menges v. State* (1886) 21 Tex. App. 413, 2 S. W. 812, it was held that the mere absence of a witness from the state does not render his testimony admissible, under a statute making necessary a showing that the witness resided out of the state, or had removed beyond the limits of the state.

A statute which declares that in a criminal action the testimony of a witness must be given orally in the presence of the court and jury, except in the case of a witness whose testimony is taken by deposition by order of the court in pursuance to the consent of the parties, relates to the manner in which the testimony is to be given or taken in the first instance, and not to the use which may be made of it after it is once given, and is not intended to abrogate a doctrine so firmly established as that of permitting the testimony of a witness, given in a manner required by statute, to be used by either the state or defense in a subsequent trial, when the witness has since died, or is absent from the state. *State v. Walton* (1909) 53 Or. 567, 99 Pac. 431, 101 Pac. 389, 102 Pac. 173.

Under the Texas statute, testimony taken at a former trial is admissible only when in the form of a deposition, and production of the testimony by the stenographer who took it down on the former trial is improper. *Smith v. State* (1905) 43 Tex. Crim. Rep. 65, 85 S. W. 1153.

Under a statute requiring the testimony taken by the committing magistrate to be written down and filed with the court, the magistrate cannot give evidence of his recollection of the witness's testimony, where he only put down what he thought to be material, upon mere proof that what was written is not in the office of the clerk of the court, or in that of the magistrate, with nothing to show that the magistrate does not know where it is. *Tharp v. State* (1849) 15 Ala. 749.

And in *Evans v. State* (1882) 12 Tex.

App. 370, it was held that statutory provisions for the admission of testimony when reduced to writing must be complied with, when the testimony is proved by parol, though such parol testimony is not expressly included in the statute—overruling, on this point, *Sullivan v. State* (1879) 6 Tex. App. 319, 32 Am. Rep. 580.

In *People v. Gardner* (1893) 98 Cal. 127, 32 Pac. 880, where the statute gives the accused the right to be confronted with the witnesses against him in the presence of the court, excepting certain cases when depositions taken at the examination are made admissible, it was held that, on rejection of such a deposition for improper authentication, the testimony could not be proved by the parol testimony of the stenographer—the court disapproving a dictum in *People v. Carty* (1888) 77 Cal. 213, 19 Pac. 490, to the effect that in such a case the reporter might refresh his memory from the defective deposition, and testify orally as to what occurred at the examination.

In *Austin v. Com.* (1906) 124 Ky. 55, 98 S. W. 295, it is held that the statute above referred to does not make the stenographer's bill of evidence the best evidence of what the witness testified to on the former trial, that "best evidence" is a technical term, which does not necessarily mean that which is the most credible, though generally it is supposed to refer to that fact, and that the statement in the *Fuqua Case* (1904) 118 Ky. 578, 81 S. W. 923, *supra*, as to the relative value of the testimony as taken by the stenographer, and as recollected by witnesses, dealt alone with the weight or credibility of the evidence, and not at all with its grade, and while the stenographer's bill may be proved and read as evidence of what a deceased witness may have testified to on a former trial, provided he testified that it was taken down accurately by him at the trial and is correctly transcribed, other evidence by any other competent witness, who had heard and remembers the substance of the deceased witness's testimony, is also receivable to substantiate or rebut the

fact that the said deceased witness did so testify.

2. Authentication.

Under a statute permitting evidence produced before a committing magistrate, when the accused is present and has opportunity to cross-examine, to be reproduced at the trial, the statutory directions as to preservation of the testimony must be observed, and, if not, the stenographers who took the testimony must identify it under oath as a true and correct copy, transcribed from the notes taken at the examination. *Wadsworth v. State* (1913) 9 Okla. Crim. Rep. 84, 130 Pac. 808.

Under the statute, a writing purporting to be a transcript of the testimony must be so authenticated as to require no oral proof for that purpose. *People v. Ward* (1895) 105 Cal. 652, 39 Pac. 33.

Where the record does not affirmatively show whether the deposition taken at the examination was or was not transcribed, certified, and filed according to the statute, it will be presumed on appeal that the court properly admitted it, in the absence of specific objection on that ground at the trial. *People v. Reilly* (1895) 106 Cal. 648, 40 Pac. 13.

The objection that the reporter had not filed his original minutes, as required by statute, was not sufficient to exclude the transcript of the testimony of a deceased witness, the defect being corrected by filing the notes before the trial ended. *People v. Eslabe* (1899) 127 Cal. 243, 59 Pac. 577.

Under a statute making depositions at the examination admissible, testimony taken stenographically through an interpreter is admissible, the interpreter and stenographer being first sworn to prove the correctness of the interpretation and transcription of the testimony. *People v. Oiler* (1884) 66 Cal. 101, 4 Pac. 1066.

Where the proper foundation is laid for the admission of a deposition taken at the examination, the fact that it was taken through an interpreter will not make it inadmissible. *People v. Lewandowski* (1904) 143 Cal. 574, 77 Pac. 467.

Likewise, while it was the duty of the magistrate to place an interpreter under oath the same as any other witness, the burden of proving that he was not sworn is on the defendant who objects to the deposition, and under a statute providing that when written out in longhand writing, and certified as being a correct statement of the testimony and proceedings in the case, the transcript shall be prima facie a correct statement of such testimony and proceedings, proof is not required that the interpreter was sworn, to make a deposition prima facie correct. *People v. Kelly* (1911) 17 Cal. App. 447, 120 Pac. 46.

The fact that deceased witness was unable to sign his deposition personally, but another did so at his request, was not a ground for excluding it, under a statute requiring that the testimony be reduced to writing by the magistrate and signed by the witness. *State v. Carlisle* (1874) 57 Mo. 105.

The transcript of the stenographer's notes is admissible to prove the testimony of an absent witness, if he swears that what he did not transcribe himself he dictated to copyists, and that he had compared the result, and that all was correct. *People v. Garnett* (1908) 9 Cal. App. 194, 98 Pac. 247; *People v. Buckley* (1904) 143 Cal. 375, 77 Pac. 169.

To permit reproduction of testimony given at a preliminary hearing by means of stenographer's notes, it is not necessary that they should have been taken by the official stenographer of the court under a statute providing that where a witness has testified at an examining trial, and his testimony was taken in shorthand, such written statement, upon proof of death of said witness, may be used as a deposition, without further identification or verification. *Davis v. State* (1919) 15 Okla. Crim. Rep. 386, 177 Pac. 621.

Where the magistrate before whom the examination was held personally reduced the testimony of the witness to writing, and, pursuant to statute, returned it to the office of the court where the matter was to be tried, the deposition was sufficiently authenticated, in the absence of the magis-

trate, by the testimony of the clerk of the court where the matter was to be tried that he was present when the magistrate examined the witness, that he wrote down the evidence as he examined him, and that the deposition and certificate were all in the handwriting of the magistrate, who afterwards delivered them to him to file in his office. *State v. Valentine* (1847) 29 N. C. (7 Ired. L.) 225.

In *State v. McPherson* (1914) 70 Or. 371, 141 Pac. 1018, the court, conceding, without deciding, that a statute providing for the admission of testimony given on a former trial referred to the trial of criminal as well as civil cases, refused to admit such testimony because it was not certified as required by statute, and said: "The constitutional right of a defendant to meet the witnesses face to face is not to be circumscribed except within strict accordance with the law, and there is grave doubt whether this right is subverted by anything less than meeting the witnesses face to face, in the very trial in which their testimony is used against him." But in the later case of *State v. Von Klein* (1914) 71 Or. 159, 142 Pac. 549, Ann. Cas. 1916C, 1054, the court recognizes as well settled that evidence given in a former trial, between the same parties and relating to the same matter, is admissible in criminal cases, if the defendant was present when the evidence was taken and had an opportunity to cross-examine the witnesses who gave it.

Under a statute providing for the taking in shorthand, and transcribing, of the testimony given at a preliminary hearing, and requiring, if the accused is held to answer to the district court, that the stenographer, within ten days after the close of the hearing, transcribe his stenographic notes into longhand, attach his certificate thereto, and file the same with the clerk of the district court, and also file his original shorthand notes, the provision for filing within ten days is not mandatory, and failure to file it within that time will not render it inadmissible. *State v. Vance* (1910) 38 Utah, 1, 110 Pac. 434.

VII. *Admissibility in favor of accused.*

a. *In general.*

There are no constitutional objections to the reproduction by accused of testimony of an absent witness, given at a former trial or preliminary hearing. Therefore, the question of admissibility is merely one of practice or policy, and the courts have generally followed the rule which they adopted with respect to permitting or rejecting the testimony in favor of the prosecution.

In *Smith v. State* (1912) 66 Tex. Crim. Rep. 593, 148 S. W. 722, the court held that there is no constitutional inhibition which would keep the accused from offering the testimony adduced at a former hearing between the same parties, when the attendance of the witness cannot be obtained, and therefore accused may offer such evidence if he proves that due diligence has been used to secure the attendance of the witness. The court says: "If after diligent search and inquiry he cannot be located, and there is no reasonable hope of securing his attendance by a postponement of the case, we think the testimony of such a witness given at a former trial, properly proven up, would be admissible in evidence, and the court erred in this instance in excluding the testimony. Take all the rules of evidence, and in each and every instance, if the primary evidence would be admissible, and it is shown that it is lost and cannot be found by diligent search, and there does not seem to be any reasonable hope of ever procuring it, then secondary evidence becomes admissible as being the best that is obtainable. The courts are organized for the purpose of arriving at the truth of any and all controverted issues, and the rules of evidence are and should be so construed as to accomplish that purpose, keeping in view always that the best evidence obtainable must be adduced; and when we consider that a note, deed, or other particle of evidence is lost or destroyed, then secondary evidence of the contents becomes admissible, in criminal as well as civil cases,

the same reasoning would, by analogy, admit the testimony of a witness who had testified under the sanction of an oath, subject to cross-examination, who has moved away permanently, and his whereabouts could not be ascertained after the most diligent search and inquiry. Of course, temporary absence or inability to locate a witness would not be sufficient; but the absence must be shown to be permanent, and the present whereabouts or location of a witness impossible of ascertainment, after diligent search and inquiry."

While the mere fact that a witness is absent will not otherwise authorize his former testimony to be reproduced unless it be shown that he is either dead, or out of the state, or his presence prevented by one of the parties, where the state has shown that an eyewitness to the crime, who testified at former trials, is absent, the defendant is then entitled to have his testimony at the former trial reproduced to show that the testimony was not unfavorable to him. *Green v. State* (1913) 69 Tex. Crim. Rep. 485, 154 S. W. 1003.

In *State v. Stewart* (1882) 34 La. Ann. 1037, and *Hernandez v. State* (1916) 78 Tex. Crim. Rep. 604, 182 S. W. 494, it was held that the absence of a witness from the jurisdiction was sufficient ground for the admission of his former testimony on behalf of defendant; and in *Reg. v. Hagan* (1837) 8 Car. & P. (Eng.) 167, the deposition of a witness for the prosecution, who was at sea, was held to be admissible in behalf of defendant, on consent of the prosecutor.

In *State v. Milam* (1903) 65 S. C. 321, 43 S. E. 677, it was held that testimony given at a former trial by a witness since deceased, was admissible at a second trial on behalf of the defendant, who was the sole defendant in the first trial, but was not admissible as to a codefendant at the second trial, the proper method being to admit such testimony and instruct the jury that it is not to be regarded as evidence against the other defendant.

Where testimony of a witness given at a former trial was introduced in evidence by one of two defendants,

such testimony was not subject to an objection on the part of his codefendant, whose testimony it contradicted, as the witness was in no sense a witness against such codefendant, and his constitutional right to be confronted by the witnesses against him was not invaded by the court's reception of the evidence in behalf of the other defendant, the court expressly limiting the jury to consideration of such testimony as bearing upon the guilt or innocence of the one in behalf of whom it was introduced. *State v. Brauneis* (1911) 84 Conn. 222, 79 Atl. 70.

A defendant in a similar prosecution may waive the right to confront the witnesses against him, and introduce the transcript of testimony of a witness given before the committing magistrate, upon a showing that the witness is not within the jurisdiction of the court, although the state would not have a right to introduce such testimony on that ground. *State v. Butler* (1913) 247 Mo. 685, 153 S. W. 1042.

Where, on the request of defendant, the shorthand reporter took the stand and read to the jury, from his notes of a former trial, part of the testimony of a witness who was not available at the second trial, the state was entitled to have the remainder of the witness's examination read to the jury. *State v. Thomas* (1912) 158 Iowa, 687, 138 N. W. 864.

But in *United States v. Sterland* (1858) Fed. Cas. No. 16,387, it was held that the testimony of a deceased witness taken at a former trial was not admissible, the court following what it supposed to be the rule as to the admissibility of such testimony on behalf of the state.

And in *Brown v. People* (1908) 145 Ill. App. 263, affirmed in (1912) 254 Ill. 260, 98 N. E. 535, testimony given at a former trial, by a witness who was out of the state at the time of the second trial, was held to be inadmissible on behalf of defendant, the same rule applying as in the case of an offer of testimony by the state, and the court apparently considering that death was the only ground for the admission of such testimony.

And in *Montgomery v. Com.* (1901) 99 Va. 833, 37 S. E. 841, there appears, in the report in 37 S. E., an obiter statement that the testimony of a deceased witness given at a former trial is not admissible, but this statement is not found in the official report.

The Virginia court held, in *Finn v. Com.* (1827) 5 Rand. (Va.) 701, that the state could not reproduce evidence of a witness who had merely gone beyond the jurisdiction of the court.

And in *Brogy v. Com.* (1853) 10 Gratt. (Va.) 722, the court refused to admit former testimony on behalf of defendant on the ground that the witness was out of the state.

When the question of the admissibility of reproduced evidence at the instance of accused, in case of death of witness, came before the court, it distinguished the *Finn* and *Brogy* Cases on the ground that they were cases of absent witnesses, and cited *Wigmore's* text holding the evidence admissible, and then states that it would, indeed, prove an anomalous state of the law to admit such evidence in civil cases involving property rights merely, and to apply the rule of exclusion to criminal cases involving life and liberty, when the introduction of such evidence is not infrequently of controlling weight, either in bringing the guilty to punishment, on the one hand, or of shielding the innocent on the other. The evidence was, therefore, admitted in favor of the accused, in case of a deceased witness. But the reasoning seems to go far enough to change the general law of the state as it has been understood to exist. *Parks v. Com.* (1909) 109 Va. 807, 63 S. E. 462.

b. Authentication.

The same rules, with respect to authentication of the former testimony, apply, as in cases where the state attempts to introduce the testimony.

An accused cannot use the testimony of a stenographer as to the evidence of an absent witness, if it is not shown that the testimony was correctly taken, or the minutes correctly transcribed. *People v. Hoke*

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(1912) 151 App. Div. 744, 136 N. Y. Supp. 235.

In *McLain v. Com.* (1881) 99 Pa. 86, testimony given at a coroner's inquest by a witness who was ill at the time of the trial, and taken in shorthand by a bystander who was not requested by the coroner to do so, and whose notes were not certified to by the coroner, was held to be inadmissible when offered by defendant, and objections to its admission were made on the ground that it was incompetent and that there had been no cross-examination by the state.

c. Predicate.

A proper predicate must be laid to render the reproduction admissible.

Evidence cannot be reproduced in favor of accused, in the absence of a showing of reason why the witness cannot be produced. *Cooper v. State* (1913) 71 Tex. Crim. Rep. 489, 160 S. W. 382.

The testimony of a witness given at a former trial is admissible on behalf of the accused, where it is shown that the witness is dead. *Pope v. State* (1860) 22 Ark. 372; *Parks v. Com.* (1909) 109 Va. 807, 63 S. E. 462.

And in *Pope v. State* (1913) 183 Ala. 61, 63 So. 71, inability to find a witness was held to be sufficient ground for the admission of his former testimony on behalf of defendant.

But in *Wyatt v. State* (1910) 58 Tex. Crim. Rep. 115, 137 Am. St. Rep. 926, 124 S. W. 929, it was held that the testimony of a witness given at a former trial was not admissible on behalf of defendant, upon a mere showing of the absence or inaccessibility of such witness, as he must be dead or out of the state to make his testimony admissible.

In *State v. Rose* (1887) 92 Mo. 201, 4 S. W. 733, it was held that the testimony given by a witness at a former trial was not admissible on behalf of defendant, where there was no showing that the witness was dead or beyond the jurisdiction of the court.

In *People v. Johnson* (1910) 13 Cal. App. 776, 110 Pac. 965, the court said, while diligence is a relative term incapable of precise or exact definition,

it may be safely stated, in connection with the diligence required in endeavoring to procure the attendance of a witness, that, as a general proposition, where a party to an action, whether criminal or civil, depends entirely upon his adversary for the production of a witness by whose testimony he expects to sustain his action or defense, and can make no further showing, negligence rather than diligence is disclosed. So, where a defendant in a criminal case endeavored to introduce the testimony of a witness taken at the preliminary trial, and showed only that a subpoena had been issued to the sheriff on behalf of the prosecution, and that defendant informed the sheriff and district attorney that he desired such witness for his client, and was told by the sheriff that the latter had in his possession a subpoena issued at the request of the people, and that he was making every effort, and would continue to make every effort to find, and subpoena, and have said witness at the trial, and the district attorney made similar statements, defendant did not show due diligence, and his offer of the former testimony was properly rejected.

In *State v. Evans* (1877) 65 Mo. 574, it was held that the testimony of an absent witness given at a former trial was not admissible on behalf of defendant, where the witness was in court until the state closed its case, and it did not appear that process was invoked to compel his attendance, nor that it would have been ineffectual if invoked.

In *People v. Hill* (1892) 65 Hun, 420, 20 N. Y. Supp. 187, it was held that a showing by defendant that, after a former trial, a witness who was seventy-seven years old returned to his home in another state, and was reported by relatives to have died, was sufficient to authorize the admission of his testimony given at the former trial.

But in *James v. State* (1893) 104 Ala. 20, 16 So. 94, an offer by defendant to prove the issuance of a subpoena for the witness, its return "not found," and that the witness's where-

abouts were unknown to defendant, was held not sufficient to admit the testimony.

In *People v. McFarlane* (1903) 138 Cal. 481, 61 L.R.A. 245, 71 Pac. 568, 72 Pac. 48, where it appeared that two or three days before trial one of defendant's counsel was informed that a certain person could tell him exactly where the witness was located, and he gave up the search after two or three attempts to see such person, and did not have another subpoena issued, though subpoenas previously issued had been fruitless, it was held there was insufficient showing for admission of the testimony of such witness at a former trial.

In *State v. Riddle* (1904) 179 Mo. 287, 78 S. W. 606, the court refused to admit, on behalf of defendant, the testimony of a witness taken at habeas corpus proceedings, where the only showing made was that the defendant had heard that the witness was in St. Louis, and had sent a subpoena there which the sheriff had neglected and failed to return.

d. What circumstances will admit reproduction.

Where ample provision is made for obtaining the testimony of a former witness who, at the time of the second trial, is confined in the penitentiary, there is no error in refusing to permit the defendant to prove by the stenographer's transcript what the testimony of such witness was on former trial. *Hayden v. Com.* (1910) 140 Ky. 634, 131 S. W. 521; *Moore v. Com.* (1911) 143 Ky. 405, 136 S. W. 608; *Quinlan v. Com.* (1912) 149 Ky. 476, 149 S. W. 892.

A prisoner cannot reproduce evidence, taken before a committing magistrate, of a witness living in an adjoining county and not subpoenaed. *Mendum v. Com.* (1828) 6 Rand. (Va.) 704.

It was not error to refuse to permit defendant to produce the testimony of the witness given on a former trial, where the witness was living, was a resident of the state, and had been attached as a witness in the case. *Caldwell v. State* (1890) 28 Tex. App.

566, 14 S. W. 122. The former proceeding must have been between the same parties.

Testimony of a witness absent at the time of a trial for seduction, given in a prior trial for breach of promise, is not admissible on behalf of defendant, the state not having been a party to the previous action. *Luckie v. State* (1894) 33 Tex. Crim. Rep. 562, 28 S. W. 533.

In *State v. Porter* (1888) 74 Iowa, 623, 38 N. W. 514, where defendant offered testimony given before a grand jury which investigated the crime prior to the investigation by the grand jury which found the indictment against defendant, the court, while recognizing the rule that the testimony of a witness, given at a former trial or preliminary examination, is admissible at a subsequent trial when the witness is since deceased, held that such testimony before the grand jury was inadmissible, defendant not being a party to the inquiry, especially where the attorney for the state was not present at the proceeding, the court saying: It is certain that the state could not introduce the evidence of a deceased witness for a grand jury, upon the trial of any person for an offense, for the reason that the right to cross-examine the witness did not exist.

Evidence given at a trial for lunacy following a homicide is admissible on behalf of defendant, at a subsequent trial for murder for the same homicide, the sanity of accused being at issue. *Witty v. State* (1913) 69 Tex. Crim. Rep. 125, 153 S. W. 1146, where it is shown that the former witness is now deceased.

The testimony of a witness, since deceased, taken at a former trial, is open to all the objections which might be taken if the witness were personally present. So, where a witness, since deceased, was objected to on the ground that he was not competent to testify, having been convicted of a felony, and it was not shown that he had been pardoned, the evidence was properly rejected, where the only showing of such a pardon consisted of a parenthetical statement in the

former testimony that the same objection was made at a former trial, and the pardon was produced, and the witness allowed to testify, and the statement of an attorney that he had obtained a pardon for the witness, and had returned such pardon to the witness at a former trial, as such pardon should have been proven by showing the original or a certified copy thereof. *Redd v. State* (1898) 65 Ark. 475, 47 S. W. 119.

Where the testimony of a witness given at a preliminary hearing is offered by a defendant in a criminal case, on the ground that she is incompetent to testify in the present trial because since that trial she has become the wife of defendant, the incompetency of the witness was occasioned by the voluntary act of defendant in marrying her, and he was not entitled to offer her testimony given on the preliminary hearing. *Langham v. State* (1915) 12 Ala. App. 46, 68 So. 504.

In *People v. Garrett* (1856) 6 Cal. 203, it was held that a deposition taken at a preliminary examination of a witness who had left the state, and who was cross-examined by the district attorney, was inadmissible because the magistrate was not authorized or required to take the deposition, and it was taken before defendant was held to answer to the charge.

e. Effect of statute.

In *State v. King* (1882) 86 N. C. 603, it is held that under a statute making former testimony admissible when the witness is dead, ill, or out of the state by procurement, no foundation is laid for the admission of such testimony by showing that the witness had been summoned, but failed to respond, and had run away.

In *Robinson v. State* (1907) 128 Ga. 254, 57 S. E. 315, under a Code provision making the testimony of a witness admissible when he is "inaccessible from any cause," it was held that, although it is not necessary to show that the witness is not within the state, no sufficient predicate was raised for the admission of such testimony, where it appeared that no

officer having process was sent to the place where the witness was last seen.

But while such statute forbids the introduction of the testimony of a witness, absent or deceased, which may have been given upon a former trial, and admits such testimony only when taken before a committing magistrate, or by deposition in the

mode prescribed, it does not restrict the rights of defendant as to the introduction of such testimony, and he may introduce in evidence the testimony of a dead or absent witness, whether it was given at the preliminary examination, or upon a former trial. *People v. Bird* (1901) 132 Cal. 261, 64 Pac. 259. H. P. F.

M. E. GULLY

v.

T. R. GULLY, Plff. in Err.

Texas Supreme Court — May 18, 1921.

(— Tex. —, 231 S. W. 97.)

Parent and child — effect of divorce on duty to support child.

A man with adequate estate may be required to pay the value of necessities furnished his minor children by the mother from her own adequate estate, although she was given their custody when the parents were divorced.

[See note on this question beginning on page 569.]

ERROR to the Court of Civil Appeals (Hodges, J.) to review a judgment reforming and affirming a judgment of the District Court for Panola County in plaintiff's favor, in an action brought to recover the amount expended by her for necessities for her children subsequent to a decree of divorce. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. H. N. Nelson for plaintiff in error.

Messrs. Young & Young for defendant in error.

Greenwood, J., delivered the opinion of the court:

By decree of the district court of Panola county, entered in 1912, defendant in error, Mrs. M. E. Gully, was granted a divorce from plaintiff in error, T. R. Gully, and the custody of their seven minor children. The decree ordered partition of the community property, including 968.90 acres of land, a sawmill, stocks of lumber and merchandise, 50 bales of cotton, etc., and set aside the homestead of 6.37 acres of land and certain appurtenant personalty for the use of defendant in error and her minor children so long as

any one of them was under age or was an unmarried daughter. The decree adjudged 567½ acres of land to plaintiff in error as his separate estate. By appropriate recital the court reserved jurisdiction to make provision for the maintenance of the minors.

In 1913 the court rendered a final judgment partitioning the community property in accordance with its previous decree, and at the same time the court fixed \$100 per month as an allowance for the support, maintenance, and education of the minors, and adjudged that same be paid, one half by defendant in error and one half by plaintiff in error.

Upon the refusal of plaintiff in error to pay one half of the minors'

monthly allowance, defendant in error applied for and obtained an order of the court directing the sale, in satisfaction of same, of a portion of the community property which had been partitioned to plaintiff in error. On appeal the order was reversed; the provision for the monthly allowances to the minors being held inoperative and void. *Gully v. Gully*, — Tex. Civ. App. —, 173 S. W. 1178.

Afterwards this suit was brought to recover of plaintiff in error the amount expended by defendant in error subsequent to the decree of divorce for necessities for the children. In the trial court defendant in error recovered a judgment for such expenditures as were found to have been reasonable and necessary for the support of the children. On appeal the Texarkana court of civil appeals reversed this judgment and rendered judgment for defendant in error for one half the amount recovered in the court below, one of the justices dissenting on the ground that defendant in error ought to have been denied any recovery whatever. *Gully v. Gully*, — Tex. Civ. App. —, 184 S. W. 555.

The judges of the court of civil appeals concurred in the view that the duty rested primarily on the father, during the marriage, to support the minor children. A majority of the judges concluded that when the marriage relation was terminated by the decree of divorce with an award of the custody of the children to the mother, then the duty to provide necessary support for the children rested equally on the father and mother. The minority judge considered that the duty to support followed the custody and passed to the mother alone.

The assignments here urge that the judgments in the divorce suit dissolving the bonds of matrimony between the husband and wife, awarding the custody of the minor children to the wife, and settling the property rights of the husband and wife, had the legal effect to absolve the husband from any obligation to

support the children, or to make his obligation secondary to that of the wife, or had the legal effect to at least absolve the husband from any obligation for the children's support which could be enforced otherwise than by further proceedings in the divorce suit.

The judgments in the divorce suit, together with the adjudication of the invalidity of the order for stipulated monthly allowances, had the same effect, in so far as this controversy is concerned, as if the court had simply decreed the divorce and awarded the custody of the children to the mother. Apart from the provision of a homestead and its furnishings, for which no compensation was sought in this action, there is nothing in the judgments not in every judgment of divorce awarding the children to the mother's custody, which could impair the obligation of either parent to support the children, except the order for monthly allowances, which was adjudged void.

The truly important question to be decided is whether the father, owning an adequate estate, can be required to pay the value of necessities for his minor

children, when furnished by the mother from her own

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adequate estate, after the mother has been divorced from the father, and after the custody of the children has been adjudged to the wife; the decree of divorce failing to provide for the children's maintenance.

The decisions in Texas uniformly recognize and declare that both parents are charged with a natural and legal duty to support their children during minority.

Perhaps the parents' natural duty has nowhere been better stated than by the court, speaking through Judge Brown, in *State ex rel. Wood v. Deaton*, 93 Tex. 247, 54 S. W. 903, when he said: "God, in his wisdom, has placed upon the father and mother the obligation to nurture, educate, protect, and guide their offspring, and has qualified them to

discharge these important duties by writing in their hearts sentiments of affection and establishing between them and their children ties which cannot exist between the children and any other persons."

A succinct statement of the parent's legal duty was made in Judge Stayton's opinion in *Galveston, H. & H. R. Co. v. Moore*, 59 Tex. 68, 46 Am. Rep. 265, as follows: "The parent is under a legal obligation to educate and maintain the child, and it has no legal claim upon others to perform that duty."

Our statutes define a "neglected child" as one who has not proper parental care, and make it a misdemeanor for "any parent" to wilfully or without justification neglect or refuse to provide for the support and maintenance of his or her child under the age of sixteen years in destitute or necessitous circumstances. Rev. Stat. art. 2184, chapter 101, Acts 33d Leg. (Vernon's Anno. Penal Code 1916, art. 640a); White's Penal Code, p. 1828.

The court is enjoined, in decreeing a divorce, to respect the rights of the children, in disposing of the estates of both parents. Rev. Stat. art. 4634. In order to provide revenues for the maintenance of the children, the interest of each parent in the community property and the separate property of both parents may be utilized, subject alone to the statutory limitation that neither parent be divested of title to realty. *Fitts v. Fitts*, 14 Tex. 454; *Rice v. Rice*, 21 Tex. 58. Thus the law regards the right of minor children to maintenance as paramount to the rights of the parents to the use of any and all property belonging to them.

A duty could not be more plainly defined as legal than by providing means for its enforcement in both civil and criminal courts; and there can be no question about it resting on those against whom it is expressly made enforceable.

Though both parents are under the duty, legal as well as moral, to support and educate their children

during minority, the duty rests primarily in this state, without doubt, upon the father.

The court said in *Magee v. White*, 23 Tex. 192: "We are of opinion that the law imposes upon the husband the obligation to support his wife and children. If he have separate property, and there is no common property, it cannot for a moment be pretended that his separate property cannot be charged for necessities for the support of his family. The law recognizes him as the head of his family. It declares that he shall support his children, because every man is under obligation to provide for those descended from his loins. Blackstone."

The doctrine of *Magee v. White* is reaffirmed as settled law in *Hutchinson v. Underwood*, 27 Tex. 256.

The father's primary obligation was the necessary foundation of the court's declaration by Chief Justice Hemphill in *Rice v. Rice*, 21 Tex. 68, that where on divorce the minors were intrusted to the mother, the funds for their support must be furnished by the father, but, where the minors were intrusted to the father, he was bound for their maintenance.

On no other theory than that the legal duty of the father is both primary and continuing can be upheld the settled doctrine in this state that a recovery of damages by a child on account of the death of his father may be sustained for the entire cost of his support until he becomes of age, though the child is in the custody of his mother, by whom he is supported, and though he had no expectation of any voluntary contribution to his support from the father. *International & G. N. R. Co. v. Culpenner*, 19 Tex. Civ. App. 182, 46 S. W. 923; *Taylor v. San Antonio Gas & E. Co.* — Tex. Civ. App. —, 93 S. W. 675; *Gulf, C. & S. F. R. Co. v. Delaney*, 22 Tex. Civ. App. 427, 55 S. W. 538; *Gulf, C. & S. F. R. Co. v. Anderson*, — Tex. Civ. App. —, 126 S. W. 930; *San Antonio & A. P. R. Co. v. Boyed*,

— Tex. Civ. App. —, 201 S. W. 220.

We do not think that a decree of divorce which is either silent as to the children's custody and maintenance or which awards their custody to the mother relieves the father of his primary duty to support the children.

The duty to support a minor child is imposed primarily on the father in the interest of the child. The chief concern of the state is the child's welfare. It is best for the child to impose the duty in the first instance on the father, because human experience demonstrates that he is best able to perform the duty. It is as much to the advantage of the child that the primary obligation of the father continue after as before the divorce. Being blameless with respect to the fault occasioning the divorce, the child certainly ought not to be thereby deprived of a right of real and continuing value.

We do not feel warranted in adopting the conclusion on which Judge Levy's majority opinion largely rests, that there was no reason save the disability of the mother during coverture for making her duty to support the children secondary at common law. Other weighty reasons may be found in natural differences between the sexes and in the necessity to equalize parental burdens. Who can say that the average mother, inspired by sacrificial love, contributes less to the good of the family than the father, though he performs every paternal duty, including the support of the family, during the marriage, as well as the support of the children, during minority, irrespective of divorce?

The mother's obligation ought not to be made more onerous because the custody of the child is confided to her in promotion of his highest interest; and in no other mode than is plainly indicated by explicit statutes ought important parental duties be subject to change.

The cases upholding the doctrine that a decree of divorce awarding the custody of a child to the mother shifts the duty to maintain the child

from the father to the mother appear to be mainly grounded on the view that the right to the custody and services of the child and the duty to support and educate are reciprocal, so that discharge of the duty necessarily follows deprivation of the right.

In order for this view to be sound, the father's duty to the child must rest on advantage to the father, which is the opposite of what we deem the true conception. The real design of the duty is to develop the child as perfectly as possible, physically, mentally, and spiritually. It is to obtain the same result that the father is deprived of the child's custody. In the eye of the law the attainment of this result justifies whatever deprivation the father must suffer.

The father's duty is all the more imperative where the child, on account of youth or affliction, renders no services. That is conclusive against the duty being grounded on material benefit to the parent instead of on the need of the child.

In *Dunbar v. Dunbar*, 190 U. S. 351, 47 L. ed. 1092, 23 Sup. Ct. Rep. 757, it was held that the father's common-law obligation to support his children continued throughout their minority and was enforceable despite the father's discharge in bankruptcy, subsequent to a decree of divorce awarding the custody of the children to the mother.

Most of the reported cases, especially the later cases, sustain the conclusion that a decree of divorce which awards the custody of the child to the mother, and makes no provision for the child's support, does not terminate the father's duty of maintenance. *Evans v. Evans*, 125 Tenn. 112, 140 S. W. 745, Ann. Cas. 1913C, 295, and note, page 296; note in Ann. Cas. 1915D, 813; 19 C. J. 354.

The case of *Hall v. Fields*, 81 Tex. 558, 17 S. W. 82, presented the question as to whether a constituent of his family survived the father so that his residence homestead was exempt from administration for the

payment of the debts against his estate, where the father resided alone on the homestead after being divorced by a decree awarding the custody of his minor children to their mother, who thereafter held the children in her actual custody. It was determined that the minors were nevertheless constituents of the father's family, the court saying that the award of the custody of the children to the mother made no difference in their right to the exemption, for the reason that "their father was still legally bound for their support, and it would be a double misfortune to them to be deprived, on account of the unhappy termination of the marriage of their father and mother, both of their right to the society and protection of the father. . . . They have no home; they are the minor children of a father, the head of a family, who has died leaving a homestead."

It was determined in *Speer v. Sykes*, 102 Tex. 451, 132 Am. St. Rep. 896, 119 S. W. 86, that the residence of the father continued exempt from execution after the rendition of a decree of divorce, with award of his children to the custody of the wife. In Judge Brown's opinion it is said: "The fact that the court awarded the custody of the minor children to the wife did not deprive Sykes of his paternal interest in them, nor did it discharge him from his legal and moral obligation to care for and support them. They were still his offspring and a part of his family."

These cases are conclusive that the obligation of the father is not discharged by the loss of the custody of his children. As the head of the family he is primarily responsible for the children's support prior to divorce. Continuing the head of a family, of which the children remain a part, subsequent to the divorce and the loss of their custody, his primary liability continues.

In determining the duty of the husband to supply necessities to his

children, before or after divorce, it is to be borne in mind that his duty corresponds to his financial ability, having due regard to all his lawful obligations, which may include those assumed to another wife and to other children, and in no event is he liable for food, clothing, attention, or education other than such as is suitable to his and their circumstances in life. Moreover, since we treat his duty as a continuing primary one, the father should not be held liable when he has actually supplied his children with their reasonable necessities. In a suit to recover the value of necessities furnished minor children the burden to prove that he has supplied the children with necessities is on the father. *Parsons v. Keys*, 43 Tex. 559.

Again, circumstances may exist under which the father would be entitled to be relieved of his primary obligation, just as the court has already determined that the mother may be entitled to be relieved of her obligation, on adequate equitable considerations. *Freybe v. Tiernan*, 76 Tex. 290, 13 S. W. 370; *Rivers v. Rivers*, — Tex. Civ. App. —, 133 S. W. 526.

In pronouncing a decree of divorce, it is within the power of the court to make suitable provision for the maintenance of the children by means of the property of both parents. Where the court has provided for the children's support and education in the decree of divorce, such provision excludes liability therefor otherwise than as ordered by the court rendering the decree.

It is now settled that the power of the court granting a divorce to make suitable provision for the children out of the revenue of the property of the parents is a continuing one, so that complete justice may be done in the light of the varying conditions of the children and of the parents, and the court's continuing authority may be invoked to safeguard the rights of the parents as well as those of the children. *Bemus v. Bemus*, 63 Tex. Civ. App. 148,

133 S. W. 503; *Plummer v. Plummer*, — Tex. Civ. App. —, 154 S. W. 598.

Here the court decreeing the divorce did not undertake to provide for the support of the children save in a manner decreed to be void. As the judgment of the court of civil

appeals does no more than to partially enforce an obligation resting primarily on plaintiff in error and from which he had not been absolved, and as plaintiff in error alone complains of that judgment, it follows that the judgment should be affirmed; and it is so ordered.

ANNOTATION.

Liability of father for support of children awarded to mother by decree of divorce not providing for maintenance.

I. Scope of note, 569.

II. Majority rule:

a. Rule stated, 569.

b. Exceptions to rule, 572.

III. Minority rule, 573.

I. Scope of note.

This annotation is confined to the liability of a father for the support of children who have been awarded to the mother by a decree of absolute divorce making no provision for their maintenance. Cases involving the effect of a decree for a limited divorce are excluded, as are all cases where the decree in question contained some provision for maintenance. The annotation also excludes all cases involving the right of the wife to have an order for the maintenance of the children made in the divorce suit, by way of amendment to the decree or otherwise. It is to be noted that in some, at least, of the jurisdictions maintaining the rule that divorce absolves the father from liability, the statutes permit an application in the divorce suit for an amendment of the decree, requiring him to contribute to the support of the children, though no provision therefor was made in the original decree.

II. Majority rule.

a. Rule stated.

The rule supported by the weight of authority is that a father is not released from his obligation to support or contribute to the support of his infant children by reason of the fact that the mother has been granted an absolute decree of divorce from him, and has been awarded the custody of

the children by a decree making no provision for their maintenance.

United States.—*Johnson v. Latty* (1912) 210 Fed. 961.

Arkansas.—*Holt v. Holt* (1883) 42 Ark. 495.

Colorado.—*Desch v. Desch* (1913) 55 Colo. 79, 132 Pac. 60. See also *Graham v. Graham* (1907) 38 Colo. 453, 8 L.R.A.(N.S.) 1270, 88 Pac. 852, 12 Ann. Cas. 137.

Connecticut.—*Stanton v. Willson* (1808) 3 Day, 37, 3 Am. Dec. 255; *Welch's Appeal* (1876) 43 Conn. 342, modifying *Finch v. Finch* (1853) 22 Conn. 411.

Delaware.—*State ex rel. Rogers v. Rogers* (1895) 2 Marv. 439, 43 Atl. 250; *State v. Redmile* (1905) 5 Penn. 520, 63 Atl. 575. Compare *State v. Phillips* (1897) 1 Penn. 11, 39 Atl. 453.

Georgia. — *Maddox v. Patterson* (1888) 80 Ga. 719, 6 S. E. 581; *Brown v. Brown* (1909) 132 Ga. 712, 131 Am. St. Rep. 229, 64 S. E. 1092. See also *Hall v. Hall* (1914) 141 Ga. 361, 80 S. E. 992; *Ellis v. Hewitt* (1915) 15 Ga. App. 693, 84 S. E. 185.

Illinois.—*Cowls v. Cowls* (1846) 8 Ill. 435, 44 Am. Dec. 708; *Armstrong v. Armstrong* (1864) 35 Ill. 109; *Plaster v. Plaster* (1854) 47 Ill. 290; *Steele v. People* (1900) 88 Ill. App. 186; *Konitzer v. Konitzer* (1904) 112 Ill. App. 326. See also *Plaster v. Plaster* (1870) 53 Ill. 445. Compare *Johnson v. Johnson* (1890) 36 Ill. App. 152.

Iowa. — *Ostheimer v. Ostheimer* (1904) 125 Iowa, 523, 101 N. W. 275; *Foote v. De Poy* (1905) 126 Iowa, 366,

68 L.R.A. 302, 106 Am. St. Rep. 365, 102 N. W. 112; *Spain v. Spain* (1916) 177 Iowa, 249, L.R.A.1917D, 319, 158 N. W. 529, Ann. Cas. 1918E, 1225. See also *Kinney v. Kinney* (1911) 150 Iowa, 225, 129 N. W. 826.

Kansas.—*Kendall v. Kendall* (1897) 5 Kan. App. 688, 48 Pac. 940; *Riggs v. Riggs* (1914) 91 Kan. 593, 138 Pac. 628, Ann. Cas. 1915D, 809; *Rowell v. Rowell* (1916) 97 Kan. 16, 154 Pac. 243, Ann. Cas. 1918C, 936. And see *Harris v. Harris* (1869) 5 Kan. 346. Compare *Chandler v. Dye* (1887) 37 Kan. 765, 15 Pac. 925; *Miller v. Morrison* (1890) 43 Kan. 446, 23 Pac. 612; *Hampton v. Allee* (1896) 56 Kan. 461, 43 Pac. 779, all of which cases are reviewed and distinguished in *Riggs v. Riggs* (1914) 191 Kan. 593, 138 Pac. 628, Ann. Cas. 1915D, 809, *supra*.

Kentucky. — *Shrader v. Shrader* (1889) 11 Ky. L. Rep. 441; *Tuggles v. Tuggles* (1895) 17 Ky. L. Rep. 221, 30 S. W. 875. See also *Wills v. Wills* (1916) 168 Ky. 35, 181 S. W. 619; *Griffin v. Griffin* (1916) 173 Ky. 636, 191 S. W. 458.

Louisiana.—*State v. Seghers* (1909) 124 La. 115, 49 So. 998.

Maryland. — *Alvey v. Hartwig* (1907) 106 Md. 254, 11 L.R.A.(N.S.) 678, 67 Atl. 132, 14 Ann. Cas. 250.

Minnesota. — *Spencer v. Spencer* (1906) 97 Minn. 56, 2 L.R.A.(N.S.) 851, 114 Am. St. Rep. 695, 105 N. W. 483, 7 Ann. Cas. 901; *McAllen v. McAllen* (1906) 97 Minn. 76, 106 N. W. 100. See also *Re Koopman* (1920) 146 Minn. 36, 177 N. W. 777.

Missouri.—*Viertel v. Viertel* (1908) 212 Mo. 562, 111 S. W. 579; *Auer v. Auer* (1917) — Mo. App. —, 193 S. W. 926; *Kinsolving v. Kinsolving* (1916) — Mo. App. —, 194 S. W. 530; *Winner v. Shucart* (1919) 202 Mo. App. 176, 215 S. W. 905; *Kershner v. Kershner* (1920) 202 Mo. App. 238, 216 S. W. 547; *Lukowski v. Lukowski* (1904) 108 Mo. App. 204, 83 S. W. 274; *Cole v. Cole* (1905) 115 Mo. App. 466, 91 S. W. 457; *Seely v. Seely* (1906) 116 Mo. App. 362, 91 S. W. 979; *Bennett v. Robinson* (1914) 180 Mo. App. 56, 165 S. W. 856; *Robinson v. Robinson* (1916) 268 Mo. 703, 186 S. W. 1032, modifying judgment in (1913) 168 Mo.

App. 639, 154 S. W. 162. See also *Keller v. St. Louis* (1899) 152 Mo. 596, 47 L.R.A. 391, 54 S. W. 438; *White v. White* (1913) 169 Mo. App. 40, 154 S. W. 872.

Montana.—See *Kane v. Kane* (1916) 53 Mont. 519, 165 Pac. 457.

Nebraska.—*Eldred v. Eldred* (1901) 62 Neb. 613, 87 N. W. 340; *Geary v. Geary* (1918) 102 Neb. 511, — A.L.R. —, 167 N. W. 778.

New Hampshire.—*Dolloff v. Dolloff* (1894) 67 N. H. 512, 38 Atl. 19.

New Jersey.—See *Richmond v. Richmond* (1838) 2 N. J. Eq. 90.

North Carolina.—See *Sanders v. Sanders* (1914) 167 N. C. 319, 83 S. E. 490.

Ohio.—*Pretzinger v. Pretzinger* (1887) 45 Ohio St. 452, 4 Am. St. Rep. 542, 15 N. E. 471; *Schuman v. State* (1899) 9 Ohio S. & C. P. Dec. 513, 6 Ohio N. P. 244; *State v. Stouffer* (1901) 65 Ohio St. 47, 60 N. E. 985. See also *Young v. Young* (1905) 28 Ohio C. C. 179.

Oregon.—*State v. Langford* (1918) 90 Or. 251, 176 Pac. 197. See also *Miller v. Miller* (1913) 67 Or. 359, 136 Pac. 15.

Pennsylvania. — *Com. v. Edgar* (1910) 44 Pa. Super. Ct. 496.

Tennessee.—*Evans v. Evans* (1911) 125 Tenn. 112, 140 S. W. 745, Ann. Cas. 1913C, 294; *Graham v. Graham* (1918) 140 Tenn. 328, 204 S. W. 987.

Texas.—*Ligon v. Ligon* (1905) 39 Tex. Civ. App. 392, 87 S. W. 838; *Barry v. Barry* (1910) — Tex. Civ. App. —, 131 S. W. 1142; *Bemus v. Bemus* (1911) 63 Tex. Civ. App. 148, 133 S. W. 503; *Bond v. Bond* (1905) 41 Tex. Civ. App. 129, 90 S. W. 1128. And see the reported case (*GULLY v. GULLY*, ante, 564).

Vermont.—*Buckminster v. Buckminster* (1865) 38 Vt. 248, 88 Am. Dec. 652; *Montpelier v. Elmore* (1899) 71 Vt. 193, 44 Atl. 71. See also *Wheeler v. Lowell* (1917) 91 Vt. 278, 100 Atl. 39.

Washington. — *Gibson v. Gibson* (1898) 18 Wash. 489, 40 L.R.A. 587, 51 Pac. 1041; *Ditmar v. Ditmar* (1901) 27 Wash. 13, 91 Am. St. Rep. 817, 67 Pac. 353; *Hector v. Hector* (1909) 51 Wash. 434, 99 Pac. 13; *Hilleware v.*

Hilleware (1919) 104 Wash. 361, 176 Pac. 330. See also Schoennauer v. Schoennauer (1913) 77 Wash. 132, 137 Pac. 325.

Wisconsin. — Zilley v. Dunwiddie (1898) 98 Wis. 428, 40 L.R.A. 579, 67 Am. St. Rep. 820, 74 N. W. 126. See also Campbell v. Campbell (1875) 37 Wis. 206.

England.—Bazeley v. Forder (1868) L. R. 3 Q. B. 559.

In Brown v. Brown (1909) 132 Ga. 712, 131 Am. St. Rep. 229, 64 S. E. 1092, the court stated the reason of the rule as follows: "There is much conflict in the authorities on this question, and some courts hold that the father is not liable to the mother for expenditures made by her in support of the children under such circumstances. A majority of the authorities, however, seem to be in accord with the view which we entertain and have hereinabove expressed, to the effect that the father is liable. One of the reasons given in the authorities holding the contrary view, why the father is not liable, is that support and service are reciprocal duties, and that the father cannot be liable for the support of his children when he loses their service by reason of their being awarded to the mother. We do not think, however, this argument is sound, because the services of the children are lost to the father by reason of his wrongful act, if the divorce is granted because of his misconduct, and the court only acts to protect them in taking them from him and awarding them to the mother; and it would not be proper to allow the father to be relieved of liability for necessary support furnished his children because of his own wrongful conduct."

The majority view was set forth in the case of Dolloff v. Dolloff (1894) 67 N. H. 512, 38 Atl. 20, in the following language: "Nor is it material that the plaintiff was awarded alimony to the amount of \$600. Alimony, in its proper signification, is not maintenance to the children, but to the wife; and when no order is made for the children's maintenance upon the allowance of alimony with custody of children, the father's obligation to

support them is in no wise affected. In brief, when the father has been found, by a judicial decree like the one in this case, to be an unfit person to exercise parental control by reason of his own voluntary misconduct, the law does not allow him to convert such misconduct into a shield against his parental liability.' Another reason given in this line of cases for holding that the father is not liable is that, when the children are awarded to the mother without any provision for their support, it is to be presumed that the court made such provision for their support as was necessary, and that the decree is conclusive as to the father not being under any obligation for their support after the decree, unless such decree is afterwards modified by continued proceedings in the original action. It would seem that if it is proper for any presumption at all to be had in such a case, it would be that the court omitted to make any provision for the support of the children in the decree because it was deemed proper to leave the obligation to support his children where it legally and ordinarily belonged, to wit, with the father, until there was some legal proceeding in regard thereto." See to the same effect, Konitzer v. Konitzer (1904) 112 Ill. App. 326.

So, in Buckminster v. Buckminster (1865) 38 Vt. 248, 88 Am. Dec. 652, the court said: "Divorce and decreeing the custody of minor children to the mother do not absolve the father from his parental duties and obligations to his children. He must still be reasonably liable for their support and education. . . . It is their right that those who have brought them into the world should take care of them till they are old enough to take care of themselves." But it was said that "in enforcing this duty the court will consider all the circumstances; will not allow the right to be abused, and under color of maintenance for the children allow further alimony for the wife; nor disregard the rights of the husband and his new relations and duties to others."

The question was raised in Desch v. Desch (1913) 55 Colo. 79, 132 Pac. 60,

and in holding the father to be liable the court said: "In the case at bar the decree of divorce was granted on account of the husband's misconduct, and only directs that the mother shall have the custody of the child without any provision for its support. This did not impose upon the mother, as between the father and herself, the obligation to support the child, nor did it release the defendant from that obligation, but leaves that duty which the law imposes upon him subsisting and unimpaired. We are therefore of the opinion that the court erred in ruling that plaintiff could not recover for expenses incurred in supporting the child prior to the commencement of her action over and above the amount contributed by the defendant during that period. There are cases in which the opposite conclusion has been announced; but unquestionably our conclusion is supported by the majority of the recent decisions upon the subject."

In *Welch's Appeal* (1876) 43 Conn. 342, the husband's estate was held to be liable for the support of his minor children where the custody of the children was given to the wife by a decree of divorce making no provision for their maintenance, under a statute providing that on the dissolution of a marriage by divorce the parents of a minor child of the marriage shall maintain it according to their respective abilities. That case modified the law as laid down in *Finch v. Finch* (1853) 22 Conn. 411, which was decided before the statute, wherein the wife was denied relief for the support of the children awarded to her custody, and sustained the rule as laid down, independently of the statute, in *Stanton v. Willson* (1808) 3 Day (Conn.) 37, 3 Am. Dec. 255.

In *Maddox v. Patterson* (1888) 80 Ga. 719, 6 S. E. 581, it was held that a minor child was entitled, according to statute, to a year's support out of the father's estate, where the parents were divorced and the custody of the minor was awarded to the mother without any provision for the child's support.

In *Com. v. Edgar* (1910) 44 Pa. Super. Ct. 496, it appeared that the

wife had been granted a decree of divorce *a mensa et thoro* with alimony. The decree contained the following provision: "And it is further ordered, adjudged, and decreed that the respondent pay to the libellant the annual sum of \$1,300 from the date of this decree and until the further order of this court, in weekly payments of \$25, for her support and maintenance." It was held that this decree was not intended to include maintenance for the child, and that it did not affect the right of the wife to apply for an order to compel the father to support his child.

The fact that the father is willing and has repeatedly offered to take the children himself and support them constitutes no defense in an action by the mother for their support and maintenance. *La Rue v. Kempf* (1914) 186 Mo. App. 57, 171 S. W. 588.

b. Exceptions to rule.

Since the rule that a father is liable for the support of his children though he has, by a decree of divorce, been deprived of their society and services, is based on the fact that his fault produced the condition, the rule has been held to be inapplicable where the divorce is granted for the fault of the wife. *Fulton v. Fulton* (1895) 52 Ohio St. 229, 29 L.R.A. 678, 49 Am. St. Rep. 720, 39 N. E. 729. In that case it appeared that the husband obtained a divorce, the decree providing that the mother should have the custody of the minor children, but making no provision for their maintenance. In an action by the wife against the former husband for expenditures on behalf of the children, it was held that unless the husband had expressly promised to pay for such necessities the wife could not recover, the court saying: "By receiving them into her custody she should be held, as to them, to assume the obligations incident to that custody. If, under these circumstances, where her own misconduct has destroyed the family relation and deprived the father of the custody and society of his children, she has in fact maintained her children, she has no

claim, legal or moral, to demand reimbursement from the father. She has simply discharged a duty cast upon her by the plainest principles of natural justice, for the reason that the necessity for it arose from her own misconduct." *Fulton v. Fulton* (Ohio) *supra*, was approved in *Douglas v. Douglas* (1901) 64 Ohio St. 605, 61 N. E. 1142. See to the same effect, *Christoff v. Christoff* (1892) 3 Ohio C. D. 562.

It has been held that the rule that the father is liable is not applicable to a case where, though the decree is silent as to the maintenance and support of the child, a settlement by contract between the parents is made in connection with the divorce proceedings for the future support of the minor children, and the mother thereafter seeks to recover for support and maintenance furnished by her. *La Rue v. Kempf* (1914) 186 Mo. App. 57, 171 S. W. 588, wherein the court said: "Though a father will ordinarily remain liable for the support and maintenance of his children after divorce, and the law will imply a promise on his part to reimburse the mother therefor, where the latter has the custody of such children and supports and maintains them, nevertheless where, in connection with the divorce proceedings, a settlement is made between the parents, whereby provision is made by the father for the future support of the children, which is accepted by the mother as and for a suitable and satisfactory provision therefor, this court has held that the father will no longer be liable in an action by the mother for such support and maintenance furnished by her, whatever liability may otherwise continue to attach to the father growing out of his natural and legal duty to provide for his offspring. . . . In the case before us, if the money paid by the defendant to plaintiff's counsel, at the time of the divorce proceeding, was paid under an agreement that the same should constitute a full and satisfactory provision for the future support and maintenance of the children, and was accepted by plaintiff as and for a suitable and satisfactory

provision therefor, then it seems clear that plaintiff cannot maintain this action."

In *Bondies v. Porter* (1913) 40 Okla. 89, 136 Pac. 417, it was held that a third person who had voluntarily furnished necessities to a child whose custody had been decreed to the mother in a divorce proceeding could not recover from the father, in the absence of an agreement, for the value of such necessities. And see *Bondies v. Bondies* (1913) 40 Okla. 164, 136 Pac. 1089.

In *Johnson v. Onsted* (1889) 74 Mich. 437, 42 N. W. 62, it appeared that a divorced wife, to whom the custody of the child had been awarded, remarried, and the child was supported by the second husband. In an action by him against the father for the support of the child, it was held that he could not recover, as the plaintiff had never demanded any pay, and the father had never agreed to compensate him for the support and maintenance.

In *Brow v. Brightman* (1883) 136 Mass. 187, it was held that a third person could not recover from the father for necessities furnished his minor child, whose custody was awarded to the mother by a divorce decree, as the mother had no authority to bind the father by contract for the support of the child.

See to the same effect, *Hancock v. Merrick* (1852) 10 Cush. (Mass.) 41.

In Washington, it seems that, by virtue of the community property doctrine, if a divorce decree not only awards the custody of the children to the wife, but makes a division of the property, the wife is not entitled to recover from the husband the entire cost of maintaining the children, but only to compel him to contribute his aliquot share. *Ditmar v. Ditmar* (1901) 27 Wash. 13, 91 Am. St. Rep. 817, 67 Pac. 353; *Hector v. Hector* (1909) 51 Wash. 434, 99 Pac. 13.

III. *Minority rule.*

In a few jurisdictions it is held that a divorce decree awarding the custody of the minor children to the wife absolves the husband from further duty

to support and educate them. *Husband v. Husband* (1879) 67 Ind. 583, 33 Am. Rep. 107; *Hall v. Green* (1895) 87 Me. 122, 47 Am. St. Rep. 311, 32 Atl. 796; *Burritt v. Burritt* (1859) 29 Barb. (N. Y.) 124; *Rich v. Rich* (1895) 88 Hun, 566, 34 N. Y. Supp. 854; *Brown v. Smith* (1895) 19 R. L. 319, 30 L.R.A. 680, 33 Atl. 466. Compare *Conn v. Conn* (1877) 57 Ind. 323; *Spade v. State* (1909) 44 Ind. App. 529, 89 N. E. 604; *Pawling v. Willson* (1816) 13 Johns. (N. Y.) 192.

In the leading case of *Husband v. Husband* (1879) 67 Ind. 583, 33 Am. Rep. 107, it was held that a father was not liable for the past support of a minor child, where the decree of divorce awarded the custody of the child to the mother and made no provision for its support. The court said: "The true legal principle applicable to cases of this kind seems to be that the right to the services of the children and the obligation to maintain them go together; and, if the assignment of the custody to the wife extends to depriving the father of his claim to their services, then he cannot be compelled to maintain them otherwise than in pursuance of some statutory regulation." A contrary view was apparently taken in *Conn v. Conn* (1877) 57 Ind. 323; and there was dictum to the contrary in *Spade v. State* (1909) 44 Ind. App. 529, 89 N. E. 604, based on *Leibold v. Leibold* (1902) 158 Ind. 60, 62 N. E. 627, a case involving the effect of a judicial separation.

In *Hall v. Green* (1895) 87 Me. 122, 47 Am. St. Rep. 311, 32 Atl. 796, it was held in an action by a third person against the father for the support of his child, where the custody had been awarded to the mother in a divorce decree, that a common-law action could not be maintained against the father by a third person for the support of his child.

In *Brown v. Smith* (1895) 19 R. L. 319, 30 L.R.A. 680, 33 Atl. 466, the court in holding that the mother, to whom the custody of the children had been awarded in a decree of divorce silent as to maintenance, could not recover for the support of the children from the deceased husband's estate,

said: "By virtue of the decree in the petition above referred to, said Rebecca M. Brown became entitled to the custody of said minor children, together with the right to their services, and defendant's intestate was thereby deprived of his common-law right thereto; and, being thus deprived of this right, he became absolved from the correspondent common-law obligation which previously rested upon him to support said children. In other words, the award of the children to the mother carried with it a transfer of parental duties as well as of parental rights."

In *Exchange Bkg. & T. Co. v. Finley* (1906) 73 S. C. 423, 53 S. E. 649, it appeared that the wife obtained a divorce giving to her the custody of a minor child, no provision being made for its maintenance. The father, however, did make some contribution toward the child's support. Subsequently a legacy was left to the child, and the father, having been appointed executor, sought to deduct the amount which he had contributed to the child's support from the legacy. It was held that the father was under no legal obligation to pay for necessities furnished the child, but, having done so, the contributions would be considered as made under a moral obligation, and he could not obtain credit therefor from the legacy.

In California, the minority doctrine heretofore stated seems to obtain. *McKay v. Superior Ct.* (1898) 120 Cal. 143, 40 L.R.A. 585, 52 Pac. 147; *McKay v. McKay* (1899) 125 Cal. 65, 57 Pac. 677; *Shattuck v. Shattuck* (1901) 135 Cal. 192, 67 Pac. 45; *Selfridge v. Paxton* (1900) 145 Cal. 713, 79 Pac. 425; *Calegaris v. Calegaris* (1906) 4 Cal. App. 264, 87 Pac. 561; *People v. Hartman* (1913) 23 Cal. App. 72, 137 Pac. 611; *Re Perry* (1918) 37 Cal. App. 189, 174 Pac. 105. Thus, in *Re Perry*, supra, it appeared that a wife obtained a decree of divorce awarding to her the custody of the children, with no provision for their support by the father. In a criminal action against the father for nonsupport of his children, the court, in holding that the father was not liable, said: "It has frequent-

ly been held that where, by a decree of divorce, the custody of the minor children of the parties is awarded to one of the parents, without charging upon the other parent the support of such children, the parent to whose custody the children are so awarded is, under the terms of § 196 of the Civil Code, alone liable for their support, and the parent not entitled to the custody of the minors is relieved of that duty." See to the same effect, *Calegaris v. Calegaris* (1906) 4 Cal. App. 264, 87 Pac. 561, wherein the court said: "If no provision in reference to the children is made in the original judgment, but by reason of their necessities, or for the protection of their interests, any judicial action is required in their behalf, it may be sought in an independent proceeding therefor. By the terms of the original decree herein, the care, custody, and control of the children were given to the plaintiff, and in the order appealed from no modification or change of the judgment in this respect has been made; and in awarding to her \$30,000 of the community property, estimated at one half thereof, and making no provision that the defendant shall contribute to the support or education of the children, it must be assumed that the court intended that he should not contribute to the plaintiff any portion of the expense incurred by her in caring or providing for them. See *Parkhurst v. Parkhurst* (1897) 118 Cal. 18, 50 Pac. 9. The failure to provide in the original decree that defendant should pay any money to plaintiff for the care, custody, and education of the children had the legal effect of an adjudication as between them that he should not be required to make any payment therefor." In *Selfridge v. Paxton* (1905) 145 Cal. 713, 79 Pac. 425, it was held, under a statute providing that the parent entitled to the custody of the child must give him support and education suitable to his circumstances, that a third person could not recover from a child's

father for medical services rendered to the child, who was in the custody of the mother under a decree of divorce. The court said: "Whatever may be thought as to how the law should be on this subject, we must take it to be as it is written in the Code. It must be presumed that the lawmakers looked at the question from all sides,—considering the interests of the child as well as the proper liability of the parent,—and concluded to enact the law as it stands." In *McKay v. McKay* (1899) 125 Cal. 65, 57 Pac. 677, it appeared that a divorce was granted, giving the custody of the children to the wife, but making no provision for their maintenance. The divorced wife remarried and the children were supported by the second husband. In an action against the father for the expense incurred for the past support and also for their future support, it was held in a prior proceeding (*McKay v. Superior Ct.* (1898) 120 Cal. 143, 40 L.R.A. 585, 52 Pac. 147) that the court had jurisdiction, under § 138 of the Civil Code, to make an order compelling the father to pay for the past and future support of the children; but on a rehearing in *McKay v. McKay*, supra, the court held that, as the second husband had supported the children, the father could not be held liable for expenses incurred for their maintenance prior to the application. In *People v. Hartman* (1913) 23 Cal. App. 72, 137 Pac. 611, the court held, by virtue of statute (Civil Code, § 196), that where in a divorce proceeding the custody of a minor child is given to the mother and no provision in the decree is made for the support of the child by the father, the parent entitled to the custody of the child must support it. But the same case held that by authorization of statute (Civ. Code, §§ 138, 139) the court, in a proper case, may by supplementary proceedings, require the father, who has not the custody of the child, to contribute to its support.

L. W. B.

**ADOLPH STASMAS, Plff. in Err.,
v.
ROCK ISLAND COAL MINING COMPANY et al.**

Oklahoma Supreme Court—February 8, 1921.

(Stasmos v. State Industrial Commission, 80 Okla. 221, 195 Pac. 762.)

Workmen's compensation — assault by fellow workmen.

1. Injury resulting from an assault by a workman upon a fellow workman while the latter is engaged in the work of the master is an "accidental personal injury arising out of and in the course of employment," within the meaning of the term as used in § 1 (article 2) of the Workmen's Compensation Act.

[See note on this question beginning on page 588.]

— construction of act.

2. The Workmen's Compensation Law should be construed fairly, indeed, liberally, in favor of the employee.

[See 28 R. C. L. 755.]

— test of liability.

3. The test of liability under the

Headnotes by KANE, J.

Workmen's Compensation Law for injuries arising out of and in the course of employment is not the master's dereliction, whether his own or that of his representatives, acting within the scope of their authority, but is the relation of the service to the injury, of the employment to the risk.

[See 28 R. C. L. 796 et seq.]

ERROR to the State Industrial Commission to review its order denying compensation to petitioner in a proceeding under the Workmen's Compensation Act to recover compensation for personal injuries alleged to have been sustained by him while in the employ of the respondent company. *Reversed.*

The facts are stated in the opinion of the court.

Mr. J. S. Arnote for plaintiff in error.

Messrs. Moore & Harries, for defendant in error Company:

The injury sustained by petitioner was not one of those accidental personal injuries arising out of and in the course of the employment for which compensation would be payable under the provisions of the Oklahoma Workmen's Compensation Law.

Heitz v. Ruppert, 218 N. Y. 148, L.R.A.1917A, 344, 112 N. E. 750; Gann v. Great Southern Lumber Co. 131 La. 400, 59 So. 830; Slater v. Advance Thresher Co. 97 Minn. 305, 5 L.R.A. (N.S.) 598, 107 N. W. 133; Riley v. Roach, 168 Mich. 294, 37 L.R.A. (N.S.) 834, 134 N. W. 14.

Messrs. S. P. Freeling, Attorney General, and R. E. Wood, Assistant Attorney General, for State Industrial Commission.

Kane, J., delivered the opinion of the court:

This is an appeal from the action of the State Industrial Commission in refusing to allow the petitioner compensation for personal injuries incurred while in the employ of the Rock Island Coal Mining Company as a miner. There is no controversy between the parties concerning the facts disclosed by the evidence, which may be briefly summarized as follows:

At the time of the injury and for some time prior thereto, Stasmas, the petitioner, was in the employ of the Rock Island Coal Mining Company in the capacity of a coal miner. On the day of the injury he was at work in rooms 48 and 49. About 1 o'clock of that date the mine shut

down, and word was sent to the miners and to the petitioner that the mine had stopped work, and that it was necessary for the workmen to depart from their working places and proceed to the surface. Upon receiving these directions, the petitioner, with other workmen, left his working place and passed up through the entries and passageways of the mine to the bottom of the shaft for the purpose of taking the cage out of the mine. While waiting at the bottom of the shaft for the cage to arrive, the petitioner asked Tom Woods, an assistant mine foreman and a fellow employee of the petitioner, who was present, where the cage was, saying that he (the petitioner) wanted the cage to go out of the mine. Whereupon Woods, becoming angry, applied an ugly epithet to the petitioner, adding: "Why don't you go up the air shaft?" Upon the petitioner resenting the insult of Woods, the latter picked up a 2x4 scantling and struck petitioner over the head, knocking him down and crushing and breaking his skull so severely that he remained unconscious for some time. The cage, which was temporarily out of order, arriving shortly after the encounter, the petitioner was taken out of the mine and from the mine to his home, from which he was taken next day to the hospital at McAlester, where he remained ten days. As the result of this injury the petitioner was unable to work for a period of about six weeks, his mind being seriously affected for a period of one month. The claim for compensation filed by the petitioner before the State Industrial Commission was denied upon the ground that the disability of the petitioner was not the result of accidental personal injury arising out of and in the course of his employment. This ruling is assigned as error. In our opinion this ground for reversal is well taken.

The part of § 1, art. 2, chap. 246, of the Session Laws of 1915, generally known as the Workmen's Compensation Act, necessary to no-

15 A.L.R.—37.

tice, provides as follows: "Every employer subject to the provisions of this act shall pay or provide as required by this act compensation according to the schedules of this article for the disability of his employee resulting from an accidental personal injury sustained by the employee arising out of and in the course of his employment, without regard to fault as a cause of such injury, except where the injury is occasioned by the wilful intention of the injured employee to bring about injury of himself or of another."

A casual reading of this section makes it fairly obvious that the petitioner's right to recover depends upon an affirmative answer to two questions: (1) Were his disabilities the result of accidental personal injuries? (2) Did they arise out of and in the course of his employment? It seems clear to us, in view of the rule of construction many times announced by this and other courts, that the Workmen's Compensation Law should be construed fairly, indeed, liberally, in favor of the injured workman, that both of these questions must be answered in the affirmative.

Workmen's compensation—construction of act.

It is now well settled in these workmen's compensation cases that the fact that an injury is the result of the wilful or criminal assault of another does not prevent the injury from being accidental. *McNicol's Case*, L.R.A.1916A, 309, and note (215 Mass. 497, 102 N. E. 697, 4 N. C. C. A. 522); L.R.A.1917D, 112, note; *Western Indemnity Co. v. Pillsbury*, 170 Cal. 686, 151 Pac. 398, 10 N. C. C. A. 1; *Western Metal Supply Co. v. Pillsbury*, 172 Cal. 407, 156 Pac. 491, Ann. Cas. 1917E, 390; *Heitz v. Ruppert*, 218 N. Y. 148, 112 N. E. 750; *Von Ette's Case*, 223 Mass. 56, L.R.A.1916D, 641, 111 N. E. 696, 12 N. C. C. A. 551; *Willis v. Pilot Butte Min. Co.* 58 Mont. 26, 190 Pac. 124; 1 C. J. 390, and cases cited.

The latter authority defines the

word "accident" as follows: Accident in the legal signification is difficult to define. It is not a technical legal term with a clearly defined meaning, and is used in more senses than one. The word denotes an event which proceeds from an unknown cause, or is the unusual effect of a known cause, and therefore unexpected. Chance, casualty, an event happening without any human agency, or, if happening through human agency, an event which, under the circumstances, is unusual or unexpected to the person to whom it happens. An event which, under the circumstances, is unusual and unexpected by the person to whom it happens. Under this definition we think the injury was "accidental" within the meaning of the statute. It was sudden and unlooked for, and the purpose of the act is to insure the workmen, at the expense of their employers, against personal injury not expected or designed by the workman himself, provided such injuries arise out of and in the course of employment.

—assault by fellow workmen.

It seems equally clear to us that the facts in this case show that petitioner's injury arose out of and in the course of his employment.

—test of liability.

As we have seen from the brief statement of the case hereinbefore set out, the petitioner was in the act of leaving the mine, following the usual course of exit from his working place to the foot of the shaft, for the purpose of taking the cage to the top. Tom Woods, the assistant foreman, was there, directing the men, and while the test of liability under the statute is not the dereliction of the master, or that of his representative, acting within the scope of his authority, it seems to us that it was entirely proper for the petitioner to complain to the mine foreman concerning the delay in the arrival of the cage.

Our statute, in so far as it provides for compensation for the "disability of an employee resulting from accidental personal injury sus-

tained by the employee arising out of and in the course of his employment," is almost if not identical with the British statute upon this subject, and with the statutes of practically every state in the United States except Washington, which has a broader provision on the foregoing paragraph of our statute.

It is the decided weight of authority in Great Britain and the United States that an assault by a third party, or an assault of the employer arising out of and in the course of the employment, resulting in an injury and disability, is such an injury as comes within the Workmen's Compensation Law. L.R.A. 1917D, 112, notes; Willis v. State Industrial Commission, 78 Okla. 216, 190 Pac. 92; Willis v. Pilot Butte Min. Co. 58 Mont. 26, 190 Pac. 124, and many other cases.

The facts in the Willis Case, supra, are somewhat similar to the case at bar. The employee, with others, had left his work and gathered around a fire to warm, and was not actually at work. A fellow employee came along and voluntarily and intentionally threw a piece of split dynamite in the fire. Those around the fire were warned of the act, and all ran away except the one injured, and the dynamite exploded and injured him. The supreme court held that Willis was entitled to recover under the Compensation Law of this state.

An injury sustained by an employee of a factory from being struck by an apple which one of his fellow employees, a boy, had thrown at another in sport, and which nearly caused the loss of the entire sight of one eye, was held by the New York court of appeals to be an injury arising out of and in the course of his employment, within the Workmen's Compensation Law, in Leonbruno v. Champlain Silk Mills, 229 N. Y. 470, 128 N. E. 711. The injured employee was, at the time, engaged in the performance of his duties, and had no knowledge of the horseplay. Judge Cardozo, who wrote the opinion, reviewed and dis-

tinguished a number of cases which arose in New York and in some of the other states, as well as cases arising under the English law. In conclusion he said: "The risks of injury incurred in the crowded contacts of the factory through the acts of fellow workmen are not measured by the tendency of such acts to serve the master's business. Many things that have no such tendency are done by workmen every day. The test of liability under the statute is not the master's dereliction, whether his own or that of his representatives, acting within the scope of their authority. The test of liability is the relation of the service to the injury, of the employment to the risk."

If we apply this test to the case at bar, it is obvious that the State Industrial Commission erred in denying the petitioner compensation for his disabilities.

As was said in *Verschleiser v. Joseph Stern & Son*, 229 N. Y. 192, 128 N. E. 126, another late New York case more directly in point: "It may seem harsh and arbitrary to impose liability upon a master for an assault committed by a workman upon a coworkman, but the purpose and intent of the statute is to fix an arbitrary liability in the

greater public interest involved. This legislation was to ameliorate a social condition,—not to define a situation or fix a liability by an adherence to the old common law. Liability was imposed regardless of fault,—vitally different from the rule under the common law. Injury by an employee, moved by some cause aside from his regular duties, may be considered an inevitable, however, undesirable, result,—a risk which is incident to the employment of many persons. It is a burden which industry may well bear under this legislation."

For the reasons stated, the judgment of the State Industrial Commission is reversed and the cause remanded, with directions to proceed in accordance with the views herein expressed.

All the Justices concur.

Petition for rehearing denied.

NOTE.

The liability under the Workmen's Compensation Act for injury by an assault is the subject of the annotation following *CHICAGO v. INDUSTRIAL COMMISSION*, post, 588.

STATE OF MINNESOTA EX REL. COMMON SCHOOL DISTRICT
NO. 1, in Itasca County,

v.

DISTRICT COURT of Itasca County in and for the Fifteenth Judicial
District

Minnesota Supreme Court—July 12, 1918.

(140 Minn. 470, 168 N. W. 555.)

Workmen's compensation — assault on teacher.

A school district employed a young woman teacher for a one-room school in a densely wooded and sparsely settled part of the country. On her way to her boarding house after her day's work at the schoolhouse was done, and when off the schoolhouse grounds, she was assaulted by an unknown man for the gratification of his passions, and as a part of the transaction she was shot and the sight of one eye was destroyed. The

Headnote by DIBELL, C.

Workmen's Compensation Act gives compensation for personal injury "caused by accident, arising out of and in the course of employment." It does not cover workmen except while engaged in or about the premises where their work is done or their service requires their presence; and it excludes "an injury caused by the act of a third person or fellow employee intended to injure the employee because of reasons personal to him, and not directed against him as an employee or because of his employment." Without determining whether the injuries to the teacher arose in the course of the employment, it is held that they were not caused by accident arising out of the employment, and that they are not compensable under the Compensation Act.

[See note on this question beginning on page 588.]

PETITION for a writ of certiorari to review a judgment of the District Court for Itasca County (Wright, J.) awarding compensation under the Workmen's Compensation Act for personal injuries to a teacher in the employ of the relator. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Baldwin, Baldwin, & Holmes, for relator:

The injury to the employee, Olga Dahl, did not result from accident arising out of and in the course of her employment.

Re McNicol, L.R.A.1916A, 309, note; Rayner v. Sligh Furniture Co. L.R.A. 1916A, 64, note; Linnane v. Aetna Brewing Co. L.R.A.1917D, 123, note; Bradbury, Workmen's Comp. Law, 3d ed. pp. 587 et seq.; Murphy v. Berwick, 43 Ir. L. T. 126, 2 B. W. C. C. 103; Walther v. American Paper Co. 89 N. J. L. 732, 99 Atl. 263; Harboe's Case, 223 Mass. 139, L.R.A.1916D, 933, 111 N. E. 709; State ex rel. Rau v. District Ct. 138 Minn. 250, L.R.A.1918F, 918, 164 N. W. 916; State ex rel. Virginia & R. L. Co. v. District Ct. 138 Minn. 131, L.R.A.1918C, 116, 164 N. W. 585; State ex rel. H. S. Johnson Sash & Door Co. v. District Ct. 140 Minn. 75, L.R.A. 1918E, 502, 167 N. W. 283.

Mr. Ralph A. Stone, for respondent:

The injury arose in the course of the teacher's employment.

Munn & Co. v. Americana Co. 83 N. J. Eq. 309, L.R.A.1916D, 118, 91 Atl. 87; Rayner v. Sligh Furniture Co. L.R.A.1916A, 57, note; McNicol's Case, 215 Mass. 497, L.R.A.1916A, 309, 102 N. E. 697, 4 N. C. C. A. 522; Milwaukee v. Althoff, 156 Wis. 68, L.R.A.1916A, 327, 145 N. W. 238, 4 N. C. C. A. 110; De Constantin v. Public Service Commission, 75 W. Va. 32, L.R.A.1916A, 331, 83 S. E. 88; State ex rel. Duluth Brewing & Malting Co. v. District Ct. 129 Minn. 176, 151 N. W. 912; Hills v. Blair, 182 Mich. 20, 148 N. W. 243, 7 N. C. C. A. 409; Rieff v. Sac-

ramento, 2 Cal. Ind. Acci. Dec. 251, cited in 12 N. C. C. A. 901; Bradbury, Workmen's Comp. 3d ed. 607; Aldridge v. Merry, 47 Ir. L. T. 5, 6 B. W. C. C. 450; Mole v. Wadsworth, 6 B. W. C. C. 129.

The injury arose out of the employment.

McNicol's Case, 215 Mass. 497, L.R.A.1916A, 306, 102 N. E. 697, 4 N. C. C. A. 522; Bradbury, Workmen's Comp. 3d ed. p. 465; Bryant v. Fissell, 84 N. J. L. 72, 86 Atl. 458, 3 N. C. C. A. 585; Ketron v. United R. Co. 1 Cal. Ind. Acci. Dec. 528, cited in 12 N. C. C. A. 670; State ex rel. Anseth v. District Ct. 134 Minn. 16, L.R.A.1916F, 957, 158 N. W. 713; Murphy v. Berwick, 43 Ir. L. T. 126, 2 B. W. C. C. 103; Schmoll v. Weisbrod & H. Brewing Co. 89 N. J. L. 150, 97 Atl. 723; McNeil v. Mountain Ice Co. 38 N. J. L. 109, affirmed on rehearing in 38 N. J. L. J. 346; Shaw v. Macfarlane, 52 Scot. L. R. 236, 8 B. W. C. C. 382; State ex rel. People's Coal & Ice Co. v. District Ct. 129 Minn. 502, L.R.A. 1916A, 344, 153 N. W. 119, 9 N. C. C. A. 129; Mahowald v. Thompson-Starratt Co. 134 Minn. 113, 158 N. W. 913, 159 N. W. 565; State ex rel. Rau v. District Ct. 138 Minn. 250, L.R.A. 1918F, 918, 164 N. W. 916.

The employee is not precluded from compensation because of the provisions of § 8230, subsec. 1:

State ex rel. Duluth Brewing & Malting Co. v. District Ct. 129 Minn. 176, 151 N. W. 912; Re Schwenlein, 1 Bull. Ohio Ind. Com. 136; Bradbury, Workmen's Comp. 3d ed. p. 590; Western

Indemnity Co. v. Pillsbury, 170 Cal. 686, 151 Pac. 398, 10 N. C. C. A. 1; Trumbull v. Trumbull Motor Co. 1 Conn. Comp. Dec. 304.

Dibell, C., filed the following opinion:

Certiorari to the district court of Itasca to review a judgment awarding compensation under the Workmen's Compensation Act to a school-teacher in the employ of school district No. 1 of the county.

The facts are not in dispute. The school district employed a young woman to teach in the Round Lake school, some 35 miles from Deer river in Itasca county and 25 miles from Black Duck in Beltrami county, these two places being the nearest railway points. The country is densely wooded and sparsely settled. The school was a one-room school and fifteen pupils attended. The nearest house was a half mile away, and the boarding house was a mile or a mile and a quarter. On the morning of September 20, 1916, an unknown man asked for food at the boarding place of the teacher. On the evening of that day, when her work at the schoolhouse was finished, she started for her boarding house, taking a short cut through the woods. She had some papers which she intended to correct at home in the evening, and a book to study. As she was on her way, and when just off the school grounds, she was criminally assaulted by this man for the gratification of his passions, and as a part of the transaction he shot her, destroying the sight of her left eye. Some months later his body was found in a creek some miles away, with a bullet wound through the heart and a revolver near by. He had evidently committed suicide. There is no mistaking the facts recited. The assailant saw the teacher in the morning, lurked about until the opportunity came after she left school, and then committed the assault for purposes of his own.

The Compensation Act requires of the employer compensation "in every case of personal injury or

death of his employee, caused by accident, arising out of and in the course of employment," etc. Gen. Stat. 1913, § 8203.

The meaning of the word "accident" and the phrase "personal injuries arising out of and in the course of employment" is defined as follows:

"(h) The word 'accident' as used in the phrases 'personal injuries due to accident' or 'injuries or death caused by accident' in this act shall, unless a different meaning is clearly indicated by the context, be construed to mean an unexpected or unforeseen event, happening suddenly and violently, with or without human fault and producing at the time, injury to the physical structure of the body.

"(i) Personal Injuries, etc.—Without otherwise affecting either the meaning or interpretation of the abridged clause, 'personal injuries arising out of and in the course of employment,' it is hereby declared:

"Not to cover workmen except while engaged in, on, or about the premises where their services are being performed, or where their service requires their presence as a part of such service at the time of the injury, and during the hours of service as such workman, and shall not include an injury caused by the act of a third person or fellow employee intended to injure the employee because of reasons personal to him, and not directed against him as an employee, or because of his employment." Gen. Stat. 1913, § 8230.

It is not questioned that a wilful assault may be an accident within the definition of the act. Without stopping to consider whether the injury to the teacher occurred in the course of employment, as the statute uses the term, since she was away from the place of her definite school work, and on her way home, and upon that question this opinion is not to be taken as intimating a view, we pass to a consideration of whether it arose out of employment within the meaning of the statute.

The phrase, "arising out of employment," is usual to compensation acts, though some do not have it, and it has been provocative of litigation. That under some circumstances an injury from an assault is one caused by accident arising out of the employment is without question; and it is as much without question that under other circumstances it is not.

When the nature of the employment is such as naturally to invite an assault, or when the employee is exposed to an assault by the character of his work, as when he is protecting or in charge of his employer's property, and the assault naturally results because of the employment, and not because of something unconnected with it, so that it is a hazard or special risk of the work, the cases say that it arises out of the employment. The following are illustrative: *Trim Joint Dist. School v. Kelly* [1914] A. C. 667, 83 L. J. P. C. 220, 111 L. T. N. S. 305, 30 Times L. R. 452, 58 Sol. Jo. 493, 48 Ir. L. T. 141, [1914] W. C. & Ins. Rep. 359, 7 B. W. C. C. 274, Ann. Cas. 1915A, 104 (schoolmaster in industrial school assaulted by pupils); *Weekes v. Stead*, 137 L. T. Jo. 180, [1914] W. N. 263, 30 Times L. R. 586, 83 L. J. K. B. N. S. 1542, 111 L. T. N. S. 693, 58 Sol. Jo. 633, [1914] W. C. & Ins. Rep. 434, 6 N. C. C. A. 1010, 7 B. W. C. C. 398 (foreman whose duty it was to hire men, those applying being of a rough class, assaulted by man to whom he refused work); *Nisbet v. Rayne* [1910] 2 K. B. 689, 80 L. J. K. B. N. S. 84, 103 L. T. N. S. 178, 26 Times L. R. 632, 54 Sol. Jo. 719, 3 B. W. C. C. 507, 3 N. C. C. A. 268 (cashier assaulted and killed for purpose of robbing him of employer's money); *Anderson v. Balfour* [1910] 2 Ir. R. 497, 44 Ir. L. T. 168, 3 B. W. C. C. 588 (gamekeeper assaulted by poacher); *Challis v. London & S. W. R. Co.* [1905] 2 K. B. 154, 74 L. J. K. B. N. S. 569, 53 Week. Rep. 613, 93 L. T. N. S. 330, 21 Times L. R. 486, 7 W. C. C. 23 (engineer driving engine under

bridge hit by a stone thrown by boy on bridge); *Reithel's Case*, 222 Mass. 163, L.R.A.1916A, 304, 109 N. E. 951, 11 N. C. C. A. 235 (mill superintendent shot by trespasser whom it was his duty to remove); *Chicago Dry Kiln Co. v. Industrial Bd.* 276 Ill. 556, 114 N. E. 1009, Ann. Cas. 1918B, 645 (night watchman assaulted while protecting employer's property); *Ohio Bldg. Safety Vault Co. v. Industrial Bd.* 277 Ill. 96, 115 N. E. 149, 14 N. C. C. A. 224 (watchman assaulted); *Hellman v. Manning Sand Paper Co.* 176 App. Div. 127, 162 N. Y. Supp. 335 (watchman assaulted); *Carbone v. Loft*, 219 N. Y. 579, 114 N. E. 1062 (workman assaulted by fellow worker, apparently as result of a quarrel); *Polar Ice & Fuel Co. v. Murray*, 67 Ind. App. 270, 119 N. E. 149 (employee whose duty it was to collect shortages from deliverymen shot as result of quarrel with one of them about collections).

When the assault is unconnected with the employment, is personal to the assailant and the one assaulted, is not because the relation of employer and employee exists, and the employment is not the cause, though it may be the occasion, of the wrongful act, and may give a convenient opportunity for its execution, the cases say that the intentional injury does not arise out of the employment. The following are illustrative: *Murphy v. Berwick*, 43 Ir. L. T. 126, 2 B. W. C. C. 103 (cook in hotel assaulted by drunken customer of adjoining bar); *Mitchinson v. Day Bros.* [1913] 1 K. B. 603, 82 L. J. K. B. N. S. 421, 108 L. T. N. S. 193, 29 Times L. R. 267, 57 Sol. Jo. 300, 6 B. W. C. C. 190 (employee, driver of a van, assaulted and killed by a drunken man under circumstances constituting manslaughter); *Armitage v. Lancashire & Y. R. Co.* [1902] 2 K. B. 178, 71 L. J. K. B. N. S. 778, 66 J. P. 613, 86 L. T. N. S. 883, 18 Times L. R. 648 (workman injured by piece of iron thrown by angry fellow workman); *Blake v. Head*, 106 L. T. N. S. 822, 28 Times L. R. 321,

5 B. W. C. C. 303 (felonious assault by employer); Walther v. American Paper Co. 89 N. J. L. 732, 99 Atl. 263 (night watchman killed by fellow employee for purpose of robbing him of his pay); Schmoll v. Weisbrod & H. Brewing Co. 89 N. J. L. 150, 97 Atl. 723 (collector of brewing company assaulted by unknown person in a rough locality, where his work took him; no showing that motive was robbery or that employer knew of character of locality); Harbroe's Case, 223 Mass. 139, L.R.A.1916D, 933, 111 N. E. 709 (night watchman killed by police officers who mistook him for a robber).

These and many other cases are cited on one phase or the other of the question in the various treatises and annotations: Bradbury, Workmen's Comp. pp. 587 et seq.; 1 Honnold, Workmen's Comp. §§ 87, 120; Dosker, Comp. Law, § 113; Chartres, Workmen's Comp. 112-114; notes in L.R.A.1916A, 64, 309; L.R.A. 1917D, 123; 6 N. C. C. A. 1010-1030, and 11 N. C. C. A. 235-254.

There are no cases in this state of direct value. State ex rel. Anseth v. District Ct. 134 Minn. 16, L.R.A.1916F, 957, 158 N. W. 713, is cited. There an injury to a bartender, who was struck by a glass thrown by a drunken customer, was held to arise out of the employment. The fact that there was no personal altercation was noted. State ex rel. H. S. Johnson Sash & Door Co. v. District Ct. 140 Minn. 75, L.R.A.1918E, 502, 167 N. W. 283, is cited. There it was recognized that an injury coming from horseplay or practical joking might, under particular circumstances, be said to arise out of the employment. These cases suggest, as do others which we might cite, and perhaps particularly so those which have given compensation when the injury was caused by lightning, or freezing, or heat stroke, the liberal construction which we put, in favor of the employee, upon the language of the statute. It is not a question of fault or negligence. It is a question

of causal relation between the employment and the injury for which compensation is sought.

The cases which are here cited from various jurisdictions, and of which we have indicated briefly the nature, arose under statutes not limiting the meaning of the phrase, "arising out of employment," by excluding intentional acts of third persons. We find not more than a half-dozen states having compensation acts with such a limitation, and the English act has not, and in none having such limitation do we find a construction. The important statement is that compensable injuries "*shall not include an injury caused by the act of a third person or fellow employee, intended to injure the employee because of reasons personal to him, and not directed against him as an employee, or because of his employment.*" The act of the unknown man was, in its beginning, solely to gratify his personal lust, and it was not directed against the teacher because she was a teacher, or as an employee, or because of her employment. The employment may have given the occasion, and without the employment there might have been no opportunity, but there was no causal connection between the employment and the criminal act of the unknown assailant. Whether, without the clause excluding intentional injuries by third persons for personal reasons and unconnected with the employment, there could be compensation, we do not inquire. In any event the statutory exclusion is effective to prevent compensation.

In reaching this conclusion we have examined all the cases cited to us, and the carefully prepared and helpful memorandum of the trial court.

Judgment reversed.

NOTE.

The above decision is in accord with the conclusion in other cases where,

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teacher.

for purposes unconnected with the employment, an assault was committed on an employee by a third person. The general subject of right to recover

under the Workmen's Compensation Act in case of injury from assault is covered in the annotation to *CHICAGO v. INDUSTRIAL COMMISSION*, post, 588.

MARY E. CRANNEY'S CASE.
RE HOTEL ESSEX et al., Appts.

Massachusetts Supreme Judicial Court — February 26, 1919.

(232 Mass. 149, 122 N. E. 266.)

Workmen's compensation — homicide — injury arising out of employment.

1. The killing of the head waiter of an hotel by a waiter whom he had discharged for breach of discipline, while such head waiter is at luncheon in the hotel, arises out of his employment within the meaning of the Workmen's Compensation Act.

[See note on this question beginning on page 588.]

— what injuries arise out of employment.

2. So long as an employee, while in the performance of his employer's business, properly exercises the authority conferred upon him by his

contract of employment, injuries received by him, resulting from such employment, arise out of the employment, within the Workmen's Compensation Act.

[See 28 R. C. L. 797.]

APPEAL by the employer and the insurer from a decree of the Superior Court for Suffolk County (Brown, J.), affirming an award to claimant in a proceeding by her under the Workmen's Compensation Act to recover compensation for the death of her husband. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Sawyer, Hardy, Stone, & Morrison and Gay Gleason for appellant insurer.

Mr. James H. Cline for appellee.

Braley, J., delivered the opinion of the court:

The case was heard in the first instance by a single member of the Industrial Accident Board, whose decision for the claimant was affirmed on review by the full board. While the insurer concedes that there was some evidence to support most of the findings of fact, we are satisfied, upon reading the evidence, which includes the statement of Zacharachi, who shot and killed the employee, that all of the findings were warranted. The findings are as follows: "The employee . . . was shot and killed on August 28, 1916, by one Stellianos Zacharachi;

that the deceased was head waiter at the Hotel Essex and had been such for two and one-half years prior to the shooting; that the deceased employee had been employed as a waiter and as head waiter at the hotel for about sixteen years; that his duties as head waiter embraced the hiring and discharging of waiters, their control while on duty, and the maintenance of discipline among them; that Zacharachi, the assailant, had been employed as a waiter at the hotel for about twenty years; that prior to the claimant's decedent becoming head waiter Zacharachi had enjoyed special privileges not enjoyed by the other waiters, including a special station and shorter hours; that the deceased, in the interest of discipline and to allay dissatisfaction among the other

waiters and promote the interests of his employer, took these privileges away from Zacharachi; that a few weeks before the shooting Zacharachi had been discharged because he was not a member of the waiters' union, and that immediately prior to the shooting the deceased had voluntarily re-employed Zacharachi, but had not given him his old station; that Zacharachi was of an excitable temperament, was made ugly by drinking liquor; that Zacharachi was an habitual drinker for a long period of years and that he habitually carried a pistol; that his drinking habits and the effect of liquor on him, and the fact that he carried a pistol, were generally known at the hotel; that about a month before the shooting a pistol belonging to Zacharachi was taken away from him at the hotel and placed in the custody of the bookkeeper; that on the morning of August 28, 1916, Zacharachi came in to work and did some work; that about 11 A. M. he had some words with the deceased in regard to his work; that he refused to obey the orders of the deceased and was told that he was discharged; that he was very angry and became further inflamed by a couple of drinks which he secured at the hotel bar; that while angry and inflamed by liquor he sought out the deceased employee, had some further words with the deceased in regard to his employment, and then shot and killed him; that the shooting occurred while the deceased employee was eating his luncheon, shortly after 2 o'clock; that his luncheon was furnished to him as a part of his contract of employment; that the deceased was free to leave the hotel from 2 o'clock until 5:30 in the afternoon, but that he was subject to call while in the hotel, and customarily returned to his place of employment in the dining room after eating his luncheon."

It is unnecessary to discuss the questions whether the employer knew of Zacharachi's habits in the use of intoxicating liquors or of carrying a pistol, or that drinking

caused him to be ugly, as the decision is put on the ground that the employee "was shot and killed solely by reason of his performance of his duties as a head waiter, and that, as it turned out, his death resulted from a risk of his employment, and flowed from that source as a rational consequence."

The insurer, relying on McNicol's Case, 215 Mass. 497, L.R.A.1916A, 306, 102 N. E. 697, 4 N. C. C. A. 522, contends that compensation cannot be awarded, as the casualty could not have been reasonably foreseen by the employer, and therefore, not being a risk of the employment, it does not arise out of it. The shooting occurred in the employer's dining room while Cranney was at luncheon. It is manifest that he lost his life, not because of any quarrel of his own with the assailant, but because he faithfully and properly discharged the duty owed to his employer, and thereby incurred the resentment of Zacharachi. "The servant must serve in the master's way as he is directed, or, in emergencies, as he has reason to believe the master would approve were he present, or as he, a faithful servant, owing to his master fealty and aid in time of peril, ought."

It was plainly in the employer's interest and for its benefit that Zacharachi should be discharged, and when Cranney was hired and intrusted with this general authority, which he exercised in a reasonable and suitable way, it was contemplated that whatever befell him

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when acting strictly within the scope of his employment, even if the time and conditions could not be forecast, was incidental to and part of the employment. "The rational mind must be able to trace the resultant personal injury to a proximate cause set in motion by the employment, and not by some other agency, or there can be no recovery." Madden's Case, 222 Mass. 487, 495, L.R.A.1916D, 1000, 111 N. E. 383.

It, moreover, is reasonably with-

in the common experience of mankind that the general nature of what Cranney would have to do in maintaining discipline if a waiter persisted in disobeying orders, and the possible anger and desire "to get even," of a waiter discharged under such circumstances, could be foreseen in the sense that such incidents are not mere figments of the imagination, but incidents which might occur in the ordinary course of human affairs.

"That murder resulted instead of a broken bone is of slight, if, indeed, it is of any, significance. This injury was one to which the employee was exposed by reason of his employment. . . . The causative danger was peculiar to his work. It was incidental to the character of the employment, and not independent of the relation of master and servant. Although unforeseen, and the consequence of what, on this record, appears to have been a crime of the highest magnitude, yet now, after the event, it appears to have had its origin in a hazard connected with the employment, and to have flowed from that source as a rational consequence. Tried by the test suggested in McNicol's Case, 215 Mass. 497, 499, L.R.A.1916A, 306, 102 N. E. 697, 4 N. C. C. A. 522, the injury seems to have arisen in the course of the employment." Reithel's Case, 222 Mass. 163, 165, L.R.A.1916A,

304, 109 N. E. 952, 11 N. C. C. A. 235.

We are of opinion that, so long as the employee, while ^{—what injuries arise out of employment.} in the performance of the employer's business, properly exercises the authority conferred upon him by his contract of employment, injuries received by him, resulting from such employment, arise out of the employment, and if death ensues, as in the case at bar, his dependents are entitled to compensation. McNicol's Case, 215 Mass. 497, L.R.A.1916A, 306, 102 N. E. 697, 4 N. C. C. A. 522, Reithel's Case, 222 Mass. 163, L.R.A.1916A, 304, 109 N. E. 951, 11 N. C. C. A. 235; Von Ette's Case, 223 Mass. 56, L.R.A.1916D, 641, 111 N. E. 696, 12 N. C. C. A. 551; Harbroe's Case, 223 Mass. 139, L.R.A.1916D, 933, 111 N. E. 709. The decree should be affirmed.

NOTE.

The conclusion in the above case is in harmony with other decisions in which the fact that one of the employees was a superior was an element. The general question of right to recover under the Workmen's Compensation Act in case of injury from assault is covered in the annotation to CHICAGO v. INDUSTRIAL COMMISSION, post, 588.

CITY OF CHICAGO, Plff. in Err., v. INDUSTRIAL COMMISSION et al.

Illinois Supreme Court — April 21, 1920.

(292 Ill. 406, 127 N. E. 49.)

Workmen's compensation — assault by fellow servant — personal quarrel.

1. An injury from an assault by one employee upon another, because the latter would not get or give him a drink of water, does not arise out of the employment within the meaning of the Workmen's Compensation Act.

[See note on this question beginning on page 588.]

(298 Ill. 406, 127 N. E. 49.)

— what accidents within.

2. To be within the operation of the Workmen's Compensation Act, the accident causing the injury must have

had its origin in some risk of the employment.

[See 28 R. C. L. 797.]

ERROR to the Circuit Court for Cook County (Torrison, J.) to review a judgment affirming an award of the Industrial Commission in a proceeding by claimant under the Workmen's Compensation Act to recover compensation for the death of her husband. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Samuel A. Ettelson, William H. Devenish, and Robert H. Farrell for plaintiff in error.

Messrs. Joseph P. Mahoney and W. P. Quinby for defendants in error.

Dunn, Ch. J., delivered the opinion of the court:

John Gallagher, a laborer in the employ of the city of Chicago, was at work on August 3, 1917, loading sand from a freight car into wagons near the municipal pier. He got down from the car and went to a hydrant to get a can of drinking water, with which he returned to the car. A negro named Ramsey was working on an adjoining car, and asked Gallagher for a drink, but Gallagher told him to get his own water. Ramsey called him a name and told him to climb on the car and he would knock his head. Gallagher said nothing, but after standing there for a few minutes climbed upon the car to go on with his work, and Ramsey called him a name and struck him on the head with a shovel. Gallagher died as a result of the injury, and the Industrial Commission affirmed a decision of an arbitrator allowing compensation to his widow. The circuit court confirmed the decision of the Industrial Commission, and upon the petition of the city a writ of error was awarded to review the judgment of the circuit court.

The only question in the case is whether the accident arose out of the deceased's employment. The rule is that an accident, to be within the Compensation Act (Hurd's Rev.

Stat. 1917, chap. 48,

§§ 126-152i), must

have had its origin

in some risk of the

employment, but the cases are so

various that it is impossible to establish a fixed rule for determining that is a risk of the employment. We have held that an injury to an employee in a fight with another employee, growing out of a quarrel about the employer's work in which they were engaged, arises out of the employment. In *Pekin Cooperage Co. v. Industrial Commission*, 285 Ill. 31, 120 N. E. 530, we held that there must be some causal relation between the employment and the injury, and though it is not necessary that the injury be one which ought to have been foreseen or expected, it must be one which, after the event, may be seen to have had its origin in the nature of the employment. The injury for which the claimant was held in that case to be entitled to compensation was received in a fight with another employee, growing out of a quarrel in regard to the manner of doing their work, and it was held for this reason that it might be inferred that the injury arose out of the employment, because, where men are working together at the same work, differences may be expected to arise about the manner of doing the work, the use of tools, interference of the workmen with one another, or other details. *Swift & Co. v. Industrial Commission*, 287 Ill. 564, 122 N. E. 796, was also a case of an injury received in a fight between two employees. The decision holding that the dispute arose out of the employment, and that the employer was liable for compensation, was based upon the proposition that the altercation grew out of matters connected with the employee's work,

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and was not purely a personal one entirely outside the scope of his employment. These cases were entirely different from the present case. The felonious assault which was made upon the deceased was without any excuse. It had no more connection with the work in which he was engaged than if Ramsey had been a loiterer on the street and had asked for a drink from Gallagher's can. There was no causal relation between the work and the assault. The affair was purely personal, with no reference to the employment. Ramsey and Gallagher happened to be at the same place because of their

employment, but an injury done by one to the other on account of some purely personal grudge, which this proximity gave an opportunity to inflict, was not a result of the employment. There was no causal connection between the conditions under which the work was to be done and the injury.

The injury was not ^{—assault by fellow servant—} incidental to the ^{personal quarrel.} character of the business, but the deceased would have been equally exposed to it entirely apart from his employment.

The judgment will be reversed, and the award set aside.

ANNOTATION.

Workmen's compensation: injury from assault.

- I. Accidental injury, 588.
- II. Arising out of and in the course of employment:
 - I. Generally, 589.
 2. Assault by one employee upon another:
 - a. Generally, 590.
 - b. Superior and inferior employees, 592.
 - c. Personal ill will, 594.
 3. By one other than employee, 595.

As to applicability of workmen's compensation acts to watchmen, including cases of assaults on such persons, see annotation in 6 A.L.R. 578, and supplemental annotation thereto, appended to *Munro v. Williams*, 13 A.L.R. 508.

As to right to compensation under workmen's compensation acts in case of injuries through horseplay, or fooling, see annotation to *Hollenbeck v. Hollenbeck*, 13 A.L.R. 524.

For recovery under workmen's compensation acts for injury occurring as result of labor trouble, see annotation to *Rourke's Case*, 13 A.L.R. 549.

I. Accidental injury.

It is now well settled that the fact that an injury is the result of the wilful or criminal assault of a third person does not prevent the injury from being accidental within the meaning of the workmen's compensation acts. *Western Indemnity Co. v. Pillsbury*

(1915) 170 Cal. 686, 151 Pac. 393, 10 N. C. C. A. 1; *San Bernardino County v. Industrial Acci. Commission* (1917) 35 Cal. App. 33, 169 Pac. 255; *McNicol's Case* (1913) 215 Mass. 497, L.R.A.1916A, 306, 102 N. E. 697, 4 N. C. C. A. 522; *Willis v. Pilot Butte Min. Co.* (1920) 58 Mont. 26, 190 Pac. 124; *Heitz v. Ruppert* (1916) 218 N. Y. 148, L.R.A.1917A, 344, 112 N. E. 750; *STASMAS v. ROCK ISLAND COAL MIN. CO.* (reported herewith) ante, 576; *Kelly v. Trim Joint Dist. School* (1913) 47 Ir. L. T. 151, 6 B. W. C. C. 921, affirmed in [1914] A. C. (Eng.) 667, 7 B. W. C. C. 274, 83 L. J. P. C. N. S. 220, 111 L. T. N. S. 305, 30 Times L. R. 452, 58 Sol. Jo. 493, 48 Ir. L. T. 141, [1914] W. C. & Ins. Rep. 359, Ann. Cas. 1915A, 104.

Thus, in *STASMAS v. ROCK ISLAND COAL MIN. CO.* (reported herewith) ante, 576, an assault on a miner by another employee, while seeking the cage to ascend, was held an accidental injury.

And the injury was held accidental in *McNicol's Case* (1913) 215 Mass. 497, L.R.A.1916A, 306, 102 N. E. 697, 4 N. C. C. A. 522, where a workman was assaulted by an intoxicated fellow workman.

And injuries resulting from personal contact between two employees, caused by a dispute over the employ-

er's work, are accidental, within the meaning of the New York statute. *Heitz v. Ruppert* (1916) 218 N. Y. 148, L.R.A.1917A, 347, 112 N. E. 750.

And the injury was held accidental where a section foreman was assaulted by a member of his gang during an altercation. *Western Indemnity Co. v. Pillsbury* (1915) 170 Cal. 686, 151 Pac. 398, 10 N. C. C. A. 1.

And it was held in *Spang v. Broadway Brewing & Malting Co.* (1918) 182 App. Div. 443, 169 N. Y. Supp. 574, that an injury caused deliberately and wilfully, by a third person, might be an accidental injury within the meaning of the New York act.

And injury by assault was held, without discussion, to be an accident, in *Nevich v. Delaware, L. & W. R. Co.* (1917) 90 N. J. L. 228, L.R.A.1917E, 847, 100 Atl. 234.

The same view has been taken by the English courts.

Thus, an assistant schoolmaster in an industrial school, who died from a fracture of the skull and other injuries as a result of an assault committed upon him by several boys in the school, in pursuance of a prearranged plan, was held to have suffered an injury by accident. *Kelly v. Trim Joint Dist. School* [1913] W. C. & Ins. Rep. 401, 47 Ir. L. T. 151, 6 B. W. C. C. 921, affirmed in [1914] A. C. (Eng.) 667, 111 L. T. N. S. 306, 30 Times L. R. 452, [1914] W. N. 177, 7 B. W. C. C. 274, 83 L. J. P. C. N. S. 220, 58 Sol. Jo. 498, 48 Ir. L. T. 141, [1914] W. C. & Ins. Rep. 359, Ann. Cas. 1915A, 104.

And the murder of a cashier for the sake of robbery is an accident within the meaning of the statute. *Nisbet v. Rayne* [1910] 2 K. B. (Eng.) 689, 80 L. J. K. B. N. S. 84, 103 L. T. N. S. 178, 26 Times L. R. 632, 54 Sol. Jo. 719, 3 B. W. C. C. 507, 3 N. C. C. A. 268.

And it has been held that a game-keeper who was beaten by poachers sustained an injury by accident within the meaning of the Compensation Act. *Anderson v. Balfour* [1910] 2 Ir. R. 497, 44 Ir. L. T. 168, 3 B. W. C. C. 588.

And in *Challis v. London & S. W. R. Co.* [1905] 2 K. B. (Eng.) 154, 74 L.

J. K. B. N. S. 569, 53 Week. Rep. 613, 93 L. T. N. S. 330, 21 Times L. R. 486, 7 W. C. C. 23, it was held that, although the injury was caused by a stone wilfully thrown by a boy, it might be said to be an "accident" from the standpoint of the one who suffered the injury.

II. *Arising out of and in the course of employment.*

1. *Generally.*

Where the assault is of such a character as is incidental to the employment,—that is, such as is likely to happen because of the very nature of the work performed,—it has been held to arise out of and in the course of the employment within the meaning of the workmen's compensation acts.

California.—*Atolia Min. Co. v. Industrial Acci. Commission* (1917) 175 Cal. 691, 167 Pac. 148; *O. L. Shafter Estate Co. v. Industrial Acci. Commission* (1917) 175 Cal. 522, 166 Pac. 24.

Connecticut.—*Jacquemin v. Turner & S. Mfg. Co.* (1918) 92 Conn. 382, L.R.A.1918E, 496, 103 Atl. 115.

Illinois.—*Pekin Cooperage Co. v. Industrial Bd.* (1917) 277 Ill. 53, 115 N. E. 128.

Indiana.—*Polar Ice & Fuel Co. v. Mulray* (1918) 67 Ind. App. 270, 119 N. E. 149.

Massachusetts.—*CRANNEY'S CASE* (reported herewith) ante, 584.

Michigan.—*Marshall v. Baker-Vawter Co.* (1919) 206 Mich. 466, 178 N. W. 191.

Minnesota.—*State ex. Ire. Anseth v. District Ct.* (1916) 134 Minn. 16, L.R.A.1916F, 957, 158 N. W. 713.

New Jersey.—*Nevich v. Delaware, L. & W. R. Co.* (1917) 90 N. J. L. 228, L.R.A.1917E, 847, 100 Atl. 234; *Emerick v. Slavonian Roman Greek Catholic Union* (1919) 93 N. J. L. 282, 108 Atl. 223.

New York.—*Re Slane* (1917) 179 App. Div. 952, 165 N. Y. Supp. 1112; *Spang v. Broadway Brewing & Malting Co.* (1918) 182 App. Div. 443, 169 N. Y. Supp. 574.

Ohio.—*Industrial Commission v. Pora* (1919) 100 Ohio St. 218, 125 N. E. 662.

England.—*Trim Joint Dist. School*

v. Kelly [1914] A. C. 667, 83 L. J. P. C. N. S. 220, 111 L. T. N. S. 305, 30 Times L. R. 452, 58 Sol. Jo. 493, 7 B. W. C. C. 274, 48 Ir. L. T. 141, Ann. Cas. 1915A, 104, [1914] W. C. & Ins. Rep. 359; Nisbet v. Rayne [1910] 2 K. B. 689, 80 L. J. K. B. N. S. 84, 103 L. T. N. S. 178, 26 Times L. R. 632, 54 Sol. Jo. 719, 3 B. W. C. C. 507, 3 N. C. C. A. 268; Weekes v. Stead [1914] W. N. 263, 30 Times L. R. 586, 83 L. J. K. B. N. S. 1542, 111 L. T. N. S. 693, 58 Sol. Jo. 633, 7 B. W. C. C. 398, 137 L. T. Jo. 180, [1914] W. C. & Ins. Rep. 434, 6 N. C. C. A. 1010.

Scotland. — M'Intyre v. Rodger (1903) 6 Sc. Sess. Cas. 5th series, 176, 41 Scot. L. R. 107, 11 Scot. L. T. 467; Shaw v. Macfarlane (1914) 52 Scot. L. R. 236, 8 B. W. C. C. 382.

The rule governing, in case of injury to an employee by assault, has also been stated as follows: "If one employee assaults another employee solely to gratify his feeling of anger or hatred, the injury results from the voluntary act of the assailant, and cannot be said to arise either directly out of the employment or as an incident to it. But when the employee is assaulted while he is defending his employer, or his employer's property, or his employer's interests, or when the assault is incidental to some duty of his employment, the injuries he suffers in consequence of the assault will, as a rule, arise out of the employment. He will then be serving his employer's ends, and not his own." *Jacquemin v. Turner & S. Mfg. Co. (Conn.) supra.*

In *Blake v. Head* [1912] W. C. Rep. (Eng.) 198, 106 L. T. N. S. 822, 28 Times L. R. 321, 5 B. W. C. C. 303, it was held that an injury caused by an intentionally felonious assault by an employer, in a fit of melancholia, upon the workman, does not arise out of the employment.

2. Assault by one employee upon another.

a. Generally.

While the foregoing rule seems to be generally recognized, as might be expected, its application to specific cases, depending as it does upon the facts, has resulted in some lack of

harmony. It may be said, however, that in most instances, where an assault by one employee upon another has grown out of some incident of the employment, it has been held to be within the act.

In *Hinchuk v. Swift & Co. (1921) — Minn. —*, 182 N. W. 622, where two employees quarreled over the manner of doing their work, and one of them picked up a piece of iron pipe and struck and killed the other, it was held that a recovery could be had under the Minnesota Compensation Act, providing for compensation in every case of personal injury or death of an employee caused by accident arising out of and in the course of his employment, although the act defined accident as an unexpected or unforeseen event, happening suddenly and violently, with or without human fault, and also provided that the act did not "include an injury caused by . . . a third person or fellow employee . . . because of reasons personal to him, and not directed against him as an employee, or because of his employment." The court stated that the principle applicable to such cases is that the injury is included within the statute if there is some causal relation between the employment and the injury, and said: "Not that the injury must be one which ought to have been foreseen, but it must be one which, after the event, may be seen to have had its origin in the nature of the employment."

In *Mueller v. Klingman (1919) — Ind. App. —*, 125 N. E. 464, the injury was held to have been caused by an accident arising out of and in the course of the employment, where a workman on a building was struck in the head with a hammer, thrown by another employee, who entered into an argument with the employee injured, in regard to helping him with his work.

And in *STASMAS v. ROCK ISLAND COAL MIN. CO.* (reported herewith) ante, 576, an injury to a miner who was assaulted by another employee while waiting for the cage to ascend was

held to have arisen out of and in the course of his employment.

And a miner, who, while acting within the course of his employment, was shot by one of the armed guards at the mine, was held entitled to compensation, where the shot was fired by the guard while acting within what he might reasonably suppose to be the course of his employment. *Atolia Min. Co. v. Industrial Acci. Commission* (1917) 175 Cal. 691, 167 Pac. 148.

And an employee who was injured by the pushing and jostling of a line of employees, while they were waiting to receive their pay at the office window, was held to have suffered injuries by accident arising out of the employment. *Pekin Cooperage Co. v. Industrial Bd.* (1917) 277 Ill. 53, 115 N. E. 128.

And in *Pekin Cooperage Co. v. Industrial Commission* (1918) 285 Ill. 31, 120 N. E. 530, the evidence was held sufficient to show that the employee's injury was received in the course of his employment, and that it "arose out of the employment," where it tended to show that he objected in offensive language when another employee in the cooperage shop, where they were cutting staves, took some of the claimant's staves, and that the other employee assaulted and injured him.

In two Scotch cases, apparently conflicting decisions have arisen, where one workman was trying to take away an appliance from another, and personal injuries resulted.

Thus, in *M'Intyre v. Rodger* (1903) 6 Sc. Sess. Cas. 5th series, 176, 41 Scot. L. R. 107, 11 Scot. L. T. 467, it was held that, where a workman in the employment of shipbuilders was oiling a machine at which he was working, with a brush which was not the one belonging to the machine, and another workman came up and claimed the brush as his, pulled it away from the claimant, and, in so doing, injured the latter's hand, the injury was caused by accident arising out of and in the course of the employment.

But, in *Baird v. Burley* [1908] S. C. 545, 45 Scot. L. R. 415, 1 B. W. C. C. 7, it was held that an employee in a mine,

who, while endeavoring to obtain possession of a hutch from other workmen, who had taken it for their own use, suddenly turned his head to avoid a handful of dust and rubbish which one of the others had thrown at him, and came in contact with the side of the passage, injuring himself, did not suffer injury arising "out of his employment."

And it will be observed that in *CHICAGO v. INDUSTRIAL COMMISSION* (reported herewith) ante, 586, an injury from an assault by one employee upon another, because the latter would not get or give him a drink of water, was held not to arise out of the employment within the meaning of the Workmen's Compensation Act.

And the injury did not arise in the course of the employment, within the Compensation Act, where a miner entered into a controversy with a driver because of his failure to deliver a car the preceding day, and, after cursing the driver, was finally struck over the head by the latter, and killed. *Marion County Coal Co. v. Indiana Commission* (1920) 292 Ill. 463, 127 N. E. 84.

And it has been held that the driver of an automobile truck engaged in hauling brick from a car, who was killed in a quarrel with another driver over the question of priority in securing their loads, which quarrel was commenced by him, did not suffer injury by accident arising out of the employment. *Stillwagon v. Callan Bros.* (1918) 183 App. Div. 141, 170 N. Y. Supp. 677, affirmed in (1918) 224 N. Y. 714, 121 N. E. 893.

And in *Jacquemin v. Turner & S. Mfg. Co.* (1918) 92 Conn. 382, L.R.A. 1918E, 496, 103 Atl. 115, it was held that injuries arising out of a quarrel between casters over the possession of a ladle, for the prosecution of their work did not arise out of the employment, although, in order to prevent the men from finishing their work too early in the day, the master did not furnish sufficient ladles to keep all the men busy at once.

And in *Union Sanitary Mfg. Co. v. Davis* (1917) 64 Ind. App. 227, 115 N. E. 676, the injury was held not to have arisen out of the employment,

where a molder was injured when assaulted by another employee, during an altercation about the relining of the molder's ladle, it appearing that it was no part of the work of the employee committing the assault to reline the ladle.

And in *Metropolitan Redwood Lumber Co. v. Industrial Acci. Commission* (1919) 41 Cal. App. 131, 182 Pac. 315, it was held that the injury to an employee of a store did not arise out of his employment, within the meaning of the Compensation Act, where the injury resulted from an assault made on him by another employee of equal rank, because of a quarrel between them. It appears in this case that some discord had arisen between the two employees, over differences in relation to making change and certain charges made by one against the other's account, but the immediate cause of the assault does not appear.

It has been held that an employee, who, while acting in the scope of his employment, suffers injury from the bite of a dog which another employee, with the knowledge of the master, was keeping upon the premises, suffered an injury arising out of and in the course of the employment, so that the Compensation Law was applicable, to the exclusion of a remedy at law. *Barone v. Brambach Piano Co.* (1917) 101 Misc. 669, 167 N. Y. Supp. 933. The court said: "The mere fact that the direct cause of the injury was animate, rather than inanimate, does not alter the result; nor, in this view, can I see any force in the suggestion that the dog was not especially kept as a watchdog, or for some similar purpose (though I think the proof showed that it was so employed). The right of the plaintiff to a recovery does not, on any theory of which I am made aware, depend upon the comparative usefulness to the employer's business of the immediate cause of the injury."

b. Superior and inferior employees.

In some cases the fact that one of the employees was a superior appears to have been an element.

Thus, in *Polar Ice & Fuel Co. v. Mulray* (1918) 67 Ind. App. 270, 119 N. E. 149, where a workman who was

employed to keep a record of ice taken from an ice plant to be sold by the drivers, and to require each of them to account for the quantity taken out by him when he returned after delivering the load, and to collect for any shortage, was shot and killed by one of the drivers in a quarrel over the collection for such shortage, it was held that the death might be said to have arisen out of and in the course of the employment. The court said: "The rule is well established that a claim for compensation will not be denied, simply because the accident occurred by reason of the unlawful and felonious act of some third person, if the employee actually sustained it by being specially and peculiarly exposed, by the character and nature of his employment, to the risk of the danger which befell him. In other words, when the injury results from the conditions surrounding an employee at the time of the accident, and under which he was required to perform his duties, then, generally speaking, it arises out of the employment."

Likewise, in *Re Slane* (1917) 179 App. Div. 952, 165 N. Y. Supp. 1112, an award of compensation to the dependents of an engineer, who was killed by a subordinate because he had deducted money from him on account of time lost, was unanimously affirmed by the appellate division, without opinion.

And in *CRANNEY'S CASE* (reported herewith) ante, 584, it was held that the killing of the head waiter of a hotel by a waiter whom he had discharged for breach of discipline, while the head waiter was at luncheon in the hotel, arose out of his employment within the meaning of the Workmen's Compensation Act, the court holding that it was for the employer's interest that the waiter be discharged, and that the consequence of the head waiter's act in discharging him was contemplated as incidental to his employment.

And it has been held that a section foreman in charge of a gang of fifteen or twenty section men, mostly Greeks, may be found to have been acting in the scope of his employment in at-

tempting to take a shovel away from one of the gang, who, after he had been properly instructed, continued to do the work in the wrong manner, and who continued to hold the shovel after he had been told to drop it and get his time, and who, upon the foreman's attempting to take the shovel, committed an assault upon him. *Western Indemnity Co. v. Pillsbury* (1915) 170 Cal. 686, 151 Pac. 398, 10 N. C. C. A. 1.

And, under the Washington act, the dependent of a foreman, who was killed as the result of an assault by an employee whom he had discharged, was held entitled to compensation. *Stertz v. Industrial Ins. Commission* (1916) 91 Wash. 588, 158 Pac. 256, Ann. Cas. 1918B, 354.

And a like decision on similar facts was rendered by the California court, in *San Bernardino County v. Industrial Acci. Commission* (1917) 35 Cal. App. 33, 169 Pac. 255.

And the shooting of an engine washer by a helper whom he had reported to the boss for quitting work before time, in order to obtain a substitute, was held to have arisen out of the employment, within the meaning of the Compensation Act. *Chicago, R. I. & P. R. Co. v. Indiana Commission* (1919) 288 Ill. 126, 10 A.L.R. 1170, 123 N. E. 278.

And in *Heitz v. Ruppert* (1916) 218 N. Y. 148, L.R.A.1917A, 344, 112 N. E. 750, where there was evidence that it was a part of claimant's employment to take care of the horses which he drove, and see that they were not injured by injudicious wetting, or otherwise, by his fellow workmen, and that in the course of their employment, while claimant and another employee were at work, a quarrel or argument over the wetting of the horses arose between them, and a personal injury grew out of the physical contact resulting from the quarrel, it was held that the accident arose out of and in the course of employment.

And in *Willis v. Pilot Butte Min. Co.* (1920) 58 Mont. 26, 190 Pac. 124, the injury to a station tender in a mine, who was assaulted and shot by a mine foreman, was held to have arisen out of his employment, where there was

evidence warranting the inference that the trouble between the two arose on account of a feeling of enmity because of the discharge of another employee, or a feeling that the foreman was seeking excuse for discharging the employee shot, or that the foreman, because of his anger toward the employee for carrying him to the surface, assaulted the employee.

And in *Swift & Co. v. Industrial Commission* (1919) 287 Ill. 564, 122 N. E. 796, the evidence was held to justify a finding that the accident arose out of and in the course of the employment within the Compensation Act, where there was testimony that the injured person was an employee in the steam-fitting department of a packing plant, and that he went to a certain part of the plant in response to a whistle for him, and was asked by the foreman to fix a certain leak, which he told the foreman he could not do at that time, and that an altercation followed, in the course of which the foreman struck the claimant and injured him.

And in *American Steel Foundries v. Melnik* (1920) — Ind. App. —, 126 N. E. 88, an injury to one employed to wheel wood was held to have arisen out of his employment, where it appeared that, while wheeling wood, he accidentally ran against the foreman, who kicked over the wheelbarrow, and, when the employee made some remark, struck him and injured him.

And in *Industrial Commission v. Pora* (1919) 100 Ohio St. 218, 125 N. E. 662, where an employee was ordered by a superior to procure an instrument which was in the hands of another, who had an equal right to it and refused to give it up, and who violently assaulted the other employee, who had argued his right to the instrument, but had done nothing justifying an assault, the injury was held to have arisen in the course of his employment.

And in *Knocks v. Metal Packing Corp.* (1921) 231 N. Y. 78, 131 N. E. 741, reversing (1920) 194 App. Div. 65, 185 N. Y. Supp. 307, where a foreman, who had accused an employee of using too much oil on a machine, struck and in-

jured the employee, after the latter had called him a liar and threatened to strike him, it was held that the injury was an accidental one, arising out of and in the course of the employment. The court said: "In the case now before us the controversy was in the factory during working hours, and about the employer's work and the manner of doing it. The assailant was the foreman of the factory, and concededly acting as such—at least, up to the moment of the assault. When he sent for the claimant and escorted him to the machine that was said not to have been operating properly, the claimant was and continued to be engaged in the employer's business, and the foreman, when he charged the claimant with responsibility for the machine's defective operation, was also engaged in what seems to have been his duty as the person in control, for the employer, of the employees and the work in the factory. If the foreman was mistaken in his accusation against the claimant, the claimant could properly have denied that he was responsible for the machine's defective operation. Each seems, while performing his work and in discussing the employer's business, to have been equally hasty in becoming angry toward the other. The claimant's use of an irritating word in making his denial did not, however, justify, either in law or in fact, an assault upon him by the foreman. The foreman's duty, as such, to exercise reasonable discipline over the employees of the factory, made possible a lack of discretion in performing such duty. The assault by the foreman was incidental to his employment as such. It grew out of his performance of his duty as foreman for the employer. It cannot be said as a matter of law or fact that the foreman, who, up to the moment of the assault, was properly engaged in the performance of his duty to his employer, at that moment abandoned his duty and indulged in the assault as an individual act. The employer should be responsible for an excitable and violent foreman in the prosecution of his duties as such; at least, until there is sufficient interruption in

the performance of such duties as to justify the conclusion that the foreman had abandoned his employment, and that the assault was an independent and individual act, as distinguished from acts within the terms of his employment. There was no intervening time between the acts and words of the assailant and the assailed, and the injury, in this case."

In *Marshall v. Baker-Vawter Co.* (1919) 206 Mich. 466, 173 N. W. 191, the finding of the industrial board that the accident did not arise out of the employment, and that the janitor who assaulted the claimant was not such a person as the employer would not have the right to employ, was sustained, there being evidence that the claimant, a foreman of a composing room, was shot by the janitor, whom he had reported to a superior, and it appearing that the janitor had before served a sentence for assault with intent to do great bodily harm to another employee, and that he was taken back by the employer when he was paroled.

c. Personal ill will.

If the assault on an employee was committed by another solely to gratify his personal ill will, anger, or hatred, it is generally held that the injury did not arise out of the employment within the meaning of the workmen's compensation acts. *Metropolitan Redwood Lumber Co. v. Indiana Acci. Commission* (1919) 41 Cal. App. 131, 182 Pac. 315; *Jacquemin v. Turner & S. Mfg. Co.* (1918) 92 Conn. 382, L.R.A.1918E, 496, 103 Atl. 115; *Romerez v. Swift & Co.* (1920) 106 Kan. 844, 189 Pac. 923; *Griffin v. A. Roberson & Son* (1916) 176 App. Div. 6, 162 N. Y. Supp. 318.

Thus, in *Griffin v. A. Roberson & Son* (N. Y.) *supra*, where one who in anger committed an assault upon a fellow workman, and as a result himself received an injury, was held not within the protection of the Compensation Act, since such injury did not arise out of the employment, the court said: "The case at bar is very similar, in its essential and controlling features, to the case of an accident

arising out of horseplay. Diametrically opposite motives, it is true, occasion the injurious acts in the two classes of cases; but in both classes of cases the purpose is to gratify a personal desire. In one class of cases, the motive is a spirit of frivolity or playfulness. In the other, the motive is anger, animosity, or vindictiveness. But in both the purpose is not to serve the master's interest, but to serve a momentary personal emotion of the employees. Whether the stirring of the mind be due to sportiveness or to vindictiveness, it is, in both cases, personal to the employee, and the purpose of the act which brings about the injury is to serve that impulse of the employee, and such act neither in fact does, nor is intended to, subserve the interests of the master, nor is it in any proper sense incidental thereto."

And in *Edelweiss Gardens v. Industrial Commission* (1919) 290 Ill. 459, 125 N. E. 260, an injury to a waiter in a restaurant, who was assaulted by a bus boy with whom he had an altercation, was held not to have arisen out of and in the course of his employment, there being no evidence that the difficulty between the two grew out of the manner of performing their work, or had any connection with it. The court said: "If the injury can be seen to have been a natural incident of the work, and to have been contemplated by a reasonable person as a result of the exposure occasioned by the nature of the employment, it may be said to arise out of the employment. An injury not fairly traceable to the employment as the contributing proximate cause, and which comes from a hazard to which the employee would have been equally exposed, apart from the employment, does not arise out of the employment. The causative danger must be peculiar to the work and incidental to the character of the business."

And in *Romerez v. Swift & Co.* (1920) 106 Kan. 844, 189 Pac. 923, the injury was held not to have arisen out of the employment within the meaning of the Workmen's Compensation Act, where it appeared that two Mexi-

can truckers in a packing house had an altercation, in performing their work, with a colored trucker, which was reported to the foreman, and that, shortly after, the Mexicans, when passing near the colored trucker and another colored man, were verbally abused by the colored men, and approached them and engaged in an altercation, during which one of the colored men stabbed and killed one of the Mexicans, the court holding that the colored man stepped aside from his work and left his task to settle this matter of personal spleen.

And in *Shaw v. Wigan Coal & I. Co.* (1909) 3 B. W. C. C. (Eng.) 81, an injury received by a workman while he himself was deliberately assaulting a fellow workman, for no apparent cause, was held not caused by accident arising out of and in the course of the employment.

And in two English cases it has been held that no compensation is recoverable where one workman was injured by a stone thrown in anger by another workman, while at work. *Armitage v. Lancashire & Y. R. Co.* [1902] 2 K. B. (Eng.) 178, 71 L. J. K. B. N. S. 778, 66 J. P. 613, 86 L. T. N. S. 883, 18 Times L. R. 648; *Clayton v. Hardwick Colliery Co.* [1914] 7 B. W. C. C. (Eng.) 643.

In *Verschleiser v. Joseph Stern & Son* (1920) 229 N. Y. 192, 128 N. E. 126, it was held that the injury arose out of and in the course of the employment, where one employed as a trucker in an abattoir had a piece of flesh thrown about his neck by a co-employee, and was kicked, and sustained an injury, when he assaulted another employee, who he supposed had thrown the piece of flesh.

And in *Carbone v. Loft* (1916) 219 N. Y. 579, 114 N. E. 1062, an award under the Compensation Act was sustained, where the claimant was injured in an assault made on him by another employee three quarters of an hour after a verbal exchange of insulting language had taken place between them.

3. *By one other than employee.*

IN STATE EX REL. COMMON SCHOOL

DIST. v. DISTRICT CT. (reported here-with) ante, 579, it was held that injuries to a woman teacher of a small school, in a densely wooded and sparsely settled country, were not caused by an accident arising out of the employment, where she was criminally assaulted and shot by an unknown man, while off the school grounds and on her way home, the court holding that there was no causal connection between the employment and the assailant's act.

And in a New Jersey case it has been held that a brewing company was not liable to pay compensation for the death of one of its collectors, caused by an assault by an unknown person, while he was in a locality in which lawless characters congregated, and assaults and murders occurred with greater frequency than in any other part of the city, where there was no evidence at all to show why the assault was committed, and it might have been the result of an accident, or of revenge for some fancied personal wrong. **Schmoll v. Weisbrod & H. Brewing Co.** (1916) 89 N. J. L. 150, 97 Atl. 723.

And no compensation was allowed where the workman was employed as a cook in a hotel, and a drunken customer came out of the barroom into the kitchen, and made a lurch at the cook, who was injured in trying to avoid him. **Murphy v. Berwick** (1909) 43 Ir. L. T. 126.

So, an employee who went to the rescue of his employer, who was being attacked by a gang of rowdies, and was stabbed to death, was held not injured by an accident arising out of and in the course of his employment. **Collins v. Collins** [1907] 2 Ir. R. 104.

And in **Sabatelli v. De Robertis** (1920) 192 App. Div. 873, 183 N. Y. Supp. 796, affirmed in 230 N. Y. 592, where an employee in a pastry and ice cream store, who was sent to the police station by his employer to see if bail furnished by the latter for one who had been arrested in a saloon, in which the employer was interested, was satisfactory, was pushed downstairs by a policeman at the station, and his leg was broken, it was held

that the injury did not arise out of and in the course of his employment.

And it has been held that the risk of being assaulted by a drunken man is not in any way especially connected with, or incident to, employment as a carter. **Mitchinson v. Day Bros.** [1913] 1 K. B. (Eng.) 603, 82 L. J. K. B. N. S. 421, 108 L. T. N. S. 193, 29 Times L. R. 267, 57 Sol. Jo. 300, 6 B. W. C. C. 190.

But in **Emerick v. Slavonian Roman Greek Catholic Union** (1919) 93 N. J. L. 282, 108 Atl. 223, the injury was held to have arisen out of the employment, where the employee, who was a bartender, was shot by customers during a dispute as to the price of liquors sold them.

And an injury to a bartender in a saloon, who was struck in the eye with a drinking glass, thrown by a drunken man, has been held one arising out of the employment, where it appeared that the glass was not thrown in a personal altercation between the employee and the drunken man, but that the latter did not know the nature of his act, or what he was doing. **State ex rel. Anseth v. District Ct.** (1916) 134 Minn. 16, L.R.A.1916F, 957, 158 N. W. 713.

And a collector for a brewery, who was shot in order to secure the money that he had on his person, belonging to his employer, was held to have suffered an injury by accident arising out of the employment. **Spang v. Broadway Brewing & Malting Co.** (1918) 182 App. Div. 443, 169 N. Y. Supp. 574.

And where a gamekeeper was shot while, at the direction of the owner of the ranch, he was assisting a hunter in shooting a deer, his injuries were held to have arisen out of and in the course of his employment. **O. L. Shafter Estate Co. v. Industrial Acci. Commission** (1917) 175 Cal. 522, 166 Pac. 24.

So an employee who was assaulted while, in accordance with the direct instructions of his employer, he was reclaiming tools from persons who, without authority, were attempting to remove them, has been held entitled

to compensation. *Nevich v. Delaware, L. & W. R. Co.* (1917) 90 N. J. L. 228, L.R.A.1917E, 847, 100 Atl. 234.

And in *Mariano v. Krasnoger Bros.* (1919) 190 App. Div. 65, 179 N. Y. Supp. 314, modified as to amount of award in (1920) 228 N. Y. 609, 127 N. E. 916, the employee's injury was held to have arisen out of and in the course of his employment, where it appeared that he was a carpenter working on a building, and that he went to the wash room during working hours, and at the request of an employee of another contractor, whom he found tied there, he untied him, and was then attacked by workmen in the employ of the other contractor, and that, before the altercation had been entirely subdued, he was struck and injured by the superintendent having general charge of work on the building.

And an iron-molder's helper, who, while working in a stooping position in close proximity to boxes of molten metal, was struck by an intoxicated stranger, and fell and was burned by the metal, was held to have suffered an injury by accident arising out of and in the course of his employment.

Shaw v. Macfarlane (1914) 52 Scot. L. R. 286, 8 B. W. C. C. 382.

And in the following English cases the assault was held to have arisen out of the employment: *Trim Joint Dist. School v. Kelly* [1914] A. C. (Eng.) 667, 111 L. T. N. S. 306, 80 Times L. R. 452, [1914] W. C. & Ins. Rep. 359, 83 L. J. P. C. N. S. 220, 58 Sol. Jo. 493, Ann. Cas. 1915A, 104, 48 Ir. L. T. 141, 7 B. W. C. C. 274 (assistant schoolmaster in an industrial school, assaulted by several boys of the school, in accordance with pre-arranged plan); *Nisbet v. Rayne* [1910] 2 K. B. (Eng.) 689, 80 L. J. K. B. N. S. 84, 103 L. T. N. S. 178, 26 Times L. R. 632, 54 Sol. Jo. 719, 3 B. W. C. C. 507, 3 N. C. C. A. 368 (cashier, traveling with a large sum of money, assaulted and robbed); *Weekes v. Stead* [1914] W. N. (Eng.) 263, 30 Times L. R. 586, 58 Sol. Jo. 633, 137 L. T. Jo. 180, [1914] W. C. & Ins. Rep. 434, 83 L. J. K. B. N. S. 1542, 111 L. T. N. S. 693, 7 B. W. C. C. 398, 6 N. C. C. A. 1010 (foreman of company employed in moving furniture assaulted by man to whom he had refused work).
J. T. W.

B. C. EPPERSON et al., Appts.,

v.

R. G. HELBRON et al.

Arkansas Supreme Court—November 1, 1920.

(145 Ark. 566, 225 S. W. 345.)

Mines — advance payment of yearly rentals.

1. Payment of each instalment of rent must be made in advance to avoid a forfeiture under a lease of land for a period of years for exploration for oil and gas, which provides that, in case no well is completed within a year from date, then the grant shall be null and void "unless second party shall thereafter pay the first party" at the rate of a specified sum for each year thereafter that such completion is delayed.

[See note on this question beginning on page 604.]

—forfeiture of oil and gas lease — jurisdiction of equity.

2. Equity will enforce a forfeiture of a lease giving the exclusive right to explore for minerals upon a tract of

land where it would be inequitable to permit the lessee longer to assert such right, by reason of his continued default.

[See 18 R. C. L. 1218.]

Appeal — direction of decree.

3. Where a proceeding in equity to cancel a lease was fully developed at the trial, the appellate court will direct the entering of the proper decree.

[See 2 R. C. L. 284.]

On Petition for Rehearing.**Attorney and client — effect of notice by attorneys.**

4. Notice by attorneys of forfeiture of an oil and gas lease is the act of their principal.

[See 21 R. C. L. 837.]

Postoffice — effect of mailing notice.

5. Forfeiture of an oil and gas lease

becomes effective upon the mailing of the notice declaring it, not when the notice is received.

[See 20 R. C. L. 856; 21 R. C. L. 769.]

Mines — effect of lease being in undeveloped territory.

6. That a lease for exploration for oil and gas is in undeveloped territory does not change the rule that rent must be paid in advance to prevent a forfeiture, where the lease provides that it shall become null and void "unless" lessee pays lessor at the rate of a specified sum for each year thereafter that completion is delayed.

(Wood, J., dissents.)

APPEAL by plaintiffs from a decree of the Nevada Chancery Court (Shaver, Ch.) in favor of defendants in a suit brought to cancel an oil and gas lease alleged to have been forfeited by them. *Reversed.*

Statement by Hart, J.:

This was a suit brought in equity by the owner of land to cancel an oil and gas lease covering 120 acres of land in Nevada county, Arkansas, upon the ground that the lessee and his assigns had forfeited the lease. On the 2d day of December, 1918, B. C. Epperson and W. E. Epperson, his wife, in consideration of \$1, leased to H. H. Givan 120 acres of land in Nevada county, Arkansas, for ten years, upon the following conditions: "If oil is found in paying quantities, first party shall have one-eighth part of all oil produced and saved from said premises, to be delivered in pipe line, with which second party shall connect the wells. Second party shall have the right to use sufficient gas, oil, and water to drill all wells and to run all necessary machinery in operating same. Second party agrees to pay any damage such operations may cause to growing crops. In case no well is completed on said premises within one year from this date, then this grant shall become null and void, unless second party shall thereafter pay the first party at the rate of \$60 for each year thereafter such completion is delayed, payment to be made by depositing the amount in the bank of Prescott, Prescott, Arkansas, or by check to first party."

H. H. Givan assigned the lease to R. G. Helbron. On April 19, 1920, B. C. Epperson wrote Helbron a letter, in which he declared the lease void, and informed Helbron that he had leased the land to other parties. Epperson claimed that the lease was void, because it was conditioned that no well had been commenced on the land and no payment of rent had been made, although more than a year had elapsed since the lease was executed. The letter was duly received by Helbron, and he replied by tendering to Epperson \$40, which he claims was the rental due upon the part of the lease which had been assigned to him. Epperson refused to receive the amount tendered by Helbron and returned the check to him. Epperson also informed Helbron in the letter that he had leased the land to another party for the purpose of having it explored for oil and gas.

The agreed statement of facts shows that no well was drilled on the land within the year mentioned in the lease, and that no effort has been since made to drill a well. The chancellor was of the opinion that there was no equity in the plaintiffs' bill, and it was decreed that their complaint should be dismissed for want of equity. The

plaintiffs have duly prosecuted an appeal to this court.

Messrs. McRae & Tompkins, for appellants:

The lease was unilateral. It bound the lessee to do nothing, and the lessor was not bound.

El Dorado Ice & Planing Mill Co. v. Kinard, 96 Ark. 184, 131 S. W. 460; Owens v. Corsicana Petroleum Co. — Tex. Civ. App. —, 169 S. W. 193; Federal Oil Co. v. Western Oil Co. 112 Fed. 373, 22 Mor. Min. Rep. 25; Knight v. Indiana Coal & I. Co. 47 Ind. 105, 17 Am. Rep. 692; Tennessee Oil, Gas & Mineral Co. v. Brown, 65 C. C. A. 524, 131 Fed. 696; Long v. Sun Co. 132 La. 601, 61 So. 684.

Where the effect of a forfeiture will be to promote justice and protect the lessor against the laches and indifference of the lessee, the forfeiture will be declared.

Parish Fork Oil Co. v. Bridgewater Gas Co. 51 W. Va. 583, 59 L.R.A. 566, 42 S. E. 655, 22 Mor. Min. Rep. 145; Munroe v. Armstrong, 96 Pa. 307.

Any uncertainties or ambiguities in the lease should be resolved against the lessee and in favor of the lessor.

Clark v. J. R. Watkins Medical Co. 115 Ark. 166, 171 S. W. 136; Ford v. Fix, 112 Ark. 1, 164 S. W. 726; Mississippi Home Ins. Co. v. Adams, 84 Ark. 431, 106 S. W. 209; Kolachny v. Galbreath, 26 Okla. 772, 38 L.R.A. (N.S.) 451, 110 Pac. 902; Superior Oil & Gas Co. v. Mehlin, 25 Okla. 809, 138 Am. St. Rep. 942, 108 Pac. 545; Frank Oil Co. v. Belleview Gas & Oil Co. 29 Okla. 719, 43 L.R.A. (N.S.) 487, 119 Pac. 260; Dill v. Frazee, 169 Ind. 53, 79 N. E. 971.

Messrs. Carmichael & Brooks, for appellees:

The lease was a binding and mutual obligation.

Keopple v. National Wagonstock Co. 104 Ark. 466, 149 S. W. 75; Thomas-Huycke-Martin Co. v. Gray, 94 Ark. 9, 140 Am. St. Rep. 93, 125 S. W. 659; Minneapolis Mill Co. v. Goodnow, 40 Minn. 497, 4 L.R.A. 202, 42 N. W. 356; Frank Oil Co. v. Belleview Gas & Oil Co. 29 Okla. 719, 43 L.R.A. (N.S.) 487, 119 Pac. 260; Northwestern Oil & Gas Co. v. Branine, — Okla. —, 3 A.L.R. 349, 175 Pac. 533; Rich v. Doneghey, — Okla. —, 3 A.L.R. 357, 177 Pac. 86; Dunaway v. Galbraith, 139 Ark. 580, 214 S. W. 33.

The tender was made in proper time.

Rhodes v. Mound City Gas, Coal &

Oil Co. 80 Kan. 762, 104 Pac. 851; Webster v. Cook, 38 Cal. 423; Rose v. Lanyon Zinc Co. 68 Kan. 126, 74 Pac. 625; Mower v. Sanford, 76 Conn. 504, 63 L.R.A. 625, 100 Am. St. Rep. 1008, 57 Atl. 119; Blodgett v. Lanyon Zinc Co. 58 C. C. A. 79, 120 Fed. 893; Thompson v. Christie, 138 Pa. 230, 11 L.R.A. 236, 20 Atl. 934; May v. Hazelwood Oil Co. 152 Pa. 518, 25 Atl. 564; Wolf v. Guffey, 161 Pa. 276, 28 Atl. 1117; Evans v. Consumers' Gas Trust Co. — Ind. —, 31 L.R.A. 673, 29 N. E. 398; Columbian Oil Co. v. Blake, 18 Ind. App. 680, 42 N. E. 234; Edmonds v. Mounsey, 15 Ind. App. 399, 44 N. E. 196, 18 Mor. Min. Rep. 384; Glasgow v. Chartiers Oil Co. 152 Pa. 48, 25 Atl. 232, 17 Mor. Min. Rep. 523; Gibson v. Oliver, 158 Pa. 277, 27 Atl. 961; Cochran v. Pew, 159 Pa. 184, 28 Atl. 219; Eaton v. Allegany Gas Co. 122 N. Y. 416, 25 N. E. 981; Smiley v. Western Pennsylvania Natural Gas Co. — Pa. —, 21 Atl. 1; Jones v. Western Pennsylvania Natural Gas Co. 146 Pa. 204, 23 Atl. 386; Leatherman v. Oliver, 151 Pa. 646, 25 Atl. 309, 17 Mor. Min. Rep. 526; Liggett v. Shira, 159 Pa. 350, 28 Atl. 218; Guffy v. Hukill, 34 W. Va. 49, 8 L.R.A. 759, 26 Am. St. Rep. 901, 11 S. E. 754.

Mr. Samuel M. Wassell, amicus curiæ:

Plaintiffs were not in possession or entitled to maintain a suit for cancellation of the lease in question, as a cloud on their title.

Evans v. Consumers' Gas Trust Co. — Ind. —, 31 L.R.A. 675, 29 N. E. 398; 27 Cyc. 736; Thompson v. Christie, 138 Pa. 236, 11 L.R.A. 236, 20 Atl. 934; Consumers Gas Trust Co. v. Littler, 162 Ind. 320, 70 N. E. 363; Bay State Petroleum Co. v. Penn Lubricating Co. 121 Ky. 637, 87 S. W. 1102; Lynch v. Versailles Fuel Gas Co. 165 Pa. 518, 30 Atl. 984, 18 Mor. Min. Rep. 149; Duffield v. Hue, 129 Pa. 94, 18 Atl. 566, 17 Mor. Min. Rep. 253; Hukill v. Myers, 36 W. Va. 639, 15 S. E. 151.

The lease was not wanting in mutuality merely because it reserved to one party an option which it withheld from the other.

Brewster v. Lanyon Zinc Co. 72 C. C. A. 213, 140 Fed. 807; Rich v. Doneghey, — Okla. —, 3 A.L.R. 352, 177 Pac. 86; Brown v. Fowler, 65 Ohio St. 507, 63 N. E. 76; Central Ohio Natural Gas & Fuel Co. v. Eckert, 70 Ohio St. 127, 71 N. E. 281; 9 Cyc. 334.

There was no abandonment of the work of exploring for oil.

Dickey v. Coffeyville Vitrified Brick & Tile Co. 69 Kan. 106, 76 Pac. 400.

Hart, J., delivered the opinion of the court:

Counsel for the plaintiffs contend that no well was completed on the land within one year from the date of the execution of the lease, and that by the terms thereof the \$60 rental provided in the surrender clause was payable in advance, and that the lessor had a right to declare the lease void for the nonpayment thereof. It is the contention of counsel for the defendants that the \$60 annual rental was not payable until the end of the second year after the date of the execution of the lease, and that the plaintiffs had no right to declare the lease void for the nonpayment of the \$60 before the payment therefor became due.

That equity will enforce a forfeiture of a lease giving the exclusive right to explore for minerals upon a tract of land, where it would be inequitable to permit the

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lessee longer to assert such right, by reason of his continued default, is settled in this state by the case of Mansfield Gas Co. v. Alexander, 97 Ark. 167, 133 S. W. 837. The reason for enforcing a forfeiture under such leases is well stated in Brown v. Vandergrift, 80 Pa. 142. In the opinion Chief Justice Agnew said: "The discovery of petroleum led to new forms of leasing land. Its fugitive and wandering existence within the limits of a particular tract was uncertain, and assumed certainty only by actual development founded upon experiment. The surface required was often small compared with the results, when attended with success; while these results led to great speculation, by means of leases covering the lands of a neighborhood like a flight of locusts. Hence it was found necessary to guard the rights of the landowner, as well as public interest, by numerous covenants, some of the most

stringent kind, to prevent their lands from being burdened by unexecuted and profitless leases, incompatible with the right of alienation and the use of the land. Without these guards, lands would be thatched over with oil leases by subletting, and a farm riddled with holes and bristled with derricks, or operations would be delayed so long as the speculator would find it hopeful or convenient to himself alone. Hence covenants became necessary to regulate the boring of wells, their number and time of succession, the period of commencement and of completion, and many other matters requiring special regulation. Prominent among these was the clause of forfeiture to compel performance and put an end to the lease in case of injurious delay, or a want of success. These leases were not valuable, except by means of development, unlike the ordinary terms for the cultivation of the soil, or for the removal of fixed minerals. A forfeiture for nondevelopment or delay, therefore, cut off no valuable rights of property, while it was essential for the protection of private and public interest in relation to the use and alienation of property."

It is true that, in general, equity abhors a forfeiture, but not when it works equity and protects a landowner from the laches of a lessee under a lease for exploring for oil and gas. The reason is that a small tract of land could be nearly or entirely drained by wells on adjoining lands, and it is common that leases contain covenants for diligent operation and for forfeiture in case of suspension. Again, it is said that an oil lease yields nothing to the landowner, unless worked, and is an encumbrance on his land, tying his hands against selling or leasing to others. Munroe v. Armstrong, 96 Pa. 307.

This brings us to a consideration of a construction of the terms of the lease. In Lawrence v. Mahoney, 145 Ark. 310, 225 S. W. 340, the court had under consideration a lease similar to the one in the case

at bar in all essential particulars. In that case the court held valid an oil and gas lease for a term of ten years in consideration of \$1, under which the lessee covenanted that, in case a well was not completed on the premises within one year from the date of the execution of the lease, the lease should become null and void unless the lessee should pay a fixed sum per annum for each additional year that such completion was delayed, and further covenanted to pay the lessor one eighth of all the oil produced. This principle was involved in the case of *Mansfield Gas Co. v. Alexander*, supra, where the court recognized that part of the consideration in such leases is the exploitation of the mineral resources of the land to which the lease relates. Other cases sustaining leases of this character may be found in a case note to *Rich v. Doneghey*, — Okla. —, in 3 A.L.R. 352, at pages 381 and 382.

Counsel for the plaintiffs also seek to reverse the decree on the ground that the \$60 annual rental after the first year is payable in advance, and that the plaintiffs had a right to forfeit the lease for the nonpayment thereof. In support of their contention reliance is placed upon the case of *Sullivent v. Clear Creek Oil & Gas Co.* 138 Ark. 367, 211 S. W. 173, in which the court construed a similar lease as giving the lessee the right, at the end of the first year, to continue the lease to the end of the ten-year period upon the payment in advance of the fixed annual rental until a well was drilled. That case should not control here, because the question does not appear to have been duly considered by the court at that time. The language was pertinent to the issues involved, but it does not appear that the attention of the court, or the mind of the judge writing the opinion, was directed to a decision of the question involved in the instant case.

It will be observed that the contract in the present case, in consideration of \$1, leases the 120 acres of land for ten years for the purpose

of enabling the lessee to explore it for gas or oil and iron ore. The lease is conditioned, however, that, in case no well is completed on the premises within one year from the date of the execution of the lease, then the lease shall become null and void, unless the lessee shall thereafter pay the lessor at the rate of \$60 for each year thereafter such completion is delayed. The full force of this clause is to give the lessee the option, by making such payment, to continue the lease in force to the end of ten years without completing the first well, or, upon failure to make such payment, to allow the lease to become null and void, if the lessor should declare a forfeiture. Under a lease of this kind, the lessee, so long as he pays the rentals in the manner provided, has an option to continue the lease in force to the end of the term. The lessee may also terminate the lease at will by a mere failure to pay the stipulated rent at the time due. The lessor has no right to terminate the lease as long as the lessee complies with its terms; but he may declare a forfeiture if the lessee fails to pay the annual rental when due.

In *Dill v. Frazee*, 169 Ind. 53, 79 N. E. 971, the supreme court of Indiana construed a clause in a lease, in all respects similar to the present one, to mean that in case the lessee failed to complete a well within the time limit first provided, and desired to continue the lease under the surrender clause, he must pay the annual rental in advance. The reasoning of the court is clearly stated in the following language: "There can be no doubt that the principal purpose of appellant in making said contract was to procure the exploration of his land for oil and gas, to be followed by the development of it, if circumstances warranted. The strong implication of the contract was that this would be done, and it must be construed in the light of this fact [citing cases]. While, upon the receipt of the first year's compensation for delay, the operator would have been entitled to postpone

the beginning of operations, yet it does not admit of question that it was within the power of appellant, by appropriate action, to prevent the second party from continuing to hold the right granted in the land, without exploration or development, for the whole of the contract period. The agreement contains an express provision for a forfeiture if a well is not completed within sixty days, unless the second party thereafter pays at the rate of \$40 per year for each year such completion is delayed. The unit of payment was \$40, and the question arises whether such payment was to be made in advance. While the ordinary rule governing rentals is that payment in advance is not required, unless so stipulated in the contract, yet, as the endeavor of courts in the enforcement of agreements is to effectuate the intent of the makers, we are of opinion that, in the circumstances of this case, it should be held that it was the purpose of the parties that payment should be made in advance. The situation of appellant must be considered. There was no express agreement on the part of the operator that he would even explore for gas or oil; on the contrary, he had reserved the right at any time, upon the payment of the nominal consideration of \$1, to cancel and annul the contract. He had not agreed that he would pay any sum in the nature of rent. . . . The contract before us distinctly contemplated that a forfeiture should result at the end of sixty days (a well not being then completed), unless the operator should pay the consideration for delay. This plainly required him to become an actor if he would save his rights. In such a case the owner has the privilege of declaring the lease forfeited at the end of said time, except as the other party pays the sum stipulated for the delay. The forfeiture must occur, if at all, when that time has elapsed, provided that the owner sees fit to take advantage of it. In these circumstances it would throw the provisions of said

contract into hopeless confusion, and would work a great injustice to the owner, to hold that he must wait a year, without even the assurance that the contract would then be complied with."

The contrary view is maintained by the supreme court of Kansas in *Rhodes v. Mound City Gas, Coal, & Oil Co.* 80 Kan. 762, 104 Pac. 851. The opinion in that case cites the cases of *Mower v. Sanford*, 76 Conn. 504, 63 L.R.A. 625, 100 Am. St. Rep. 1008, 57 Atl. 119, and *Blodgett v. Lanyon Zinc Co.* 58 C. C. A. 79, 120 Fed. 893, to support it. All these cases proceed upon the theory that the ordinary rule governing the payment of rentals should apply, and that is, that a contract for the payment of money in fixed instalments, containing no other provision for the time of payment of such instalments than that they are to be paid annually, is lawfully performed by the payment of a single instalment at the end of each year.

We decline to follow the holding of these cases, and adopt that of the supreme court of the state of Indiana, believing it to be the

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better reasoning. What has been said above on the question of equity following the law, and enforcing forfeitures in cases of this kind, applies with equal force to this question. Leases of this kind are prepared by the lessee, and holding to a lease after ceasing to search for oil or gas is often for the purpose of speculation. When the lessee is not exploring the land for oil or gas, he is out nothing, and it is valuable to him to hold the lease for the purpose of speculation, or to await developments of other persons in that vicinity. Hence we think that time is of the essence of the contract. It was contemplated that the lessee should do the affirmative act of paying the annual rental in advance, in order to prevent the lease from being declared forfeited by the lessor.

It is claimed, however, that the word "thereafter" indicates that the

annual rental was not to be paid in advance. We do not think that word was inserted for any such purpose. It is used twice, and seems to have been used only to show that the annual rental was not to be paid during the first year of the lease. It is a matter of common knowledge that such contention has been made in many instances in similar leases. The lessor was within his rights in declaring the forfeiture of the lease for the nonpayment of the annual rental, and the chancery court erred in not so holding.

Therefore the decree will be reversed, and, inasmuch as the case

seems to have been fully developed, The Chancery Court will be directed to enter a decree, canceling the lease as prayed for in the plaintiff's complaint.

Wood, J., dissents.

A petition for rehearing having been filed, Hart, J., on November 29, 1920, handed down the following additional opinion:

Counsel for appellees insist in their motion on rehearing that the court's statement of facts with regard to the forfeiture, and the rule laid down with regard to it, are wrong. The case was tried on an agreed statement of facts, and a re-examination shows that we correctly stated them in our opinion. It is true that, as insisted by counsel, we stated that on April 19, 1920, B. C. Epperson wrote Helbron a letter in which he declared that the lease was void, and informed Helbron that he

had leased the land to other parties, when in fact this letter was written and signed by the attorneys of Epperson. Their act, however, was his act.

Again, it is insisted by counsel for appellees that this letter was not received by Helbron until April 22, 1920, and that on April 20, 1920, Helbron wrote Epperson a letter tendering him the rent for the cur-

rent year. This did not avoid the forfeiture. The forfeiture occurred when the attorneys for Epperson mailed the letter on April 19, 1920, in which the forfeiture was declared. It was not necessary that Helbron should receive the declaration of forfeiture before it became effective. Epperson had the power to declare the forfeiture, and his act in so doing was completed when he mailed the letter. Therefore it did not make any difference that Helbron wrote Epperson a letter tendering the rent before he received Epperson's letter declaring the forfeiture.

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notice.

Again, it is contended that the force of the opinion in Dill v. Frazee, 169 Ind. 53, 79 N. E. 971, is weakened because the supreme court of Indiana in that case impliedly overruled the earlier case of Watson v. Penn, 108 Ind. 21, 58 Am. Rep. 26, 8 N. E. 636, without mentioning the case. The supreme court of Indiana did not overrule the case of Watson v. Penn. That was an ordinary case of tenancy, in which no time was stipulated for the payment of the rent, and the court held that the payment could be made at the end of the year. The reason for the holding was that rent is, in its nature, a return for the enjoyment of the annual profits of the land. As pointed out in the case of Dill v. Frazee, a different rule applies in cases of a lease for the contemplated exploration of the land for gas or oil. The conditions existing in such cases require a different rule, and form an exception to ordinary cases of tenancy, where the object of the lease is for the lessee to obtain possession of the land and use it in return for rent paid.

Again, counsel contend that there should be a difference in developed and undeveloped oil territory in this respect. We can see no reason for this distinction. As pointed out in the opinion, the object of the rule is that the lessee should act in the

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lease being in
undeveloped
territory.

premises by paying the rent in advance, so that the lessor would know whether or not the lessee intended to extend the term of the lease. If he did not, the lessor would then have an opportunity to lease it to someone else for the purpose of having it explored for oil.

Finally, it is insisted that the use of the word "thereafter" gave the

lessee until the end of the year within which to pay the rent. We think the use of this word rather indicates to the contrary. It applies to the first thing which the lessee was required to do,—to wit, the payment of the rent, if he desired to continue the lease for another year.

Therefore the motion for a rehearing will be denied.

ANNOTATION.

Rent in lieu of development under oil and gas lease as payable in advance.

It seems that it is frequently provided in oil and gas leases that if no well is completed on the leased premises within a specified time the lessee shall, if he desires to continue the lease in force, pay a stipulated rental in lieu of development.

In the reported case (*EPPELSON v. HELBRON*, ante, 597) it is held that if no time of payment is stipulated, such rentals are payable in advance. A like holding was made in *Dill v. Frazee* (1907) 169 Ind. 58, 79 N. E. 971, quoted at length in the reported case, and in *Maud Oil & Gas Co. v. Bodkin* (1919) 75 Okla. 6, 180 Pac. 959, which also followed and quoted *Dill v. Frazee* (Ind.) supra. See also *Bearman v. Dux Oil & Gas Co.* (1917) 64 Okla. 147, 166 Pac. 199, wherein the ruling was rested largely on a practical construction of the lease by the parties.

In several other cases, however, it has been held that where an oil and gas lease providing for rent in lieu of development does not stipulate for payment in advance, the rule governing other tenancies is applicable, and the rent is not due until the end of the term.

Thus, in *Rhodes v. Mound City Gas, Coal & Oil Co.* (1909) 80 Kan. 762, 104 Pac. 851, the court construed a lease providing as follows: "Second party agrees to drill a well upon said premises within two years from this date or thereafter pay to first party eighty (\$80) dollars annually until said well is drilled, or this lease shall be void." It was held that the rent need not be paid in advance.

So, the provisions of the lease involved in *Gillespie v. Fulton Oil & Gas Co.* (1908) 236 Ill. 188, 86 N. E. 219, and the construction thereof, were stated by the court as follows: "The lease provides that 'the second parties shall, within twelve months from the date hereof, drill a test well upon said premises.' By another clause in said lease it is provided: 'In case no well is completed on said premises within twelve months from this date, the parties of the second part shall pay the party of the first part a rental of 25 cents per acre per year, to be paid annually, counting from the expiration of the said twelve months.' Taking these two clauses together, and in connection with the clause providing that the lease was for five years from the date thereof, it is clear that the lessee was not required to pay any rent until the expiration of the first year. At that time, if no test well was completed, the rent commenced to accrue. The lease does not require the payment of the rent in advance. Appellant would, therefore, have all of the second year in which to pay his rental of 25 cents per acre."

Likewise, in *Washburn v. Gillespie* (1920) 171 C. C. A. 637, 261 Fed. 41, in holding to be good a tender of rentals in lieu of development under a lease providing that "the party of the second part agrees to complete a well on said premises within one year from date hereof, or pay at the rate of \$40 for each additional three months such completion is delayed, from the time above mentioned for the full comple-

tion of such well until a well is completed," it was said: "The only objection touching the rentals is that the second tender was overdue nine or ten days. This is based on the theory that the lease required the quarterly payments to be in advance, which would make this payment due December 23, 1916. There is no such requirement in the lease."

Similarly, in *Blodgett v. Lanyon Zinc Co.* (1903) 58 C. C. A. 79, 120 Fed. 893, it was held that payment in ad-

vance was not required by an oil lease providing that, if no well was sunk within two years, the lease should become void unless the lessee should elect to continue it from year to year by paying \$40 each year, the court saying: "An election from year to year, by paying \$40 each year, literally means an election by paying during each year; and there is nothing elsewhere in the contract inconsistent with the words and the ordinary meaning of this provision." W. A. S.

UNITED STATES FIDELITY & GUARANTY COMPANY, Appt.,
v.
MRS. LOLA D. HOOD.

Mississippi Supreme Court (Division B)—February 21, 1921.

(124 Miss. 548, 87 So. 115.)

Insurance — accident — provision for autopsy — construction.

1. The provision of an accident policy providing for an autopsy in case of death will be construed most strongly against the insurer and in favor of the insured; and such provision will be construed so as to require the demand and the operation to be made before interment. If the company desires to make an autopsy, it must arrange its affairs so as to secure the necessary information and make the demand and perform the operation before interment.

[See note on this question beginning on page 614.]

—effect of burial — public policy.

2. A provision in an accident policy of insurance providing for an autopsy after the body has been buried is contrary to public policy and void.

Witness — physician — competency.

3. Under § 3695, Code 1906 (Hemingway's Code (6380)), a physician is incompetent to testify to facts which come to his knowledge by virtue of his being employed by his patient as a physician, and the patient does not waive the privilege because he introduces another physician, who testifies for the patient about the same facts. It is improper practice in such case to permit the physician to testify at all about such facts, even in the absence of the jury. The proper practice is to ascertain whether the facts were

learned because of the relation, and, if so, to exclude the evidence.

[See 28 R. C. L. 535-537.]

Insurance — accident — causing disease — proximate cause.

4. Where a provision of an accident insurance policy insures against "the effects resulting directly and exclusively of all other causes from bodily injury sustained during the life of this policy solely through accidental means," and an accident happens which sets in action a latent and inactive disease, and death results from the accident accompanied by the effects of such disease, the accident is the proximate cause of the death. To avoid the policy in case of an accident accompanied by disease, the disease must proximately contribute to the death.

[See 14 R. C. L. 1245, 1246.]

Headnotes by ETHRIDGE, J.

APPEAL by defendant from a judgment of the Circuit Court for Washington County (Elmore, J.) in favor of plaintiff in an action brought to recover the amount alleged to be due on an accident insurance policy. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. Joseph A. McCullough, for appellant:

If pre-existing disease combined and concurred with the injury received in causing death, the said death was not caused "directly" and "exclusively" from the bodily injuries sustained, and the disability did not result "from such injuries alone."

Illinois Commercial Men's Asso. v. Parks, 103 C. C. A. 286, 179 Fed. 794; Clarke v. New Amsterdam Casualty Co. 180 Cal. 76, 179 Pac. 195; New Amsterdam Casualty Co. v. Shields, 85 C. C. A. 122, 155 Fed. 54; Maryland Casualty Co. v. Morrow, 52 L.R.A.(N.S.) 1213, 130 C. C. A. 179, 213 Fed. 599; Hubbard v. Mutual Acci. Asso. 98 Fed. 930; Ætna L. Ins. Co. v. Ryan, 166 C. C. A. 559, 255 Fed. 483; Western Commercial Travelers' Asso. v. Smith, 40 L.R.A. 653, 29 C. C. A. 223, 56 U. S. App. 393, 85 Fed. 401; Leland v. United Commercial Travelers, 233 Mass. 558, 124 N. E. 517; Western Indemnity Co. v. MacKechnie, — Tex. Civ. App. —, 214 S. W. 456; Kellner v. Travelers Ins. Co. 180 Cal. 326, 181 Pac. 61; Crandall v. Continental Casualty Co. 179 Ill. App. 330; Koprivica v. Standard Acci. Ins. Co. — Mo. App. —, 218 S. W. 689.

The company was justified in its demand for an autopsy, and acted with unusual and extraordinary diligence.

American Employees' Liability Ins. Co. v. Barr, 16 C. C. A. 51, 32 U. S. App. 444, 68 Fed. 873; Johnson v. Bankers Mut. Cas. Ins. Co. 129 Minn. 18, L.R.A.1915D, 1199, 151 N. W. 413, Ann. Cas. 1916A, 1543; Wehle v. United States Mut. Acci. Asso. 153 N. Y. 116, 60 Am. St. Rep. 598, 47 N. E. 35; American Nat. Ins. Co. v. Nuckols, — Tex. Civ. App. —, 187 S. W. 497.

Messrs. Percy & Percy also for appellant.

Mr. R. B. Campbell, for appellee:

The provision of the policy giving the right to make "an autopsy" in case of death does not carry with it the right of exhumation; and if it does carry that right, the demand for the autopsy was unreasonably delayed, in consequence of which its refusal constituted no bar to a recovery.

Johnson v. Bankers Mut. Casualty

Ins. Co. Ann. Cas. 1916A, 156, note; Wehle v. United States Mut. Acci. Asso. 153 N. Y. 116, 60 Am. St. Rep. 598, 47 N. E. 35; Sudduth v. Travelers' Ins. Co. 106 Fed. 822; Patterson v. Ocean Acci. & G. Corp. 25 App. D. C. 46; Ewing v. Commercial Travelers' Mut. Acci. Asso. 55 App. Div. 241, 66 N. Y. Supp. 1056; American Nat. Ins. Co. v. Nuckols, — Tex. Civ. App. —, 187 S. W. 497; 5 Joyce, Ins. 2d ed. § 3491; 13 Cyc. 267.

Even though disease may have contributed to, or accelerated, insured's death, if the injury was the proximate, predominant, or efficient cause of his death, the insurer was liable on the policy.

Stanton v. Travelers Ins. Co. 34 L.R.A.(N.S.) 445, note; Rathman v. New Amsterdam Casualty Co. Ann. Cas. 1917C, 463, note; Freeman v. Mercantile Mut. Acci. Asso. 156 Mass. 351, 17 L.R.A. 753, 30 N. E. 1013; Fetter v. Fidelity & C. Co. 174 Mo. 256, 61 L.R.A. 459, 97 Am. St. Rep. 560, 73 S. W. 592; Fidelity & Casualty Co. v. Meyer, 106 Ark. 91, 44 L.R.A.(N.S.) 493, 152 S. W. 995; Moon v. United Commercial Travelers, 96 Neb. 65, 52 L.R.A.(N.S.) 1003, 146 N. W. 1037, Ann. Cas. 1916B, 222; Hall v. General Acci. Assur. Corp. 16 Ga. App. 66, 85 S. E. 600; Thornton v. Travelers' Ins. Co. 116 Ga. 129, 94 Am. St. Rep. 99, 42 S. E. 287; Cary v. Preferred Acci. Ins. Co. 127 Wis. 67, 5 L.R.A.(N.S.) 926, 115 Am. St. Rep. 997, 106 N. W. 1055, 7 Ann. Cas. 484; Continental Casualty Co. v. Lloyd, 165 Ind. 52, 73 N. E. 824; Driskell v. United States Health & Acci. Ins. Co. 117 Mo. App. 362, 93 S. W. 880; Bohaker v. Travelers' Ins. Co. 215 Mass. 32, 46 L.R.A.(N.S.) 543, 102 N. E. 342.

Whatever communication was made to Dr. Smythe, or information derived during the course of his examination, was privileged, and could not be disclosed in this proceeding, except at the instance of the assured.

Yazoo & M. Valley R. Co. v. Messina, 109 Miss. 143, 67 So. 963; Hamel v. Southern R. Co. 113 Miss. 344, 74 So. 276; Newton Oil Mills v. Spencer, 116 Miss. 568, 77 So. 605.

Ethridge, J., delivered the opinion of the court:

The judgment in this case was affirmed on a former day without written opinion. — Miss. —, 86 So. 814. A suggestion of error has been filed in which we are asked to write our views if we should adhere to the former opinion, but earnestly insisting that we erred in the decision heretofore rendered.

The appellee was the plaintiff below and the appellant the defendant. The appellant issued an accident policy to Clifton R. Hood, the husband of the appellee, in which policy the appellee was named as a beneficiary. The policy agreed to pay her, in the event of his death within the terms of the policy, \$10,000, called the principal sum, and \$5,000 by virtue of what is termed an "accumulation indorsement" attached to the policy.

The policy was first issued March 12, 1915, and was renewed from time to time, and was in force at the time of the death of Clifton R. Hood.

The insurance was against "the effects resulting directly and exclusively of all other causes from bodily injury sustained during the life of this policy solely through accidental means."

Under the heading "General Agreements," the policy contains various paragraphs, of which it is only necessary to mention here paragraphs 3 and 8, paragraph 3 being as follows: "(3) The company shall in case of injury or disability have the right and opportunity to examine the person of the assured or beneficiary when and as often as it requires, and shall also have the right and opportunity to make an autopsy in case of death."

Paragraph 8, so far as necessary to state, is as follows: "(8) Compliance with all of the terms and conditions of this policy shall be a condition precedent to the recovery of any claim hereunder."

The assured was fifty-six years of age, and, while walking in his yard on December 12, 1917, during the life of the policy, he slipped down,

striking the back of his head on the frozen ground, which was heavily covered with ice. He was carried into his house, and put in bed, where he remained until December 19, 1917, when he was removed to the King's Daughters' Hospital, in Greenville, Mississippi, and there died on the morning of December 27, and was buried in the afternoon of December 28, 1917.

Notice of the accident and of the death of the assured, and proof of the injury and loss, were furnished by the appellee to the appellant within the time and as required by the policy.

The appellant denied liability and refused to pay the amount claimed, and suit was brought to recover the amount due.

The appellant pleaded the general issue and a special plea to the declaration; contended under the general issue that the assured's death was not the direct and exclusive result of his accidental fall, but that disease, existing at the time, was the sole or a contributing cause thereof, and, by said special plea, set forth the above paragraphs relating to the matter of autopsy, and then averred "that, upon being advised of the death of the assured, defendant demanded the opportunity to make an autopsy on the body of the said assured, Clifton R. Hood, and, under said ¶ 3, defendant was entitled to the right and opportunity to make an autopsy on said body; and the plaintiff refused to this defendant the opportunity to make such an autopsy, and refused to permit such autopsy, which was a violation of ¶ 3 of said policy, and under the provision of ¶ 8, by reason of such failure and refusal to comply with the terms and conditions of the policy, plaintiff is not entitled to recover."

To which special plea a replication was filed by the plaintiff, admitting the provisions of the policy set forth in the special plea, and then averred "that the demand for such autopsy was not made by defendant at or within a reasonable time after

having been advised of the injury and resultant death of said assured, in that said defendant delayed making said demand until five or six days after the body of said assured had been buried."

To which replication the appellant interposed a demurrer, which the appellee asked the court to extend to the said special plea of the defendant, which the court did, sustained the demurrer to the special plea, and ordered the appellant to plead over to the declaration.

Thereupon, by leave of court, the appellant filed a second and third special plea, pleading in each a demand for an autopsy and its refusal in bar of the suit.

The appellee joined issue upon the second special plea, and interposed a demurrer to the third special plea, which demurrer was sustained.

The second special plea showed that the demand for an autopsy was made after the burial of the deceased, and alleged that the request to perform an autopsy was made by the defendant immediately upon being advised of the death of the assured, and that the defendant was also advised that the death of the deceased was due to pre-existing disease and was not within the terms of its policy, death not having resulted directly and exclusively of all other causes from bodily injuries sustained solely from accidental means, and that an autopsy of the body would reveal this fact.

On the trial it appeared from the evidence of Dr. Gamble, a physician who attended the deceased, that the deceased was affected with high blood pressure and some kidney trouble; that Dr. Gamble had examined the deceased a few days before the accident, and that his condition was better than it had been for some years, and that, if the accident had not occurred, the deceased would probably have lived for a number of years; that the accident operated upon the diseased condition, but that the accident was the primary cause of his death, his death being caused by the fall ac-

companied by uremia. The deceased, when injured, was carried into his home, and suffered great pain in his head, and was suffering when first attended by Dr. Gamble the following morning, and continued to suffer more or less until his death. After the injury and after the removal of the deceased to the hospital at Greenville, Mississippi, he gradually passed into a comatose state.

Dr. Lewis, a physician, also attended the deceased, and his opinion was that the death was caused by the fall and uremia.

Dr. Smythe, another physician, was also called to attend the deceased, but he was not introduced by the attorney for the appellee, but was placed on the stand by the appellant, and, in the absence of the jury, testified that he made one examination and one visit to the deceased, that in his opinion the condition of high blood pressure and the kidney trouble produced the death, and that he could not see that the fall had anything to do with it. This evidence was excluded and did not go to the jury.

Dr. McMahon, who was present in the court room as an expert pathologist for the appellant company, and heard the evidence of the physicians, was asked the following questions:

Q. You have heard the testimony of Dr. Gamble in regard to the history of the case of Mr. C. R. Hood and the symptoms of the case. From what you have heard, are you able to form an opinion as to the cause of the death?

A. I think I am.

Q. What is your opinion?

A. After hearing the testimony of these doctors I should be of the opinion that this gentleman died from uremia, from arteriosclerosis, chronic interstitial nephritis, and perhaps organic heart disease.

Q. Would you say that the fall which he had brought about, accelerated, or had any effect upon the case?

A. That would be a very hard question to answer, but in the light of the evidence of this high blood pressure, and the fact that he lived some fourteen days following the accident, I should say in all probability it did not have any effect.

At the conclusion of the evidence the appellant company requested a peremptory instruction, which was refused.

Certain instructions hereafter referred to were given to the appellee and excepted to, and certain instructions were refused to the appellant, and exception taken to such refusals.

There was a verdict and judgment for the appellee, Mrs. Hood, from which this appeal is taken, and the following assignments of error are assigned:

"(1) The court erred in overruling the demurrer filed by defendant to the plaintiff's replication.

"(2) The court erred in applying the demurrer which was overruled, and which was filed to the plaintiff's replication, to the special plea filed by defendant.

"(3) The court erred in sustaining the demurrer of plaintiff to defendant's third special plea.

"(4) The court erred in sustaining the objection to the introduction of the testimony of J. D. Smythe, and in refusing to permit such testimony to go to the jury.

"(5) The court erred in granting each and every instruction given for the plaintiff.

"(6) The court erred in refusing each and every instruction requested by the defendant and refused by the court.

"(7) The court erred in overruling the motion for a new trial and in refusing to set aside the verdict of the jury and the judgment rendered thereon and to grant the defendants a new trial."

The first three assignments relate to the ruling of the court on the demurrers, and present for consideration the question whether or not the defendant had a right to an autopsy after the burial of the deceased.

The appellant has its principal office in Baltimore, Maryland, and has an agency at Memphis, Tennessee, and an agent in Washington county, Mississippi. Under its rules it reserved to its home office the right to demand an autopsy; it being contended that neither the agent at Memphis, Tennessee, nor the agent in Washington county, Mississippi, had any right to demand or waive an autopsy. When the accident occurred, the agent at Greenville, Mississippi, reported to the Memphis office. On the day preceding the death of deceased the agent reported to the Memphis office that the accident was much more serious than was first thought, and he reported the death to the Memphis office on the day that the deceased died, and on the following day sent a copy of the notice in the paper containing an account of the funeral arrangements.

The burial was on the 28th day of December, and on the 2d day of January the appellant company sent an adjuster to report upon the death. This adjuster conferred with the physicians and the undertakers, and obtained statements from them which he reported to the Memphis office, which office notified the home office on the 2d day of January and requested authority to demand an autopsy, which request was granted by the home office, and the request communicated to the appellee, who advised the agent of the company that her brother would be there the next day, and she wished to consult him. On January 3d the company sent a physician to conduct the autopsy, and this physician requested permission to make the autopsy, and was advised that a family council would be held the following day. The physician returned home without having any other communication with the appellee or her family. On the 5th day of January the company wrote Mrs. Hood making a request for an autopsy, which on the 8th day of January she refused because the demand was made too late.

It will be seen from the above that no demand was made for an autopsy until after the burial, but the appellant insists that under its contract it had the right to make an autopsy, even though it required exhuming the body to do so.

There are a number of authorities which on their facts have held that the request for an autopsy came too late, but none of the authorities cited have passed specifically upon the question as to whether a demand for an autopsy after interment and its refusal would constitute a defense to the policy. The general trend of the authorities is to the effect that the demand must be seasonably made. It is insisted here that the company had no notice of the necessity for an autopsy or the probable results that might follow an autopsy until after the interment, and that the right was not waived because the facts were not communicated to the company by the beneficiary until after the interment was made, and that it made the request seasonably after securing the information that an autopsy would probably show the nonliability of the company under the policy.

The company may, of course, confide to such of its officers as it may desire the sole power of making a demand for an autopsy in such cases, and may refuse the local agents any authority to either demand an autopsy or to waive the benefits. But where it does so it is nevertheless bound by knowledge coming to the knowledge of its agent, and must exercise such reasonable diligence as the circumstances call for. In the present case it was advised of the seriousness of the injury prior to the death of the deceased, and knowledge of his death came to its agents in ample time, if promptly communicated, for it to have made the demand.

Provisions of a contract of this kind which are prepared by the insurer are to be construed most strongly against the insurer and in favor of the insured. Where there is no provision in the contract itself

giving the right of an autopsy after interment, the court will construe the provisions to mean that an autopsy must be demanded

*Insurance—
accident—
provision for
autopsy—
construction.*

and performed prior to interment, and, if the insurer desires to avail itself of this privilege, it must so arrange and provide for information to be given of the death prior to the interment.

From a consideration of all the facts in the present case we think, if the company had required its agents to report information to it, it could have learned all needed facts for the determination of its right to an autopsy before burial. If, however, this be not a correct view or consideration of the clause above set out, and if the clause is to be construed so as to

*—effect of burial
—public policy.*

mean that the insurer should have the right to exhume the body, then we think such contract would be in violation of public policy and would render it void.

Section 1100, Code of 1906 (Hemingway's Code, § 826), makes it a felony for any person to remove a dead body of any human being from the grave or place of interment for the purpose of selling the same, or for mere wantonness, and prescribes a punishment.

Section 1101, Code of 1906 (Hemingway's Code, § 827), prohibits any person from receiving or purchasing such body, knowing the same to have been disinterred contrary to the last section, and prescribes the punishment.

Section 1102, Code of 1906 (Hemingway's Code, § 828), provides that every person who shall open a grave or other place of interment with the intent to remove the dead body of any human being for the purpose of selling the same, or for the purpose of dissection, or to steal the coffin or any part thereof, or the fastenings or other articles interred with the dead body, or any of them, shall be punished, etc.

While the act of removing the

body from the grave for the purpose of an autopsy under a contract of the character of the one here involved would not come within the literal meaning and purpose of the statute so as to make it a felony, still we think the statute establishes a settled purpose on the part of the public to protect the repose of the dead and to protect the living from the violation of the sensibilities and sentiments that cluster around the dead. There is no statute giving any person any right to disinter the dead body for this purpose. At common law it was a misdemeanor to disinter a dead body which had been buried, and even a disinterment for laudable motives was not a defense.

In 13 Cyc., at page 271, we find the following: "Except in cases of necessity or for laudable purposes, the policy of the law is that the sanctity of the grave should be maintained, and that a body once suitably buried should remain undisturbed,"—citing numerous authorities in note 18, from which note we quote the following: "A proper appreciation of the duty we owe to the dead, and a due regard for the feelings of their friends who survive, and the promotion of the public health and welfare, all require that the bodies of the dead should not be exhumed, except under circumstances of extreme exigency."

At page 276 of 13 Cyc. we find the following statement: "It may be stated as the universal rule of law in civilized countries that it is an indictable offense to disinter and remove dead bodies wantonly or for the sake of gain, and by the old common law even the fact that the motive of the person removing the body is laudable is no defense. In most of the states of the Union the violation of sepulture is made a specific offense by statute. But these statutes are not directed against and do not apply to exhumations made by public officials, with a view to ascertaining whether a crime has been committed; nor do they apply to a

person who, having obtained the necessary permit from the constituted authorities, removes the dead body of a relative or friend for reinterment."

The beneficiary in a life insurance policy is not the only person who has an interest in having the repose of the dead respected and held sacred. It is shocking to the senses to conceive of one person or one or more persons contracting so as to provide for the exhumation and mutilation of dead bodies. We think to hold that such rights may be established by contract is carrying commercialism to unwarranted extremes.

It is next assigned for error that the court erred in sustaining the objection to the introduction of the testimony of Dr. J. D. Smythe and in refusing to permit such evidence to go to the jury.

Section 3695, Code of 1906 (Hemingway's Code, § 6380), reads as follows: "All communications made to a physician or surgeon by a patient under his charge or by one seeking professional advice, are hereby declared to be privileged, and such physician or surgeon shall not be required to disclose the same in any legal proceeding, except at the instance of the patient."

In the case of Yazoo & M. Valley R. Co. v. Messina, 109 Miss. 143, 67 So. 963, this court held that the evidence of a physician as to knowledge gained by reason of his employment as such could not be disclosed without the consent of the patient; that the privilege was for the benefit of the patient, and not of the physician.

In *Newton Oil Mill v. Spencer*, 116 Miss. 568, 77 So. 605, this court held that a physician who had attended the party injured as his physician, though he was employed and paid by the company, could not testify, although the plaintiff had introduced another physician who testified as to the extent of his injuries. In this case the point was directly involved as to whether the plaintiff, Spencer, waived his privilege by placing a physician on the stand to

testify relative to his injury about which the suit was instituted, and we treated the principle as being settled by the Messina Case, *supra*, and did not enlarge upon the law in announcing our conclusions, but the point was directly involved and pressed upon us in that case. There is no conflict between the Spencer Case, *supra*, and any other case in this state. In the case of Hamel v. Southern R. Co. 113 Miss. 344, 74 So. 276, division A of this court expressly reserved the decision of the point. In the Spencer Case, *supra*, we expressly decided the point.

In attacking these decisions the appellant says: "The bringing of an action in which the essential part of the issue is the existence of physical ailment should be a waiver of the privilege for all communications concerning that ailment. The whole reason for the privilege is the patient's supposed unwillingness that the ailment should be disclosed to the world at large; hence the bringing of a suit in which the very declaration, and much more the proof, discloses the ailment to the world at large, is of itself an indication that the supposed repugnancy to disclosure does not exist."

We do not agree with counsel that this is the whole reason for the enactment of the statute. One of the reasons that may have prompted the legislature in the enactment of the statute was the evil of commercializing knowledge so obtained by certain experts, so called, and by physicians employed by one party to wait upon and minister to parties which such employer had injured. But, whatever may have been the reason for the enactment of the statute, the statute expressly prohibits a physician from testifying without the consent of the patient. The evidence of a physician ought not to be received before the court,

Witness—
physician—
competency.

and it is error for
the court to proceed
upon the idea that

the judge and the public may hear the statement of the physician in such case, though it be excluded

from the jury. In such case the question ought to be directed to ascertaining whether the physician has knowledge by reason of the relation of physician and patient, and, if it was so acquired, it ought to be excluded.

It is next insisted that the injury was not caused, directly and exclusively of all other causes, from bodily injuries sustained during the life of the policy solely through accidental means.

It appears clearly from the testimony of Dr. Gamble that the active cause of the death was the accident, and that the accident precipitated the other troubles; that, had the accident not occurred, death would not have resulted for some years.

Does the provision of the policy, "the effects resulting directly and exclusively of all other causes from bodily injury sustained during the life of this policy solely through accidental means," mean that there can be no recovery if there is a latent or dormant disease which becomes active through the agency of the accident, and co-operates with the other effects of the accident in bringing about death?

We think that, if the accident is the proximate cause of the death and sets in motion or starts a latent or dormant disease, and such disease merely contributes to the death after being so precipitated by the accident, it is not a proximate cause of the death nor a contributing cause within the meaning of the terms of the policy.

Insurance—
accident—
causing disease—
proximate cause.

In *Patterson v. Ocean Acci. & G. Corp.* 25 App. D. C. 46, the rule is stated in one of the headnotes as to proximate cause as follows: "What is the proximate cause of an injury is generally a question for the jury, to be determined as a fact in view of all the circumstances of fact attending it; . . . and where, in an action on an accident insurance policy, the evidence tending to show that the death of the decedent was the immediate result of an accident

is weak, but it cannot be said that all reasonable men would necessarily conclude that it was not the result of the accident, the case is one for the jury."

And it is also stated: "The rule of interpretation of contracts of insurance of all kinds is that, in cases of doubt, that interpretation shall be given which favors the insured rather than the insurer; and this rule has its strongest application in relation to those terms of the policy that would work the forfeiture of a right otherwise maintainable."

In that case the clause involved read as follows:

"By the first of these the insurance is expressly stated to be 'against accidental bodily injuries caused solely . . . by external, violent, and visible means which shall, independently of all other causes, disable the assured.'"

"That a strain received in the ordinary course of the assured's business, if received at all, is an accident within the contemplation of the policy, we can have no doubt. United States Mut. Acci. Asso. v. Barry, 131 U. S. 100, 121, 33 L. ed. 60, 67, 9 Sup. Ct. Rep. 755.

"The universal rule of interpretation of contracts of insurance of all kinds is that, in cases of doubt, that interpretation shall be given which favors the insured rather than the insurer. The particular words quoted would seem to have been intended particularly to apply to a case of disability for which the assured might claim the indemnity stipulated in the policy. But, assuming that they were expressly intended to apply to the death indemnity clause, and be read in connection with the words therein providing that death shall result from accidental bodily injuries as the 'actual and direct cause thereof,' we think they cannot be regarded as clearly meaning that there shall be no recovery in a case where there was a pre-existing diseased condition of the body,—a predisposing cause of death, as it has been called,—notwithstanding the accidental in-

jury may have been the exciting, efficient, predominant cause.

"Their meaning, considering them together or separately, is, in our opinion, that the intervening accident must be the proximate, direct cause of death, and nothing more. This conclusion is supported by the following authorities: *Fetter v. Fidelity & C. Co.* 174 Mo. 256, 61 L.R.A. 459, 97 Am. St. Rep. 560, 73 S. W. 592; *Horsfall v. Pacific Mut. L. Ins. Co.* 32 Wash. 132, 63 L.R.A. 425, 98 Am. St. Rep. 846, 72 Pac. 1028; *Modern Woodman Acci. Asso. v. Shryock*, 54 Neb. 250, 39 L.R.A. 826, 74 N. W. 607; *Freeman v. Mercantile Mut. Acci. Asso.* 156 Mass. 351, 353, 17 L.R.A. 753, 30 N. E. 1013. See also *Winspear v. Accident Ins. Co.* L. R. 6 Q. B. Div. 42, 45, 43 L. T. N. S. 459, 29 Week. Rep. 116; *Travelers Ins. Co. v. Murray*, 16 Colo. 296, 25 Am. St. Rep. 267, 26 Pac. 774; *Atlanta Acci. Asso. v. Alexander*, 104 Ga. 709, 42 L.R.A. 188, 30 S. E. 939, 4 Am. Neg. Rep. 616; *Omberg v. United States Mut. Acci. Asso.* 101 Ky. 303, 72 Am. St. Rep. 413, 40 S. W. 909.

"The doctrine is well expressed by the supreme judicial court of Massachusetts in *Freeman v. Mercantile Mut. Acci. Asso.* 156 Mass. 351, 17 L.R.A. 753, 30 N. E. 1013, in the following words: 'The law will not go farther back in the line of causation than to find the active, efficient, procuring cause of which the event under consideration is the natural and probable consequence, in view of the existing circumstances and conditions. . . . An injury which might naturally produce death in a person of a certain temperament or state of health is the cause of his death, if he dies by reason of it, even if he would not have died if his temperament or previous health had been different; and this is so as well when death comes through the medium of a disease directly induced by the injury as when the injury immediately interrupts the vital processes.'"

See also *Freeman v. Mercantile Mut. Acci. Asso.* supra; *Fetter v.*

Fidelity & C. Co. 174 Mo. 256, 61 L.R.A. 459, 97 Am. St. Rep. 560, 73 S. W. 592; Fidelity & C. Co. v. Meyer, 106 Ark. 91, 44 L.R.A.(N.S.) 493, 152 S. W. 995; Moon v. United Commercial Travelers, 96 Neb. 65, 52 L.R.A.(N.S.) 1003, 146 N. W. 1037, Ann. Cas. 1916B, 222; Hall v. General Acci. Assur. Corp. 16 Ga. App. 66, 85 S. E. 600; Thornton v. Travelers Ins. Co. 116 Ga. 129, 94 Am. St. Rep. 99, 42 S. E. 287; Continental Casualty Co. v. Lloyd, 165 Ind. 52, 73 N. E. 824; Driskell v. United States Health & Acci. Ins. Co. 117 Mo. App. 362, 93 S. W. 880; Bohaker v. Travelers Ins. Co. 215 Mass. 32, 46 L.R.A.(N.S.) 543, 102 N. E. 342.

There are numbers of cases, and especially cases in the Federal court, which hold to the contrary of the doctrines herein announced, but we think the authorities cited in support of this opinion adopt the true rule. It is not sufficient to defeat the policy that the accident may have made some latent disease active, which disease contributed in some degree to the death. If the disease was active and of such character and virulence as to endanger life apart from the accident, but might not have done so had the ac-

cident not happened, then that may be said to be a proximate, contriuting cause. The court ought not to construe a contract so as to defeat rather than promote the purpose of the party in taking out the insurance. The condition of health or the existence of latent and inactive disease evidently was not contemplated by the parties in making the contract. No medical examination was required, and the pleadings did not seek to question the answers given by the assured as to his condition of health at the time the application was signed.

Next, the assignments go to the giving of the instructions for the plaintiff and the refusal of the instructions for the defendant. The instructions of the court which were given to the jury accord with our views as herein announced. The refused instructions sought to present the theory to the jury that the law was that any cause contributing to the death would bar recovery, even though it was not a proximate cause; the proximate cause hypothesis was omitted from these instructions, and for that reason they were rightfully refused.

The suggestion of error will therefore be overruled.

ANNOTATION.

Provisions for autopsy in policy of life or accident insurance.

- I. In general, 614.
- II. Time for making demand for autopsy or exhumation, 615.
- III. Upon whom demand must be made, 617.
- IV. By whom autopsy to be made, 618.

I. In general.

The propriety and necessity of these provisions have been recognized by the courts.

Thus the provision in an accident policy as to the examination of the body of the insured is a reasonable provision and quite necessary in accident insurance as affording protection against fraud. *Wehle v. United States Mut. Acci. Asso.* (1897) 153 N. Y. 116, 60 Am. St. Rep. 598, 47 N. E. 35.

- V. Necessity that insurance company be notified of intended autopsy, 618.
- VI. Right to examine body as including "autopsy" and "exhumation," 619.
- VII. Bill of discovery, 620.

And the court in *Whitehouse v. Travelers' Ins. Co.* (1877) Fed. Cas. No. 17,566, said that the necessity of the provision in accident policies that insurer shall have the right to make an autopsy can be seen "where a man might die and be buried and it be alleged afterwards that death was caused by accident, whereas if the autopsy had been made it might have been shown otherwise."

Although there is no doubt that an

accident caused the death of an insured through a blow, and an autopsy is utterly unnecessary, still, if "it is so nominated in the bond," the insurance company has a right to an autopsy if it applies for it in a reasonable time after the death. *American Nat. Ins. Co. Nuckols* (1916) — *Tex. Civ. App.* —, 187 S. W. 497.

So, under the provision of an accident policy giving the insurer the right to examine the body of the insured, failure to extend such permission upon demand made at a reasonable time and place before burial will preclude recovery upon policy. *Patterson v. Ocean Acci. & G. Corp.* (1905) 25 App. D. C. 46.

But a provision in a contract of insurance that the insurer shall have the right to exhume the body of insured to perform an autopsy would be void as against public policy. *UNITED STATES FIDELITY & G. CO. v. HOOD* (reported herewith) ante, 605.

And provisions of this kind are to be construed most strongly against the insurer and in favor of the insured. *UNITED STATES FIDELITY & G. CO. v. HOOD*.

In *Steinhausen v. Preferred Mut. Acci. Asso.* (1891) 59 Hun, 336, 36 N. Y. S. R. 70, 13 N. Y. Supp. 36, the report of which does not disclose the evidence on the point, the court said that the question whether there was any violation of a clause of a certificate of membership in a mutual accident association, giving insurer the right to examine the person of a member in respect to an injury or cause of death when and as often as may be reasonably required, was a question for jury.

II. Time for making demand for autopsy or exhumation.

A demand for an autopsy under the terms of an accident insurance policy, to be effective, must be made within a reasonable time after death, and at a reasonable time and upon a proper occasion, and when made upon the widow of the insured between his death and burial, the language should leave nothing to intendment, but should be free from doubt and ambi-

guity. *Johnson v. Bankers Mut. Casualty Ins. Co.* 129 Minn. 18, L.R.A. 1915D, 1199, 151 N. W. 418, Ann. Cas. 1916A, 154.

So, failure to withhold burial at telegraphed request of insurance company will not work forfeiture of rights in the policy, where the request was indefinite as to length of time burial was to be withheld and was received only two and one-half hours before time set for funeral, all arrangements for which had been made, particularly when it is not shown that an examination of the body would have thrown any additional light on the case. *Massachusetts Bonding & Ins. Co. v. Duncan* (1915) 166 Ky. 515, 179 S. W. 472.

And a demand for an autopsy as provided in an accident insurance policy was not made at a reasonable time or upon a proper occasion, and its refusal does not defeat the right of action under the policy, where the demand was made by the claim auditor of the company about three hours before the time set for the funeral of the insured, and when friends were beginning to arrive from a distance and the body was being prepared for burial, and when the demand was a present demand calling for present compliance or refusal, and the medical adviser whom the auditor had in mind to perform the autopsy was many miles away, so that compliance with the demand would have caused a delay in the funeral, the extent of which cannot be determined, and when the claim auditor had been within 2 miles of the place of demand since the day before, investigating the cause of death. *Johnson v. Bankers Mut. Casualty Ins. Co.* (Minn.) supra.

Though differing somewhat as to the grounds of their decisions, it may be noted that the cases have uniformly denied the right of the insurer to insist by virtue of the provisions under consideration, upon exhumation of the body for purposes of examination or autopsy as a condition of its liability under the policy. *American Employers' Liability Ins. Co. v. Barr* (1895) 16 C. C. A. 51, 32 U. S. App. 444, 68 Fed. 873; *Union Cent. L. Ins. Co. v. Hollowell* (1895) 14 Ind. App.

611, 43 N. E. 277; *Massachusetts Bonding & Ins. Co. v. Duncan* (1915) 166 Ky. 515, 179 S. W. 472; *UNITED STATES FIDELITY & G. Co. v. HOOD* (reported herewith) ante, 605; *Wehle v. United States Mut. Acci. Asso.* (1897) 153 N. Y. 116, 60 Am. St. Rep. 598, 47 N. E. 35; *Ewing v. Commercial Travelers' Mut. Acci. Asso.* (1900) 55 App. Div. 241, 66 N. Y. Supp. 1056; affirmed without opinion in (1902) 170 N. Y. 590, 63 N. E. 1116; *Root v. London Guarantee & Acci. Co.* (1904) 92 App. Div. 578, 86 N. Y. Supp. 1055, (affirmed without opinion in (1904) 180 N. Y. 527, 72 N. E. 1150; *American Nat. Ins. Co. v. Nuckols* (1916) — *Tex. Civ. App.* —, 187 S. W. 497.

In the reported case (*UNITED STATES FIDELITY & G. Co. v. HOOD*), the court, while construing the clause in question not to give the insurer the right to exhume the body after burial for purposes of autopsy, expressed the opinion that if it were to be construed to give such right it would be contrary to public policy and void.

In *Ewing v. Commercial Travelers' Mut. Acci. Asso.* (1900) 55 App. Div. 241, 66 N. Y. Supp. 1056, affirmed without opinion in (1902) 170 N. Y. 590, 63 N. E. 1116, where, immediately after death, an autopsy had been made in the public interest, and the stomach and other organs had been taken away, and not replaced with the body, and a demand by the insurer for examination nearly a month after the burial was refused by the plaintiff (father and beneficiary of insured) and by the widow, the court said that a provision of an accident policy that "no claim shall be payable under this certificate unless any medical adviser of the association shall be allowed to examine the person of the member in respect to any alleged . . . cause of death, then and so often as may be necessary or reasonably required on behalf of the association," would be rationally construed if interpreted to bind the member so long as he has control of his own person, but continued: "If this should be interpreted as conferring upon the insurance company an absolute and unconditional right to exhume and examine at least once the

body of any member, on pain of forfeiture of the right to recover, it would be giving to it the full force which defendant claims for it. If a body should by the living relatives be cremated, instead of buried in the ground, no recovery could be had under the policy. But does this clause necessarily mean so much? The contract is with a member of the association; it is in part for the benefit of the assured; in case of partial disability from accidental causes, the assured is to receive the benefits, and he agrees that the medical adviser shall be allowed to examine his person, 'the person of the member.' There is no express stipulation here that the defendant may dissect the body of the member—no stipulation for a forfeiture should any relative having lawful custody of the body of a deceased member refuse to permit it to be dug up and dissected. I think the policyholder interpreting this clause to bind the member so long as the member has control of his own person would place upon it a rational construction. If this right to 'examine the person of the member' in respect to any 'cause of death' is extended for a reasonable time after death and so long as the body is unburied or not finally disposed of, I think the utmost limit of the privilege stipulated for would be reached. Thereafter other interests than the wishes of the beneficiary or the expressed wishes of the contracting member while living might reasonably be expected to prevail. In any case I think a party who alleges a contract right to invade the tomb or the graves of the buried dead, should be sure of the language of his written agreement; it should, at least, be unmistakably clear, the purpose should be apparent, and the terms so plain that inference or conjecture need not be resorted to to discover the true intent of the contracting parties. If the policy in question in plain terms stated to an applicant for membership that by accepting membership the applicant bartered to the insurer the right at any time to dig up and examine or dissect his dead body, it is quite conceivable that

there would be few applicants for membership."

Denial by widow of assured under accident policy of permission to insurance company to exhume and examine her dead husband's body three or four weeks after it had been embalmed and buried is not a defense to an action on the policy by the beneficiary, who was a nephew of the deceased, where there is no evidence that he refused to allow the body to be examined either before interment, when it was in his power to grant the request, or that he refused such request after interment, or that it was in his power to grant the request to exhume. *American Employers' Liability Ins. Co. v. Barr* (1895) 16 C. C. A. 51, 32 U. S. App. 444, 68 Fed. 873.

Where no effort was made for an autopsy while the body of insured was in the hands of the coroner, although liability was denied because of suicide by poison, and no reason is shown why an application to the court for an order to exhume the body was delayed until nine months after death, four months after commencement of the action, and two days before trial, such order is properly refused. *Union Cent. L. Ins. Co. v. Hollowell* (1895) 14 Ind. App. 611, 43 N. E. 277.

There is no error in the court's refusal to order disinterment and autopsy seven months after burial, where it is not shown with reasonable certainty that an autopsy would disclose the cause of death. *Massachusetts Bonding & Ins. Co. v. Duncan* (1915) 166 Ky. 515, 179 S. W. 472.

Refusal to permit examination of body of assured ten days after interment will not work forfeiture of policy where immediate notice of death was given to the company. *Wehle v. United States Mut. Acci. Asso.* (1897) 153 N. Y. 116, 60 Am. St. Rep. 598, 47 N. E. 35. The court stated that the provision authorizing examination of the body should have been availed of immediately upon receipt of notice of death, and that the delay in the demand was, as a matter of law, unreasonable in the absence of any facts or circumstances excusing it.

And in *Root v. London Guarantee &*

Acci. Co. (1904) 92 App. Div. 578, 86 N. Y. Supp. 1055, affirmed without opinion in (1904) 180 N. Y. 527, 72 N. E. 1150, it was held that, under a provision of accident policies "that any medical adviser of the company shall be allowed to examine the . . . body of assured," a delay until the day after burial in making demand for an autopsy was unreasonable, as the company knew of the assured's death two days before the burial.

If the right of an autopsy carries with it the right of exhumation of a body, it must certainly be asked for promptly, and then not to satisfy an idle curiosity or to form the basis for a forfeiture, but it must appear that the desecration of the graves of the dead and the pain inflicted on those left behind will reveal something that will show fraud or mistake, and that will inure to the absolute benefit of the insurer. *American Nat. Ins. Co. v. Nuckols* (1916) — Tex. Civ. App. —, 187 S. W. 497.

And a demand for an autopsy is utterly unreasonable and properly refused when made six weeks after interment, where no reason is given or attempted for the delay in the request, and there is no evidence tending to show that death came within any exception exempting from payment, and an autopsy, if held, would not alter the fact that the deceased died by an accident. *Ibid.*

An insurance company waives its right to an autopsy where its agent, who is satisfied as to the proof as to how insured died, permits his burial without protest or objection, and the adjuster fails to demand an autopsy until long after the interment of the body, and then for no reason at the time, or afterwards given, for violating the grave and giving pain to the relatives of the deceased. *Ibid.*

III. Upon whom demand must be made.

Where a policy of accident insurance gives to the insurer the right, in case of death, to an autopsy by a medical adviser, and the policyholder suffers death claimed to be accidental, his widow, who is sole beneficiary, is the proper person upon whom to

make a demand for an autopsy. *Johnson v. Bankers Mut. Casualty Ins. Co.* (1915) 129 Minn. 18, L.R.A.1915D, 1199, 151 N. W. 413, Ann. Cas. 1916A, 154.

An insurance company is not denied its contract right to an autopsy where no request for such was made by the company of the beneficiary nor of anyone else as representing her at any time, and, further, no act of the beneficiary prevented or hindered the company from making such request if it had seen fit so to do. *O'Brien v. Columbian Nat. L. Ins. Co.* (1920) — Me. —, 109 Atl. 379.

And, too, forfeiture of claims under accident policies cannot be predicated on refusal of demand for autopsy, made upon one not a relative of the deceased, and who had no authority to grant the privilege. *Root v. London Guarantee & Acci. Co.* (1902) 92 App. Div. 578, 86 N. Y. Supp. 1055, affirmed without opinion in (1904) 180 N. Y. 527, 72 N. E. 1150.

And in *American Employers' Liability Ins. Co. v. Barr* (1895) 16 C. C. A. 51, 32 U. S. App. 444, 68 Fed. 873, a request made, not to the beneficiary, but to the widow of the insured, was considered to be improper.

However, it is not necessary that a demand for an autopsy, to which an accident insurance company is entitled under the terms of its policy in case of death of the insured, be made upon the proper person in person, so long as it is communicated to him. *Johnson v. Bankers Mut. Casualty Ins. Co.* (1915) 129 Minn. 18, L.R.A.1915D, 1199, 151 N. W. 413, Ann. Cas. 1916A, 154.

IV. By whom autopsy to be made.

It is not necessary that an insurance company call the attending physician to make an autopsy, but it may call its own physician; and so, failure to call the attending physician is not evidence per se of fraud on the part of the company. *Whitehouse v. Travelers' Ins. Co.* (1877) Fed. Cas. No. 17,566.

V. Necessity that insurance company be notified of intended autopsy.

A provision of an accident policy

that the insurer shall have the right to perform an autopsy does not give the insurer exclusive right to perform an autopsy, or require that the company be notified of an intended autopsy, and so failure to notify the company of an autopsy will not forfeit the policy. *Crotty v. Continental Casualty Co.* (1912) 163 Mo. App. 628, 146 S. W. 833.

So, a clause of an insurance policy which requires timely notice to the company of a proposed autopsy is not violated by failure to give notice of an official autopsy made, not at the instigation of the beneficiary, but at the instigation of a brother of deceased, and for the sole purpose of laying a foundation, if possible, for the criminal prosecution of one who caused the injury which resulted in the death of insured. *O'Brien v. Columbian Nat. L. Ins. Co.* (1920) — Me. —, 109 Atl. 379. The court stated that the autopsy contemplated by the provision of the policy was an unofficial one,—one made at the instigation of the beneficiary,—while the one held was an official autopsy made by an officer of the state in behalf of the state, and under the restrictions provided by statute only such persons could be present as the medical examiner under the statute sees fit to admit.

And in *Loesch v. Union Casualty & S. Co.* (1903) 176 Mo. 654, 75 S. W. 621, the accident policy provided that if a post mortem be held without notifying the company in time to have its medical examiner present, all claims under the policy should be forfeited. The company claimed a forfeiture because the beneficiary, at the request of insured's physician, permitted a post mortem, of which no notice was given to the company. The court, while it said that it is a reasonable requirement under reasonable interpretation, and a violation of its terms under circumstances reasonably showing disadvantage to the company would work a forfeiture of the policy, yet held that a failure to give notice did not work forfeiture in this case, as no disadvantage to the company was indicated, the evidence

showing that it was very doubtful if the beneficiary was responsible for the act, as she testified that she did not know what post mortem meant, and did not know what the physicians were doing. And further, and which was the real ground of the decision, that as soon as the attending physician saw the policy and read the clause, which was immediately after the post mortem, he went to the office of the company and told them what had been done and offered to allow them to make a re-examination, and there was no suggestion in the record of any fact or theory which would tend to show that a re-examination of the body at that time would not have disclosed to the company's physician everything which the first examination disclosed to the physicians who made it.

It cannot be said that there is a failure to comply with the provisions of an accident policy with reference to notice of autopsy, where the company's agent was informed of an intended autopsy by physicians engaged by the beneficiary to perform it. *Legnard v. Standard L. & Acci. Ins. Co.* (1903) 81 App. Div. 320, 81 N. Y. Supp. 516.

Under a provision of an accident policy that if a post mortem be held without notifying the company in time to have its medical examiner present, then all claims under the policy shall be forfeited, a post mortem which occurred without knowledge or consent of beneficiaries will be no defense on the ground of lack of notice. *Loesch v. Union Casualty & S. Co. (Mo.) supra.*

Failure to notify an insurance company of an autopsy to be held to ascertain the cause of death will not, in an action on the policy, affect the competency as evidence of facts adduced thereat, where there is no provision of law or of the insurance contract that the company should be notified when a post mortem examination is to be held. *Sun Acci. Asso. v. Olson* (1895) 59 Ill. App. 217.

VI. Right to examine body as including "autopsy" and "exhumation."

In order to have the right of ex-

humation, such right must be clearly expressed and in no uncertain words in the policy. *American Nat. Ins. Co. v. Nuckols* (1916) — *Tex. Civ. App.* —, 187 S. W. 497.

So, a right to an autopsy cannot be made broad enough to include disinterment weeks after burial. *Ibid.*

An order compelling the exhumation of a body in plaintiff's control should be granted only upon strong showing that, without examination, a fraud is likely to be accomplished, to expose which the company has exhausted every other method known to law. *Grangers' L. Ins. Co. v. Brown* (1879) 57 Miss. 308; 34 Am. Rep. 446.

That the right of the insurer to examine body of insured conferred by an accident policy did not include the right to make an autopsy or dissect was held in *Sudduth v. Travelers' Ins. Co.* (1901) 106 Fed. 822. The court said that it did not "think that any ordinary person, in agreeing to a stipulation for examination of the insured before or after death, would suppose he was agreeing to what would have been much more clearly expressed by the word 'autopsy' or by the word 'dissect.' I do not think that one would ordinarily suppose that the word 'examine' as applied to the human body, either living or dead, would, *ex vi termini*, include, or by an insured, at least, would be supposed to include, the idea of cutting it up. The word 'examine' may not definitely express the same idea to every person who sees it or who uses it, but it is quite clear to me that it does not, in the clause of the contract we are considering, include the idea either of an 'autopsy' or of a 'dissection,' if there is any essential difference between those two words in this connection. 'Autopsy' is defined to be an examination of a dead body by dissection. 'Dissection' is the cutting apart of a dead body, or the cutting of it into pieces. Can it reasonably be supposed that it was in the contemplation of both of the parties to these contracts at the time they were made that the meaning of the word 'examine' in its context was to be so expanded as

to include either the idea of an autopsy or the idea of a dissection? While an autopsy, speaking generally, always includes an examination, can it be said that an examination always includes an autopsy? or can it be fairly held that the simple word 'examine,' as used in the policies sued on, would be accurately defined in the same words as those used to define either 'autopsy' or 'dissection,' when endeavoring to arrive at the mutual agreement of the parties at the time they were contracting? It seems to me not; particularly when construing policies for insurance against death from external causes only, and which ordinarily would only involve or require external inspection. If the company desired or expected the insured to agree to a condition such as either of these words would have clearly indicated, there is no obvious reason why it should not have been expressed in plain terms. If there is a fair doubt as to the meaning of the words used in a policy, it should be solved in favor of the insured, because there appears to have been no reason why the plainest words could not have been employed by the company in framing the condition. It may be that the right to dissect a body, even after burial, is or would be an important right to the company; but that would make it all the more necessary for it to express it in language in no way ambiguous or doubtful, or which, in order to effect the company's purpose, would have to be extended beyond its ordinary import."

So, also, it was held in *Patterson v. Ocean Acci. & G. Corp.* (1905) 25 App.

D. C. 46 (action on insurance policy insuring against "accidental bodily injury caused solely by external, violent, and visible means"), that the right to "examine" the body of insured does not include the right of autopsy or dissection, much less exhumation.

But there is an obiter statement in *Wehle v. United States Mut. Acci. Asso.* (1897) 153 N. Y. 116, 60 Am. St. Rep. 598, 47 N. E. 35, that if it should appear in any case that at some subsequent date after interment of a body, circumstances or facts coming to the knowledge of the insurer warranted a reasonable belief that death was occasioned by means or causes excepted from the contract, a reasonable construction of such provision would authorize the insurer to insist upon an exhumation of the body and upon a dissection.

VII. *Bill of discovery.*

Under a policy insuring against death from accident and providing that the insurer shall have the right to make an autopsy, a court of equity has jurisdiction to entertain a bill of discovery and appoint a receiver to take charge of the organs of the deceased insured pending examination as to cause of death, when demand of autopsy is refused, the court holding that under its contract the insurer had a right to make an examination of the organs, superior to any property right in any member of the family of the assured. *Painter v. United States Fidelity & G. Co.* (1914) 123 Md. 301, 91 Atl. 158. J. H. B.

MARGARET ALVINA SANDALL, Resp.,

v.

JOHN EUGENE SANDALL, Appt.

Utah Supreme Court — November 29, 1920.

(— Utah, —, 193 Pac. 1093.)

Attorney and client — termination of authority.

1. The authority of an attorney for defendant in a divorce proceeding terminates when the decree is entered and he is paid, so that subsequent

(— *Utah*, —, 193 Pac. 1093.)

notice to him of a motion for modification of decree is without effect upon defendant.

[See note on this question beginning on page 627.]

Appeal — what errors not considered.

2. Errors assigned but not argued, those argued but not assigned, those presenting questions not raised below, and those relying on insufficiency of evidence without specifying particulars, will not be considered on appeal.

[See 2 R. C. L. 69, 135, 159, 160, 178.]

— presumption as to sufficiency of evidence.

3. An order will be presumed to be based on findings supported by evidence where neither the evidence nor the findings are before the appellate court.

Trial — finding of facts — motion to vacate order.

4. Formal findings of fact are not necessary in a proceeding to vacate and set aside an order theretofore made in the case.

Divorce — modification of decree to allow alimony.

5. A decree of divorce without ali-

mony may be amended so as to allow alimony, where it was omitted from the decree because of defendant's inability to pay, while changed conditions have made him able to pay, and have made allowance necessary to plaintiff and her child, and the statute permits such new orders as shall be reasonable and proper.

[See 1 R. C. L. 937.]

Evidence — relationship of attorney and client — sufficiency.

6. Correspondence between an attorney who represented a man in a divorce proceeding and a county official, as to the man's liability to support his child, whose custody was awarded to the mother in the proceeding, is of little weight in determining whether or not the relationship between them of attorney and client had, so far as the divorce proceedings were concerned, terminated.

APPEAL by defendant from an order of the District Court for Salt Lake County (Tobin, J.), denying a motion to vacate and set aside an order modifying a divorce decree. *Reversed.*

The facts are stated in the opinion of the court.

Mr. George Halverson, for appellant:

The service on defendant's former attorney was not sufficient to confer jurisdiction.

4 Cyc. 952; 2 R. C. L. 1004, § 82; Tobler v. Nevitt, 45 Colo. 231, 23 L.R.A. (N.S.) 702, 132 Am. St. Rep. 142, 100 Pac. 416, 16 Ann. Cas. 925; Scott v. Scott, 174 Iowa, 740, 156 N. W. 835; Blachly v. Blachly, 169 Iowa, 489, 151 N. W. 447; Hamman v. Van Wagenen, 94 Iowa, 399, 62 N. W. 795; Delbridge v. Sears, 179 Iowa, 526, 160 N. W. 218; State ex rel. Tatum v. Ramey, 134 Mo. App. 722, 115 S. W. 458.

Messrs. Rich, Rich, & Roberts, for respondent:

Objections not made in the court below cannot be considered on appeal.

Herriman Irrig. Co. v. Keel, 25 Utah, 96, 69 Pac. 719; Jenkins v. Mammoth Min. Co. 24 Utah, 513, 68 Pac. 845; First Nat. Bank v. Brown, 20 Utah, 85, 57 Pac. 877; Beatty v. Shelly, 42 Utah, 592, 132 Pac. 1160; Firman v. Bate-man, 2 Utah, 268; Walker v. Continen-

tal Ins. Co. 2 Utah, 331; Rhemke v. Clinton, 2 Utah, 438; Miller v. Zeigler, 3 Utah, 17, 5 Pac. 518; Young v. Martin, 3 Utah, 484, 24 Pac. 909; People v. Peacock, 5 Utah, 237, 14 Pac. 332; Wimmer v. Simon, 9 Utah, 378, 35 Pac. 507; Cooper v. Denver & R. G. R. Co. 11 Utah, 46, 39 Pac. 478; Wasatch Min. Co. v. Crescent Min. Co. 148 U. S. 293, 37 L. ed. 454, 13 Sup. Ct. Rep. 600; Blish v. McCornick, 15 Utah, 188, 49 Pac. 529; Whittaker v. Greenwood, 17 Utah, 83, 53 Pac. 736; Summit County v. Gustaveson, 18 Utah, 351, 54 Pac. 977; Warren v. Robison, 25 Utah, 205, 70 Pac. 989; Kunkel v. Utah Lumber Co. 29 Utah, 13, 81 Pac. 897, 4 Ann. Cas. 187; Karren v. Rainey, 30 Utah, 7, 83 Pac. 333.

A divorce case is not terminated and closed for all purposes as long as there are minor children to be cared for.

Ruge v. Ruge, 97 Wash. 51, L.R.A. 1917F, 721, 165 Pac. 1063; Spain v. Spain, 177 Iowa, 249, L.R.A. 1917D, 319, 158 N. W. 529, Ann. Cas. 1918E, 1225.

As long as the case is open for any purpose, all papers may be served upon the attorneys of record.

Branch v. Walker, 92 N. C. 87; *Miller v. Miller*, 37 How. Pr. 1; *Drury v. Russell*, 27 How. Pr. 130.

Thurman, J., delivered the opinion of the court:

On July 28, 1910, final decree of divorce in the above-entitled cause was entered for plaintiff against defendant in the district court of Salt Lake county. The decree also awarded the plaintiff the custody of their minor child, at that time about two years of age. Plaintiff, in her complaint, prayed for a reasonable amount per month as permanent alimony for the support of herself and child, but alimony was not allowed.

In the divorce proceeding the firm of Halverson & Pratt, attorneys at law, residing in Ogden City, Utah, appeared as attorneys for defendant.

On September 26, 1919, plaintiff filed her petition in the same court for a modification of the decree. The petition, in substance, alleged the granting of the divorce, as above stated, and the award to plaintiff of custody of the child. The petition then alleged that the decree of divorce was granted on the ground of the failure of defendant to provide plaintiff and said child the common necessities of life, and also on the ground of defendant's drunkenness and profligacy. Plaintiff alleges that in her complaint for divorce she prayed for alimony for the support of herself and child, but that said application for alimony, at the hearing of the cause, was abandoned for the reason that any order which the court might have made at that time respecting alimony would have been valueless to plaintiff and could not have been enforced. The petition then alleges that at the time of the hearing in the divorce proceeding, and for a long time prior thereto, the defendant had been addicted to the use of liquor to the extent that he could not and would not work sufficiently to pro-

vide plaintiff and her child with the common necessities of life; that the reason she did not insist, at the trial of the divorce proceeding, on an allowance for support and maintenance, was owing to defendant's habit and his lack of ability to occupy a position of responsibility. For this reason, she alleges, an order for alimony would have been unenforceable and of no value. Plaintiff further alleges that at all times since said decree of divorce was rendered she has had the care, custody, and control of said minor, and has at all times supported herself and the child by her own efforts and out of her own funds; but that, owing to the growth of the child and the high cost of living and the increased cost of clothing, etc., it had become practically impossible for plaintiff to provide herself and the child with the necessities of life. The petition then shows that within the last three or four years defendant has improved his habits to such an extent that he is now able to contribute to the support and maintenance of the child; that defendant is earning upwards of \$200 per month and has inherited certain property which makes it now possible for him to make proper allowance for the child's support, and that \$40 per month would be a reasonable sum for that purpose. The petition prays for such other relief as may be equitable and just.

The hearing upon the petition was set for October 4, 1919, and notice thereof served by mail upon Halverson & Pratt, at Ogden, as attorneys for defendant. The notice appears to have been received by Halverson on the day it was issued, September 26, 1919. On October 4, the day set for hearing, nobody appearing on the part of defendant, the clerk of the court called Halverson by phone at Ogden, and inquired if he intended to appear in said cause, and Halverson answered he "would not." The court then proceeded to a hearing of the case and the evidence offered on the part of the plaintiff,

whereupon it was ordered that defendant pay to plaintiff for the support and maintenance of the minor child the sum of \$40 per month, payable as follows: \$40 on or before October 10, 1919, \$40 on or before November 1, 1919, and \$40 on or before the 1st day of each month thereafter, and that the original decree be modified accordingly. Notice of this order was served upon the defendant himself. Thereafter Halverson appeared as attorney for defendant and served notice on Rich & Rich, attorneys for plaintiff in Salt Lake City, that on January 31, 1920, he would move the court to vacate and set aside the order modifying the decree upon the grounds that the same was made and entered without jurisdiction, and particularly upon the grounds that defendant was not served with notice of process for a modification of the decree; that said judgment was and is void and of no effect.

In support of the motion to vacate the order modifying the decree, said attorney Halverson, on the 23d day of January, 1920, filed therewith his affidavit to the effect that he was one of the attorneys for defendant prior to entry of the decree for divorce, and that Arthur E. Pratt, now one of the judges of the second judicial district court, also appeared for defendant; that after the termination of said action the firm of Halverson & Pratt were paid off by said defendant and have never since represented him; that on or about the 26th day of September, 1919, he received through the mail, addressed to Halverson & Pratt, attorneys at law; Ogden, Utah, a notice with petition attached thereto, copy of which affiant attached to his affidavit as part thereof; that he thereupon notified Rich & Rich, attorneys for plaintiff, that neither himself nor said Pratt was representing defendant, and that affiant had no authority to appear for said defendant; that at the time said notice was served upon affiant neither he nor said Pratt were attorneys for said defendant, nor had either of

them authority to appear as his attorney. Affiant further states that he did not notify defendant of said pretended service of motion.

The affidavit of defendant, Sandall, was also attached to the notice of motion to vacate the order modifying the decree. Defendant's affidavit is to the effect that on the 10th day of October, 1919, he received through the mail a document purporting to be an amendment and modification of the decree in the above-entitled action, and with the document he also received a letter which, together with the document, he attached to his affidavit as part thereof; that prior to the receipt of said papers at Layton, Utah, he had no knowledge or notice of any proceeding in said action looking to the amendment or modification of said decree; that he is now advised and believes, and therefore alleges the fact to be, that on or about the 26th day of September, 1919, an unsigned paper, purporting to be a copy of the petition on file herein, was served through the United States mail on Halverson & Pratt, who were his attorneys when the decree of divorce was entered, and represented him in said action, but that said attorneys had, long prior to service of said notice upon him, been paid off and discharged; that said attorneys, nor either of them, represented affiant in said action in reference to any proceeding for the modification of said decree; and that he is advised by said Halverson, upon whom said papers were served, that he (Halverson) so notified the attorneys for the plaintiff prior to the pretended order modifying said decree. Affiant further states that he is now, and for a long time prior to filing the petition has been, a resident of Layton, in Davis county, Utah, and never has been a resident of Salt Lake county.

The motion to vacate and set aside the order modifying the decree was heard upon the documents and papers filed in the cause and oral testimony taken at the hearing in open court. On February 17, 1920,

the motion was denied. Defendant appeals and assigns as error that the petition of plaintiff for modification of the decree does not state facts sufficient to entitle her to relief, and that defendant was not served with notice of the hearing thereon.

Many other errors are assigned, but they are not referred to in appellant's brief; others are argued in the brief but were not assigned; others raise questions not presented in the court below; and, finally, others allege insufficiency of the evidence to authorize a modification of the decree, without specifying the particulars wherein the evidence is insufficient, and without incorporating any of the evidence in the record.

Such omissions and commissions on the part of appellant are in disregard of the rules of practice of this court, and have been condemned

Appeal—what errors not considered.

by the decisions of the court in every case with which we are familiar wherein the objection has been seasonably made and relied on. To cite all the cases so holding would require more space than ought to be accorded an entire opinion in an ordinary case. We cite a few, however, as a gentle reminder: *Walker v. Continental Ins. Co.* 2 Utah, 331; *People v. Peacock*, 5 Utah, 237, 14 Pac. 332; *Herriman Irrig. Co. v. Keel*, 25 Utah, 96, 69 Pac. 719; *Warren v. Robison*, 25 Utah, 205, 70 Pac. 989; *Beatty v. Shelly*, 42 Utah, 593, 132 Pac. 1160; *Egelund v. Fayter*, and cases cited, 51 Utah, 579, 172 Pac. 313; *Holt v. Great Eastern Casualty Co.* 53 Utah, 543, 173 Pac. 1168.

The errors properly assigned and relied on in the court below will now be considered.

1. The petition does not state facts sufficient to entitle plaintiff to relief.

Appellant's contention concerning this assignment is stated in a single paragraph of his brief. Its brevity justifies quoting it at length: "We think, too, that neither the petition

nor the amended decree shows sufficient facts to justify the court in the modification of the decree. The custody was awarded to the plaintiff, and, unless changed conditions are shown, the court has absolutely no jurisdiction to modify the decree. In this case no finding was made by the court to justify such modification, and it is doubtful if the petition alleges such facts, and the court therefore had no jurisdiction to modify the same."

This proceeding was to set aside and vacate the order amending and modifying the decree. The evidence before the trial court on the hearing of the petition to modify and amend is not before this court. It was not brought up in the record on appeal; therefore neither the evidence nor the findings of the trial court thereon, if any were made, are before this court except as they may be inferred from the fact that the court granted the relief prayed for. In these circumstances, it must be presumed that the order of the court was based upon findings supported by the evidence. As far as formal findings in the present proceeding are concerned, none were necessary, as the sole purpose of the proceeding was to vacate and set aside the order theretofore made. A simple denial of the motion to vacate was all that was necessary, if that was the conclusion arrived at by the court.

—presumption as to sufficiency of evidence.

Trial—finding of facts—motion to vacate order.

The sole question, then, in connection with this assignment, is, Does the petition of plaintiff state sufficient facts to entitle her to relief?

Without commenting in detail upon its substance as heretofore set out, it is sufficient to say the petition seems to state all the elements necessary to sustain the order of the court. It refers to the divorce without

Divorce—modification of decree to allow alimony.

alimony and the reasons therefor. It recites the changed condition of plaintiff and her child, and also the changed condition of defendant in

respect to his ability to support the child. *Utah Comp. Laws 1917*, § 3000, relating to divorce, provides for such proceeding. The last sentence of the section reads: "Subsequent changes, or new orders, may be made by the court in respect to the disposal of the children or the distribution of the property, as shall be reasonable and proper."

The following authorities, cited by respondent, recognize the effect of statutes similar to the one just quoted: *Delbridge v. Sears*, 179 Iowa, 526, 160 N. W. 218; *State ex rel. Tatum v. Ramey*, 134 Mo. App. 722, 115 S. W. 458; *Spain v. Spain*, 177 Iowa, 249, L.R.A.1917D, 319, 158 N. W. 529, Ann. Cas. 1918E, 1225. In the absence of any adjudicated cases, we would feel justified, in view of the statute above quoted, in holding that plaintiff's petition to modify the decree states facts sufficient to authorize the judgment complained of.

2. Defendant was not served with notice of hearing on the petition.

This assignment presents a more serious question. It is alleged that notice of the hearing on plaintiff's petition to modify the decree was not served upon the defendant, and therefore the court acquired no jurisdiction. It is contended by appellant that notice of the hearing served upon Halverson & Pratt, his former attorneys in the divorce proceeding, was not sufficient, for the reason that they had been paid off and discharged at or about the time the decree of divorce was granted in 1910, and since that time neither of them had been defendant's attorney in that particular case.

The authorities support the proposition that an attorney's relation to his client ceases upon the rendition of judgment and satisfaction thereof, unless there are disturbing events or a special arrangement continuing the relation. The following excerpt from 6 C. J. p. 672, § 184, illustrates the trend of authority:

"In the absence of disturbing events the employment of an attorney

continues as long as the suit or business upon which he is engaged is pending, and ordinarily comes to an end with the completion of the special task for which the attorney was employed. Where the evidence as to the continuance of the relation is conflicting, it is a question for the jury.

"It is always a presumption that an attorney is employed to conduct the litigation to judgment, and no further; the relation of attorney and client and the general powers of the attorney cease upon the rendition and entering of the judgment. There is a distinction in this connection, however, between cases in which the attorney is retained to represent plaintiff, and those in which he represents defendant; in the latter case, the entry of final judgment always terminates the relation and the attorney's authority; in the former case it is generally the rule that the attorney's authority lasts until satisfaction of the judgment, and that he may take the ordinary and usual steps to secure such satisfaction."

See also 3 Am. & Eng. Enc. Law, 327; 4 Cyc. 593; 2 R. C. L. 1004.

There is no evidence in this case of any disturbing events or special arrangement between Halverson & Pratt and the defendant, continuing their relation after the entry of final decree in favor of plaintiff in July, 1910. Nothing further being required of them in connection with the case, it seems conclusive that their professional relation with defendant ceased at that time.

But respondent contends that subsequent events establish a new relation between Halverson and defendant, and she relies upon these in support of her contention that the service of the notice upon Halverson & Pratt was sufficient. Whether or not this is true depends upon facts which we shall now briefly consider.

Perhaps the strongest circumstance relied on by respondent in

Attorney and client—termination of authority.

support of her contention is certain correspondence by mail which occurred a few weeks before the commencement of the proceeding to modify the decree. On July 13, 1919, Paul H. Ray, assistant county attorney for Salt Lake county, addressed the following communication to defendant at Layton, Utah:

"Complaint is made to this office by M. E. Foulger that you have failed for some time past to provide for the support and maintenance of your minor child, Imogene, who resides in this city. It is a violation of the Criminal Code of the state of Utah for a father to fail to support his minor children under sixteen years of age.

"We trust that it will not be necessary for us to suggest more strongly to you than this your duty toward your child."

Defendant either delivered the letter personally, or addressed it by mail to Halverson at Ogden. On the 10th day of the same month Halverson replied to the letter as follows: "Referring to your letter of July 3, 1919, addressed to John F. Sandall, will say that this child Imogene was awarded to the mother under the terms of the decree, and the father was not required to pay anything for its support. Under the law, the duty of support rests upon the person to whom custody is given, and she is in receipt of wages sufficient to support herself and the child. However, Mr. Sandall has been contributing from time to time for the support of the child, and even gave \$50 to the mother at one time as a loan, which she has never repaid. The mother obtained a divorce from the father several years ago, and the trouble comes now because he has recently remarried. If you wish any authority on the proposition that from the legal point of view the father is not responsible, I stand ready to furnish that, as I have had occasion to brief that matter up."

It is quite probable that Mr. Ray, in addressing the communication to

defendant, had in contemplation the commencement of a criminal proceeding against defendant for neglecting to support the child. No other rational conclusion can be drawn. It is quite conceivable that this correspondence was given considerable weight by counsel for respondent, afterwards, in arriving at the conclusion that Halverson & Pratt were still attorneys for defendant in the civil case, and therefore proper persons upon whom to serve notice of proceedings to modify the decree. Furthermore, it scarcely admits of doubt that the court, in subsequent proceedings, attached great importance to the correspondence as determining the professional relation between Halverson and the defendant.

In the hearing afterwards, on the motion to vacate the order modifying the decree, both Halverson and defendant testified in support of the motion, and stated in effect that the relationship of attorney and client between Halverson and defendant had ceased at or about the time the decree for divorce was entered in 1910. It will be remembered that both Halverson and defendant, in their affidavits filed with the motion to vacate, to which we have referred, stated in effect that there had been no business relation between them since the decree of divorce was entered. These statements, literally construed, are apparently in sharp conflict with the actual facts developed by the correspondence between Ray and Halverson. It is manifest from the correspondence that Halverson and defendant had had business relations relating to the contemplated criminal prosecution. When confronted with this apparent conflict, at the hearing on the motion to vacate the order, defendant's explanation was somewhat confusing. It is quite evident, however, that he meant to be understood as meaning that, after the decree of divorce was rendered in 1910, he had had no

business relations with Halverson & Pratt until he received the letter from Mr. Ray; that he either took or mailed the letter to Halverson, understanding that he would attend to the matter referred to in the letter. Defendant frequently stated, in effect, that he thought it all came under the same head. This is the confusing feature of his testimony. In justice to Halverson, it is proper to say that at all times shown by the record he persisted in maintaining that the relationship existing in the proceeding for divorce had ceased upon entry of the decree, and had never been resumed in that particular case. He testified that he had notified plaintiff's attorneys, either by letter or phone, before the hearing on the petition to modify the decree, that he was not defendant's attorney, had no authority to appear for him in the case, and would not accept service in his behalf. We do not find that this statement is denied by plaintiff's attorneys, although it is implied in the argument and brief of her counsel that the statement was untrue.

As we interpret the record, we regret our inability to agree with the conclusion that the trial court reached in denying the motion to vacate the order. We are unable to find any substantial evidence upon which to base a conclusion that the relation of attorney and client in the above-entitled cause existed between Halverson & Pratt, or either of them, and the defendant Sandall, at the time plaintiff's attorneys assumed to make the service to which objection is made. The correspondence relied on between Ray and Halverson, relating to a contemplated criminal prosecution for failure to support the child, is entitled to

but little, if any, weight in determining the relationship of the parties in the case at bar. In our opinion, it would be a dangerous precedent to hold that the relationship of attorney and client in a particular case can be established by the fact that such relationship exists in some other case, even though the subject-matter of the two cases may bear some apparent relation to each other; and the further fact that, at some remote period, the relationship existed in the case in which the question is raised, should not have any controlling influence where the uncontradicted evidence of the parties themselves shows that that relationship had long since ceased to exist. Even counsel for respondent, evidently, were not sure of their ground. In serving notice of the order modifying the decree they served defendant in person instead of making service upon the attorneys. Feeling, as they must have felt at that time, that there was a grave doubt concerning the matter, the prudent thing for them to have done would have been to not resist the motion to vacate the order. Plaintiff could not have been seriously prejudiced by such proceeding. Both sides would have had their day in court, and the judgment finally rendered would, in all probability, have been unassailable from any point of view.

The judgment is reversed and the cause is remanded, with directions to the trial court to proceed in accordance with the views herein expressed. No costs allowed.

Corfman, Ch. J., and Frick, Weber, and Gideon, JJ., concur.

ANNOTATION.

Service of notice to modify decree in respect of alimony upon attorney who represented adverse party in the suit.

It will be seen that it is held in the reported case (*SANDALL v. SANDALL*, ante, 620) that a notice of motion,

nine years after the entry of a decree of divorce, to modify the decree by granting alimony to the plaintiff,

*Evidence—
relationship of
attorney and
client—
sufficiency.*

served upon the attorneys for the defendant in the suit, is not sufficiently served to give the court jurisdiction, in the absence of evidence showing a new retainer of the attorneys by the defendant.

In *Underwood v. Underwood* (1914) 142 Ga. 441, L.R.A.1915B, 674, 83 S. E. 208, it was held, as stated in the headnote by Beck, J., who wrote the opinion, that "where proceedings are instituted in a court of another state to secure a divorce and alimony, and a decree of divorce is there granted and the question of alimony is reserved, and the case stands for a period of twenty years, and falls into a class of cases styled 'stale actions' under a rule of that court providing that, where no steps are taken in a case for a period of two years, no further step can be taken in the same, unless the persons proposing to take the steps shall first give reasonable notice in writing to the other party or his attorney, but the plaintiff does not take steps until after the lapse of twenty years from time the decree of divorce is rendered, and then, proposing to file an amendment asking for alimony, serves notice, not upon the defendant or upon one shown to be actually his attorney, but merely upon one who was the attorney of record when the decree of divorce was rendered, the court is not shown to have jurisdiction of the defendant; and a judgment rendered upon the application for alimony will not be enforced against the defendant, residing in this state."

In *Ellis v. Ellis* (1882) 13 Neb. 91, 13 N. W. 29, upon an application by the plaintiff for a sum of money in lieu of the tract of land decreed to her as alimony in a suit for divorce, the notice being given to the attorney for the defendant in the suit some six months after the entry of the decree, the court said: "Upon the rendition of the original decree, except for some special purposes, the parties were out of court. In this case a petition was necessary, and doubtless it was necessary that a summons in the nature of a subpoena in chancery should also issue and be served on the defendant

the same as in the original case; and such summons could no more be legally served on the person who acted as attorney for the defendant in the former suit than could the original or first summons have been so served." But it was held that the defendant had waived all irregularities of service in that, upon the making of the final order or supplemental decree appealed from, he appeared by attorney and made application for an extension of time for forty days in which to prepare a bill of exceptions in the case, the court saying: "Such bill of exceptions was not necessary for the purpose of testing the jurisdiction of the court or the sufficiency of the service of the notice. These questions would arise as well upon the record without a bill of exceptions."

It may be noted that in *Kalmanowitz v. Kalmanowitz* (1905) 108 App. Div. 296, 95 N. Y. Supp. 627, where a judgment of limited divorce was granted in favor of the wife, the defendant, requiring the plaintiff to pay her weekly alimony, a demand of arrears of weekly alimony, made by the attorney for the wife in the suit, was held not sufficient to justify a commitment for contempt, as it did not appear that the attorney had authority to make the demand. "The attorney's power to represent the defendant ceased upon entry of judgment."

On the other hand, in *McSherry v. McSherry* (1910) 113 Md. 395, 140 Am. St. Rep. 428, 77 Atl. 653, where the divorce decree provided that the defendant pay the plaintiff "as alimony and for the maintenance of the said children of the plaintiff and defendant, such sum or sums of money as may be hereafter determined by this court upon the application of any of the parties in interest," it was held that the court retains jurisdiction of the defendant for the purposes of applications brought in pursuance of such decree, regardless of the fact that the defendant is without the state; and the service upon the defendant's attorney of record of a copy of an application for alimony by the plaintiff, and of an order to show cause why such alimony shall not be

granted, is sufficient to constitute notice to the defendant. In that case the application was made about twenty-five months after the entry of the divorce decree.

In *White v. White* (1903) 65 N. J. Eq. 741, 55 Atl. 739, it is held that where a court has acquired jurisdiction over a defendant in divorce proceedings, it retains jurisdiction for the purpose of subsequent proceedings to alter the amount paid to plaintiff for the maintenance of the children, in accordance with the terms of the decree providing for such alteration; and that the court may use its discretion in prescribing the measures necessary to notify the defendant of such proceedings. And where personal service is prescribed by the court, it is immaterial that it is served without the state. In this case the divorce had been granted by an Oklahoma court in 1896; the New Jersey court had made a decree as to the custody and maintenance of the children in 1897, both parties appearing, and

the application by the mother for increase was made over four years afterward.

It may be noted that in *Gebhard v. Gebhard* (1898) 25 Misc. 1, 54 N. Y. Supp. 406, where nothing appears as to alimony, it was held that a decree of divorce in an action by the wife against the husband was properly set aside some two and one-half months later, on notice given to her attorney in the suit; and that it has been held, in cases where it does not appear whether any alimony had been granted or not, that at the same term the court may vacate a divorce decree of its own motion, and without notice to the wife, in whose favor the decree had been granted. *Barber v. Barber* (1916) 115 Me. 327, 98 Atl. 822; *Gato v. Christian* (1914) 112 Me. 427, 92 Atl. 489, Ann. Cas. 1917A, 592. In the *Gato* Case it was held that this might be done at the same term, though the successful wife had died since the decree. B. B. B.

STATE OF MINNESOTA

v.

FRANK STOREY, Appt.

Minnesota Supreme Court — April 12, 1921.

(— Minn. —, 182 N. W. 613.)

Evidence — of perjury — circumstantial.

1. Perjury may be proved by circumstantial evidence if it establishes guilt beyond a reasonable doubt.

[See note on this question beginning on page 634.]

Appeal — reception of evidence.

2. The trial court did not receive evidence that the defendant had committed another unrelated crime.

Witness — convict — employment by attorney.

3. Where a witness, on cross-examination, admits that he has been convicted of crime, it is proper, on redirect examination, to mitigate the odium of his conviction by showing that after he paid the penalty he was received in-

to the employ of the attorney who prosecuted him.

Evidence — participation in bribery.

4. Testimony tending to show that defendant participated in the fruits of bribery in connection with the case in which he is alleged to have given false testimony was proper.

Appeal — error in charge.

5. There was no error in the charge of the court.

Headnotes by HALLAM, J.

APPEAL by defendant from a judgment of the District Court for Beltrami County (McClenahan, J.) convicting him of perjury. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Walter F. Dacey and W. H. Gurnee, for appellant:

The state failed to establish the falsity of defendant's testimony.

3 Russell, Crimes, § 78; 2 Bishop, New Crim. Proc. § 927; 3 Wigmore, Ev. § 2040; 1 Greenl. Ev. § 257; 2 Chamberlayne, Ev. § 989; Underhill, Crim. Ev. § 468; Jones, Ev. 2d ed. p. 1157, § 900; 1 Wharton, Crim. Ev. § 387; 30 Cyc. 1451, 1452; Thomas v. State, 51 Ark. 138, 10 S. W. 193; People v. Porter, 104 Cal. 415, 38 Pac. 88; Com. v. Butland, 119 Mass. 817; State v. Gibbs, 10 Mont. 213, 10 L.R.A. 749, 25 Pac. 289; Gandy v. State, 27 Neb. 707, 43 N. W. 747, 44 N. W. 108; State v. Jean, 42 La. Ann. 946, 8 So. 480; State v. Blize, 111 Mo. 464, 20 S. W. 210; Allen v. United States, 39 L.R.A. (N.S.) 385, 114 C. C. A. 357, 194 Fed. 664; Billingsley v. State, 49 Tex. Crim. Rep. 620, 95 S. W. 520, 13 Ann. Cas. 730; People v. McClintic, 193 Mich. 589, L.R.A.1917C, 52, 160 N. W. 461; Cook v. United States, 26 App. D. C. 427, 6 Ann. Cas. 810; State v. Raymond, 20 Iowa, 582; Galloway v. State, 29 Ind. 442; United States v. Hall, 10 L.R.A. 324, 44 Fed. 864; State v. Courtright, 66 Ohio St. 35, 63 N. E. 590, 15 Am. Crim. Rep. 584; Williams v. Com. 91 Pa. 493; 21 R. C. L. Perjury, § 17; United States v. Wood, 14 Pet. 430, 10 L. ed. 527; United States v. Mayer, Deady, 127, Fed. Cas. No. 15,753.

Evidence was improperly received, tending to show that the defendant had committed other offenses.

12 Cyc. 405; State v. Gardner, 88 Minn. 130, 92 N. W. 529; State v. Fitchette, 88 Minn. 145, 92 N. W. 527; State v. Fournier, 108 Minn. 402, 122 N. W. 329; State v. Towers, 106 Minn. 105, 118 N. W. 361; Bishop v. People, 194 Ill. 365, 62 N. E. 785, 14 Am. Crim. Rep. 548; Com. v. Campbell, 155 Mass. 537, 30 N. E. 72; People v. Molineux, 168 N. Y. 264, 62 L.R.A. 193, 61 N. E. 286; Boyd v. United States, 142 U. S. 450, 35 L. ed. 1076, 12 Sup. Ct. Rep. 292.

Messrs. Clifford L. Hilton, Attorney General, James E. Markham, Assistant Attorney General, and Graham M. Torrance for the State.

Hallam, J., delivered the opinion of the court:

Defendant was convicted of per-

jury, alleged to have been committed while testifying as a witness for the state on the trial of Joseph Thiebault of the charge of keeping an unlicensed drinking place in the village of Baudette. Defendant appeals.

1. The first claim is that the state failed to establish the falsity of defendant's testimony.

There was evidence tending to prove the following facts: In May, 1919, the county attorney of Beltrami county sent defendant and John Musolf from Bemidji to Baudette to make investigation as to illegal sale of liquor. They were there from May 7th to May 12th, inclusive. On returning, defendant made a detailed report showing that he had bought liquor from five persons whom he named in his report. One of those named was Thiebault. In each case defendant turned in a sample of the liquor bought, which he had sealed and labeled. On May 21st, while standing on the street in Bemidji, a party of five men passed by. Defendant mentioned their names and mentioned Thiebault as one of them. Soon after that, defendant went to Duluth. Before leaving for Duluth, he was subpoenaed to appear before the grand jury on September 9th. He told parties in Duluth that a man, whom he named, had told him there was \$200 in it if he could fix those cases at Bemidji. A short time before September 9th, he told another party he did not think he was going to Bemidji as a witness at all, and added: "If Torrance [the county attorney] happens to ask you if you see me in here, why tell him 'No;' you didn't see me."

He did not go to Bemidji until the afternoon of September 11th. Then he did not go to the courthouse. After being there some time, he called on the county attorney and told him he had made a mistake as to three of the men charged. These three had entered pleas of not

guilty. Two others who pleaded guilty he had no difficulty in identifying. Nevertheless Thiebault and the others were indicted. Before Thiebault's case was called and while a case against one Dewey was on trial, defendant told another operator that there was \$50 apiece in it in the Dewey case; that if they cleared all the cases there was \$2,000 in it, and "another \$2,000 when we get to Fergus Falls." When asked how the cases could be cleared, he said, "Just not identify the men and no jury in the world can throw a conviction on them." When he took the samples of liquor at Baudette, he put them in separate bottles and sealed the bottles with sealing wax and made an imprint on the wax with a Yale lock key. He was told by the county attorney to produce the key on the trial. He did not do so. When placed on the stand, he said he bought whisky in the place charged as Thiebault's place on five successive days, and that always the same man was behind the bar and sold the liquor. There is evidence of another witness that, during all this time Thiebault was in entire charge of this place and was the only man who tended bar or worked about the place. When defendant was asked on the trial of the Thiebault case whether Thiebault was the man who sold him the liquor, he said he was not. It is in this that the state charges perjury.

Under ordinary rules of evidence the verdict would be amply sustained. So strongly impressed was the trial judge who tried the Thiebault case that this defendant committed perjury that, after hearing his testimony, he ordered his arrest, acting under Gen. Stat. 1913, § 8564.

But defendant contends that the proof required to establish the fact of perjury is greater than is required to establish other crimes; that the books place "perjury and treason in a class by themselves in so far as proof is concerned."

There are old decisions that, to

convict of perjury, two witnesses must testify directly to the falsity of defendant's oath. See Jones, Ev. 2d ed. § 900.

This rule has been generally relaxed, but the greater number of decisions still sustain the rule that the positive testimony of at least one witness should be required, and if there is but one such witness, that his testimony must be corroborated as to material facts; that "oath against oath" is never sufficient. 3 Russell, Crimes, p. 508; 3 Wigmore, Ev. §§ 2032, 2040 (where the history and development of the rule are reviewed); Greenleaf, Ev. § 257; Underhill, Crim. Ev. 468; Com. v. Butland, 119 Mass. 317; State v. Gibbs, 10 Mont. 213, 10 L.R.A. 749, 25 Pac. 289; Gandy v. State, 27 Neb. 707, 43 N. W. 747, 44 N. W. 108; State v. Blize, 111 Mo. 464, 20 S. W. 210; People v. McClintic, 193 Mich. 589, L.R.A. 1917C, 52, 160 N. W. 461; Galloway v. State, 29 Ind. 442; United States v. Hall (D. C.) 10 L.R.A. 324, 44 Fed. 864; Williams v. Com. 91 Pa. 493; United States v. Wood, 14 Pet. 430, 10 L. ed. 527.

To illustrate: In a case in California, where the rule is statutory, it was charged that, in a prosecution of another for larceny of a cow, defendant falsely testified that he met the cow on the road at a certain time near the residence of the party charged with the theft, and that the person so charged then took her up as an estray. The court said: "To support the charge of perjury as to the alleged false statement of defendant, that he met the cow at the time stated upon this particular public highway, it was necessary to produce the positive testimony of one witness at least that such meeting did not take place; as, that the defendant was not at that time at that place, or that the cow was not there." People v. Wells, 103 Cal. 631, 37 Pac. 529.

The reason of the rule is stated in Thomas v. State, 51 Ark. 138, 10 S. W. 109, as follows: "The oath of the prisoner is entitled to have the same effect as is given to that of a

credible witness. If nothing more than the testimony of one witness was introduced to prove its falsity, the scale of evidence would be exactly balanced, and additional evidence would be necessary to destroy the equilibrium before the accused could be convicted."

This reason is a survival of what Mr. Wigmore calls the "quantitative theory of testimony." Witnesses are to be counted, and their testimony, to an extent at least, is measured by force of numbers, not by weight. See *Allen v. United States*, 39 L.R.A. (N.S.) 385, 114 C. C. A. 357, 194 Fed. 664.

In *State v. Courtright*, 66 Ohio St. 35, 41, 63 N. E. 591, 15 Am. Crim. Rep. 584, the reason was stated as follows: "To convict of some great crimes, more or stronger evidence is required than to convict of others. Of such enormity is the crime of treason that by express statute, unless the accused confess in open court, he shall not be convicted except by the testimony of two credible witnesses to the same overt act laid in the indictment.

. . . And perjury has always been regarded as an unnatural and heinous crime, because of its tendency to jeopardize person and property and even life. . . . Therefore we consider that, when one is charged with the grave crime of perjury, it is but a just safeguard that more than purely circumstantial evidence shall be adduced to establish the corpus delicti."

In *Best on Evidence*, §§ 605, 606, this reason is given: "When we consider the very peculiar nature of this offense, and that every person who appears as a witness in a court of justice is liable to be accused of it by those against whom his evidence tells,—who are frequently the basest and most unprincipled of mankind,—and when we remember how powerless are the best rules of municipal law without the co-operation of society to enforce them, we shall see that the obligation of protecting witnesses from oppression or annoyance by charges, or threats

of charges, of having borne false testimony, is far paramount to that of giving even perjury its deserts. To repress that crime, prevention is better than cure."

In this case we are not primarily concerned with the question whether the direct testimony of one witness, without more, will sustain a conviction; for in this case there was no direct testimony of the falsity of the oath. The evidence was circumstantial. But if direct testimony of one witness is required, then, of course, circumstantial evidence does not suffice, and there are decisions which explicitly hold that circumstantial evidence alone of the falsity of the oath is not sufficient. *Allen v. United States*, 39 L.R.A. (N.S.) 385, 114 C. C. A. 357, 194 Fed. 664; *State v. Courtright*, 66 Ohio St. 35, 63 N. E. 590, 15 Am. Crim. Rep. 584, 30 Cyc. 1452; and text books above cited.

The question is a new one in this state, and we are at liberty to choose the rule which appeals to us as being most consonant with reason. Notwithstanding the high authority above cited, we are of the opinion that the rule laid down is out of harmony with our system of jurisprudence. In our opinion it is one of the rules of the common law inapplicable to our situation and "inconsistent with our circumstances," and hence not to be followed. See *State v. Pulle*, 12 Minn. 164, Gil. 99. We find ourselves unable to approve the doctrine that perjury is a more heinous crime than murder, or that one charged with perjury should have greater immunity than one charged with murder. Suppose, for example, the only eyewitness to a murder should testify that the accused is not the man who committed the crime, and yet the circumstantial evidence of guilt is so strong that the jury convicts of first degree murder. With what consistency can it be said that a quality of testimony which will justify a court in condemning a defendant to life imprisonment, or, in some jurisdictions, to be hanged, is insufficient

to sustain a conviction of the falsifier of the crime of perjury, for which he may suffer a penalty of a short term of imprisonment? The lightness with which, we are pained to say, the oath of a witness is too often treated, does not warrant us in making conviction of the crime of perjury most difficult of all crimes of which state courts have jurisdiction. We hold that perjury

Evidence—of perjury—circumstantial.

may be proved by circumstantial evidence, if proof is made beyond reasonable doubt, as in the case of other crimes. Nor is this doctrine without authority to sustain it. *Ex parte Metcalf*, 8 Okla. Crim. Rep. 605, 44 L.R.A. (N.S.) 513, 129 Pac. 675. See *People v. Doody*, 172 N. Y. 165, 64 N. E. 807, 15 Am. Crim. Rep. 576, holding that the old rule has no application where the proof of the crime is necessarily based on circumstantial evidence.

2. Defendant contends that the court permitted proof that defendant had committed another unrelated crime. We do

Appeal—reception of evidence.

not so understand the record. The contention is based on testimony in substance as follows: After defendant had testified in the Thiebault case that he had made a mistake as to the identity of three out of five men identified, the county attorney, on cross-examination, asked him to explain how he made that mistake. He said, "I can't just go on and explain it." He was then asked if he had ever had similar experience in making mistakes in the identity or names of persons he had procured liquor from. He answered that he had several different times.

Then followed this testimony:

A. Yes; one time I made a mistake in nine.

Q. And nine out of nine?

A. Nine out of nine.

Q. And that was the highest average you ever secured?

A. That is the highest average I have made.

Q. That is 100 per cent?

A. Yes, sir.

Q. Where did you make that record?

A. I made it in Michigan one time.

Further than that he pleaded inability to give the month, the year, the court, the town, the name of the judge or prosecutor, saying: "I can't remember, because that is a little too far back for me to remember."

Then occurred the following:

Q. How much too far back, how far back can you remember?

A. I remember back, probably a year back, something like that.

Q. Then your memory quits?

A. My memory quits after that on those cases, because I don't pay no more attention to them.

On the perjury trial, the court permitted this testimony to be read into the record by the prosecution. There was no error in this. No one who heard this testimony could really think that the defendant, in giving it, was convicting himself of another crime. It was simply an exhibition of utter collapse.

3. Appellant proved on cross-examination of one of the state's witnesses that he had been convicted of crime and had served a term in a penitentiary. On redirect examination the state was permitted to prove that after his release from prison he was received into the employ of the prosecuting attorney who prosecuted him, and also of other peace officers. This testimony was properly received.

Witness—convict —employment by attorney.

The testimony as to his conviction was an impeachment of his character and incidentally of his veracity. The subsequent testimony has some proper tendency to mitigate the odium of his conviction. See 40 Cyc. 2644-2647.

4. Testimony was received that defendant admitted that he had been approached for the purpose of bribery, and other testimony was received tending to show that he

had contemplated participating in the fruits of bribery in connection with liquor prosecutions. The alleged bribery did **Evidence—participation in bribery.** not relate to this case alone, but to a number of cases of which this was one. The testimony was properly received.

5. The charge in the indictment was that defendant committed perjury on the trial of an indictment charging Thiebault with maintaining a place where intoxicating liquor was sold on May 12, 1919. In answer to a question of a juror, the court charged: "If you find he did not buy from Thiebault nor at all on the 12th, but are obliged to find

that he did buy from Thiebault on the other days, the fact that he did not buy on the 12th would not require you to acquit him;" and further in substance said that doubt surrounding the question whether there was a sale on the 12th might affect the credibility of witnesses and was to be considered in its bearing on the probability of sales on other days. The instruction seems to **Appeal—error in charge.** us free from error.

As an abstract statement it was correct, and we find no reasons for holding that, under the evidence in this case, it was either erroneous or misleading.

Judgment affirmed.

ANNOTATION.

May conviction of perjury rest on circumstantial evidence.

Rule that circumstantial evidence is not sufficient.

The weight of authority among the decisions passing directly upon the question stated in the title is to the effect that circumstantial evidence alone is not sufficient to sustain a conviction of perjury, but there must be positive and direct testimony. *Allen v. United States* (1912) 39 L.R.A. (N.S.) 385, 114 C. C. A. 357, 194 Fed. 666; *Canal Zone v. Kerr* (1913) 2 Canal Zone Sup. Ct. 262; *Cook v. United States* (1906) 26 App. D. C. 427, 6 Ann. Cas. 810; *Hann v. State* (1916) 185 Ind. 56, 113 N. E. 304; *State v. Courtright* (1902) 66 Ohio St. 35, 63 N. E. 590, 15 Am. Crim. Rep. 584, quoted in the reported case (*STATE v. STOREY*, ante, 629) and followed in *Ruch v. State* (1913) 18 Ohio C. C. N. S. 391. And see *Reg. v. Braithwaite* (1859) 8 Cox, C. C. (Eng.) 254, 1 Fost. & F. 638; *Reg. v. Shaw* (1865) 10 Cox, C. C. (Eng.) 66; and 16 Vin. Abr. let. K, 328. In *Allen v. United States* (Fed.) supra, the court said: "No witness testified to anything which was absolutely inconsistent with defendant's innocence. No admission of his which showed him to be guilty was offered in evidence against him. The defendant prayed the court to instruct

the jury that, in order to convict him, the falsity of his oath must be proved by two credible witnesses, or by one such witness and corroborative circumstances sufficient to turn the scale against the defendant's oath. The learned judge declined to give this instruction or others of similar import. He told the jury that such had been the rule of the common law, but that it did not apply in a case like the present. He added: 'This case depends largely upon circumstantial evidence. . . . The law of circumstantial evidence is not supplanted by the rule of the common law which I have stated, but in an indictment for perjury, if the prosecution has introduced testimony showing circumstances which are well connected, strong, cogent, and convincing, which irresistibly lead the minds of the jury to the conclusion beyond a reasonable doubt that the defendant swore falsely as charged in the indictment, that he swore contrary to what he necessarily knew to be the truth, not only is the jury warranted in returning a verdict of guilty under such circumstances, but it would be their duty to do so.' To the refusal of the instructions asked for by him and to the portion of the charge of the learned

judge above referred to, the defendant duly excepted and has assigned error. Such assignments must be sustained. In trials for treason and perjury almost alone are now to be found any survival of the practice of arbitrarily measuring the probative value of evidence by the number of witnesses. It is true that in perjury the requirements of the rule are not now what they once were. There is no question that there are cases in which neither the two witnesses of the earlier law, nor the one witness with strong corroboration of the later, are required to support a conviction. The courts and the text-writers have said that the oath of a living witness to the falsity of the statement in question is not indispensable,—(1) where the falsehood of the matter sworn by the prisoner is directly proved by documentary or written evidence springing from himself, with circumstances showing the corrupt intent; (2) in cases where the matter so sworn is contradicted by a public record, proved to have been well known to the prisoner when he took the oath, the oath only being proved to have been taken; and (3) in cases where the party is charged with taking an oath contrary to what he must have known necessarily to be true, the falsehood being shown by his own letters relating to the fact sworn to, or by any other written testimony existing and being found in his possession, and which has been treated by him as containing the evidence of the fact recited in it.' *United States v. Wood* (1840) 14 Pet. (U. S.) 440, 441, 10 L. ed. 532; 1 Greenl. Ev. § 258. It may well be that a conviction might be sustained under still other circumstances, although the living witness was not forthcoming. If so, the evidence that the defendant had in fact foresworn himself must be direct and positive. . . . The most recent text-writers recognize that to convict of perjury the government must produce testimony of a more direct and positive character than is required to justify a verdict of guilty of other offenses. . . . In this case no witness directly swore to the falsity of any of the testimony for the giving of which the

defendant was indicted. Nor is there any direct written evidence springing from himself which proves any of that testimony to be untrue. No admission or action of his established by the evidence is logically inconsistent with his innocence. Under such circumstances the refusal of the instructions asked for by him and the giving of the portion of the charge above quoted constituted prejudicial error." And in *Canal Zone v. Kerr* (1913) 2 Canal Zone Sup. Ct. 262, supra, in discussing the rule and the reasons therefor, the court said: "The crime of perjury may be defined as the corrupt assertion of a falsehood, when under oath an affirmation by legal authority, for the purpose of influencing the course of law. . . . The crime so defined is one of the most serious known to the criminal law. It may jeopardize person, property, and even life. When committed in a judicial proceeding it obstructs the course of law, strikes a blow at good order, and pollutes the stream of justice at its source. It is hard enough, as was ably and aptly said by counsel for the government when arguing this case, for courts to administer justice between man and man when dealing with real facts; it is a difficult task to interpret rightly the meaning of veracious evidence, but it is impossible for courts to do justice when the facts of a case are perverted by the wilful and corrupt falsifications of a perjurer. As a result of its possible effects, therefore, very early in the history of our English and American law perjury came to be regarded as one of the great unnatural crimes which belonged to a class so heinous that one convicted of it was rendered only worthy of the contempt and loathing of all good men. And, in order to convict of this great and loathsome crime, more and stronger evidence was required than was required to convict of most other crimes. The same sort of a rule of evidence was applied as is applied to-day in respect to the crime of treason in those American jurisdictions in which it is provided by express statute that no conviction can be had on a charge of treason unless

the accused confess in open court or two credible witnesses testify directly to the same overt act laid in the indictment. And so it came to be the rule of the common law that no one accused of perjury could be convicted except upon the evidence of at least two credible witnesses, testifying directly to the *corpus delicti*. The common-law writers, seeking a reason for this rule of evidence, found such reason in the theory that, as the alleged corruptly false statements were made by defendants when bound by the solemn obligation of their oath, the direct testimony of one living witness was necessary to counterbalance the defendants' oath, while the direct testimony of the other necessary living witness was required to overcome that presumption of innocence with which the common law clothed every person brought into a court of justice charged with the commission of a crime. The rule of evidence so stated was transplanted to the English-speaking portions of North America. In the course of time, however, it has come to be the view of most of the courts of the United States, that while the direct evidence of a living witness is necessary to counterbalance the defendant's oath there is no good reason, in common sense or logic, why there should be any different rule in regard to the sort of evidence necessary to overcome the presumption of innocence in the case of one accused of perjury than in the case of one accused of any other crime. It is, therefore, now the general rule in most of the states of the United States,—in some of the states by statute and in others by judicial interpretation of the practice and custom of courts,—that there is not sufficient evidence to sustain a conviction of perjury unless there be in the evidence the testimony of one living witness testifying directly to the falsity sworn to by defendant, which testimony must be corroborated by either the testimony of another living witness or by sufficient corroborating circumstances. . . . Counsel for the government, in the case now before us, insists that the rule of evidence requiring one living witness testifying directly to the

corpus delicti and sufficient corroborating circumstances is not in force in the Canal Zone. . . . There is no reason known to us why an exception should be made with respect to the rule under consideration. On the contrary there is every reason why the rule should be followed in this American jurisdiction as well as in other American jurisdictions. It is a rule which has developed from the very nature of the crime of perjury. . . . And, too, it is a beneficent rule making for the safety of individuals. Witnesses in judicial proceedings are so likely, through unconscious bias or misinformation or wrong legal advice, to make misstatements as to material facts, and language itself is so faulty a medium for the conveyance of the average man's ideas, that a charge which is primarily based on the corruptly false use of language ought to be difficult of proof. We are therefore of the opinion that unless the evidence in the case before us discloses the testimony of one witness speaking directly to the *corpus delicti*, together with sufficient corroborating evidence, then the evidence is not as a matter of law sufficient to sustain the verdict, and the defendant should have been acquitted by the trial court. . . . We are aware that the evidence contains much which points the finger of suspicion at Kerr, and that inferences might be rightly drawn from such evidence prejudicial to the defendant's reputation for veracity and fair dealing, but we cannot arrive at any other conclusion than that the evidence does not meet the requirements of the wise, safe, and beneficent rule of evidence which we have set forth."

And in California, under a statute providing that perjury must be proven by the testimony of two witnesses, or one witness and corroborating circumstances, it has been held that positive testimony is required and that circumstantial evidence alone is never sufficient. See *People v. Wells* (1894) 103 Cal. 631, 37 Pac. 529; *People v. Porter* (1894) 104 Cal. 415, 38 Pac. 88; *People v. Maxwell* (1897) 118 Cal. 50, 50 Pac. 18; *People v. Rodley* (1900)

131 Cal. 240, 63 Pac. 351; *People v. Smith* (1906) 3 Cal. App. 68, 84 Pac. 452; and *People v. Chadwick* (1906) 4 Cal. App. 63, 87 Pac. 384, 389. In *People v. Wells* (Cal.) *supra*, the court said: "This declaration of the Code clearly means that the falsity of the accused's statements must be shown to the jury by the positive testimony of two witnesses, or of one witness and circumstances corroborating the statement of such witness, in order that the defendant may be legally convicted of the crime of perjury. In other words, the law prescribes a different rule of evidence in this class, both as to the kind and amount, as compared to the great majority of violations of the law. The rule is different as to the kind of evidence, for positive evidence is absolutely necessary, and circumstantial evidence alone is never sufficient." And in *People v. Maxwell* (1897) 118 Cal. 50, 50 Pac. 18, *supra*, where the evidence was wholly circumstantial, the court, in reversing a conviction, said: "It is further insisted upon the part of appellant that the evidence is insufficient to sustain the verdict and judgment; that the conviction was had upon circumstantial evidence alone, and that there was an absence of the positive testimony of two witnesses, or of one witness and corroborating circumstances, required by the law, before conviction in such a case as this can be had. . . . Section 1968 of our Code of Civil Procedure, requiring as indispensable evidence to a conviction of perjury the testimony of two witnesses, or of one witness and corroborating circumstances, is a statutory enactment of the rule which prevailed at common law. It may be argued with much force that in adopting this rule it was adopted in the light of the decisions of the common-law courts in interpretation of it. . . . Of positive testimony there is none, nor is there any documentary or written evidence by which its place may be supplied. Even if the parol admissions of a defendant covering directly the matter charged could, under any circumstances, be held sufficient, the evidence here introduced falls far

short even of that. The admissions do not go directly to the matter charged, but to collateral matters from which the jury was asked to draw the inference of guilt." For contrary holdings under a similar statute, see Texas cases set out *infra*.

And support for the rule that a conviction of perjury cannot rest upon circumstantial evidence alone of the falsity of the oath is found in those cases which explicitly hold that the "direct" testimony of one or more witnesses is required; since, if direct testimony is absolutely essential, circumstantial evidence, of course, cannot suffice, at least, unless the court should adopt the seemingly fallacious view occasionally advanced in argument that the condition of the rule that the testimony must be direct is satisfied by the direct testimony of witnesses to the circumstances from which an inference of guilt is sought to be inferred. See the following cases, which, without expressly discussing the question of sufficiency of evidence wholly circumstantial, have adhered to the rule that where oral testimony is exclusively relied upon, direct testimony of one or more witnesses is essential to a conviction for perjury:

United States. — *United States v. Wood* (1840) 14 Pet. 430, 10 L. ed. 527; *United States v. Coons* (1856) 1 Bond, 1, Fed. Cas. No. 14,860; *United States v. Mayer* (1865) Deady, 127, Fed. Cas. No. 15,753; *United States v. Hall* (1890) 10 L.R.A. 324, 44 Fed. 864 (contains extended discussion of rule); *Hashagen v. United States* (1909) 94 C. C. A. 618, 169 Fed. 396.

Alabama.—*Peterson v. State* (1883) 74 Ala. 34; *Powell v. State* (1912) 5 Ala. App. 150, 59 So. 328; *McDaniel v. State* (1915) 13 Ala. App. 318, 6 So. 315, certiorari denied in (1915) 193 Ala. 678, 69 So. 1018.

Arkansas.—*Thomas v. State* (1888) 51 Ark. 138, 10 S. W. 193, quoted in the reported case (*STATE v. STOREY*, ante, 629); *Grisson v. State* (1908) 88 Ark. 115, 113 S. W. 1011; *Brooks v. State* (1909) 91 Ark. 505, 121 S. W. 740; *Atkinson v. State* (1918) 133 Ark. 341, 202 S. W. 709; *Lamb v. State* (1918) 135 Ark. 275, 205 S. W. 653.

Connecticut. — *State v. Campbell* (1918) 93 Conn. 3, 104 Atl. 653.

Florida.—*McClerkin v. State* (1884) 20 Fla. 879; *Yarbrough v. State* (1920) — Fla. —, 83 So. 873.

Georgia.—*Haines v. State* (1900) 109 Ga. 526, 25 S. E. 141; *Parham v. State* (1907) 3 Ga. App. 468, 60 S. E. 123; *Mallard v. State* (1916) 19 Ga. App. 99, 90 S. E. 1044. Rule is statutory in this state. But see the *Mallard Case* as set out *infra*.

Illinois.—*Mackin v. People* (1885) 115 Ill. 312, 56 Am. Rep. 167, 3 N. E. 222, 6 Am. Crim. Rep. 556; *Hereford v. People* (1902) 197 Ill. 222, 64 N. E. 310; *People v. Niles* (1920) 295 Ill. 525, 129 N. E. 97.

Indiana. — *Pierce v. McConnell* (1844) 7 Blackf. 170; *Hendricks v. State* (1866) 26 Ind. 493; *Galloway v. State* (1868) 29 Ind. 442.

Iowa.—*State v. Young* (1911) 153 Iowa, 4, 132 N. W. 813, Ann. Cas. 1913E, 70. And see *State v. Raymond* (1866) 20 Iowa, 582; *State v. Waddle* (1896) 100 Iowa, 57, 69 N. W. 279; and *State v. Clough* (1900) 111 Iowa, 714, 83 N. W. 727.

Kentucky.—*Wells v. Com.* (1887) 9 Ky. L. Rep. 658, 6 S. W. 150; *Com. v. Davis* (1892) 92 Ky. 460, 18 S. W. 10; *Barton v. Com.* (1895) 17 Ky. L. Rep. 582, 32 S. W. 396; *Wadlington v. Com.* (1900) 22 Ky. L. Rep. 1108, 59 S. W. 851; *Williams v. Com.* (1902) 113 Ky. 652, 68 S. W. 871; *Goslin v. Com.* (1905) 121 Ky. 698, 90 S. W. 223 (contains good discussion of rule and reasons therefor); *Sweat v. Com.* (1906) 29 Ky. L. Rep. 1067, 96 S. W. 843; *Stamper v. Com.* (1907) 30 Ky. L. Rep. 992, 100 S. W. 286; *Howell v. Com.* (1907) 31 Ky. L. Rep. 983, 104 S. W. 685; *Smith v. Com.* (1910) 140 Ky. 568, 131 S. W. 493; *Goins v. Com.* (1916) 167 Ky. 603, 181 S. W. 184; *Hansford v. Com.* (1916) 170 Ky. 700, 186 S. W. 498; *Fugate v. Com.* (1917) 177 Ky. 794, 198 S. W. 240; *Smith v. Com.* (1918) 180 Ky. 240, L.R.A.1918E, 927, 202 S. W. 635.

Louisiana.—*State v. Jean* (1890) 42 La. Ann. 946, 8 So. 480.

Massachusetts. — *Com. v. Parker* (1848) 2 Cush. 212 (reviews history of

the rule); *Com. v. Butland* (1876) 119 Mass. 317.

Michigan.—See *People v. McClintic* (1916) 193 Mich. 589, L.R.A.1917C, 52, 160 N. W. 461.

Mississippi.—*Brown v. State* (1879) 57 Miss. 424; *Vance v. State* (1884) 62 Miss. 137; *Lee v. State* (1913) 105 Miss. 539, 62 So. 360; *Johnson v. State* (1920) 122 Miss. 16, 84 So. 140.

Missouri.—*State v. Heed* (1874) 57 Mo. 252, 1 Am. Crim. Rep. 502; *State v. Blize* (1892) 111 Mo. 464, 20 S. W. 210; *State v. Faulkner* (1903) 175 Mo. 546, 75 S. W. 116; *State v. Hunter* (1904) 181 Mo. 316, 80 S. W. 955; *State v. Gordon* (1906) 196 Mo. 185, 95 S. W. 420; *State v. Thornton* (1912) 245 Mo. 436, 150 S. W. 1048; *State v. Hardiman* (1919) 277 Mo. 229, 209 S. W. 879; *State v. Miller* (1891) 44 Mo. App. 159.

Montana.—*State v. Gibbs* (1890) 10 Mont. 213, 10 L.R.A. 749, 25 Pac. 289.

Nebraska.—*Gandy v. State* (1888) 23 Neb. 436, 36 N. W. 817, on subsequent appeal in (1889) 27 Neb. 707, 43 N. W. 747, 44 N. W. 108, where a conviction was reversed on the ground that there was no witness "swearing positively in contradiction of the accused's oath."

New Jersey. — *State v. Dayton* (1850) 23 N. J. L. 49, 53 Am. Dec. 270.

New Mexico.—*Territory v. Williams* (1898) 9 N. M. 400, 54 Pac. 232.

New York. — *Woodbeck v. Keller* (1825) 6 Cow. 118; *Eighmy v. People* (1880) 79 N. Y. 546; *People v. Stone* (1884) 32 Hun, 41; *People ex rel. Madigan v. Sturgis* (1905) 110 App. Div. 1, 96 N. Y. Supp. 1046; *Johnson's Case* (1816) 1 N. Y. City Hall Rec. 21; *Re Francis* (1816) 1 N. Y. City Hall Rec. 121; *Merritt's Case* (1819) 4 N. Y. City Hall Rec. 58. But see *People v. Doody* (1902) 172 N. Y. 165, 64 N. E. 807, 15 Am. Crim. Rep. 576, in which, as shown *infra*, the court modified the rule in a case in which direct and positive testimony could not be had because of the nature of the false oath in issue.

North Carolina.—See *State v. Swaim* (1887) 97 N. C. 462, 2 S. E. 68, and *State v. Hawkins* (1894) 115 N. C. 712, 20 S. E. 623.

Ohio. — *Silver v. State* (1848) 17 Ohio, 365; *Crusen v. State* (1859) 10 Ohio St. 259.

Pennsylvania. — *Williams v. Com.* (1879) 91 Pa. 493; *Com. v. O'Grady* (1895) 4 Pa. Dist. R. 732; *Com. v. DeCost* (1907) 35 Pa. Super. Ct. 88; *Com. v. Bobanic* (1916) 62 Pa. Super. Ct. 40; *Com. v. Rogo* (1919) 71 Pa. Super. Ct. 109.

Philippine. — See *United States v. McGovern* (1905) 4 Philippine, 451.

South Carolina. — *State v. Hayward* (1819) 10 S. C. L. (1 Nott & M'C.) 547; *State v. Howard* (1827) 15 S. C. L. (4 M'Cord) 159.

South Dakota. — *State v. Pratt* (1907) 21 S. D. 305, 112 N. W. 152.

Tennessee. — See *Coulter v. Stuart* (1828) 2 Yerg. 225.

Washington. — *State v. Rutledge* (1905) 37 Wash. 523, 79 Pac. 1123, followed in *State v. Smails* (1910) 63 Wash. 172, 115 Pac. 82.

West Virginia. — See *State v. Miller* (1884) 24 W. Va. 802.

Rule that circumstantial evidence may be sufficient.

The court in the reported case (*STATE v. STOREY*, ante, 629), in rejecting the common-law theory as to the exceptional proof required in cases of perjury, and placing it upon a plane with other crimes by holding that perjury may be proved by circumstantial evidence sufficient to show guilt beyond a reasonable doubt, as in the case of other crimes, is, of course, in conflict with the great weight of authority.

The decision, however, is not without judicial support, there being a few additional authorities to the effect that the falsity of an oath may be established by circumstantial evidence.

Thus in *Ex parte Metcalf* (1913) 8 Okla. Crim. Rep. 605, 44 L.R.A. (N.S.) 513, 129 Pac. 675, it was held that, in a prosecution for perjury, the falsity of the defendant's evidence may be established by circumstantial evidence, providing the facts constituting such circumstantial evidence are directly and positively sworn to by at least one credible witness supported by corroborating evidence; and provided, further, that the evidence taken as a

whole is of such a conclusive character as to exclude every other reasonable hypothesis except that of the defendant's guilt.

And in New York it has been held that the rule of perjury which requires direct proof of the charge does not apply where, because of the nature of the false oath, the falsity cannot be proved by direct and positive testimony, but rather must be determined upon circumstantial proof. This rule was laid down in *People v. Doody* (1902) 172 N. Y. 165, 64 N. E. 807, 15 Am. Crim. Rep. 576, affirming (1902) 72 App. Div. 372, 76 N. Y. Supp. 606, wherein it was held that it was competent for the people to sustain a charge of perjury in that the accused had falsely testified in answer to questions propounded in a prosecution of another, that he did "not remember," by circumstantial evidence. The court, among other things, said: "In order to sustain the charge of wilful and corrupt perjury against the defendant, the prosecution was bound to prove to the satisfaction of the jury that the defendant did remember.

. . . It was competent for the people to sustain that issue by circumstantial evidence. The rule that prevails in cases of perjury, where one oath is placed against another, that there must be two witnesses to prove the charge, or, in case only one witness is produced, there must be independent corroborating circumstances, has no application to this case. There was no witness produced upon this trial who could swear that the defendant knew and remembered the facts which were the subject of inquiry. That issue had to be determined upon circumstantial proof. The question for the jury was whether it was true, as the defendant pretended, that in the space of a few days his mind had become a perfect blank with respect to the facts which the questions called for. He had testified to them all before the grand jury, and on the former trial and on other trials, only a very brief time before he was examined. Moreover, they were all brought to his attention two or three days before he was called as a witness

by the district attorney, when his former testimony was read to him from the records of these trials, and which he then pronounced correct. The jury could determine from all this whether the defendant told the truth when he said that he did not remember any of the facts embraced in the questions, or whether, on that occasion, his answers were wilfully and corruptly false. It is hardly necessary to add that the verdict upon this question of fact is well sustained by the evidence. We have no doubt that a charge of perjury may be based upon the testimony of a witness upon a judicial trial who has sworn that he did not remember the facts material to the inquiry, if it be shown by competent proof that he did remember them. It may be difficult to prove the charge in many cases, but in this case there was no lack of proof. A witness may commit perjury by falsely stating what he thought, or what he did or did not remember, or what his opinion is when these matters become material to the issue. It may be difficult to prove that his thought or his memory or his opinion was otherwise, but that difficulty has been successfully met and overcome in this case."

And in Georgia it has been held that the statutory rule that to convict of perjury there must be two witnesses to prove the charge, or one witness with corroborating circumstances, does not apply to a case "where the proof of the crime is necessarily based upon circumstantial evidence." See *Mallard v. State* (1916) 19 Ga. App. 99, 90 S. E. 1044. This case, however, is not reported in full, but the court seems to have regarded the statute as applying where oral evidence is relied upon, which apparently was not the fact in the case under consideration.

In Texas, where the Code provides that a conviction for perjury cannot be had except upon the testimony of two credible witnesses, or of one credible witness corroborated strongly by other evidence, as to the falsity of the defendant's statement under oath, or upon his own confession in open court, there has been considerable controversy as to whether or not the statute

permitted a conviction on circumstantial evidence. This question seems to have been squarely raised for the first time in *Maines v. State* (1888) 26 Tex. App. 14, 9 S. W. 51, where the court, after stating that the Code evidently clings to the view that if perjury is not confessed in open court the falsity of the statement assigned for perjury must be proven by the "positive, direct testimony," held that a conviction for perjury may be sustained upon evidence which, though technically circumstantial, is of such a character as to be virtually positive or direct. This decision was followed in point of time by *Kemp v. State* (1890) 28 Tex. App. 519, 13 S. W. 869, wherein the court said that a conviction "cannot be had upon purely circumstantial evidence which is not virtually direct and positive," and reversed a conviction where the evidence was considered as circumstantial only. Then, in *Beach v. State* (1893) 32 Tex. Crim. Rep. 240, 22 S. W. 976, the court, in answer to the contention that "one cannot be convicted of perjury upon circumstantial evidence," held that it is sufficient when the facts sworn to by the witnesses, if true, conclusively demonstrate defendant's guilt, and sustained a conviction for having made an affidavit for continuance of a prosecution on the ground that a certain witness was absent, upon evidence that accused and the witness were seen together in the town where the court was held, shortly before the application was made. However, in *Plummer v. State* (1895) 35 Tex. Crim. Rep. 202, 33 S. W. 228, it was squarely held that a case of perjury may be entirely made out and supported by circumstantial evidence; and that it is not the character of the proof that is contemplated by the statute, but the number and character of the witnesses. The court, speaking through Hurt, P. J., in answer to the contention that perjury cannot be proved by circumstantial evidence and that there must be at least one credible witness, corroborated as the law requires, swearing positively to the statement assigned for perjury, said: "The statute (Code Crim. Proc. art. 746) re-

quires that the falsity of the statement be established by the testimony of two credible witnesses, or by one credible witness strongly corroborated. We hold that the falsity of the statement can be established by circumstantial evidence, but this must be done by the testimony of at least two credible witnesses, or by one credible witness strongly corroborated, as the law requires. In all criminal cases the guilt of the accused can be established by circumstantial evidence. Why cannot the falsity of a statement in a perjury case be established by the same character of evidence? The difference between other cases and perjury cases is this: While one witness may be sufficient to establish the guilt of the accused in other cases, the law requires two credible witnesses, or one credible witness strongly corroborated, in perjury cases. It is not the character of the proof that is contemplated by the statute, but the number and character of the witnesses." The Plummer Case has since been followed in *Rogers v. State* (1895) 35 Tex. Crim. Rep. 221, 32 S. W. 1044, where the character of the evidence does not fully appear, but in which the court said that "we have recently held that a case of perjury may be made out and supported wholly by circumstantial evidence," citing *Plummer v. State* (Tex.) supra.

To the same effect is *Maroney v. State* (1903) 45 Tex. Crim. Rep. 524, 78 S. W. 696. And in *Franklin v. State* (1897) 38 Tex. Crim. Rep. 346, 43 S. W. 85, the court admitted that *Kemp v. State* (Tex.) supra, was a decision to the effect that a conviction of perjury cannot be had on circumstantial evidence alone, but added that such construction of the statute "appears to have been overruled" in *Beach v. State* and *Plummer v. State* (Tex.) supra. In *Miles v. State* (1914) 73 Tex. Crim. Rep. 493, 165 S. W. 567, in holding that a person may be convicted of perjury on circumstantial evidence alone, the court said that the character of proof was clearly within that class of evidence designated as sufficient in *Maines v. State* (1888) 26 Tex. App. 14, 9 S. W. 51, supra. And in *Hart v. State* (1914) 73 Tex. Crim. Rep. 362, 166 S. W. 152, the court again remarked that the accused, in his contentions, "overlooks the fact that perjury can be proven by circumstantial evidence as well as positive testimony." In *Hays v. State* (1915) 76 Tex. Crim. Rep. 213, 173 S. W. 671, where there does not appear to have been any direct testimony, it was held that the court, in failing to charge on circumstantial evidence, erred. For contrary holdings under a similar statute, see the California cases set out supra. G. J. C.

MARIA DE ANGELE VERDI, Admr., etc., of Tony Verdi, Deceased,
Respt.,

v.

HELPER STATE BANK, Appt.

Utah Supreme Court—February 7, 1921.

(— Utah, —, 196 Pac. 225.)

Interest — certificate of deposit — effect of maturity.

1. Interest will not run on a certificate of deposit after maturity where it is for a specified time, and expressly stipulates that no interest will be paid after maturity.

[See note on this question beginning on page 650.]

Evidence — parol to modify a certificate of deposit.

2. A certificate of deposit is an instrument in writing evidencing a
15 A.L.R.—41.

transaction between the parties, and is subject to the same rules of law and evidence as other written instruments.

[See 3 R. C. L. 573.]

Appeal — submitting question of legal effect of instrument to jury.

3. It is error to submit to the jury the question of the legal effect of an instrument.

[See 6 R. C. L. 863.]

— submitting issue not raised by pleadings.

4. It is error to submit to the jury an issue not raised by the pleadings.

[See 14 R. C. L. 784.]

Contract — implied — express existing.

5. No agreement can be implied where there is an express one existing.

[See 6 R. C. L. 589.]

Bank — interest on deposit.

6. Interest is not ordinarily recoverable upon bank deposits except by

special agreement or after demand and refusal to pay.

[See 3 R. C. L. 528.]

Appeal — submitting issues not raised by pleadings.

7. It is reversible error to submit to the jury the question of an implied agreement to pay interest on a bank deposit, which there is some evidence to support, while the pleadings rely upon an express agreement.

— issues of complaint not supported by evidence.

8. A verdict for plaintiff cannot be sustained in a law case unless the evidence supports the allegations of the complaint, although there may be evidence which would support a finding in his favor under different allegations.

(Gideon, J., dissents.)

APPEAL by defendant from a judgment of the District Court for Carbon County (Christensen, J.) in favor of plaintiff in an action brought to recover interest alleged to be due upon a certain certificate of deposit. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Price & Fouts, for appellant:

The certificate of deposit in question was not due until returned properly indorsed and demand made for payment.

Elliott v. Capitol City State Bank, 1 L.R.A.(N.S.) 1134, and note, 128 Iowa, 275, 103 N. W. 777; *Hillsinger v. Georgia R. Bank*, 108 Ga. 357, 75 Am. St. Rep. 42, 33 S. E. 985; *Murphy v. Pacific Bank*, 130 Cal. 542, 62 Pac. 1061; *Tobin v. McKinney*, 15 S. D. 257, 91 Am. St. Rep. 694, 88 N. W. 572; *Howell v. Adams*, 68 N. Y. 315; *Bellows Falls Bank v. Rutland County Bank*, 40 Vt. 377; *Fells Point Sav. Inst. v. Weedon*, 18 Md. 320, 81 Am. Dec. 603; *Munger v. Albany City Nat. Bank*, 85 N. Y. 587; 8 C. J. 414.

No interest was to be paid after maturity.

Kirkwood v. First Nat. Bank, 40 Neb. 484, 24 L.R.A. 448, 58 N. W. 1016.

Mr. Oliver K. Clay, for respondent:

The certificate of deposit was in legal effect a promissory note.

7 C. J. 647; 8 C. J. 414; 3 R. C. L. § 202; *Jensen v. Wilslef*, 36 Nev. 37, 132 Pac. 16, Ann. Cas. 1914D, 1220; *Hillsinger v. Georgia R. Bank*, 108 Ga. 357, 75 Am. St. Rep. 42, 33 S. E. 985.

Being a promissory note, it was the

duty of the maker to make tender to the payee.

22 Cyc. 1555; *Westcott v. Patton*, 10 Colo. App. 544, 51 Pac. 1021; *McCauley v. Leavitt*, 10 Utah, 91, 37 Pac. 164; *Le Vine v. Whitehouse*, 37 Utah, 280, 109 Pac. 2, Ann. Cas. 1912C, 407.

The certificate being a time certificate, no demand was necessary.

Thompson v. Farmers' State Bank, 159 Iowa, 662, 44 L.R.A.(N.S.) 552, 140 N. W. 877; *First Nat. Bank v. Security Nat. Bank*, 34 Neb. 71, 15 L.R.A. 390, 51 N. W. 305; 3 R. C. L. 199; *Towle v. Starz*, 67 Minn. 370, 36 L.R.A. 463, 69 N. W. 1098; *Maupin v. Mobridge State Bank*, 38 S. D. 331, 161 N. W. 332.

The words "with interest to maturity only" fixed the time the deposit was to remain with the bank before the depositor would be entitled to interest thereon, and limited the bank's liability to pay interest after maturity only, hence it would not be liable for interest prior to the date of maturity.

Bank of Commerce v. Harrison, 11 N. M. 50, 66 Pac. 462; *Cordell v. First Nat. Bank*, 64 Mo. 600; *Eaton v. Whitmore*, 3 Kan. App. 760, 45 Pac. 450; *Crescent Min. Co. v. Wasatch Min. Co.* 151 U. S. 317, 38 L. ed. 177, 14 Sup. Ct. Rep. 348, affirming 7 Utah, 8, 24 Pac. 586.

Frick, J., delivered the opinion of the court:

The plaintiff, as administratrix of the estate of one Tony Verdi, deceased, commenced this action against the defendant to recover a certain amount of interest alleged to be due upon a certain certificate of deposit. The complaint sets forth two causes of action. In the first cause of action, after stating the necessary matters of inducement, plaintiff alleged: "That on July 11, 1917, plaintiff loaned defendant the sum of ten thousand (\$10,000) dollars for the use of which defendant agreed to pay interest at the rate of four (4) per cent per annum for a period of one year; that defendant issued its certificate of deposit in favor of plaintiff, which said certificate provided for interest at the rate of four (4) per cent per annum for a period of only six months from July 11, 1917; that subsequent to the issuance of said certificate, to wit, on the same date, plaintiff discovered that said certificate was issued for a period of only six months; that she thereupon called the matter to the attention of defendant, and defendant then and there agreed that interest would be paid to plaintiff at the rate of four (4) per cent per annum for a period of one year from July 11, 1917; that plaintiff, relying upon the said promise, agreement, and representation of defendant, permitted defendant to have and use the said ten thousand (\$10,000) dollars for the said period of one year, to wit, up to and including the 11th day of July, 1918."

The plaintiff further alleged that on July 11, 1918, she made demand for said \$10,000, together with interest at the rate of 4 per cent per annum from July 11, 1917, to July 11, 1918, and that the defendant refused to pay interest for the full period stated, but only paid interest at the rate aforesaid for a period of six months commencing July 11, 1917, and ending January 11, 1918, amounting to \$200; that

the interest for said six months, commencing January 11, 1918, and ending July 11, 1918, is due and unpaid, wherefore she demanded judgment for said \$200 and costs.

The second cause of action sets forth the same transaction in somewhat different phraseology. The second cause of action was, however, disregarded, and the verdict of the jury is based entirely upon the first cause of action.

The defendant answered the complaint, and, after admitting the matters of inducement, it also admitted that the plaintiff had made a deposit of \$10,000 in defendant's bank, but averred that said deposit was to draw 4 per cent interest for a period of six months only; that defendant had agreed to pay interest for no longer period. The defendant also denied the alleged representations set forth in the complaint, averred that it had paid to plaintiff the \$10,000 at the date it was demanded as alleged in the complaint, and denied that it was indebted to the plaintiff in any sum or amount whatever.

The case was tried to a jury, which returned a verdict in favor of plaintiff "for 4 per cent interest on \$10,000 from January 11, 1918, to July 11, 1918." The amount of interest, to wit, \$200, was not stated in the verdict. Judgment was duly entered on the verdict for said \$200, from which defendant appeals.

Among the errors assigned are that the evidence is insufficient to justify the verdict, and that the court misled the jury as to the law.

On reading the evidence, the writer was of the opinion that it was insufficient to justify the verdict. In view, however, that a majority of the members of the court are of the opinion that the evidence is of such a character that we should not say as a matter of law what the findings upon the evidence should be, I cheerfully yield to the judgment of my associates in that regard. We are, however, agreed that the district court erred in charging the jury as will here-

inafter appear, and for that reason the judgment must be reversed and the cause remanded for further proceedings. In view, therefore, that the cause must be remanded, we shall refrain from setting forth or expressing any opinion upon the effect of the evidence, but shall confine ourselves to a consideration of the legal questions involved.

The action was commenced to recover interest upon a certain certificate of deposit after the certificate had matured by its own terms. The certificate reads as follows:

Helper, Utah, July 11, 1917.
No. 463.

This certifies that Maria de Angele Verdi, Admr., has deposited with the Helper State Bank ten thousand dollars (\$10,000), payable to the order of herself, countersigned by the Aetna Casualty Co. on the return of this certificate, properly indorsed, six months after date, with interest to maturity at the rate of four per cent per annum.

J. A. Pland, Assistant Cashier.

There was an indorsement on the back of the certificate, which the testimony shows was placed thereon and signed on the date the same was issued and before it was delivered, which indorsement reads as follows:

Four per cent interest will be paid if left for six months. No interest will be paid after maturity, and all interest is forfeited if principal is drawn before maturity.

J. A. Pland, Assistant Cashier.

There is much controversy between respective counsel in their briefs respecting the legal effect of certificates of deposit. Many cases are cited, especially by counsel for plaintiff. Practically all of these cases, however, have no bearing on this case for the reasons (1) that the facts and circumstances of this case are entirely different from those in the cited cases; and (2) because the questions whether an ordinary certificate of deposit matures without demand for payment, and when the Statute of Limitations begins to run, which are the principal

subjects discussed in most of the cases cited, are not material, (a) because the certificate in question here matured by its own terms, and (b) for the reason that in this state, by virtue of Utah Comp. Laws 1917, § 6478, there is no limitation in favor of bank deposits. That section reads: "To actions brought to recover money or other property deposited with any bank, banker, trust company, or savings or loan corporation, association, or society, there is no limitation."

It will be observed that the certificate in question here was negotiable in form, and thus, under the law, constituted a negotiable instrument. See 2 Dan. Neg. Inst. 6th ed. § 1703, where a large number of cases are cited in support of the text. At all events, the certificate of deposit in this case must be treated as an instrument in writing which evi-

Evidence—parol to modify a certificate of deposit.

denced a transaction between the parties, and hence must be considered in the light of the same rules of law and evidence as other written instruments. In 3 R. C. L. p. 574, § 202, it is said: "As regards matters of evidence, a certificate of deposit is usually subject to the rules applicable to other written contracts."

While there is some diversity of opinion with respect to what extent parol evidence may be admitted in actions to recover on certificates of deposit, yet such difference does not relate to the principles governing the parol evidence rule, but arises entirely out of the different forms of certificates and the nature of the transactions. See *Coleman v. First Nat. Bank*, 53 N. Y. 388. See also the note to the case of *Steckel v. First Nat. Bank*, 39 Am. Rep. 760, where the subject is thoroughly discussed. Moreover, so-called certificates of deposit are sometimes no more than acknowledgments of the receipt of money, such as ordinary deposit slips, etc., and when such is the case they are treated merely as receipts. See *First Nat. Bank v.*

Clark, 134 N. Y. 368, 17 L.R.A. 580, 32 N. E. 38. We are, however, not dealing now with such an instrument, but are dealing with a certificate of deposit which, as already pointed out, constitutes a negotiable instrument, and not a mere receipt. The certificate in question is for a certain sum, namely, \$10,000, which is payable at a fixed time, "six months after date," and is made payable to the order of the depositor. The conditions which entitled the depositor to interest, and the rate thereof, are also clearly stated. The rate is 4 per cent per annum if the money is "left for six months." Further, the certificate provides: "No interest will be paid after maturity, and all interest is forfeited if principal is drawn before maturity." It would seem that in the absence of a legal modification of the foregoing stipulations, which constitute the contract between the parties, there is little room for real controversy respecting the rights of the respective parties. It has repeatedly been held that such a certificate matures at the time stated; in this case, at the end of six months. *First Nat. Bank v. Security Nat. Bank*, 34 Neb. 71, 15 L.R.A. 386, 33 Am. St. Rep. 618, 51 N. W. 305, and cases there cited; *Hunt v. Divine*, 37 Ill. 137.

In *Towle v. Starz*, 67 Minn. 370, 36 L.R.A. 463, 69 N. W. 1098, the certificate was substantially in the same terms as the one in question, and Mr. Justice Buck, in a dissenting opinion, which, however, relates to a point not controverted by the majority of the court, uses the following language, which the writer adopts as expressing his own views, namely: "The words, 'to be left six months,' found in the instrument, are a limitation upon the right of the holder to demand payment until the expiration of that time. His power to make a lawful demand was suspended during this time. When the money was deposited it became the property of the bank, and it became the debtor of the depositor to the amount stated in the certificate. If

left longer than six months, it would not draw interest after that time, unless a demand was made for its payment and refusal to pay, because it is expressly stipulated that it shall not draw interest after maturity."

Notwithstanding the authorities just referred to, counsel for plaintiff insists that his client is entitled to interest by virtue of the terms of the certificate, and in support of that contention especially refers to *Payne v. Clark*, 23 Mo. 259; *Cordell v. First Nat. Bank*, 64 Mo. 600; *Bank of Commerce v. Harrison*, 11 N. M. 60, 66 *Pac.* 460; *Hillsinger v. Georgia R. Bank*, 108 Ga. 357, 75 Am. St. Rep. 42, 33 S. E. 985; and one or two other cases based upon certificates of deposit like those involved in the cases just cited. The theory upon which the decisions in the foregoing cases are based is made quite clear in *Payne v. Clark*, *supra*. The certificate of deposit involved in that case reads as follows: "L. P. Payne has deposited in this office \$1,014 (in funds as below), payable to the order himself, on return of this certificate sixty days after date, with interest at the rate of 6 per cent per annum."

Then follows a statement showing the character of the funds deposited.

In that case the court held that the certificate did not mature—that is, was not payable—until the expiration of sixty days, and then only upon demand by the payee or by his order. In other words, the court held that a demand for payment could not legally have been made until the sixty days had expired, and that the certificate did not mature until a demand for payment was actually made after the sixty-day period. It was therefore held that the bank was required to pay interest at the rate specified in the certificate until a demand for payment was actually made. The case we are dealing with here is, however, quite different. The certificate in the case at bar provides, "No interest will be paid after maturity," and, further, that

interest will be paid "to maturity only." The contract, therefore, is that interest will not be paid after maturity, and it expressly is further stated that it will be paid only to maturity. Such being the contract

**Interest—
certificate of
deposit—effect
of maturity.**

of the parties, this court is powerless to modify its terms, or to require either

party to do something contrary to such terms, unless there was a modification of the terms, or unless a new contract was entered into between the bank and the plaintiff respecting payment of interest. Whether there was a modification of the terms of the certificate respecting the payment of interest, or whether a new agreement was entered into whereby the bank agreed to pay interest, is a question of fact upon which we express no opinion. Moreover, the evidence in that regard must be limited to the allegations of the complaint.

It only remains to refer to some of the instructions of the court which were excepted to, and the giving of which is assigned as error.

The court, after stating the pleadings, charged the jury as follows: "That, gentlemen of the jury, then, leaves the issues for you to determine (a) whether or not the certificate of deposit issued by defendant to plaintiff limited the time for which interest should be paid to six months; (b) whether or not the defendant held the said \$10,000 in readiness to pay the plaintiff, and that the plaintiff could have withdrawn the said sum of money from the said bank at any time after the expiration of six months from the date of its deposit; (c) whether or not there was a subsequent agreement, either express or implied, that said sum of money should remain for an additional six months after the expiration of the six months set forth in the certificate of deposit."

It is manifest that the court erred in submitting proposition (a) to the jury. In doing that the court re-

quired the jury to do what clearly the law requires of the court. The legal effect of written instruments is necessarily a question of law, and hence is one that must be determined by the court. To

Appeal—submitting question of legal effect of instrument to jury.

that rule there is no exception, not even in cases where the facts respecting the terms of the written instruments are in dispute, which arise sometimes where the written instruments have been lost. In the latter class of cases the jury may find what the terms of the instruments were; but the court must, nevertheless, determine the legal effect of the instruments when the terms are found and determined.

It is, however, insisted that in view that the court instructed the jury that the certificate of deposit constituted the contract between the parties which could not be varied by parol evidence, and for the reason that the provisions of the certificate are plain, therefore the court committed no error in that regard. That statement manifestly overlooks the contention of plaintiff's counsel. His contention in the court below was, and now is, that by the terms of the certificate it did not become due and payable until a demand for its payment was made, and hence it continued to draw the interest specified therein until such demand was made. In other words, that the certificate, by its terms, did not mature until demand for payment was made, and hence continued to draw interest. If, therefore, that was the construction placed upon the certificate by plaintiff's counsel, why could not a jury give it the same construction? Indeed, that is just what, under the instructions of the court, the jury were permitted to do, and, in view that they found the interest as contended for by plaintiff's counsel, it is quite probable that that is what was done. In view of counsel's contention, therefore, it was manifest error to submit the question to the jury whether the certificate limited the time for

(— *Utah*, —, 196 Pac. 225.)

which interest could be collected to six months. Had the jury followed the language of the certificate they would have found only six months' interest. How, then, can anyone say that the jury may not have misconstrued the certificate? There is not only nothing upon which such an inference can be based, but, in view of the contention of plaintiff's counsel, the inference is precisely to the contrary.

As to proposition (b) we find no such issue tendered
 —submitting issue not raised by pleadings. by the pleadings.

There was no claim that the money was withheld after demand therefor was made. It is not necessary to refer to proposition (b).

Proposition (c) was a question of fact to be determined by the jury. The difficulty with the court's statement, however, is that it is too broad. The complaint was predicated upon an express contract to pay interest, and not upon an implied one. It is axiomatic that where an express contract exists one may not be implied.

Contract—implied—express existing. 2 Elliott, Contr. § 1360; 9 Cyc. 242.

Ordinarily, therefore, where the plaintiff seeks to recover upon an express contract, he cannot rely upon an implied one. The rule has special application to cases where the recovery of interest is sought upon bank deposits. The law in that regard is that, ordinarily at least, interest is not recoverable upon deposits

Bank—interest on deposit. except by special agreement, or after

demand and refusal to pay. 1 Morse, Banks & Bkg. 4th ed. § 309. Moreover, in this case the rate of interest sought to be recovered was not the legal rate, but a rate which it is alleged was the subject of special contract. It is, however, urged that although the court may have erred in submitting the foregoing proposition, yet it did not constitute prejudicial error to do so. I cannot conceive how, in a law case, this

court can sustain such a contention. I have set forth the controlling allegations of the complaint. In addition to the fact that the complaint proceeded upon the theory of an express agreement or contract, the court permitted the jury to proceed as upon an implied one. While, in my judgment, there is no substantial evidence which sustains the allegations of the complaint, yet there is some evidence from which the jury might have found an implied promise to pay interest. In view of that, it was manifest error in this

Appeal—submitting issues not raised by pleadings.

case to submit that question to the jury. It is, however, urged that there is ample evidence to sustain the finding of the jury. While I do not so read the record, yet, if that were conceded, it would in no way cure the error to which I have referred. This is a law case, and hence, unless the evidence supports the allegations of the complaint, the verdict cannot be sustained, although there might be evidence supporting the findings in plaintiff's favor if the allegations of the complaint had been different and were subject to amendment after introduction of evidence. This court has not original jurisdiction in such cases, and cannot enter judgment merely because it thinks one or the other of the parties is entitled to prevail.

—issues of complaint not supported by evidence.

In view of what has been said, it is not necessary to discuss any of the other errors assigned. All of these alleged errors are necessarily covered by what has already been said, and hence, although the cause is remanded, the court will easily avoid those alleged errors.

From what has been said it follows that the judgment should be, and it accordingly is, reversed, and the cause is remanded to the District Court of Carbon County, with directions to grant a new trial, and to proceed with the case in accord-

ance with the views herein expressed.

Appellant to recover costs.

Corfman, Ch. J., and Weber and Thurman, JJ., concur.

Gideon, J., dissenting:

In my opinion two facts, which should be decisive of the case, are conclusively shown by the testimony in this record. First, that the plaintiff, Mrs. Verdi, understood, from statements made by the bank officials subsequent to the receipt of the certificate of deposit, that if she left the money in the bank for an additional six months after January 11, 1918, the bank would pay her an additional six months' interest, or one year's interest in all; second, that the bank officials knew that she so understood the agreement. They further knew that she left the money with the bank after January 11, 1918, by reason of such understanding.

Carrying out that understanding, the plaintiff, on January 11, 1918, when the first six months' interest was due, did not ask payment of the same, nor did the bank tender payment, either of the principal or interest, at that date, or at any subsequent date, until after the expiration of one year. The testimony tending to establish this subsequent agreement or arrangement in no way varied or contradicted the terms of the written agreement. It is evident that the district court so understood the testimony from the following colloquy between the court and counsel for the defendant, which occurred during the trial:

The court: I don't know what the agreement is. It appears to be a certificate of deposit for six months.

Counsel: Yes.

The court: Now, does counsel contend that they cannot agree that it might remain there after that?

Counsel: Not unless it is embodied in the agreement.

The court: The motion to strike will be denied.

Also, the court, in its fifth in-

struction, said: "Gentlemen of the jury, you are instructed that the certificate of deposit, together with the stamped indorsement signed by the assistant cashier, is the contract upon which this money was deposited in said bank, and its terms and conditions cannot be modified or contradicted by parol testimony."

True it is that the court, in the instruction quoted by Mr. Justice Frick in the majority opinion, submitted to the jury the question of whether the certificate of deposit issued by the bank to the plaintiff limited the time for which interest should be paid to six months. There is nothing about that certificate. It is couched in plain and unambiguous language. It was an agreement to pay the principal and six months' interest,—nothing less, nothing more. That the court should have construed this contract and determined the rights of the parties thereunder will be readily conceded. The verdict, however, is amply supported by other testimony upon another issue rightly submitted to the jury. I regard the second proposition submitted to the jury as wholly immaterial. Either an affirmative or a negative answer to that question could in no way affect the rights of the parties. If the defendant bank was obligated to pay to the plaintiff the amount deposited by her, the fact that it had or did not have the coin on hand to make the payment was of no significance respecting its liability.

The third issue submitted to the jury, in my judgment, is the controlling one in the case, and the only issue upon which there was any competent evidence. The jury had been instructed that the certificate of deposit constituted the contract by which the money was deposited in the bank, and that the contract could not be varied or modified by oral testimony. The decisive question in the case, as I view it, was whether or not this money was left with the bank after the six months mentioned in the certificate, with the understanding that if it were so

left the defendant bank would continue to pay interest for an additional six months. That question was fairly submitted to the jury in the third proposition of the instruction quoted in the majority opinion. The jury, by its verdict, seems to have emphasized the fact that the determination of that question was decisive of the case. The verdict is not for a definite sum but is: "We . . . do find the issues in favor of the plaintiff and against the defendant for 4 per cent interest on \$10,000 from January 11, 1918, to July 11, 1918."

This court, by *Utah Comp. Laws* 1917, § 6968, is precluded from regarding any exception unless the decision excepted to is material and prejudicial to the substantial rights of the party excepting. By § 6622 the court is required to disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the parties, and no judgment shall be reversed or affected by reason of such error or defect. In *Staton v. Western Macaroni Mfg. Co.* 52 *Utah*, 426, 174 *Pac.* 821, it was held that an instruction which might mislead the jury would not be treated as prejudicial and authorize a reversal, where the controlling facts in the case were such that the party complaining was at the time of the accident chargeable with negligence by being on a public right of way where he was not entitled to be. See also *Moore v. Utah Idaho C. R. Co.* 52 *Utah*, 373, 174 *Pac.* 873.

Moreover, the testimony in this case strongly tends to support the contention that all parties understood that the bank was liable to pay interest for an additional six months after January 11, 1918. A daughter of the plaintiff testified that she called upon the bank sometime in the early part of April or latter part of March of 1918, stated to the bank officials that her mother wanted some money. She was advised by Mr. Barboglio, the president of the bank, that she could not have it until it was due, for the rea-

son that the bank was paying interest on the money, with the statement that the money would be due in July, 1918. Furthermore, a Mr. Clay testified that, as the attorney for the plaintiff, he called upon the defendant bank on or about the 8th day of March, 1918; that he then had never seen the certificate of deposit; that he inquired of the president when the same would be due, and was advised that it would be due in July. The same witness testified that in April of that year he interviewed the president of the bank in the presence of the plaintiff, in an effort to obtain certain money for the plaintiff's use. He was at that time advised that the bank would pay six months' interest to January preceding, but that the certificate was for one year, and would not be due until some time in July. True it is that this testimony is disputed by the president of the bank. This official, in his testimony, however, answered most of the questions on cross-examination by saying, "I don't remember," etc. Such testimony, read in the face of the admitted facts in this case, is its own best refutation. A jury that could have been influenced by such testimony would indeed have welcomed deception. It is evident from the verdict that the jury believed the plaintiff's witnesses. Every circumstance in the case, in my judgment, corroborates the plaintiff's contention that it was understood and agreed that if the money were left in the bank for a period of one year (and it was so left) she should receive one year's interest. Plaintiff held this money as a legally appointed guardian. As such she is accountable under her bond not only for the principal, but for a reasonable income for the use of the money. Notwithstanding this, it is insisted here by the bank that this plaintiff left this large amount of money for a period of six months with the bank, without any promise or hope of any consideration for its use, and this, too, at a time when it

was a matter of common history that money was in demand not only in the commercial world, but by the general government for use in the prosecution of a great war.

A reversal of this judgment, in

my opinion, is not warranted by any errors, or alleged errors, occurring in the lower court. The judgment of the district court reflects justice between the parties, and should be affirmed. I therefore dissent.

ANNOTATION.

Interest on certificate of deposit after maturity.

Unless the instrument contains an express provision to the contrary, a certificate of deposit which is payable with interest at the expiration of a certain period of time continues to bear interest after its maturity. *Payne v. Clark* (1856) 23 Mo. 259; *Cordell v. First Nat. Bank* (1877) 64 Mo. 600; *Bank of Commerce v. Harrison* (1901) 11 N. M. 50, 66 Pac. 460.

In the case last cited it appeared that the defendant bank issued to the plaintiff a certificate of deposit payable on its return properly indorsed six months after date, with interest at 6 per cent per annum. The certificate was not presented or payment demanded for almost ten years. The court held that although the Statute of Limitations did not run against the certificate until it was returned and a demand made for its payment, it continued to bear interest after the expiration of six months.

A statute providing that a creditor shall be allowed interest on any money after it becomes due by virtue of a written instrument of the debtor has been held to entitle the holder of a certificate of deposit to recover interest thereon after its maturity. *Payne v. Clark* (Mo.) supra. The certificate sued on in that case was, by its terms, payable to order on its return sixty days after the date thereof, with interest at the rate of 6 per cent per annum. It was first presented for payment about five months after its date. The court held that under the statute the instrument became due sixty days after date, even though it was not then presented for payment, and that by virtue of the statute it continued to bear interest from that date. That decision was followed in

Cordell v. First Nat. Bank (1877) 64 Mo. 600.

In *Bank of Commerce v. Harrison* (N. M.) supra, it was said by way of dictum that a bank may, after the maturity of a certificate of deposit, terminate its obligation to pay interest, or change the rate of interest for which it will thereafter be liable, by giving notice to the holder; and that, a fortiori, a bank may terminate the period for which a certificate of deposit will bear interest after maturity, by seeking out the holder and tendering payment to him.

But if the certificate stipulates the length of the notice and the manner in which it is to be given to avoid the running of interest or to change its rate, the bank may change its obligation with respect to interest only by giving a notice that is in conformity with the stipulation in the certificate. *Cole v. New England Trust Co.* (1909) 200 Mass. 594, 86 N. E. 902. In that case it appeared that a certificate of deposit issued by a bank for money deposited by a probate judge as trustee for a beneficiary provided that interest would be allowed at the rate of 2½ per cent if the deposit remained in the bank more than thirty days, but that the bank reserved the right to discontinue the payment of interest or reduce its rates on giving ten days' notice. In an action against the bank by the administrator of the beneficiary it was held that the bank could not terminate its agreement to pay interest without giving the required notice to the probate judge and that a one-day notice to the beneficiary and the register of probate was clearly insufficient.

An express provision in a certificate

of deposit that interest is not payable thereon after maturity is binding on the holder; and where an instrument with such a provision is payable with interest, on the expiration of a certain period after its date, on the return of the certificate properly indorsed, it becomes mature at the end of the period designated, and ceases to bear interest at that time though the certificate is not then returned or payment demanded. *Baxley Bkg. Co. v. Gaskins* (1916) 145 Ga. 508, 89 S. E. 516; *First Nat. Bank v. State Bank* (1906) 15 N. D. 594, 109 N. W. 61.

In the reported case (*VERDI v. HELPER STATE BANK*, ante, 641) it is held that no interest accrues after maturity on a certificate of deposit which provides that no interest is to be paid after that time. It is also held that parol evidence is not admissible to show that interest is to continue after maturity, that the construction of the instrument must be determined by the court and not by the jury, and that the question of an implied contract to pay interest should not be submitted to the jury where the plaintiff's action is based on the express contract embodied in the certificate.

The certificate of deposit involved in *Baxley Bkg. Co. v. Gaskins* (1916) 145 Ga. 508, 89 S. E. 516, contained the following words: "Payable to the order of the administrator twelve months after date, on return of this certificate properly indorsed, with interest at the rate of 6 per cent per annum. Interest will cease at maturity. The court said: "It is plain that the money could not be withdrawn under twelve months from the date of the certificate. It is also clear that the interest ceased after twelve months."

However, a provision in a certificate of deposit that no interest will be paid after maturity does not prevent the holder from recovering interest at the legal rate after the bank has failed or has refused to pay the amount due on the instrument at its maturity. *Baxley Bkg. Co. v. Gaskins* (Ga.) and *First Nat. Bank v. State Bank* (N. D.) *supra*. In the

case last cited the court said: "The plaintiff concedes that interest should be computed from the date of the certificate to the failure of the bank (July 23, 1901) at 8 per cent, and thereafter at 7 per cent. The certificate in terms bears interest from its date to maturity at 8 per cent, and no interest after maturity. The bank, in legal effect as well as in fact, refused payment of the obligation. In such a case it is obvious that the stipulation providing that no interest should be allowed after maturity does not take effect. That stipulation merely protected the bank from any liability for interest after the maturity of the certificate, if the holder failed to present it for payment at that time. The bank having defaulted its obligation, the law allows legal interest from the date of the default as compensation to the party injured by the breach of the contract."

Similarly, where a bank improperly refuses to pay the amount of a certificate of deposit which does not provide for the payment of any interest, the holder is entitled to interest from the date of the refusal. *Citizens' Nat. Bank v. Brown* (1887) 45 Ohio St. 39, 4 Am. St. Rep. 526, 11 N. E. 799. In that case the court said: "It is assigned as error that the court below allowed interest on the certificate of deposit from the 18th day of September, 1882. On that day Brown requested payment, and the bank refused. It was incumbent upon him to produce and surrender the certificate, or give an adequate reason for his inability to do so. Such a reason was furnished in the loss of the certificate. As the bank, notwithstanding, deemed it advisable to withhold payment, the certificate should bear interest from the day the bank declined to pay."

But it has been held that in an action by an indorsee on a certificate of deposit which by its terms was not to bear interest after maturity, a refusal to pay the certificate after maturity did not render the bank liable for interest accruing thereafter, where the refusal was due to a demand by the original payee, who

claimed to be entitled to the amount thereof, and the indorsee, seeking to recover, had notice of the disputed title to the instrument at the time he accepted it. *Kinney v. Hynds* (1897) 7 Wyo. 22, 49 Pac. 403. The decision, however, in that case, was based on the state of the pleadings. The court said: "The plaintiff took these securities, with notice of their dishonor, in payment of an antecedent debt, and stands in no better condition than the original indorsees. The plaintiff in error was a substituted defendant

standing in the place of the bank, the maker of the certificates. The bank has held itself in readiness at all times to pay to whoever should be found entitled to receive payment, and is liable on its contract only for interest to the maturity of the certificates at the rate of 6 per centum per annum. The suit being upon the certificates, and they ceasing to draw interest at maturity, six months from date, there is nothing in the pleadings upon which to base a judgment for interest against the plaintiff in error." W. S. R.

THEODORE STRAND, Appt.,

v.

WILLIAM BOLL, Respt.

South Dakota Supreme Court—June 2, 1921.

(— S. D. —, 183 N. W. 284.)

Life tenant — right of tenant to harvest crop after life tenant's death.

An undertenant of a life tenant is entitled to harvest a crop planted by him notwithstanding the death of the life tenant during the term, and therefore cannot defeat liability on the notes given for rent.

[See note on this question beginning on page 659.]

APPEAL by plaintiff from a judgment of the Circuit Court for Minnehaha County (Fleeger, J.) in favor of defendant, and from an order denying a new trial, in an action brought to recover the amount alleged to be due on two promissory notes. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Mundt & Mundt, for appellant:

Plaintiff, the assignee and purchaser for value, before maturity, of the promissory notes in question from the life tenant, can recover on them in full, even though he had notice and knowledge at the time of the purchase that they had been given for a lease of a farm consisting of agricultural lands in which she had a life estate.

Splivallo v. Patten, 38 Cal. 138, 99 Am. Dec. 358; *Flood v. Petry*, 165 Cal. 309, 46 L.R.A. (N.S.) 869, 132 Pac. 256; *Saddler v. White*, 14 La. Ann. 173; *Simmons v. Council*, 5 Ga. App. 386, 63 S. E. 238; *Adoue v. Tankersley*, — Tex. Civ. App. —, 28 S. W. 346; *Buchanan v. Wren*, 10 Tex. Civ. App. 560, 30 S. W. 1077; 3 R. C. L. 1067, §

273; *Hines v. McCombs*, 2 Ga. App. 675, 58 S. E. 1124; *Mitchell v. Rutherford*, 9 Ga. App. 722, 72 S. E. 302; *Batterman v. Albright*, 122 N. Y. 484, 11 L.R.A. 800, 19 Am. St. Rep. 510, 25 N. E. 856; 8 R. C. L. 365; *Bradley v. Bailey*, 56 Conn. 374, 1 L.R.A. 427, 7 Am. St. Rep. 316, 15 Atl. 746; *Samson v. Rose*, 65 N. Y. 411; *Edghill v. Mankey*, 11 L.R.A. (N.S.) 688, and note, 79 Neb. 347, 112 N. W. 570; *Guthmann v. Vallery*, 51 Neb. 824, 66 Am. St. Rep. 475, 71 N. W. 734; *Carman v. Mosier*, 105 Iowa, 367, 75 N. W. 323; *Shaffer v. Stevens*, 143 Ind. 295, 42 N. E. 620; *Thompson v. Thompson*, 6 Munf. 514; *Keays v. Blinn*, 14 Ann. Cas. 37, and note, 234 Ill. 121, 84 N. E. 628; *Gairdner v. Tate*, 110 Ga. 456, 35 S. E. 697; *Pritchitt v. Nashville Trust Co.* 96 Tenn. 472, 33 L.R.A. 856, 36 S. W. 1064.

Messrs. Waggoner & Stordahl, for respondent:

The lease and notes became void upon the life tenant's death.

Hoagland v. Crum, 113 Ill. 365, 55 Am. Rep. 424; Watson v. Penn, 108 Ind. 21, 58 Am. Rep. 26, 8 N. E. 633; Perry v. Aldrich, 13 N. H. 343, 38 Am. Dec. 493; Allen v. De Groodt, 14 Am. St. Rep. 638, note; Edghill v. Mankey, 79 Neb. 347, 11 L.R.A.(N.S.) 688, 112 N. W. 570; Gudgel v. Southerland, 117 Iowa, 309, 90 N. W. 623; Welch v. Apthorp, 27 L.R.A.(N.S.) 450, note; Miller v. Wohlford, 119 Ind. 305, 21 N. E. 849; Sutliff v. Atwood, 15 Ohio St. 186; Reed v. McGouirk, — Tex. Civ. App. —, 35 S. W. 527; Guthmann v. Vallery, 51 Neb. 824, 66 Am. St. Rep. 475, 71 N. W. 734.

McCoy, J., delivered the opinion of the court:

This action was instituted to recover upon two promissory notes executed and delivered by the defendant, William Boll, to one Margaretha Boll, and thereafter, before the maturity thereof, by her sold and assigned to plaintiff. The cause was tried before the court without a jury. From findings and judgment in favor of defendant, the plaintiff appeals.

The assignments of error raise the questions of the sufficiency of the evidence to sustain the findings, and the sufficiency of the findings to sustain the judgment. One of the contentions of the appellant is that the court drew an erroneous conclusion from the facts found. There is no dispute concerning the vital material facts of this case. The following state of facts, which, among other things, appear in the findings, is conceded by both parties: That one Martin Boll died testate, and under his will left a life estate in his real and personal property to his wife, Margaretha Boll; that thereafter, on the 10th day of November, 1917, Margaretha Boll, as the owner of such life estate, by a written lease, rented certain of the agricultural lands of said estate to her son, the respondent, for the period of one year, beginning March 1, 1918, and ending March 1, 1919, for the cash rental of \$500, evidenced by two

promissory notes; viz., one for \$250, due October 1, 1918, and one other for \$250, due February 1, 1919, each of said notes bearing interest from date until paid, and each of said notes containing the recital, "Cash rent note to accompany lease of even date herewith;" that respondent under said lease went into possession of said land, and in the springtime of 1918 planted agricultural crops such as corn, wheat, and other grains; that on the 3d day of July, 1918, said Margaretha Boll, for full value, sold and assigned the said notes and lease to the appellant; and that on the 8th day of July, 1918, the said Margaretha Boll died.

It is the contention of respondent that upon the death of the life tenant, under the facts of this case, the remaindermen became entitled to the rents of said land, as evidenced by said notes, and that the respondent, as the undertenant of the life tenant, upon her death, ceased to have any right, title, or interest in and to any part of said rents as represented by said notes. The sole question involved is one purely of law, to be determined from the said conceded facts. We are of the opinion that respondent, as the undertenant of the owner of the life estate, has the same substantive rights, in relation to said crops, that the said life

tenant herself possessed. If said Margaretha Boll herself had occu-

Life tenant—
right of tenant
to harvest crop
after life ten-
ant's death.

piated said premises and had planted and sown said crops, the same as did the respondent, after her death her personal representatives would have been entitled to harvest and receive the proceeds of said crops, and would have been entitled to retain possession of said lands for the purposes of maturing, cultivating, growing, harvesting, and securing the said crops so sown and planted during the lifetime of said life tenant. The respondent, as such undertenant, notwithstanding the death of his landlord, the life tenant, was

entitled to the whole of said crops and the proceeds thereof, grown on said land under said lease, and was entitled to possession of, and to go upon, said premises, and occupy the same under the said lease for the purpose of cultivating, harvesting, and securing said crops as emblements. It is a general rule that if one's estate in land comes to an end at a time which he could not have previously ascertained, without his fault, and without any action on his part to bring about such result, he is entitled to take the annual crops planted by him before the termination of such estate. This right is ordinarily referred to as the right or doctrine of "emblements," and is based upon the justice of assuring to the life tenant compensation for his labor, and also upon the desirability of encouraging husbandry as a matter of public policy. One holding under a lease from a life tenant is entitled to the benefit of the rule. *Tiffany, Land. & T.* § 251, p. 1635; *21 C. J.* 945; *Noble v. Tyler*, 61 Ohio St. 432, 48 L.R.A. 735, 56 N. E. 191; *Blaeholder v. Guthrie*, 17 Cal. App. 297, 119 Pac. 524. The respondent, therefore, was entitled to and did receive the substantial consideration for which said notes in question

were given. There has been no failure of consideration.

The judgment and order appealed from are reversed, and the cause remanded, with directions that judgment be entered on the findings in favor of appellant for the amount of principal and interest due on said notes.

Petition for rehearing denied.

NOTE.

The death of a life tenant as affecting rights under a lease executed by him is the subject of an annotation in 6 A.L.R. 1506, which is supplemented by the annotation following *WYANDT v. MERRILL*, post, 659.

The respective rights, after the death of the life tenant, of the remainderman and an assignee of rent notes given the life tenant, were involved in *STRAND v. BOLL* (reported herewith) ante, 652. The court, being of the opinion that the lessee of the life tenant was entitled to the annual crops planted before the termination of the life estate, held that the consideration for the notes had not failed, and the assignee could recover.

C. C. WYANDT, Exr., etc., of James Strachan, Deceased, Appt.,
v.

ARTHUR MERRILL et al.

Kansas Supreme Court — November 6, 1920.

(107 Kan. 661, 193 Pac. 366.)

Descent — lease of farm — share of crop.

1. Except as the rule may be modified by statute, where one having the title to a farm for his own life leases it for a share of a wheat crop delivered at market, and dies after the crop is sown and before it has matured, his estate is not entitled to any part of the crop.

[See note on this question beginning on page 659.]

— effect of statute.

2. The common-law rule referred to in the foregoing paragraph is not abrogated by the statute which de-

clares the lessor whose rent is payable in a share of the matured crop to be the owner of such share, because such ownership does not attach until the maturity of the crop.

Headnotes by MASON, J.

(Dawson, J., dissents.)

APPEAL by plaintiff from a judgment of the District Court for Dickinson County (King, J.) sustaining a demurrer to a petition filed to recover the value of wheat alleged to have been unlawfully converted by defendants. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. C. S. Crawford and E. S. Crawford, for appellant:

Under the statute and the common law one third of the wheat crop belonged to plaintiff as executor of the estate of Strachan.

4 Am. & Eng. Enc. Law, 896; Hatch v. Hart, 40 N. H. 98; Taylor v. Bradley, 39 N. Y. 140, 100 Am. Dec. 415; Guest v. Opdyke, 31 N. J. L. 554; 1 Co. Litt. p. 55, note 1; 2 Bl. Com. 122; Bradley v. Bailey, 56 Conn. 374, 1 L.R.A. 427, 7 Am. St. Rep. 316, 15 Atl. 746; McAdam, Land. & T. 3d ed. p. 760; 16 Cyc. 620; Poindexter v. Blackburn, 36 N. C. (1 Ired. Eq.) 286; Thornton v. Burch, 20 Ga. 791; Reilly v. Ringland, 39 Iowa, 106; Dorsett v. Gray, 98 Ind. 273; Wilhoit v. Salmon, 146 Cal. 444, 80 Pac. 705; Noble v. Tyler, 61 Ohio St. 432, 48 L.R.A. 735, 56 N. E. 191.

Messrs. G. W. Hurd, Arthur Hurd, and Bruce C. Hurd, for appellees:

The rent for the premises, consisting partly of the wheat in question, did not become due until the crop was harvested and the grain divided, which was some months after the death of the life tenant, and therefore such rent became the property of the remainderman.

24 Cyc. 1467, 1469; Mull v. Boyle, 102 Kan. 579, L.R.A.1918D, 664, 171 Pac. 652; Lamb v. Lemon, 103 Kan. 607, 177 Pac. 4; 8 R. C. L. p. 375; Sanders v. Sutlive Bros. 6 A.L.R. 1508, note.

Mason, J., delivered the opinion of the court:

On February 22, 1918, James Strachan, being the owner of a quarter section in the southwestern part of Dickinson county, executed to Hannah Merrill, a miner, a deed therefor, reserving to himself the possession, rents, profits, and control during his lifetime. A crop of wheat was sown on a portion of the farm in the fall of 1918 by Clarence Holmes, as a tenant of Strachan. By the terms of the tenancy Holmes was to deliver to Strachan at market one third of the wheat grown on the place during 1918 and 1919.

Nothing further is disclosed as to the character or conditions of the lease. Strachan died March 13, 1919. The wheat was presumably harvested by Holmes, whose right to retain two thirds of it is not challenged. The executor of Strachan, claiming to have been entitled to one third of the wheat, amounting to 415 bushels, brought this action against the guardian and Holmes for its value, charging them with its conversion. A demurrer was sustained to the petition, which stated substantially these facts, and the plaintiff appeals.

The reservation in the deed executed by Strachan was merely of a life estate. There was nothing in the phrase employed in this connection to indicate a purpose to reserve anything further. The rent being payable in wheat delivered at the market, there is a fair implication that the grain was all the landlord was to receive of this crop. Mull v. Boyle, 102 Kan. 579, L.R.A.1918D, 664, 171 Pac. 652. The question involved is therefore this: Where one having the title to a farm for his own life leases it for a share of the harvested annual crop, and dies after the crop is planted and before it has matured, does such share go to his estate?

Under the common law, if the life tenant sows a crop and dies before its maturity, it goes to his personal representative under the doctrine of emblements. 8 R. C. L. 365; 17 R. C. L. 634; 8 Am. & Eng. Enc. Law, 318; 16 Cyc. 621. If he dies between seedtime and harvest after having procured a "cropper" to operate the farm for a share of the crop, he is regarded as having had possession of the land, and as having owned the growing crop or an interest therein (24 Cyc. 1464; 17 C. J. 382, 383; 8 R. C. L. 373, 374), and the title passes to his estate, perhaps in conjunction with the

cropper, the remainderman taking nothing (*Vawter v. Frame*, 48 Ind. App. 481, 96 N.E. 35). If, however, he leases the land for a cash rent payable at a date subsequent to the harvest, and dies before the maturity of the crop, the lease comes at once to an end, the remainderman becoming entitled to possession of the land, the lessee, however, owning the crop and having the right of ingress and egress for the purpose of caring for and harvesting it. See the authorities concerning emblements already cited. In such a case the lessee is not required to pay rent to anyone; not to the lessor, because it had not fully accrued during the existence of the lease, and the common law permits no apportionment; and not to the remainderman, because he was a stranger to the lease, which could not inure to his benefit because it had ceased to exist the moment his title accrued. 2 Cooley's Bl. Com. p. 124; 1 Cooley's Bl. Com. 4th ed. p. 1072; 1 Tiffany, Land. & T. § 176, p. 1072; 1 Washburn, Real Prop. 6th ed. § 245. The unfair advantage thus given to the lessee has been corrected in England by a statute (11 Geo. II. chap. 19, § 15) allowing the executor or administrator of the life tenant to recover so much of the rent as was proportioned to the part of the rental period which had elapsed at the time of his death. A number of American states (Kansas not being among them) have enacted similar statutes. 1 Tiffany, Land. & T. § 176, p. 1077, note 383.

It follows that the plaintiff in the present case—the executor of the

**Descent—lease
of farm—share
of crop.**

life tenant—has no
right of recovery
under the common

law unless by reason of the fact that the rent was to be paid in a share of a crop instead of in money or some other form of property. It had not accrued at the time of the landlord's death. "Rents have not accrued until they become due, and grain rent, to be paid at threshing time, does not become due until that time." *Vawter v. Frame*, supra.

If his executor is entitled to a share of the matured crop when the rent is payable in that commodity, and not otherwise, it must be upon the theory that in that situation the life tenant is the owner or part owner of the growing crop. This is a matter concerning which there is some difference of judicial opinion. When land is leased for a part of the crop, the more usual view is that the landlord has no title to any part of the crop until its division (24 Cyc. 1469, 1470; 8 Am. & Eng. Enc. Law, 2d ed. 317); from which it would result that on the death of a landlord having only a life estate, between sowing and reaping, his executor or administrator would take nothing. See *Jennings v. Hembree*, — Ind. App. —, 124 N. E. 876; *Osborne v. Osborne*, — Tex. Civ. App. —, 138 S. W. 1062; *Borie v. Crissman*, 82 Pa. 125. In a dictum in *Wilhoit v. Salmon*, 146 Cal. 444, 80 Pac. 705, it is assumed that under such circumstances the landlord's share of the crop would go to the personal representative of the life tenant, but the suggestion that the payment of the rent had not become due at the time of his death does not appear to have been considered. It is said that tenancy in common in the crop results from an agreement to cultivate land on shares (24 Cyc. 1471; 8 Am. & Eng. Enc. Law, 2d ed. 325), or any "contract whereby the use of land is given to a person to cultivate and return to the owner a specified portion of the crop produced" (8 R. C. L. 374). The words just quoted have obviously something of a common origin with a part of this language: "Every form of agreement by which land is let to one who is to cultivate the same and give the owner as a compensation therefor a share of the produce creates a tenancy in common in the crops. An agreement to cultivate land on the shares is not a lease." *Freeman, Cotenancy & Partition*, 2d ed. § 100.

In a later note by the author of this text the proposition is stated in this form, which is warranted by a

number of well-considered cases: "Every form of contract by which the use of land is given to one who is to cultivate it and give the owner, as compensation therefor, a share of the produce, creates a tenancy in common in the crop, and this is so whether the agreement between the parties is a lease or a mere cropping contract." Note in 98 Am. St. Rep. 959.

There is some confusion in the decisions, growing out of the difficulty in classifying particular contracts as leases or as croppers' agreements, and some actual conflict. See note in 37 Am. Dec. 317; 2 Tiffany, Land. & T. § 253b. We accept the view, however, that where the relation of landlord and tenant exists, the landlord, at the common law, has no title to the growing crops (in the absence of special provision of the contract to that effect), although the rent is to be paid in a share of a matured crop; that there is a real distinction in this regard between a lease of the land, the rent being payable in a share of a specified crop, and a contract for its cultivation on shares. The fact that the income to be derived by the owner from his land is made to depend upon the prosperity of the season gives the transaction something the color of a joint enterprise, but is not sufficient to change its essential character. In a particular case the question whether the relation of the parties is that of landlord and tenant, employer and employee, or participants in a common venture, must turn upon their actual intention as gathered from the entire contract; the use of such words as "lease" or "rent" not being necessarily controlling. Here there is nothing in the pleading to show that they were anything but those of lessor and lessee. It results from this view that, except as the common law may be modified by statute, the share of a crop that would go to a life tenant as rent if he lived, in the event of his death before its maturity, does not go to his estate.

2. The plaintiff contends, however, that, under the situation pre-

15 A.L.R.—42.

sented, the landlord owned a third interest in the growing crop in virtue of the statute reading: "When any such rent is payable in a share or certain proportion of the crop, the lessor shall be deemed the owner of such share or proportion, and may, if the tenant refuse to deliver him such share or proportion, enter upon the land and take possession of the same, or obtain possession thereof by action of replevin." Gen. Stat. 1915, § 5980.

To determine the meaning of the term "such rent" it is necessary to examine the preceding section, which reads: "Any rent due for farming land shall be a lien on the crop growing or made on the premises. Such lien may be enforced by action and attachment therein, as hereinafter provided." Gen. Stat. 1915, § 5979.

It will be noted that in the provision last quoted the only qualifying word applied to the rent of farming land is "due." It is true that that word is often used in the sense of "owing," and applied to an indebtedness irrespective of its maturity. But some qualification is needed to arrive at a reasonable interpretation. It cannot be supposed that the legislature intended that the landlord should have a lien upon the crop of each season for the entire rent that would eventually accrue upon a lease covering (for instance) a period of five years. A natural plan would seem to be to have the crop of each year stand as security for the rent of that year, but no such purpose is expressed. We conclude that the word "due" was used with the intention of limiting the amount of rent for which a lien is given to such as had matured,—that for which the tenant was in arrears. It is true that in one instance this court has upheld a lien claimed for rent which had not matured, but the point now under discussion was not there raised or considered. *Neifert v. Ames*, 26 Kan. 515.

The rent referred to in § 5979 being that which had become due. the phrase "any such rent," as used in § 5980, is naturally to be inter-

preted as meaning matured rent. This construction is the more readily to be adopted because of the context. The section provides not only that the lessor shall be deemed the owner of a share of the crop to which reference is had, but that he may, if the tenant refuse to deliver it, take possession of it or maintain replevin. Obviously, within the meaning of the statute, the tenant could not refuse delivery of a part of the crop, nor could the lessor take possession of it until it had been harvested, or, at all events, until it had matured. It is held that, where a growing crop is destroyed by the tortious act of a third person, the landlord has such an interest that he may maintain an action for damages. *Sayers v. Missouri P. R. Co.* 82 Kan. 123, 27 L.R.A. (N.S.) 168, 107 Pac. 641. But in that situation, the ripening of the crop having been prevented, the maturity of the lessor's claim for rent may be regarded as having been thereby accelerated.

—effect of
statute.

We conclude that, where rent is payable in a share of the crop, the statute does not give the lessor any title thereto prior to its maturity, and therefore that the rule of the common law as to the disposition of the landlord's share in the circumstances stated still controls.

The provision of the statute that "rents from lands granted for life or lives may be recovered as other rents" (Gen. Stat. 1915, § 5972) has no bearing on the question here involved; its obvious purpose being to do away with the ancient rule that no action of debt lay for a freehold rent, reserved on a lease for life, during the continuance of the freehold out of which it issued. 3 Bl. Com. pp. 231, 232; 2 Cooley's Bl. Com. 4th ed. 1023.

The judgment is affirmed.

Dawson, J., dissenting:

The question involved in this case is not touched by our statutes, except in the general provision that the common law, so far as applicable to the conditions and wants of our

people, shall remain in force in aid of the general statutes. Gen. Stat. 1915, § 11,829. It is a rule of the common law that if a tenant for life sows the land and dies before harvest, the crop shall inure to the benefit of his estate. It is not suggested that this particular rule of the common law is unsuitable to Kansas conditions. In 2 Bl. Com. *122 (1 Cooley's Bl. Com. 4th ed. 527), it is said: "Tenant for life, or his representatives, shall not be prejudiced by any sudden determination of his estate, because such a determination is contingent and uncertain. Therefore, if a tenant for his own life sows the lands and dies before harvest, his executors shall have the emblements or profits of the crop; for the estate was determined by the act of God, and it is a maxim in the law that *"actus Dei nemini facit injuriam"* (the act of God injures no man). The representatives, therefore, of the tenant for life, shall have the emblements to compensate for the labor and expense of tilling, manuring, and sowing the lands; and also for the encouragement of husbandry, which, being a public benefit, tending to the increase and plenty of provisions, ought to have the utmost security and privilege that the law can give."

I deem it immaterial whether the life tenant sows the crop with his own hands, or by hired servants, or by a contract with another person for a share of the crop. The important matter is that the life tenant cause the crop to be sown, not the details by which he effects that object. The majority opinion sustains this view, and cites ample authorities in its support. It seems to me that that point should settle this case. I therefore dissent.

A petition for rehearing having been filed, **Mason, J.**, on January 8, 1921, handed down the following additional opinion (108 Kan. 204, 194 Pac. 634):

In a motion for a rehearing, the appellant cites *Howell v. Pugh*, 27 Kan. 702, as deciding that, where rent is to be paid by the tenant de-

livering a fractional part of a matured annual crop, the title to a share in the crop vests in the landlord before maturity. What was actually there decided was that in such a situation, while the crop was still growing, the landlord could make a valid transfer to another of all his rights with reference thereto, and that thereafter it would be beyond the reach of his creditors. The transfer there made was evidenced by a writing acknowledging the receipt of the purchase money for the landlord's share of the crop, and including an order to the tenant to deliver it to the person who had made the payment. In the opinion the transaction is spoken of as the passing of title to the crop by a sale. It might appropriately have been described as an assignment of all the rights of the landlord with respect to the crop,—in effect, an assignment or sale of the rent to become due,—which substituted the

assignee as the person to whom the tenant was required to account, and left no right in the landlord in that regard, thus effectually preventing his creditors from subjecting the crop to the payment of their claims. This aspect of the matter is to some extent recognized in the opinion by a quotation from a text-writer to the effect that, "if . . . possibilities are distinctly connected with interest or property, they may be sold." 27 Kan. p. 706.

See also 5 C. J. 854-859, 971, 972; note in 56 Am. St. Rep. 343-345. We do not regard the case as determining that, because a landlord is to receive as rent a share of a crop at its maturity, the title thereto vests in him before it matures.

The court adheres to the views expressed in the original opinion, and the motion for a rehearing is overruled.

All the Justices concur.

ANNOTATION.

Death of life tenant as affecting rights under lease executed by him.

The effect of the death of a life tenant on rights arising under a lease executed by him is discussed at length in the annotation in 6 A.L.R., beginning at page 1506. WYANDT v. MERRILL (reported herewith) ante, 654, is of considerable interest, dealing, as it does, with a situation which seems to have been but little discussed; viz., the conflicting claims of the remainderman and the personal representative of a deceased life tenant to the lessor's share of a crop to be rendered as rent, the crop being

unmatured at the time of the death of the life tenant. The court, while calling attention to the fact that statutes have been passed in many jurisdictions requiring the crop to be prorated, holds that in the absence of such a statute the remainderman takes the entire reserved share of the crop. This result, the court holds, is not affected by a statute declaring a lessor to be the owner of the share of a crop reserved as rent, "because such ownership does not attach until the maturity of the crop." W. A. S.

CLARENCE CARROLL, by Next Friend, Plff. in Err.,
v.
ATLANTIC STEEL COMPANY.

Georgia Supreme Court — April 13, 1921.

(— Ga. —, 106 S. E. 908.)

Judgment — consent — effect on infant.

1. Where proceedings in court for a minor by next friend to recover damages for injuries sustained by the minor from alleged negligence of the defendant are merely formal, and are brought in the name of the minor by an attorney employed by a company which has insured the defendant against damages resulting from injuries to defendant's employees, only to effectuate a settlement alleged to have been agreed upon between the parties, and where in such case verdict and judgment for a nominal amount are taken for the plaintiff, and there is no judicial investigation of the facts upon which the right or extent of the recovery is based, a judgment rendered in pursuance of such agreement, even if by consent, is only colorable, and will be set aside in a proper proceeding, when its effect, if allowed to stand, would be to bar the infant's substantial rights.

[See note on this question beginning on page 667.]

Appeal — nonsuit — error.

2. The court erred, under the pleadings and the evidence, in awarding a nonsuit.

Headnotes by HILL, J.

ERROR to the Superior Court for Fulton County (Bell, J.) to review a nonsuit in an action brought to set aside a judgment alleged to have been fraudulently obtained by defendant. *Reversed.*

Statement by Hill, J.:

Clarence Carroll, suing by Odessa Carroll, as his next friend, brought an equitable petition against the Atlantic Steel Company, and alleged in substance as follows:

About May 13, 1918, while employed by the defendant, the plaintiff was injured and damaged in the sum of \$25,000, having lost his left leg through the defendant's negligence. About September 3, 1918, the plaintiff believed that he effected a valid settlement of his damages by having received a contract for permanent employment with the defendant, and continued in such belief until about May 1, 1919, when he was discharged by the defendant; and, having employed counsel, he has been told that on September 3, 1918, a judgment was rendered in

the city court of Atlanta in his favor as plaintiff against the defendant for the sum of \$450, by which it was attempted to fully satisfy plaintiff's claim. The judgment was obtained by fraud by the defendant and is void; and the present suit is brought for the purpose of setting aside the judgment, and for damages for the tort referred to.

The fraud complained of was as follows: On May 13, 1918, the plaintiff received an injury while working for the defendant, which resulted in the amputation of his left leg. After several weeks, and after plaintiff had partially recovered from his injuries, the superintendent of the defendant sent for the mother of plaintiff, for the purpose of making a settlement. Plaintiff and his mother went to the plant

of the defendant, where they met the superintendent and the insurance adjuster hereinafter referred to. A settlement was agreed upon by the superintendent and plaintiff's mother, upon the following terms: Defendant was to pay plaintiff's mother \$350 in full settlement for her damages (\$50 of which had already been paid), and give permanent employment to plaintiff, and an artificial leg as soon as he was fully grown. Plaintiff and his mother were then told by the superintendent to get into defendant's automobile in company with its physician and go to the office of defendant's attorney, who would pay the \$300. The defendant carried insurance against loss for damages to employees with the Travelers' Insurance Company. The adjuster for the insurance company had employed the attorney of defendant before their arrival at his office. The insurance company, through its adjuster, gave instructions to the attorney as to what to do regarding the settlement; and the attorney followed the instructions, and his employment was from the insurance company acting for the defendant, and not for plaintiff or his mother, and he was paid by the insurance company, and he recognized and considered that he was representing the insurance company, and not plaintiff or his mother. The defendant and the insurance adjuster fraudulently withheld from the attorney the information regarding the lifetime employment for plaintiff. The attorney gave plaintiff's mother \$10 to bind the settlement with her, and told her to return in September and he would pay her the balance of \$290. Plaintiff alleges that he and his mother relied on the confidence and the honesty of the agents of the defendant, because they were ignorant in such matters, could not read or write, and were not able to understand the methods necessary to effect a valid settlement on the terms mentioned. Plaintiff's mother in September, 1918, received \$290 in accordance

with the terms of settlement. Neither plaintiff nor his mother was told by defendant or by the attorney that a suit was to be brought; and the suit referred to was wholly without the authority, knowledge, or consent of plaintiff or his mother. The defendant did give plaintiff employment for a few months, but about May 1, 1919, without cause, discharged him. He and his mother did not know that the contract relating to employment should have been entered into in writing and made a part of the judgment of the court, and they accepted the money believing that the other terms of the settlement were binding on the defendant and would be carried out in good faith with plaintiff.

There was great disparity between the mental ability of plaintiff and his mother and the agents of the defendant, and especially the adjuster. This fact, coupled with the other fact that defendant only paid \$350 to satisfy a just claim of \$25,000, is fraud; and the plaintiff sets this up as an additional ground for disregarding the judgment herein referred to. He has been advised by counsel that a named attorney on June 27, 1918, filed a suit in behalf of plaintiff by his mother, as next friend, against the defendant, for the sum of \$25,000, a copy of which petition is annexed hereto. The defendant filed its answer to the suit, copy of which is also attached. The name of W. P. Tillinghast appears as defendant's attorney. Plaintiff is advised that Tillinghast was really one of the insurance adjusters for the Travelers' Insurance Company, and had no retainer or authority as attorney directly from the defendant, and that on September 3, 1918, a consent verdict and judgment were taken in the case for \$450 and cost, a copy of which verdict and judgment is attached to this petition. The named attorney who filed the suit on June 27, 1918, filed with the clerk of the superior court a next friend's bond, and furnished as security a clerk employed by the attorney at that time. The

filing of the suit, the taking of the verdict and judgment, and the executing of the bond, were all without the knowledge, authority, or consent of plaintiff and his mother. The effect of the action of the defendant, through its agents, employing the named attorney, and not carrying out the contract of settlement made, was a fraud upon plaintiff. Plaintiff has just discovered the fraud, and comes into a court of equity and asks relief against such judgment. The money received by his mother was tendered back to the defendant.

The merits of his action against the defendant arise out of the following facts: The defendant is a corporation engaged in the manufacture of iron and steel products; and to this end it uses in and about its plant locomotives, cars, and railroad tracks. On May 13, 1918, the plaintiff was in the employment of the defendant at its plant. The particular work which he was employed to do was to clean pans from engines in the yard; and this was a safe place at which to work. It was specifically agreed between his mother (he being a minor and under her care and custody) and the superintendent of the defendant that plaintiff was not to be given dangerous employment; and his mother warned the superintendent not to place her son at work on the cars or engines of the railroad; and it was then agreed by the superintendent that he should not be so placed. He was young and inexperienced, being seventeen years of age and small for his age, being of the size and development of a boy about fourteen or fifteen years of age. He did not know the dangers incident to coupling and switching cars and performing the duties of a switchman; and on account of his inexperience and immature judgment he was not cognizant of the obvious danger to which he was exposed, and did not appreciate the same. Although the defendant knew of his youth, inexperience, and inability to comprehend the dangers of his

employment, and knew that he was not cognizant of the dangers, he received no instructions and was not warned of the danger. On the date of the injury he was placed at work coupling cars in the yards where there was an engine known as a "dinkey engine" used in switching cars. The cars being switched were equipped with pans in which were loaded scrap iron. Usually a car has four pans, which extend up to either end of the car, and the engine is coupled to cars by means of a bolt or rod about 3 feet long, which fits over a catch or device which thus attaches the engine to the cars. On the night the injury occurred the "dinkey engine" was backing up to take on a train of about three cars which had just been set in from an adjoining track. Plaintiff gave the signal for the engineer to back up so as to get close enough to make the coupling. The engine came back, but owing to defective brakes it could not be stopped by the engineer in time; and while plaintiff was holding the 3-foot coupling bolt and was ready to fit it in place so as to complete the coupling, and while in the exercise of his duty in that regard, the force of the engine, which was beyond the control of the engineer because of the defective brakes, drove the bolt and the engine up to, against, and upon the car in such a way as to catch plaintiff's leg and almost sever it from his body. The car next to the "dinkey engine" was a three-pan car, and there was room for the engine to be pushed upon it so as to be on the space usually occupied by the pan. There was no escape from being caught. The engine came suddenly and unexpectedly, and plaintiff could not have avoided the accident. The engine should have been equipped with bumpers, or other device designed to protect persons who couple cars. Plaintiff objected to the new employment, and asked to remain on his old job; but he was told by the foreman that he could do the work all right, and that he must do it or be discharged; and,

disregarding the agreement with his mother, defendant forced him from a safe place, that of cleaning pans, to a place as switchman coupling cars at night in the railroad yards operated by the defendant. A number of acts of negligence on the part of the defendant are alleged.

Plaintiff was without fault, and his injuries were the result of negligence and carelessness on the part of the defendant. At the time of the injuries plaintiff was strong and healthy, and earning the sum of \$2.50 a day; and but for the injury he would now be able to earn at least \$4 per day. His injuries are permanent and he will always be a cripple; his earning capacity has been diminished at least one half as the result of losing his leg; he has suffered much pain and agony, and continues to suffer pain. The prayer is that the verdict and judgment for the sum of \$450 and costs in favor of the plaintiff be declared a nullity, and that he have judgment in the sum of \$25,000 for his damages.

The defendant filed an answer in which it denied all the material allegations of the petition, and averred that the claim of the plaintiff for the injuries sustained was settled by defendant with plaintiff and his mother, that his suit was filed to legally effect said settlement, that the attorney in that suit was regularly employed by plaintiff and his mother and represented them, and that in and about the suit and the settlement there was no fraud or misrepresentation of any kind; and defendant pleads the verdict and judgment in that suit in full settlement and satisfaction of the alleged claim set forth in the present suit and in bar of any recovery. After evidence was offered by the plaintiff the court awarded a nonsuit, and the plaintiff excepted.

Messrs. W. S. Dillon, C. M. Lancaster, and William J. Davis, Jr., for plaintiff in error.

Messrs. C. T. Hopkins, J. L. Hopkins, and McDaniel & Black for defendant in error.

Hill, J., delivered the opinion of the court:

This was an equitable action brought by Clarence Carroll, a minor, by his mother as next friend, to set aside a judgment rendered in the city court of Atlanta on September 3, 1918, in his favor against the Atlantic Steel Company as defendant, in which a verdict and judgment were entered for \$450, by which it was attempted to fully satisfy the plaintiff's claim for damages against the defendant, alleged to have been sustained by him while an employee of the defendant. The petition also had for its purpose the recovery of damages to the amount of \$25,000. One of the questions to be determined in the case is whether, under the allegations of the petition and the evidence thereunder, the verdict and judgment of the city court should be set aside on the ground of fraud in their procurement, and the plaintiff be allowed to go to the jury on the questions at issue in the case.

The case of *Missouri P. R. Co. v. Lasca*, 79 Kan. 311, 21 L.R.A. (N.S.) 338, 99 Pac. 616, 17 Ann. Cas. 605, was similar in its facts to the instant case. There, in a suit commenced by Charles Lasca, a minor six years of age, by Nick Lasca, his father and next friend, to set aside a judgment rendered in the same court in favor of Nick Lasca and Anna Lasca, father and mother and next friends of Charles Lasca, a minor, plaintiff, against the Missouri Pacific Railway Company, defendant, for \$95 and costs, the petition alleged that the defendant caused the judgment to be rendered against itself; that there was no trial upon the pleadings and proofs, nor upon the merits of the case, and no proof was made and no evidence offered and no damages assessed by the court; that the proceeding was without the knowledge or consent of Nick Lasca or Anna Lasca, and the judgment was obtained for the purpose of defrauding the plaintiff by barring the cause of action set up in the petition therein; that the

plaintiff had a good cause of action for injuries caused by the negligence of the defendant, and still had such cause of action, unless barred by the judgment, which he asked to have set aside accordingly. The defendant answered by a general denial and a plea to the jurisdiction of the court. Upon the trial of that case the court made findings of fact from which it appears that Nick Lasca, an Italian employee of the Missouri Pacific Railway Company, with Anna, his wife, and their son, Charles, about eighteen months of age, were living in a bunk car on a sidetrack. Another car, upon which was a water tank, was standing near by on another sidetrack. Mrs. Lasca went to the water tank to draw water for domestic use, leaving the boy with his grandmother in the bunk car. While the mother was thus absent the boy left the bunk car, went to the other sidetrack, and put his hands on the rail near the tank car. Just at that time an incoming freight train moved the tank car so that a wheel passed over the boy's hands, crushing and bruising them. Negotiations were opened between the defendant's claim agent and the parents of the child, resulting in an agreement in writing whereby the parents agreed to accept \$100 from the defendant in full of all claims for the injury, to be paid through a friendly suit to be instituted in a certain court. This sum was to cover all claims of the parents as well as of Charles Lasca, and was to be divided as the attorneys for the defendant might deem proper. In pursuance of this agreement the parents went to the office of the defendant's attorney at the request of the claim agent, and there met the company's attorneys and Pittman, another attorney, who was then in the office, with whom they consulted about the matter. The petition, answer, and reply in the proposed action had been prepared by the defendant's attorneys. The petition and reply were signed by Pittman as attorney for the plaintiff; the

papers being entitled "Nick Lasca and Anna Lasca, Father and Mother and Next Friends of Charles Lasca, a Minor, Plaintiff, v. The Missouri Pacific Railway Company, Defendant." The petition stated a cause of action for the injuries to Charles Lasca, and prayed for a judgment for \$100. The answer contained a general denial and a plea of contributory negligence, and was signed by the defendant's attorneys. Nick Lasca and Anna Lasca and the attorneys named then proceeded to the court of common pleas, filed the papers, and presented them to the court; and the attorney for the defendant informed the court that this was a friendly suit for the settlement of the claim against the company, and that he wished to have judgment entered against the company, in accordance with the settlement, for \$95 and cost. The judge, the court being regularly in session, then called Nick Lasca and Anna Lasca and inquired of them whether the settlement was satisfactory. They stated that it was, and that they desired to have judgment entered accordingly. The judge informed them that, if a judgment was entered, it would cut off all claims of the child for further damages; and thereupon judgment was entered for \$95 and costs, by consent of the parties. There was no trial of the issues; and no evidence was introduced, except the statement of the parties present to the effect that the child had been injured by the defendant company, and that the parents had effected a compromise and settlement, and that the amount agreed upon was satisfactory. The judge made an entry upon his trial docket as follows: "September 9, 1901. Judgment for plaintiff for \$95 and costs, by consent and agreement of all parties."

Thereupon a judgment was entered upon the journal of the court in ordinary form, etc. In affirming a later ruling of the trial court setting aside this judgment, the supreme court of Kansas, speaking

through Benson, J., said: "While in this case the court did exercise some supervision over the agreement, it did not judicially examine the facts to determine whether the agreement was reasonable and proper. The court merely approved what the next friend had done, not because it found that it was for the best interests of the infant, but because the consent of the parents had been given and they were still satisfied. The duty of the court, stated in many decisions, and referred to in the recent case of *Crapster v. Taylor*, 74 Kan. 771, 87 Pac. 1138, to protect the interests of infants, was not performed by inquiring of the parents if they were satisfied with the agreement. It may be that some of the cases above cited have carried the doctrine to an extreme limit. The next friend must not be denied such necessary incidental powers as will facilitate the fair adjudication of the infant's rights. This is necessary to their proper vindication, both in prosecution and defense. Where a compromise is fairly incidental to an action regularly brought, and is upon due judicial examination approved, the judgment, if not otherwise impeached, may be conclusive as in the case of adults; but where the proceedings in court are merely formal and instituted and carried on only to give an apparent sanction to the agreement, and there is no judicial investigation of the facts upon which the right or extent of the recovery is based, the judgment so entered by consent is only colorable, and must be set aside in a proper proceeding when its effect, if allowed to stand, would be to bar the infant's rights. In such a case the proceeding in court should be regarded 'as but formal and as intended solely to employ the functions and powers of the court to give validity to the prior agreement.' *Pittsburg, C. C. & St. L. R. Co. v. Haley*, 170 Ill. 610-613, 48 N. E. 920. See also *Long v. Mulford*, 17 Ohio St. 484, 93 Am. Dec. 638; *Waterman v. Lawrence*, 19 Cal. 210, 79 Am. Dec. 212; *Kromer v. Friday*,

32 L.R.A. 671, and note (10 Wash. 621, 39 Pac. 229); *Gooch v. Green*, 102 Ill. 507; *Ralston v. Lahee*, 8 Iowa, 17, 74 Am. Dec. 291. The conclusion of the trial court that no fraud in fact was committed in this transaction cannot affect the right of the infant to relief. The judgment so set aside would have been an absolute bar to the prosecution of his claim, and thus he would have been deprived of his legal rights without authority. The motive of the actors does not avoid the consequences of the act. The parents had no power to consent to the judgment; having no other sanction, it cannot stand."

And see, to the same effect, *Leslie v. Proctor & G. Mfg. Co.* L.R.A. 1918C, 55, and note (102 Kan. 159, 169 Pac. 193). In the latter case it was held that "where a minor has sustained personal injuries, which his father and the wrongdoer settled for an inadequate sum, such minor on attaining his majority may bring an action against the wrongdoer for his injuries, notwithstanding the settlement negotiated by his father."

See, also, as to the powers and duties of next friends and guardians *ad litem*, 14 R. C. L. 288, 289, § 56, and cases cited.

Without adopting the views of the court in the *Lasca Case*, *supra*, in extenso, we think the ruling upon the question we are now considering is sound. This is not a case where a lawyer is really employed by the parties and a judgment is entered under a bona fide agreement of settlement. The attorney in this case, while nominally representing the plaintiffs, was, as a matter of fact, employed by the adjuster of the insurance company to effect the settlement for the steel company. The attorney testified that "Mr. Coppix [the insurance adjuster] phoned me that he had a case that he wanted to give me, and I told him I would be glad to get it. He said he had a boy injured by the steel company, and they had agreed upon a settlement of the case, and that it would be necessary, he being a minor, to

take a consent verdict in it, and that he would send the boy to my office, which he did. In about an hour after that they came to my office. I had never seen them before, and didn't know anything about them until that occurred. They told me the same that Mr. Coppix had, and wanted the suit filed so they could get their money; and I took the case for the steel company. Mr. Coppix said he would pay my fees in addition to what he would pay them, which he did. Mr. Coppix told me they had agreed upon a settlement of \$300. . . . I think my fee was \$150. I did not introduce any evidence in behalf of the plaintiff to the court and jury when the verdict was taken. No, sir; the court did not ask the plaintiff any questions as to the merits of the case. Odessa Carroll and Clarence Carroll were not present at the trial when the verdict was taken. No, sir; I did not notify Odessa Carroll or Clarence Carroll to be in court that day; it wasn't necessary; they knew when the court was to meet," etc.

It will be observed that in the *Lasca* Case, 79 Kan. 311, 21 L.R.A. (N.S.) 338, 99 Pac. 616, 17 Ann. Cas. 605, the parents of the minor child did go before the court and stated that they desired to have judgment entered according to the agreement they had entered into. But in the present case the record shows that neither the plaintiff nor his mother, who was acting as next friend for him, went before the court, and no testimony was offered as to the merits of the case, and these were not inquired into by the court. The petition in the case alleges a cause of action, and under it the plaintiff sought to recover \$25,000 damages for the loss of his leg. The damages alleged were far in excess of the amount paid. The evidence of the plaintiff was sufficient to authorize a jury to find for the plaintiff in some substantial amount for the injury alleged to have been sustained by him. Besides, the amount which was actually paid, the sum of \$300, was paid to the mother as next friend, and

not to the plaintiff. The evidence of the plaintiff was to the effect that in the agreement of settlement he was to receive a lifetime job with the defendant; and in corroboration of this contention on the part of the plaintiff he was given employment after he had recovered from the amputation of his leg. He was receiving the sum of \$3.50 per day as wages when hurt, and \$2.80 per day when he was discharged, and received no further compensation for his injury. It is true that the evidence is conflicting upon the question as to whether, under the terms of the settlement, the plaintiff was to receive a lifetime job with the defendant; and this being so, we think the case should have been submitted to a jury under proper instructions. Under the facts of this case we hold that no settlement was made that had judicial sanction. The settlement was made out of court, and the verdict and judgment were purely perfunctory, and no investigation was made before the court and jury as to the reasonableness of the settlement and as to whether the verdict and the judgment covered the agreement which was really made between the plaintiff and the defendant. And we think that in such a case, where the proceedings in court are merely formal

Judgment—
consent—effect
on infant.

and are instituted and carried out in order to give an apparent sanction to the settlement, and there is no judicial investigation of the facts upon which the right or extent of the recovery of damages by a minor is based, such a judgment entered in pursuance of the agreement and by consent merely is only colorable, and will be set aside in a proper proceeding, when its effect, if allowed to stand, would be to bar the infant's substantial rights. *Mo. Pac. Ry. Co. v. Lasca*.

From what has been said we conclude that the court erred in awarding a nonsuit.

Appeal—non-
suit—error.

Judgment reversed.

All the Justices concur.

ANNOTATION.

Right of infant to set aside consent judgment in action for personal injuries.

As to avoidance of infant's release, see annotation in 13 A.L.R. 402.

It is a general rule that where a judgment is rendered for the plaintiff in an action by an infant through his next friend to recover damages for personal injuries, and there is no judicial investigation as to the merits of the claim, but the proceedings are merely formal for the purpose of carrying out a settlement or compromise of the action made without the consent of the court, even though the court acquiesces in the rendition of the judgment, it will not be permitted to stand as a bar to a hearing in behalf of the infant upon the merits of his claim.

Alabama.—*Tennessee Coal, Iron & R. Co. v. Hayes* (1892) 97 Ala. 201, 12 S. E. 98.

Georgia. — *CARROLL v. ATLANTIC STEEL CO.* (reported herewith) ante, 660.

Illinois.—*Atchison, T. & S. F. R. Co. v. Elder* (1894) 149 Ill. 175, 36 N. E. 565; *Pittsburg, C. C. & St. L. R. Co. v. Haley* (1897) 170 Ill. 610, 48 N. E. 920.

Kansas.—*Missouri P. R. Co. v. Lasca* (1909) 79 Kan. 311, 21 L.R.A. (N.S.) 339, 99 Pac. 616, 17 Ann. Cas. 605; *Leslie v. Proctor & G. Mfg. Co.* (1917) 102 Kan. 159, L.R.A.1918C, 55, 169 Pac. 193.

Minnesota.—*Picciano v. Duluth, M. & N. R. Co.* (1907) 102 Minn. 21, 112 N. W. 885.

North Carolina.—*Rector v. Laurel River Logging Co.* (1919) 179 N. C. 59, 101 S. E. 502.

In *Tennessee Coal, Iron & R. Co. v. Hayes* (Ala.) supra, a suit was brought by the father of a minor to recover for his personal injuries, in accordance with a prior agreement of compromise made with the parent, and a judgment was entered in favor of the infant for the amount agreed upon; subsequently, ignoring this judgment, the infant brought an action by his next friend to recover for the per-

sonal injury, and the judgment was pleaded in bar thereto. It appearing that the judgment, although reciting that it was entered upon proof before the court, was really entered in accordance with a stipulation of settlement, it was set aside by the court and the infant permitted to recover damages. In sustaining the action of the trial court in this respect, the court on appeal said: "In theory a prochein ami is an officer of the court in which a minor sues by him. His only functions are to put his capacity to sue in the place of the infant's incapacity, and thus to set the machinery of justice in motion. The court is not asked to pass upon any right of his, for he has no rights in the premises, but only to determine the claims of a minor which he perfunctorily brings before it. The character of the necessity for his appearance marks the limitations of his powers. The minor cannot get before the court without him, the jurisdiction of the court to hear and determine the cause of action can only be invoked by him, and it is therefore necessary that he should appear. But having appeared, this necessity having been met, the court having before it a person speaking for the minor of a competency which is lacking in the minor, proceeds to determine the rights of the minor as between him and the defendant. The next friend has no interest in the result of the proceeding. It is of no consequence to him whether a recovery be had or not, nor whether the amount of recovery be great or small. His being an officer of the court is a basis for the court's powers over him in the litigation. His lack of interest in the result is a reason for the exercise of that power, the basis of the doctrine of his want of control over the litigation. He cannot release the cause of action, nor compromise it, nor submit it to an arbitration, the result of which will bind the infant. And being without

power to compromise the cause of action, and the court having the power and being charged with the duty of controlling the suit to the protection of the infant's interest, an attempted compromise cannot have force and validity injected into it by his mere consent to a judgment for the amount he has assumed to agree to receive in settlement of the cause of action. His mere consent is nugatory. It is as if it were not and had never been. The court may, upon being advised of the facts, upon hearing the evidence, enter up a valid and binding judgment for the amount so attempted to be agreed upon, but this not because of the agreement at all,—that should exert no influence,—but because it appears from the evidence that the amount is just and fair, and a judgment therefor will be conservative of the minor's interest."

In *Atchison, T. & S. F. R. Co. v. Elder* (1894) 149 Ill. 173, 36 N. E. 565, the defendant settled with a minor for personal injuries by arranging with his parents that a friendly suit should be brought in the name of the minor by his father, as next friend, and a judgment entered for the amount agreed upon; in accordance with this arrangement a declaration was filed, the appearance of the defendant entered, and the parties appeared before the court, waived a jury, and the court, without hearing any evidence, entered a judgment in favor of the plaintiff for the agreed sum; a few days after judgment was entered, but during the same term of court, the plaintiff appeared in court, by attorney, offered to refund the amount received, and entered a motion to vacate the judgment. In sustaining the action of the trial court in setting aside the judgment, the court on appeal said: "The court had rendered a judgment without hearing the evidence or fully understanding the merits of the case, in a case where the rights of an infant were involved, the attorney appearing for and representing the infant having been employed at the instance of the opposing party. When these and other facts of a kindred character were brought to the attention of the court

on the motion to vacate the judgment, the court, in the exercise of a sound discretion, could do no less than vacate the judgment which had been improvidently entered, and allow the cause of the minor plaintiff to be fully and fairly presented to the court."

In *Pittsburg, C. C. & St. L. R. Co. v. Haley* (1897) 170 Ill. 610, 48 N. E. 920, an infant by his next friend sought by bill in chancery to set aside as null and void a judgment entered in favor of the defendant ten years prior, alleging that the judgment was entered without the consent either of himself or of his mother, and was for the purpose of settling the claim of the plaintiff against the defendant for personal injuries. In sustaining the lower court in granting the relief prayed for, the court said: "We think the court was justified by the evidence in concluding that neither the minor complainant nor his mother, whose name was used in said pretended legal proceeding as his next friend, authorized such action to be instituted, or had any knowledge that it was pending in court. The bill charged that the summons was issued, and the declaration, plea, and replication filed, on the same day the judgment was entered; and we find no denial of such allegations in the answer. It appeared, also, in the evidence, that the declaration was filed at the request of the representative of the appellant company, and that such representative agreed with the attorney who filed the same that he would pay the fee for his services. The chancellor was amply justified in regarding the proceedings in the court as but formal, and as intended solely to employ the functions and powers of the court to give validity to the prior agreement of the representative of the company and the attorney, who assumed to be the representative of the minor plaintiff and his mother. The evidence also warranted the view that neither the minor plaintiff nor his mother agreed to settle the claim, or authorized such attorney to make any settlement of the claim of the plaintiff. Moreover, the plaintiff, being a minor, would not be bound by any

agreement made with him, nor had his mother, by reason of the parental relation, any legal right to compromise and settle his right of action. When the alleged settlement was made, the mother of the plaintiff had not been appointed or recognized by the court as his next friend, and had no power to act or bind him in that capacity. Had she been appointed to prosecute the suit as next friend of the infant, or recognized by the court as acting in that capacity, she would have had 'power to claim and pursue the rights of the infant, and powerless to yield or cede it to others.' . . . And would have had no power to make settlement of the demand of the infant except by leave of the court. . . . It does not appear that the case was settled by leave of the court, but the record purports to show it was submitted to the court for trial and decided. The chancellor correctly held the appellee was not concluded by the alleged settlement or compromise of his claim, or by the judgment procured to be entered in pursuance of such agreement."

So, in *Missouri P. R. Co. v. Lasca* (1909) 79 Kan. 311, 21 L.R.A.(N.S.) 339, 99 Pac. 616, 17 Ann. Cas. 605, the court set aside a consent judgment rendered in a friendly suit commenced by the parents of a minor in his behalf to recover damages for a personal injury to the minor, the suit having been commenced in accordance with an agreement for the compromise of the claim. The rule is here stated that "the parent has no implied authority to compromise or settle a minor's cause of action. . . . Neither has a parent authority to consent to the judgment to be rendered against his infant child; and, when admitted to prosecute or defend as a next friend or guardian ad litem, he cannot, by admissions or stipulations, surrender the substantial rights of the infant. . . . The next friend, being intrusted with the rights of the infant so far as they are involved in the cause, and acting under responsibility to the court and to the infant, may negotiate for a fair adjustment of the controversy. . . . He

may not, however, bind the infant by such settlement; it can only become effective when given due judicial sanction, . . . and this must be upon a real, and not a perfunctory, hearing. The attempted compromise does not become effective by the consent of the next friend, but by the judgment of the court, acting upon the facts judicially ascertained."

In *Picciano v. Duluth, M. & N. R. Co.* (1907) 102 Minn. 21, 112 N. W. 885, a judgment of dismissal of an action brought by an infant by his next friend to recover for personal injuries, entered pursuant to a stipulation of dismissal filed with the clerk of the court, was subsequently set aside by the trial court upon application of the minor through his next friend, on the claim that the judgment was entered without regard to the minor's real interest and right to recover, and that no part of the consideration was received by him, it having been paid to his father, who used it for other purposes. In sustaining the trial court in setting aside the judgment, the court on appeal said: "The court may always, for a good cause, review its orders. The judgment of dismissal was entered on the bare stipulation by order of the judge, without any knowledge of or investigation of the facts. It was made by the parent, without any consultation with or advice of counsel. At the earliest opportunity after being made acquainted with the facts, counsel for the child, although in the name of the parent, applied to the court for relief to set it aside upon the ground that it was inadvertently made. The court, upon being advised of the nature of the settlement and the manner in which it had been entered into, reviewed its former action. Under those circumstances the court had not lost jurisdiction. We assume that appellant's representatives proceeded in good faith in the belief that it was justified in effecting a settlement in the manner shown for the purpose of avoiding a vexatious lawsuit. But the views of appellant and its counsel as to the validity of the boy's claim were not controlling. It cannot be assumed that

the minor's interests were fully represented; his counsel and the court having been ignored. Negotiations and contracts brought about in such a manner are open to close inspection, and in this case the court was fully justified in canceling its former order and reinstating the case."

And see upon this point the reported case (*CARROLL v. ATLANTIC STEEL CO.* ante, 660), which holds that where an action by a minor through his next friend to recover for personal injuries is merely formal, and only to effectuate a settlement theretofore made between the parties, and a judgment is rendered therein without any judicial investigation of the facts, it will be set aside at the instance of the infant.

So, in *Leslie v. Proctor & G. Mfg. Co.* (1917) 102 Kan. 159, L.R.A.1918C, 55, 169 Pac. 193, where a judgment was entered by consent of the parties in an action by an infant through his next friend to recover damages for personal injuries, and there was no judicial investigation of the merits of the case or the rights of the plaintiff, or any judicial examination of the facts made by the court to determine whether the settlement was reasonable and proper, it was set aside at the instance of the infant.

In *Sawitzke v. Peters Mach. & Mfg. Co.* (1919) 29 Ohio C. A. 513, a judgment rendered by consent in favor of the injured minor, his mother acting as his next friend, and the plaintiff not being represented by any attorney, but the attorney for the defendant acting in his behalf in filing in his behalf a bill of particulars, was set aside at the instance of the plaintiff. The court said that the plaintiff's infancy "precluded him from making any binding agreement of settlement or taking any part in a court proceeding which would be binding on him; and that his mother, neither as next friend nor as guardian for the suit, could waive any of his rights or enter into any agreement or arrangement binding on him; the office of next friend is solely to bring the infant into court because of his legal inability to present his own case; the next

friend can do nothing which may injure the rights of the infant, and his admissions are not binding upon the infant; the next friend cannot release a cause of action, nor compromise, nor submit it to an arbitration." And see also *Rupert v. Cincinnati Traction Co.* (1918) 29 Ohio C. A. 238, which holds that the court of common pleas has jurisdiction of a petition to set aside a judgment rendered in favor of minor plaintiffs, where the suit was brought by a guardian and next friend, who had no warrant or authority to act in that capacity, and no trial was had, no testimony taken, and no investigation made of the facts, but the judgment was entered to carry out an agreement theretofore made for the settlement of the claim of the infant for personal injuries.

In this connection, while not within the scope of the note, attention is called to *Interstate Coal Co. v. Trivett* (1913) 155 Ky. 825, 160 S. W. 728, which holds, where, after suit was instituted to recover for personal injury to an infant, a compromise was made with him and his mother, that the infant might continue the prosecution of the suit notwithstanding this settlement, he having caused the amount received to be deposited with the clerk of the court as a tender to the defendant.

And see *Gouanillou v. Industrial Acci. Commission* (1920) — Cal. —, 193 Pac. 937, which sustains the right of a minor to disaffirm a judgment rendered in a proceeding under the Workmen's Compensation Act in which she was not represented as provided by law, she not being represented by a guardian. The court said that the minor had the right incident to minority, of disaffirming the award of the commission rendered in such proceeding within a reasonable time after reaching the age of majority.

Compare with *Clark v. Southern Can Co.* (1911) 116 Md. 85, 36 L.R.A. (N.S.) 980, 81 Atl. 271, where the settlement was made by an infant through her next friend, of a pending action to recover for personal injuries, and an order was entered in accordance with the terms of the settle-

ment, "agreed and settled," it was held that the infant could not thereafter bring another action to recover for the same injury, entirely ignoring the former action and the settlement thereof. The court said: "We think, from both principle and authorities, that the release in the prior case, and the orders based thereon upon which the entry of "agreed and settled" was made under the eye and with the sanction of the court in that case, cannot, from the facts and circumstances here disclosed, be annulled and set aside by the collateral proceeding thereafter instituted by the appellant against the appellee, and from the judgment in which case this appeal is taken. The appellant is asking in a collateral proceeding instituted in a court of law that a judgment previously entered in a prior case by the same court, in a suit brought to recover for the same injuries for the recovery of which this suit is instituted, be set aside and annulled. The plaintiff's remedy in this case was either by motion to strike out the judgment filed in due season in the court in which the judgment was entered, or by a direct proceeding instituted in a court

of equity within a reasonable time after the discovery of the facts which are supposed to establish the fraud for the setting aside and annulment of the judgment. Instead, however, of pursuing the remedy suggested, the plaintiff waited, after the discovery by her of the alleged misrepresentations and fraud of which she complains, and after such had been made known to her counsel, for nearly a year, when these proceedings were instituted."

In *Tripp v. Gifford* (1891) 155 Mass. 108, 31 Am. St. Rep. 530, 29 N. E. 208, in holding that a settlement made out of court by the next friend of an infant was not binding upon the infant, the court said: "Unless such a settlement is affirmed, either in terms if brought to the attention of the court, or by an entry of judgment in regular course, it may fairly be held invalid. If it is not of such a nature as to commend itself to counsel, to whom, as well as to the next friend, the infant has a right to look for protection, it ought not to stand unless sanctioned by the court. It is no injustice to a defendant to hold that the infant is not concluded until the cause is disposed of by judgment." A. G. S.

PEOPLE OF THE STATE OF ILLINOIS

v.

HENRY WICKLIFF CRENSHAW, Alias Wick Crenshaw, Plff. in Err.

Illinois Supreme Court — June 22, 1921.

(298 Ill. 412, 131 N. E. 576.)

Homicide — murder — striking with fist.

1. No inference of an intent to kill is warranted from the striking of a person on the head with the fist, although death results, so as to constitute murder.

[See note on this question beginning on page 675.]

— probable consequence of act.

2. Although one is presumed to have intended the reasonable and probable consequences of his act, intent to kill cannot be presumed from striking one with the fist, although death results, if such result was not a probable consequence of the act.

[See 13 R. C. L. 741, 745.]

— effect of disparity in size of persons.

3. That one assaulting another with his fist is 5 or 6 inches taller and 50 pounds heavier than the latter does not render a fatal result of the assault a natural or probable result of it, so as to constitute murder.

ERROR to the Circuit Court for Hancock County (Waggoner, J.) to review a judgment convicting defendant of murder. *Reversed.*

The facts are stated in the opinion of the court.

Mr. Clyde P. Johnson, for plaintiff in error:

It is indispensable, before one can be convicted of the crime of murder, that the act be done with malice aforethought, either expressed or implied.

People v. Bissett, 246 Ill. 516, 92 N. E. 949; *People v. Bartley*, 263 Ill. 69, 104 N. E. 1057.

The malice requisite to murder will be presumed or implied only where the act is committed deliberately, and is likely to be attended with dangerous consequences.

Perry v. People, 14 Ill. 496; *Friederich v. People*, 147 Ill. 310, 35 N. E. 472.

A blow struck with the fist is not such an unlawful act as, in its consequences, would naturally tend to destroy the life of a human being under any conditions reasonably to be anticipated.

People v. Mighell, 254 Ill. 53, 98 N. E. 236; *People v. Lurie*, 276 Ill. 630, 115 N. E. 130.

Defendant, if guilty of anything under the facts in the case, is guilty of no more than involuntary manslaughter.

People v. Mighell, 254 Ill. 53, 98 N. E. 236; *People v. Lurie*, 276 Ill. 630, 115 N. E. 130; *People v. Pilewski*, 295 Ill. 58, 128 N. E. 801.

A conviction of murder will be set aside where the evidence entirely fails to establish the crime of murder as charged, and shows only manslaughter.

People v. Bartley, 263 Ill. 69, 104 N. E. 1057.

Messrs. Edward J. Brundage, Attorney General, Albert D. Rodenberg, Assistant Attorney General, Lee Siebenborn, and O'Harras, Wood, & Walker, for the State:

The threats of defendant to kill were sufficient to justify the jury in finding a deliberate intent to kill which establishes express malice.

Lathrop v. People, 197 Ill. 175, 64 N. E. 385; *Palmer v. People*, 138 Ill. 357, 32 Am. St. Rep. 146, 28 N. E. 130; *McCoy v. People*, 175 Ill. 233, 51 N. E. 777; *Henry v. People*, 198 Ill. 187, 65 N. E. 120.

In this case there was not only no considerable provocation, but there was absolutely no provocation; hence malice must be implied.

Davidson v. People, 90 Ill. 222; *Cros-*

by v. People, 137 Ill. 325, 27 N. E. 49; *Peri v. People*, 65 Ill. 23; *People v. Venckus*, 278 Ill. 130, 115 N. E. 880; *Dunaway v. People*, 110 Ill. 333, 51 Am. Rep. 686, 4 Am. Crim. Rep. 60.

The acts of the defendant determine his intention.

Spies v. People, 122 Ill. 174, 3 Am. St. Rep. 320, 12 N. E. 865, 17 N. E. 898, 6 Am. Crim. Rep. 570; *Mayes v. People*, 106 Ill. 306, 46 Am. Rep. 698.

It was not essential that death should have been the probable and reasonable result of defendant's act in striking the deceased. It is sufficient that death or great bodily harm was the natural result.

Adams v. People, 109 Ill. 444, 50 Am. Rep. 617, 4 Am. Crim. Rep. 351.

The difference in the size of the men, and the rapid retreat of defendant after the fatal blow, were sufficient to justify the jury in finding that he had an abandoned and malignant heart when he killed Langford.

Peri v. People, 65 Ill. 23; *People v. Venckus*, 278 Ill. 130, 115 N. E. 880; *Dunaway v. People*, 110 Ill. 333, 51 Am. Rep. 686, 4 Am. Crim. Rep. 60.

Farmer, J., delivered the opinion of the court:

Henry Wickliff Crenshaw was indicted by the grand jury of Hancock county for the murder of Bertie L. Langford. The indictment charged the homicide was committed by defendant striking Langford with his right hand and clenched fist. Defendant pleaded not guilty. The jury found him guilty of murder in manner and form as charged in the indictment, and fixed his punishment at imprisonment for fifteen years in the penitentiary. The court overruled a motion for a new trial and in arrest of judgment, and rendered judgment on the verdict. Defendant has sued out a writ of error.

The homicide occurred August 25, 1920, while the parties were at a county fair at Carthage, Hancock county. Defendant and the deceased had no personal acquaintance. They had attended the fair and accidentally met on the fair

grounds about 5 o'clock in the afternoon. Deceased was with a party of men and women and they were proceeding to leave the fair grounds. Defendant was looking for the man he had come to the fair with, when he met deceased. He asked him if his name was Langford, and deceased replied it was. Defendant then asked deceased to step to one side with him, indicating a direction where there were very few people, and said he would like to talk to deceased. Deceased said he would rather meet him some other time and place. Defendant then asked Langford why he had been talking about him and threatening to kill him. Langford said he did not know he had done so. A number of witnesses testified defendant told Langford he had been talking about him, cursed him, called him a vile name, and said if Langford would go with him to some other place he would kill him. Langford told defendant he was mistaken and turned to walk away. Defendant caught deceased by the arm, turned him partially around, and said for two cents he would kill him right there. He immediately struck deceased on the side of his face or head with his clenched fist and knocked him down. Deceased was carried to an emergency hospital, where he died in a few minutes. A post mortem disclosed a dislocation of the second and third vertebræ (or a broken neck) as the cause of death, and the proof shows that was attributable only to the blow struck by defendant. Immediately after striking deceased defendant walked away and mingled with the crowd.

It appears deceased and his wife were not living together, and that she and defendant had been keeping company with each other. One witness testified on behalf of defendant that deceased had told him about a year before the homicide that if he knew defendant and found him he would have it out with him; that he would make him step some, and, putting his hand on his right hip pocket, said he had the goods to

make defendant step. Witness communicated the threats to defendant the same day they were made. Another witness testified that four or five weeks prior to the homicide deceased inquired of him if he had seen defendant, and said if he ever met him he would get defendant or defendant would get him; that at a subsequent time deceased said he hoped defendant would be at the fair; that he was going to get him, and showed the witness a 38-caliber revolver, and said, "That is the baby that will get him." Witness said he told defendant of the threats, and defendant said he had done nothing to deceased and would let him alone as long as he let defendant alone. Another witness testified that the morning of the homicide, between 9 and 10 o'clock, Langford said that if he and defendant ever came together there would be trouble, and that it would not be very far off. This was not communicated to defendant before the homicide. Defendant testified in his own behalf and did not differ materially with the witnesses for the state as to the conversation between him and deceased, except as to calling deceased a vile name and saying he would kill him. He testified when deceased turned away from him he touched him on the arm and told him he wanted him to quit following defendant around; that deceased then turned toward defendant, threw his hand to his hip pocket, and defendant then struck him. The same witness who testified to threats of deceased the morning of the homicide, and who is a brother of deceased's divorced wife, testified he saw the parties at the time of the altercation; that he could not hear anything they said, but he saw defendant tap deceased on the shoulder and saw deceased throw his hand to his hip, whereupon defendant struck him. It is highly improbable from the testimony that any such action of the deceased occurred. The testimony of a considerable number of disinterested witnesses shows that deceased showed no anger and made

no attempt to resent defendant's insulting language, but started to get away from him, when defendant caught him by the arm, caused him to partly turn around, and then struck him on the side of the face or head. No weapon of any kind was found on deceased. The assault of deceased was wholly unprovoked and unjustified by any word or act at the time.

The only question discussed in the brief of defendant is whether the conviction for murder was justified. To constitute the killing murder it must be done with malice aforethought, express or implied. Express malice is the deliberate intention to take the life of another, which is manifested by circumstances capable of proof. It is implied where no considerable provocation appears, or where all the circumstances show an abandoned or malignant heart. *Crim. Code*, § 140 (*Hurd's Rev. Stat.* 1919, chap. 38). Manslaughter is the killing of a human being without malice, express or implied, and without deliberation. It must be voluntary, caused by a provocation apparently sufficient to make the passion irresistible, or involuntary, in the commission of an unlawful act without due caution or circumspection. *Crim. Code*, §§ 143, 144. Involuntary manslaughter is the killing of a human being without intent to do so, in the commission of an unlawful act, or a lawful act which might produce such consequences in an unlawful manner, where the involuntary killing happens in the commission of an unlawful act which naturally tends to destroy life, or is committed in the prosecution of a felonious intent. *Crim. Code*, § 145.

The circumstances which distinguish murder from manslaughter have been passed upon by this court in many cases. Malice necessary to constitute a killing murder is presumed where the act is deliberate and is likely to be attended with dangerous or fatal consequences. *Perry v. People*, 14 Ill. 496; *Friederich v. People*, 147 Ill. 310, 35 N. E.

472. Death or great bodily harm must be the reasonable or probable consequence of the act to constitute murder. *Adams v. People*, 109 Ill. 444, 50 Am. Rep. 617, 4 Am. Crim. Rep. 351; *Dunaway v. People*, 110 Ill. 333, 51 Am. Rep. 686, 4 Am. Crim. Rep. 60; *Crosby v. People*, 137 Ill. 325, 27 N. E. 49. The striking of a blow with the fist on the side of the face or head is not likely to be attended with

**Homicide—
murder—striking
with fist.**

dangerous or fatal consequences, and no inference of an intent to kill is warranted from the circumstances disclosed by the proof in this case. The act of defendant in striking deceased was unlawful, but it is clear from the evidence that it was not delivered with the intent of causing death. The people contend that proof of defendant's statement to deceased that, if he would go with him, he would kill him, or that for two cents he would kill him right there, shows the intent of the defendant was murder. Even though it may be said to indicate a desire on the part of defendant to take the life of deceased, his act in striking with the bare fist was not committed for the purpose of carrying into effect any intention of that kind which the defendant may have had in mind. The defendant is presumed to have intended the reasonable and probable consequences of his act, but, death

**—probable
consequence of
act.**

not being a reasonable or probable consequence of a blow with the bare fist, he is not presumed to have intended it to produce that result, and, if he did not, the crime would be manslaughter, and not murder. In *People v. Mighell*, 254 Ill. 53, 98 N. E. 236, defendant was indicted for murder. The death resulted from a blow from the bare fist. The defendant was attempting to administer punishment to the deceased for insulting remarks made to a lady relative of defendant. The court said there was not the slightest reason to suppose defendant contemplated death or serious injury to the

deceased, that the act would not, in its consequences, naturally tend to destroy life, or that such a result could reasonably be anticipated. It was held the crime could not be murder, but was manslaughter. That case, in principle, cannot be distinguished from this.

The people argue that the difference in the size of the two men was such that the blow was likely to be attended with fatal consequences. Defendant was 5 or 6 inches taller and about 50 pounds heavier than deceased. There might be a case in which the disparity in size and

strength of the parties might be so great that a blow delivered with a bare fist might reasonably be expected to result in dangerous or fatal consequences, but there was no such difference in the two men in this case that a blow ^{—effect of disparity in size of persons.}

with the fist by the larger man would naturally or probably cause death. The evidence was insufficient to warrant the conviction for murder.

The judgment is reversed and the cause remanded to the Circuit Court for a new trial.

ANNOTATION.

Inference of intent to kill where killing is by blow without weapon.

Intent to kill not inferred.

Since death is not the natural or probable result of a blow with the hand, it seems that no intent to kill will, under ordinary circumstances, be presumed, though death results from an assault thus committed.

Thus, it is held in the reported case (PEOPLE v. CRENSHAW, ante, 671) that no inference of an intent to kill was warranted, from the fact that death was caused by the striking of a blow with the fist, the act being unlikely to cause death or serious bodily harm as a reasonable or probable consequence of its commission, and the defendant could not be presumed to have intended it to produce such a result, so as to make him guilty of the crime of murder, although he had threatened to kill the person assaulted, and was a larger and stronger man than the latter. See also Thomas v. Com. (1905) 27 Ky. L. Rep. 794, 86 S. W. 694, set out *infra* in this note.

So, in People v. Mighell (1912) 254 Ill. 53, 98 N. E. 236, wherein it appeared that a man was killed by a blow from the bare fist, inflicted by the defendant while attempting to administer punishment for insulting remarks made to a female relative of the defendant, the court said that there was not the slightest reason to suppose that the defendant contemplated death or serious injury; that

the act of striking would not, in its consequences, naturally tend to destroy life; that such a result could not reasonably be anticipated; and that therefore the defendant was not guilty of murder, but of manslaughter.

In People v. Munn (1884) 65 Cal. 211, 3 Pac. 650, 6 Am. Crim. Rep. 431, a case wherein it appeared that the killing was the result of several blows struck with the fist, which were not shown to have been intended to kill, a charge to the effect that the defendant was presumed to have intended all the "possible" consequences of his act was held to be erroneous. It was said in that case by way of dictum: "In the trial of cases of homicide committed by violence, it is almost always important to consider the character of the weapon with which the homicide was committed, and all through the cases great emphasis is laid on the fact that a weapon likely to produce death was used by the accused. If the means employed be not dangerous to life, or, in other words, if the blows causing death are inflicted with the fist, and there are no aggravating circumstances, the law will not raise the implication of malice aforethought, which must exist to make the crime murder. The distinguishing characteristic respecting the two crimes of murder and manslaughter is malice. Without the presence of

this element of malice the crime does not reach the higher degree of murder, but amounts simply to manslaughter."

Intent to kill inferred.

In a number of cases it has been held that an assault without a weapon may be attended with such circumstances of violence and brutality that an intent to kill will be presumed.

Thus, in *State v. John* (1903) 172 Mo. 220, 95 Am. St. Rep. 513, 72 S. W. 525, wherein it appeared that the defendant, while engaged in his occupation as dog catcher, provoked the derision of some boys on the street, who aroused him to anger and caused him to attack a bystander, whom he killed by striking him on the jaw with his fist, it was held that, under the circumstances, the defendant must be presumed to have intended to kill. The court said: "The court properly instructed the jury that a man is presumed to intend the natural and probable consequences of his acts, . . . and a strong, brawny man will not be allowed to approach an unoffending citizen in a public highway and deal him a deadly blow with his fist in a vital part, and when death, the natural consequence of his act, ensues, be heard to say that he merely intended to punish him, and not to kill him."

So, where the evidence showed that the defendant made an unprovoked assault on one with whom he had just exchanged words of friendly greeting, wantonly striking the latter with his fist, and felling him to the ground, from which blow and fall death resulted, it was held in *State v. Hyland* (1898) 144 Mo. 302, 46 S. W. 196, that the killing was as much murder as if the defendant had shot with a loaded revolver or stabbed with a sword. The court said: "In this case no doubt whatever can exist that the blow was premeditated and unsuspected by the victim, that it was intentional, and that defendant must be held to have intended all the natural consequences that ensued, and that the death of deceased was the immediate and natural consequence of that blow."

In *M'Whirt's Case* (1846) 3 Gratt. (Va.) 594, 46 Am. Dec. 196, it was contended that blows inflicted by the defendant, using his hands and feet, were intended as chastisement or a whipping administered to the defendant's son, and were not intended to cause death. The court said: "No one can review these transactions without seeing most clearly that great bodily harm, at least, was intended to be perpetrated upon the deceased. . . .

The fists may not, indeed, be regarded generally as a deadly weapon; but they become most deadly by blows often repeated, long continued, and applied to vital and delicate parts of the body of a defenseless, unresisting man on the ground. And if to the injury they are capable of producing, when wielded by a strong man, you add all the accompanying injuries which the more powerful agency of stamping the party on the ground may inflict, there might be strong ground to infer the intention, not merely to cause great bodily harm, but even death itself."

In *Thomas v. Com.* (1905) 27 Ky. L. Rep. 794, 86 S. W. 694, wherein it was shown that the defendant, after previously threatening to kill the woman with whom he was living, knocked her down with his fist and kicked her several times in the stomach, side, and face, from the effect of which injuries she died, the court, in holding that an instruction on the subject of involuntary manslaughter should have been given by the trial court, said: "In this case the injuries were inflicted by the hands and feet of the appellant. These are not deadly weapons within the meaning of the law, and when death results unintentionally from their use in an assault the result is not murder, but involuntary manslaughter. But if appellant intended to kill his mistress, or if, from the manner and use of his fists and feet, considering the relative size and strength of the parties, what he did was calculated to produce death or great bodily harm, then the jury would have the right to find him guilty of murder. As to whether or not murder or involuntary manslaughter resulted from the acts of appellant

was a question for the jury to determine under all the circumstances of the case; and therefore the refusal of the court to instruct as to involuntary manslaughter was prejudicial to his substantial rights."

In *Maulding v. Com.* (1916) 172 Ky. 370, 189 S. W. 251, wherein it appeared that death was caused by the defendant striking and knocking down a man and then stamping on his head and face with the heel of his shoe, it was contended, on the strength of the decision in *Thomas v. Com.* (Ky.) supra, that as neither the hands nor feet of a person are deadly weapons within the meaning of the law, and as the defendant testified that he did not intend to kill, an instruction on the subject of involuntary manslaughter should have been given. The court, saying that it was not disposed to follow the doctrine announced in the *Thomas Case*, or apply it to the case at hand, added: "'One must be presumed to intend the consequences of an act reckless in its disregard of human life, and committed under circumstances calculated to endanger it. If death results, it cannot properly be said either that it was involuntary homicide or a killing per infortunium.' And this is true whether the murder be committed with a knife, pistol, or other deadly weapon, or hands or feet. On this issue the material inquiry in every case is whether the killing was done with malice and intent to kill, and not the manner by or through which it was done, or whether the implements used were deadly weapons or not. If one person intentionally and maliciously kills another by beating and bruising him in such a manner as *Maulding*, for example, beat and bruised *Nickols*, the perpe-

trator of the crime will not be allowed to excuse himself from the consequences of his acts, or to lessen their degree by the mere assertion that he did not mean to kill, when all the circumstances surrounding the transaction disprove his assertion. In this case there is no question made that *Maulding* did not kill *Nickols*, and the undisputed facts show that he beat and bruised and mashed his head and face in such a brutal and horrible manner as to leave no room to doubt that he did intend to kill him. Under these circumstances it would be a travesty on justice for this court to say that an instruction should have been given telling the jury that they might punish *Maulding* by a mere fine and imprisonment if they believed he did not intend to kill *Nickols*."

In *Com. v. Fox* (1856) 7 Gray (Mass.) 585, the homicide resulted from an assault and battery committed by the defendant by striking and kicking the person assaulted with his hands and feet. The court, after laying down the rule that a person is legally responsible for the natural and necessary consequence of his own unlawful act, and that, where the circumstances are such as to show that the act proceeded from an evil disposition, or a mind and heart regardless of social duty and fatally bent on mischief, the law will imply malice, said: "The real question is, whether the circumstances of the homicide are such as to satisfy the jury that the party charged acted from an unlawful and evil design, with an intent to do grievous bodily harm, and that his acts were of a nature calculated to endanger life. From such acts the law will imply malice." L. F. C.

W. H. SIMMS, Appt.,

v.

L. I. SULLIVAN, Doing Business under the Name of Fashion Garage,
Respt.

Oregon Supreme Court (In Banc) — May 24, 1921.

(— Or. —, 198 Pac. 240.)

Garage — duty to drain water from radiator in freezing weather.

1. The keeper of a garage with whom an automobile is stored for hire is bound to use such ordinary care as a man of ordinary prudence and discretion ought to exercise and would be expected to exercise if the property were his own, to prevent injury to the car by draining the water from the cooling system in freezing weather.

[See note on this question beginning on page 681.]

Pleading — custom — necessity.

2. The existence of the custom of garage keepers not to drain the water from the radiators of cars left with them for storage must be pleaded to be proved in defense of an action for injury to a stored car by the freezing of the water in the radiator.

[See 27 R. C. L. 195.]

Custom — notice — general character.

3. A custom must be shown to have been so general that a contracting party will be presumed to have had knowledge of it in order to make it a part of the contract in the absence of evidence that he had actual knowledge of it.

[See 27 R. C. L. 157, 158.]

— presumption as to knowledge — custom of garage keeper.

4. There is no general presumption that persons leaving automobiles for storage in a garage have knowledge of a custom of the garage keeper in that

city not to drain the water from the radiators in freezing weather.

[See 27 R. C. L. 163.]

Contract — effect of custom.

5. Valid customs known to the contracting parties concerning the subject-matter of the agreement, or usages of which the parties are chargeable with knowledge, are, by implication, incorporated in the contract unless expressly or impliedly excluded by its terms.

[See 27 R. C. L. 161, 162.]

Garage — control of duty by custom.

6. The duty of a garage keeper with whom an automobile is left for storage to drain the water from the radiator in freezing weather cannot be controlled by a custom of garage keepers in that locality not to do so.

Evidence — judicial notice — variations of climate.

7. The court does not take judicial notice of the variations of climate in particular places at particular times.

APPEAL by plaintiff from a judgment of the Circuit Court for Multnomah County (Gatens, J.) dismissing the complaint in an action brought to recover damages for injury to plaintiff's automobile, alleged to have been caused by lack of due and proper care of it by defendant. *Reversed.*

Statement by Brown, J.:

On or about the 27th day of November, 1919, W. H. Simms, the plaintiff and appellant, left his car at the Fashion Garage, located at 192 Tenth street, Portland, Oregon. This was a public garage conducted for the storage of automobiles by defendant, L. I. Sullivan. By the acceptance of the car upon the part

of Sullivan, the relationship of bailor and bailee for hire was established between the parties hereto.

The plaintiff asserted that the defendant did not take due and proper care of the said automobile, but, on the contrary, that he exercised so little care of the vehicle that the cylinders, radiator, and gasket thereon were allowed to remain

filled or surrounded with water, and on or about December 20, 1919, the water therein became frozen, and said cylinders, radiator, and gasket were thereby broken, and greatly injured.

After admitting and denying certain allegations of the complaint, defendant, by way of a further and separate answer, alleged that "... on or about the 27th day of November, 1919, the plaintiff, well knowing the premises and garage of the defendant and the condition thereof, . . . made application to the defendant for a place to store his automobile, and he and the defendant agreed that the defendant would rent him a space for his automobile for the sum of \$7.50 per month, . . . and that the only service which he (defendant) agreed to render was that the plaintiff had the right to leave his automobile in the garage of the defendant, and that he would render ordinary care in preserving same safely from loss or damage, and it was at all times understood and agreed that the plaintiff took the storage in the condition it then was, and that in case of any loss from the elements or acts of God, or any other than the ordinary care necessary, that the defendant would not be responsible therefor, and the defendant did all things which he agreed to do, and the loss, if any, was sustained by reason of the acts of God, on account of the freezing of the water in the radiator."

The matter alleged in the foregoing paragraph was denied by the plaintiff. During the course of the trial, the court admitted testimony of a local custom among the garage keepers of Portland, over the objection of the plaintiff, on the ground that the asserted custom had not been pleaded.

Trial by jury was waived, and the issue of fact determined by the court. Based upon the findings made and the conclusions of law drawn therefrom, the complaint was dismissed.

Mr. Ernest Cole for appellant.

Mr. P. J. Bannon for respondent.

Brown, J., delivered the opinion of the court:

The plaintiff alleges that the court erred in allowing the introduction of evidence as to the existence of a local custom among the garage keepers of the city of Portland. There was no allegation of any particular custom contained in the pleadings. At the trial a number of garage keepers were permitted to testify that a custom existed among the keepers of garages at Portland to the effect that the storage of an automobile did not contemplate or include the duty of removing water from the radiator.

It is a familiar rule of pleading that the issues in each case are confined to those made by the pleadings, and, in the trial, the evidence adduced should be limited to support the issues thus made.

Defendant, by his answer, gave notice to the plaintiff that his defense was based upon a specific contract. On the trial the defense was founded not upon the contract pleaded, but upon local custom. Defendant undertook to excuse the full measure of responsibility that the law of bailment places upon him by showing local custom among the garage keepers of Portland. The plaintiff objected, upon the ground that the custom was not pleaded. The weight of authority supports the general rule that

Pleading—
custom—
necessity.

usage such as was sought to be established by defendant, in any special line of business, is not admissible unless such custom or usage is specially pleaded. Some cases recognize exceptions to the general rule, but it is not necessary to refer to them here.

As a rule, local usages and customs are facts which must be averred and proved in the same manner as any other material fact connected with the subject of litigation. According to the weight of the decisions, whenever a special custom is relied upon to take a case

out of the general rule of law, such custom must be specially pleaded, and cannot be shown under the general issue or general denial. 22 Enc. Pl. & Pr. pp. 406-408; Gladstein v. Levine, 49 Ind. App. 270, 97 N. E. 184; First Nat. Bank v. Farmers' & M. Bank, 56 Neb. 149, 76 N. W. 430; Oriental Lumber Co. v. Blades Lumber Co. 103 Va. 730, 50 S. E. 270; Smith v. Stewart, 29 Okla. 26, 116 Pac. 182; Paine v. Smith, 33 Minn. 495, 24 N. W. 305; Pittsburg Steel Co. v. Streety, 61 Fla. 393, 55 So. 67; Patton v. Texas & P. R. Co. — Tex. Civ. App. —, 137 S. W. 721; Windland v. Deeds, 44 Iowa, 98; Consolidated Coal Co. v. Jones & A. Co. 120 Ill. App. 139.

Furthermore, it is a well-established principle of law that, "in the absence of evidence that the party

**Custom—notice
—general
character.**

to be charged had actual knowledge of a trade custom or

usage, it must, in order to be admissible against him, appear to have been so general that he will be presumed to have knowledge of it.

. . . As will be seen, knowledge of a usage is necessary in every case, in order to bind a person by its terms. Sometimes this knowledge must be expressly proved, and sometimes, from its generality and notoriety, the law raises the presumption that the usage was known." 17 C. J. 454, 455.

There is no general presumption that the custom or usage of the garage keepers of Portland in failing to drain water from motor cars left

**—presumption
as to knowledge
—custom of
garage keeper.**

for storage is known to persons who leave their cars for purposes of storage, or

for bailment. Before the plaintiff can be bound by a local custom of garage keepers in the matter of the bailment of his car, he must have knowledge of such custom.

Valid usages, known to the contracting parties, concerning the subject-matter of the agreement, or

**Contract—effect
of custom.**

usages of which the parties are chargeable with knowledge, are, by implication, incorpo-

rated therein, unless expressly or impliedly excluded by its terms, and are admissible to aid in its interpretation, not as tending in any respect or manner to contradict, add to, take from, or vary a contract, but upon the theory that the usage forms a part of the contract. But evidence of usage is not admissible to vary or contradict the terms of a plain, unambiguous contract, and in the more modern cases there has been strong judicial criticism of the tendency to resort to evidence of usage when to do so would indirectly control the true intention of the parties to contracts. 17 C. J. 492-495; McCulsky v. Klosterman, 20 Or. 108, 10 L.R.A. 785, 25 Pac. 366; Holmes v. Whitaker, 23 Or. 319, 31 Pac. 705; Chadwick v. Oregon-Washington R. & Nav. Co. 74 Or. 30, 144 Pac. 1165; Hurst v. Larson, 94 Or. 211, 184 Pac. 258. However, it has been held that, where evidence of custom or usage is offered for the purpose of showing what is merely incidental to an implied contract, and relied upon only as evidence of some fact in issue, it need not be pleaded. Harrison v. Birrell, 58 Or. 410, 419, 115 Pac. 141; 17 C. J. 518. But this does not govern the instant case.

In the case at bar, the court committed error by admitting evidence of the particular cus-

**Garage—control
of duty by
custom.**

tom of the garage keepers. It has been decided that "a custom of garage keepers contrary to the implied obligation of reasonable care for safe-keeping, arising in favor of an automobile owner by the storing of his car at a public garage, cannot absolve the garage keeper from observance of such care." McLain v. West Virginia Automobile Co. 72 W. Va. 738, 48 L.R.A.(N.S.) 561, 79 S. E. 731, Ann. Cas. 1915D, 956.

This court has said: "A bailee for hire cannot by contract so limit his responsibility to the bailor as not to be liable for his own negligence or that of his agents and servants." Pilson v. Tip-Top Auto Co. 67 Or. 528, 136 Pac. 642.

Another assignment of error in the instant case relates to the intro-

duction of evidence in support of defendant's allegation as to the condition existing in defendant's garage in which plaintiff stored his automobile.

"A garage keeper storing a car of another for compensation is classed as a bailee for hire, and as such he is bound to furnish reasonably safe accommodations and to exercise reasonable care and prudence to keep the machine in a safe manner. If guilty of negligence resulting in injury to the machine, he may be charged with the damage. The liability of a garage keeper for hire is not affected by reason of the knowledge of the owner as to the place where the property is kept. Its acceptance by the garage man imposes on him the duty of exercising due care for its safety and protection." Huddy, *Automobiles*, 5th ed. § 202; Berry, *Automobiles*, 2d ed. § 742; *Stevens v. Stewart-Warner Speedometer Corp.* 223 Mass. 44, 111 N. E. 771.

Sullivan, defendant, was a bailee for hire, and as such he was under legal obligations to exercise, with respect to plaintiff's automobile, such ordinary care as a man of ordinary prudence and discretion ought to exercise, and would be expected to exercise under all circumstances if the property were his own. *Schouler*, *Bailm.* 3d ed. § 101; *Wilson v. Wyckoff*, *Church & Partridge*, 133 App. Div. 92, 117 N. Y. Supp. 783; *Smith v. Economical Garage*, 107 Misc. 430, 176 N. Y. Supp. 479.

"The garage keeper is not an insurer of the automobiles left in his charge to be cared for, but he is bound to use reasonable or ordinary

diligence in their care and keeping to the end that they be not damaged or destroyed or lost by reason of theft or otherwise." Berry, *Automobiles*, 2d ed. § 742, and cases cited under note 9.

From a case in point, we carve the following: "Proof that a motor car, when delivered to a garage keeper, was in good order, but, when called for a few days later, it was damaged, the water jacket having frozen and burst, makes out a prima facie case against the bailee, the garage keeper. It then became the duty of the garage keeper to rebut the prima facie case, by showing that he used due care as bailee." *Smith v. Economical Garage*, *supra*.

A case illustrative of this principle is *Hansen v. Oregon-Washington R. & Nav. Co.* 97 Or. 190, 213, 188 Pac. 963, 191 Pac. 655.

We are unable to find in the record any substantial evidence, either direct or inferential, which justifies the finding that the plaintiff's car was injured by "an unexpected freeze that came on suddenly after the plaintiff left his auto with the defendant." Nor can the court take judicial notice that the water in the radiator of the car became congealed by reason of a sudden change in climatic conditions. It has been held that variations of climate in particular places at particular times cannot be judicially known. 16 Cyc. 855; *Santa Cruz v. Enright*, 95 Cal. 105, 30 Pac. 197; *Haines v. Gibson*, 115 Mich. 131, 73 N. W. 126.

The judgment in this case is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

—duty to drain water from radiator in freezing weather.

Evidence—judicial notice—variations of climate.

ANNOTATION.

Duty and liability of garage keeper to owner of cars.

- I. Generally, 682.
- II. Limitation of liability; effect of custom and usage, 683.
- III. Unauthorized use by garage keeper's employee, 684.

- IV. Unauthorized use by owner's employee, 686.
- V. Delivery of car to one other than garage employee or owner's servant, 687.

- VI. Theft where no delivery by garage keeper or employee, 688.
- VII. Unauthorized use by garage keeper, 690.
- VIII. Damages resulting while car is being taken to garage, 690.
- IX. Change of place of storage without owner's consent, 691.
- X. Damage while in storage, 691.
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- XII. Freezing, 693.
- XIII. Negligent operation of garage elevator, 694.
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- XV. Damage by fire, 694.
- XVI. Loss of articles left in garage, 695.
- XVII. Effect of transfer of garage, 696.
- XVIII. Presumption and burden of proof, 697.
- XIX. Damages, 700.

I. Generally.

This note does not cover the question of the right of a garage keeper to a lien, or his liability where he detains the car for charges.

It is a well-settled general rule that garage keepers for hire are bound to exercise reasonable or ordinary care with respect to automobiles left in their care, and that they are liable for damage to cars left in their custody where it is due to their negligence.

Alabama.—Southern Garage Co. v. Brown (1914) 187 Ala. 484, 65 So. 400.

Delaware.—Morgan Millwork Co. v. Dover Garage Co. (1919) 7 Boyce, 383, 108 Atl. 62.

Illinois.—Glende v. Spraner (1916) 198 Ill. App. 584.

Kansas.—Roberts v. Kinley (1913) 89 Kan. 885, 45 L.R.A.(N.S.) 938, 132 Pac. 1180.

Minnesota.—Travelers Indemnity Co. v. Fawkes (1913) 120 Minn. 353, 45 L.R.A.(N.S.) 331, 139 N. W. 703.

North Carolina.—Beck v. Wilkins-Ricks Co. (1920) 179 N. C. 231, 9 A.L.R. 554, 102 S. E. 313.

Washington.—Tacoma Auto Livery Co. v. Union Motor Car Co. (1915) 87 Wash. 102, 151 Pac. 243, 10 N. C. C. A. 1007.

West Virginia.—McLain v. West Virginia Automobile Co. (1913) 72 W. Va. 738, 48 L.R.A.(N.S.) 563, 79 S. E. 731, Ann. Cas. 1915D, 956.

Wisconsin.—Firemen's Fund Ins. Co. v. Schreiber (1912) 150 Wis. 42, 45 L.R.A.(N.S.) 314, 135 N. W. 507, Ann. Cas. 1913E, 823.

But a garage keeper for hire is in no sense an insurer, and the measure of care required of him is only such as men of common prudence ordinarily bestow upon their own property similarly situated. Roberts v. Kinley

(Kan.), Beck v. Wilkins-Ricks Co. (N. C.), and Firemen's Fund Ins. Co. v. Schreiber (Wis.) — *supra*.

A count in assumpsit charging a garage keeper with the duty to take due and proper care of an automobile left in his custody, and safely and securely to keep, store, and care for it without damage or injury, merely charges a duty to exercise reasonable or ordinary care. McLain v. West Virginia Automobile Co. (W. Va.) *supra*.

A gratuitous bailee of an automobile is only bound to exercise slight care or diligence. Thomas v. Hackney (1915) 192 Ala. 27, 68 So. 296; Glende v. Spraner (Ill.) *supra*. (Generally, as to the duty and liability of gratuitous bailee, see annotation in 4 A.L.R. 1196.)

Thus, a garage keeper who stores a vehicle overnight to accommodate the owner, and without agreement as to compensation, is a gratuitous bailee, and is liable for gross negligence only, or a want of slight care or diligence. Glende v. Spraner (Ill.) *supra*.

And where a mechanic received a car to repair gratuitously, and it was damaged while he was riding in it for the purpose of ascertaining whether the repairs made were successful, he was a bailee without reward, and was required only to exercise slight care, and was liable only for gross neglect or bad faith. Thomas v. Hackney (Ala.) *supra*.

But a garage keeper, upon the delivery and acceptance of an automobile for the purpose of making repairs when their extent and nature have been ascertained and the order given by the owner, engages, whether the repairs are made or not, to return the car to the owner, or to deliver it to

some third person, with the owner's express or implied consent, and a delivery to an unauthorized person is a conversion of it; and in such case neither a sincere and apparently well-founded belief that the tortious act was right, nor the exercise of any degree of care in reaching such a belief, constitutes a defense even to a gratuitous bailee. *Doyle v. Peerless Motor Car Co* (1917) 226 Mass. 561, 116 N. E. 257. And see *Harnstrom v. Anderson Electric Car Co.* (1918) 210 Ill. App. 395, *infra*, VIII.

II. Limitation of liability; effect of custom and usage.

In *Pilson v. Tip-Top Auto Co.* (1913) 67 Or. 528, 136 Pac. 642, where the court approved instructions that made the liability of the defendant turn on negligence, and in other respects conformed to the principles applicable to the liability of bailees generally, it was held that a garage keeper for hire could not so limit his responsibility to the bailor as not to be liable for his own negligence or the negligence of his agents and servants.

It has been held that evidence was properly excluded, in an action against a garage keeper for the loss of a car by fire, that a sign was posted in the garage stating that the proprietor would not be liable for loss by fire, where there was no proof that it was called to plaintiff's attention, or that he ever saw it. *Parris v. Jaquith* (1921) — Colo. —, 197 Pac. 750; *Hoel v. Flower City Fuel & Transfer Co.* (1919) 144 Minn. 280, 175 N. W. 300. The court in the *Parris* Case stated that contracts limiting liability for negligence are generally against public policy, and that the defendant could not, by posting such a sign, escape liability for his own negligence.

Valid customs known to the contracting parties concerning the subject of the agreement, or usages of which the parties are chargeable with knowledge, are by implication incorporated in the contract unless expressly or impliedly excluded by its terms. *SIMMS v. SULLIVAN* (reported herewith) ante, 678.

But there is no general presump-

tion that persons leaving automobiles in a garage for storage have knowledge of a custom of the garage keepers in that city not to drain the water from the radiators in freezing weather, and such custom must be shown to have been so general that a contracting party will be presumed to have had knowledge of it in order to make it a part of the contract, in the absence of evidence that he had actual knowledge of it. *Ibid.*

A custom of garage keepers, to which the owner is not a party, contrary to the implied obligation of reasonable care for safe-keeping, arising in favor of an automobile owner by the storing of his car at a public garage, cannot absolve the garage keeper from observance of such care. *McLain v. West Virginia Automobile Co.* (1913) 72 W. Va. 738, 48 L.R.A. (N.S.) 561, 79 S. E. 731, Ann. Cas. 1915D, 956.

And so it is said in the reported case (*SIMMS v. SULLIVAN*, ante, 678), citing the *McLain* Case, that the duty of a garage keeper with whom an automobile is left for storage, to exercise ordinary care to drain the water from the radiator in freezing weather, cannot be controlled by the custom of garage keepers in that locality not to do so. As already pointed out, the court held that the owner was not charged with knowledge of the alleged custom.

In an action for the loss of an automobile which a garage keeper delivered to one who had acted as chauffeur for the plaintiff, where the defendant's manager testified that a custom to allow a chauffeur who brings a car into a garage to be kept for the owner, to take it out again without an order from the owner, did not apply where an automobile had been taken to a garage and left, pending negotiations as to repairs, it was held that the jury were justified in finding that the custom formed no part of the bailment where the car was, by the owner's direction, retained for an appreciable length of time for the sole purpose of ascertaining the extent and cost of necessary repairs. *Doyle v. Peerless Motor Car Co.* (1917) 226 Mass. 561, 116 N. E. 257.

III. Unauthorized use by garage keeper's employee.

While it is true, as a general rule, that a master is not responsible for the acts of his servants not within the scope of employment, at least as to third persons not in contractual relations with him, it is to be observed that a bailee by his contract assumes certain affirmative obligations, among which is the duty to exercise reasonable care to protect the subject of the bailment against the wrongful acts of third persons, whether in his employment or not; and it would seem that in some circumstances he might be bound to take greater precautions against such acts on the part of his employees than against the acts of persons not in his employment. Whether or not it is proper to refer such a result to the doctrine of respondeat superior, it is, at least, apparent that a bailee may, in some circumstances, be responsible to the bailor for the acts of his employees that are concededly beyond the scope of their employment.

In *Travelers' Indemnity Co. v. Fawkes* (1913) 120 Minn. 353, 45 L.R.A.(N.S.) 331, 139 N. W. 703, the question whether the proprietor of an automobile repair shop exercised proper care was held to have been properly submitted to the jury; it appearing that the car was taken out by the foreman for his own pleasure, and that the defendant had notice of proclivities on his part rendering such a course of conduct likely.

And where it appeared that the plaintiff stored his automobile at the defendant's garage at an agreed price for care and storage, and that the night man at the garage took the automobile out for his own purposes and damaged it, it was held that a breach of the contract was shown, and a non-suit was properly refused. *Corbett v. Smeraldo* (1918) 91 N. J. L. 29, 102 Atl. 889. In this case, with respect to the decision in *Firemen's Fund Ins. Co. v. Schreiber* (1912) 150 Wis. 42, 45 L.R.A.(N.S.) 314, 135 N. W. 507, Ann. Cas. 1913E, 823, the court said: "We are referred to *Firemen's Fund Ins. Co. v. Schreiber* (Wis.) supra, as holding a contrary view. The author-

ity of that case is much shaken by the dissent of three out of seven judges, and by the fact that the lower court was reversed. Giving it, however, all the force that can legitimately be claimed, it is not in point. The case did not arise between bailor and bailee, and did not involve the terms of the contract. It was a suit by an insurance company against the bailee for the tort of his servant, and the defendant's liability was necessarily dependent on the application of the rule of respondeat superior."

And in *Smith v. Bailey* (1917) 195 Mich. 105, 161 N. W. 822, 15 N. C. C. A. 308, where there was testimony that the plaintiff left his car at the defendant's garage for repairs, and that an employee of the garage keeper, without the latter's knowledge, took the car for a pleasure ride, during the course of which it was damaged, it was held that the question whether the defendant had used ordinary care or was guilty of negligence was for the jury.

In *Roberts v. Kinley* (1913) 89 Kan. 885, 45 L.R.A.(N.S.) 938, 132 Pac. 1180, where an employee in charge of a garage in which an automobile had been left for repairs took the automobile out after it had been repaired, for the purpose of testing it, and also to carry home a customer who had left his automobile for repairs which could not be completed on that day, it was held that, although the trip to the customer's home was longer than was necessary to try out the machine, the employee could not be deemed to have been acting outside the scope of his employment, and the garage keeper was held liable for the negligent wrecking of the machine. (See also, as to effect of deviation, *Southern Garage Co. v. Brown* (1914) 187 Ala. 484, 65 So. 400, *infra*, VIII.)

In *John M. Hughes Sons Co. v. Bergen & W. Automobile Co.* (1907) 75 N. J. L. 355, 67 Atl. 1018, a finding upon the evidence was held justified that the one driving plaintiff's automobile when it was damaged was the manager of defendant's garage, and that one detail of business was to assist customers when their machines broke

down on the road, and that it was within the scope of such person's employment to follow a customer who had broken down, and that he had implied authority to hire or borrow a car, and that he borrowed the plaintiff's car, and, while using it to assist a customer who was in trouble, and while acting within the scope of his employment, the car was damaged through the employee's negligence.

But the majority of the court in *Firemen's Fund Ins. Co. v. Schreiber* (1912) 150 Wis. 42, 45 L.R.A.(N.S.) 314, 135 N. W. 507, Ann. Cas. 1913E, 823, in a suit by an insurer, denied the liability of a garage keeper for damage to a car taken out by an employee after he had left work for the day, upon the ground that he was not acting within the scope of his employment. The court said: "Care is required to appreciate the meaning of 'scope of the employment.' It is not, as said by the Minnesota court in *Slater v. Advance Thresher Co.* (1906) 97 Minn. 305, 5 L.R.A.(N.S.) 598, 107 N. W. 133, 'synonymous with "during the period of employment,"' but, as indicated in *Schultz v. La Crosse City R. Co.* (1907) 133 Wis. 420, 113 N. W. 658, and *Cobb v. Simon* (1903) 119 Wis. 597, 100 Am. St. Rep. 909, 97 N. W. 276, it signifies 'in the actual prosecution of the master's business.' For example, if it were the duty of a night man at a garage to deliver a customer's machine to him at his house upon call therefor, and, in responding to such a call, he carelessly or wantonly injured the machine, the wrong would be one within the scope of his employment. The taking out of the machine contrary to the orders of both master and customer, and for a purely personal purpose, is another thing. Now, wherein was there any breach of duty of appellant shown here? The servant, so far as appellant had any reason to suppose, was a proper person to leave in charge of the garage. There was no claim made to the contrary, nor any evidence in that regard. The servant did not take the machine out under any authority from the appellant, but in most flagrant violation of it. He would not have exceeded his

authority any more certainly had he stolen the subject of the bailment, as in some of the cases cited, or destroyed it in the garage. He was not pretending to act for appellant in any respect, but acted solely for himself. As said, in effect by Parker, Ch. J., in *Foster v. Essex Bank* (1821) 17 Mass. 479, 9 Am. Dec. 168, 1 Am. Neg. Cas. 502, he cannot be considered, in any view, as having acted within the scope of his employment when he committed the villainy, and the defendant is no more answerable for such act than he would be had the servant stolen plaintiff's pocketbook while he was in the garage to take out his machine. It being clear that he had no authority whatever to take out the machine, in the words of Yellott, J., in *Adams v. Cost* (1884) 62 Md. 271, 50 Am. Rep. 211, 'by no process of ratiocination could it be made demonstrable that he was acting under the authority of the defendants. On the contrary, we are irresistibly and logically led to the conclusion that he was then acting independently of that authority, and consequently not within the limits of his assigned employment as the defendant's servant.' He wilfully, knowingly, did the wrongful act for purposes entirely foreign to his employment. He was not hired to do any such act. How, then, can it be said that it was done within the scope of his employment? The result of the foregoing renders it immaterial whether Flynn practically left his service for the day, and then returned as a stranger and took out the machine. It seems to be conceded that, if such were the fact, the appellant is not responsible under the extreme rule of *Craker v. Chicago & N. W. R. Co.* (1874) 36 Wis. 657, 17 Am. Rep. 504, 8 Am. Neg. Cas. 665. The learned court perhaps considered that Flynn merely absented himself from the garage for a brief period to get a lunch, intending to return and permanently close the place for the night. The indications are pretty plain that he was through for the day when he went for his lunch; that he had no thought of returning for further service, but merely to obtain his coat; that while so away

he met his friend, and together they conceived the plan of re-entering the place, primarily, if not solely, for the purpose of committing the trespass. Quite likely the thought of getting the coat occurred because of the necessity or convenience of it in view of the contemplated expedition. That demonstrates how very foreign such trespass was from the scope of Flynn's employment. While it would make no difference with the result, as we view the case, we are inclined to hold that Flynn returned to the garage for the machine, for an unlawful purpose, formed after he had substantially quit service for the day, and so his act was outside the scope of his employment, even from respondent's viewpoint. The mere fact that he possessed the means of re-entering the garage would not make the entry within the scope of his employment, if the purpose of such entry was to commit the trespass, or even to get the coat; especially if that was merely incidental to the scheme to commit the wrong. Little time need be spent with the contention of appellant that the scope of Flynn's employment was confined to washing machines. He was the night man at the garage. That is plain. One of the duties of night man, evidently, is to wash machines. Necessarily, his duties required him to prevent unauthorized interference with machines, to open and close the place as necessary to accommodate customers in taking out or putting them up, and to assist if necessary. The difficulty was that he violated the very purpose of his employment, instead of acting within the scope of it, in committing the trespass. It is hard to conceive a more plain case of stepping completely aside from the scope of one's employment, within the rule stated, than occurred in this case."

And in *Evans v. A. L. Dyke Automobile Supply Co.* (1906) 121 Mo. App. 266, 101 S. W. 1132, it was held that a company which had a garage and dealt in automobiles was not liable to the owner of an automobile received by one of its agents for sale on commission, for damage done to the car while it was being driven by such agent for

purposes of his own, since he was not, at the time, acting within the scope of his authority.

IV. Unauthorized use by owner's employee.

Where the owner of an automobile caused it to be delivered to a garage keeper by his chauffeur, and after delivery notified the latter that he had placed the machine in his possession for the purpose of ascertaining the extent and cost of repairs, such notice is equivalent to a notice not to deliver the machine to the chauffeur or to any person until the special purpose has been accomplished, or until the owner has specially ordered a redelivery. *Doyle v. Peerless Motor Car Co.* (1917) 226 Mass. 561, 116 N. E. 257.

And the bare relationship of parent and child does not make a daughter an agent of the owner of a car, to authorize a delivery to the owner's chauffeur. *Ibid.*

In *Wilson v. Wyckoff, Church & Partidge* (1909) 133 App. Div. 92, 117 N. Y. Supp. 783, affirmed without opinion in (1911) 200 N. Y. 561, 93 N. E. 1135, which was an action against the owner of a garage who had agreed, under a written contract, that the plaintiff's automobile should not be taken from the garage at night without the latter's written order, it was held that the verdict of the jury for the plaintiff, finding the defendant guilty of a lack of due care, was justified, where it appeared that the defendant kept a watchman stationed at the door whose business it was to see that the proper chauffeur was driving the machine of his employer and had the requisite order for taking the machine out, and that during the rush hours the plaintiff's chauffeur drove his car up rapidly behind an outgoing machine, and, when told to stop and produce his order to take out the machine, he put on speed, and dashed through the doorway, and was out of sight immediately, and the machine was found next morning, badly damaged. The court said: "All the evidence upon the subject was that which was furnished by defendant's employees, and may therefore be assumed to

be as favorable to defendant as the truth would permit. It may be that the evidence did not convict the defendant's door men of negligence, but it does not follow that defendant showed proper diligence in devising and putting into effect methods which would more effectually prevent chauffeurs taking out motor cars improperly. Indeed, the whole defense is that defendant adopted a method which ought not to be expected to be effective at what are called rush hours. It is difficult to believe that some more effective means might not have been adopted, and the jury were justified in finding that the failure to adopt, or at least try, some other method, constituted a lack of due care on defendant's part. It is no answer to say that the chauffeur was plaintiff's servant, for defendant's contract explicitly was to protect plaintiff against his own servant's acts." Houghton, J., in a dissenting opinion which was concurred in by Laughlin, J., said: "The defendant had the right to assume that plaintiff's own servant and chauffeur was ordinarily honest and would obey the rules of the establishment. In the contract of bailment the plaintiff vouched for the honesty of any chauffeur that he might employ. He had previously asked to be allowed to take out the machine in the nighttime without a written order from his employer, and had been refused, and had acquiesced in the refusal. It was a part of his duties to try out the engine while it was in the garage, and he had a right to seat himself in the driver's seat while the engine was in motion. Having started the engine and seated himself in the driver's seat, he watched his opportunity, and, when another machine was passing out of the door, threw on the clutch, thus starting the machine, and swung in close behind the outgoing automobile, and passed the watchman at the door, disregarding his commands to stop. The watchman was not called upon to jump in front of the machine and be run down, nor was it a part of prudence to arm himself with a club to stun the chauffeur, or with a pistol to kill him. If the watchman had let him-

self be run over, it would not have stopped the machine. Nor would the disabling of the chauffeur have had that effect. On the contrary, it would have turned the automobile loose in the street, without a driver, to the disaster of itself and everything in its path. Nor would a bar or chain or half-open door have helped the matter. The bar or chain must necessarily have been down to let out the automobile which was lawfully passing, and the door must have been open for the same purpose. The plaintiff's machine was following so closely behind the other automobile that the door could not have been closed or the bar or chain put up to prevent its passing out. Such an occurrence had not happened before in all defendant's experience, and it is impossible to conceive what further reasonable thing it could have done to prevent the machine from being taken out. In making its regulations, the defendant properly assumed that plaintiff's chauffeur was reasonably honest and faithful. The defendant did not insure that the plaintiff's own servant would not, by trick or theft, take the plaintiff's machine from the garage in the nighttime without a written order. All that it was bound under its contract to do was to use reasonable care to prevent it. In order to fasten liability upon the defendant, lack of such reasonable care must be proven. If ordinary care was wanting, it ought to be easy to suggest what further could have been done. I have heard no such suggestion, nor do I perceive how a reasonable one could be made."

V. Delivery of car to one other than garage employee or owner's servant.

In *Morgan Millwork Co. v. Dover Garage Co.* (1919) 7 Boyce (Del.) 383, 108 Atl. 62, where an automobile was taken by an unknown person, it was held that a garage keeper is bound to exercise reasonable care to preserve automobiles left for storage for hire by their owners; that is, such care as a reasonable person would exercise in respect to his own property; and that he is also bound to see that the person to whom he delivers an

automobile left with him for safe-keeping is the proper person to receive it, and that the only surrender that a garage keeper can rightfully make of an automobile left with him for safe-keeping is on the order of the owner, express or reasonably implied; and to the same effect is *McLain v. West Virginia Automobile Co.* (1913) 72 W. Va. 738, 48 L.R.A.(N.S.) 561, 79 S. E. 731, Ann. Cas. 1915D, 956.

And he cannot leave the garage solely in the hands of a servant, and then say the latter's negligence in releasing a car to one without authority from the owner is beyond the scope of his employment. *Ibid.*

But a garage keeper who, for compensation, stores a vehicle for the owner, is not liable for its loss by theft, if he exercised ordinary care to prevent it. *Glende v. Spraner* (1916) 198 Ill. App. 584. In this case, which was an action against a garage keeper to recover for the loss of a motorcycle, the evidence showing that the plaintiff left the machine in defendant's garage overnight, that he had advertised it for sale and so informed the defendant, and also told him that the machine could not be operated without repairs, and left his name and address, and requested defendant to permit anyone to inspect the machine whom he might send around, the defendant was held not liable for the theft of the machine by one who presented a written permit from plaintiff to inspect it, and who, under the pretext of inspecting it, stole it.

And an action of trover cannot be maintained against one engaged in the business of manufacturing bodies for automobiles, and of storing them for hire, for refusing to deliver an automobile to a vendor who had conditionally sold the machine, where the latter allowed his vendee to deliver the chassis to the defendant for the purpose of having a body put on it, and a receipt was given to the vendee by the defendant, stating that the machine was to be delivered only on return of the receipt, which the vendee then indorsed and delivered to the vendor, it appearing that the defendant had no knowledge of the vend-

or's claim, and that, after having performed the work, he redelivered the machine to the vendee; since the receipt given was not negotiable, and the defendant had a right to deliver the property to the one from whom he had received it. *Manny v. Wilson* (1910) 137 App. Div. 140, 122 N. Y. Supp. 16, affirmed in (1911) 203 N. Y. 535, 96 N. E. 1121.

And it was held that the defendant, to whom the chassis had been delivered, did not come within the provisions of a statute punishing one carrying on the business of a warehouseman "who delivers to another any merchandise for which a bill of lading, receipt, or voucher has been issued, unless such receipt or voucher bears upon its face the words 'not negotiable,' or unless such receipt is surrendered to be canceled at the time of such delivery." *Ibid.*

In *Geren v. Hollenbeck* (1913) 66 Or. 104, 132 Pac. 1164, the act of the keeper of the plaintiff's automobile in intrusting the possession of it to one who wrecked it while driving was held a conversion of the car. It does not clearly appear in this case, however, whether or not the bailee was a keeper of a garage.

The decision in *Hancock v. Anchors* (1921) — Ga. App. —, 105 S. E. 631, where the car was delivered, in trover proceedings, to one other than the ostensible owner, by whom it was stored, turns upon a point not at all distinctive to the subject under annotation.

VI. Theft where no delivery by garage keeper or employee.

It cannot be held as a matter of law that a garage keeper was free from negligence, but the question is for the jury in an action against him for the theft of a car, where there is evidence that the garage was full of automobiles on the night when the plaintiff's car disappeared, that there was no watchman after midnight, and that the thieves entered through a window which might have been left open by the defendant's employees, and that the doors through which the automobile passed could be opened from the

inside of the building by simply unhooking an iron hasp from a staple in the wall. *Stenson v. Flower City Fuel & Transfer Co.* (1920) 144 Minn. 375, 175 N. W. 681.

And in an action against the owner of a garage to recover for the loss of a machine which was kept in the garage for hire, the question of whether the defendant exercised ordinary care is for the jury where there is evidence that the automobile was taken from the garage at night, while the doors of the garage were open, so that anyone might drive a car out, and while the watchman was on another floor of the building. *Farrall v. Universal Garage Co.* (1920) 179 N. C. 389, 102 S. E. 617.

And in *Hayes v. Maykel Automobile Co.* (1919) 234 Mass. 198, 125 N. E. 165, in an action to recover for the theft of an automobile stored in defendant's garage under a contract of "live storage," the question of defendant's negligence was held to be for the jury where there was evidence that the car could not be started and driven away from its place without being heard, and also evidence of negligence in failing to lock the basement door, and testimony showing a failure to comply with a statute requiring garages storing more than five cars to keep a record of every automobile which enters or leaves the garage.

In this case a statute requiring the keeping of a record of automobiles driving in and out of garages storing more than five cars was construed to impose upon the proprietor of the garage the duty of making the entries, except in cases of cars driven by chauffeurs.

And in an action against a manufacturer of speedometers for damage to the plaintiff's car, which had been left in an alleyway near the defendant's repair shop, for the purpose of having the speedometer adjusted, it was held that it could not be ruled as a matter of law that the plaintiff could not recover, where there was evidence that the plaintiff drove the car into the alley and informed an employee of the defendant that he intended to leave it there for repairs, and that the employee consented and agreed to

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have the car ready at a certain time, but that, upon the plaintiff's return, the car was gone, and when recovered was in a badly damaged condition. *Stevens v. Stewart Warner Speedometer Corp.* (1916) 223 Mass. 44, 111 N. E. 771. The court stated that there was evidence from which it could have been found that the machine was left in the custody of the defendant, and that, if the jury so found, the defendant was liable as a bailee for hire, and as such was required to exercise due care to protect the machine from being lost or damaged; that is, was required to exercise the care a reasonable man would have exercised under the circumstances; and it was further stated that the liability of the defendant as bailee for hire was not affected by reason of knowledge of the owner as to the manner in which or the place where the property was kept, but that its acceptance by the defendant imposed upon it due care for its safety and protection, although evidence was introduced by the defendant tending to show that its employees were instructed that all cars which were left in the alley were at the owners' risk, and it was stated that the evidence warranted a finding that the defendant assumed custody and control of the car, and thereafter allowed it to remain in the alley without using any precautions whatever to protect it from being stolen, and that it could have been found that the theft of the car was the natural and probable result of the negligence of the defendant.

And where the only evidence in an action against a garage keeper for the loss of a car which was alleged to have been stolen was that the defendant could give no explanation as to how the car got out of the garage, it was held that the evidence was not such as to require a finding that defendant was free from negligence, and that the loss did not come from its lack of care. *Hoel v. Flower City Fuel & Transfer Co.* (1919) 144 Minn. 280, 175 N. W. 300.

In *Burge v. Englewood Motor Car & Garage Co.* (1919) 213 Ill. App. 357, where the original action was one of

replevin against the owner of a garage for the loss of an automobile, and was subsequently changed to an action of trover, a verdict of the jury finding the defendant guilty of "maliciously, wilfully, and intentionally" converting the property to its own use was held not supported by the evidence, which showed that the machine was stolen from the garage by some unknown person, the court stating that, considering the action as one in case, the verdict was improper; and considering it as an action in trover, the evidence did not prove a conversion of the machine.

The court is not required to rule that there was no evidence that the defendant garage keeper or its employees stole the plaintiff's car, where the record does not disclose that the plaintiff contended that either the defendant or its employees had stolen the car. *Hayes v. Maykel Automobile Co. (Mass.) supra.*

When an automobile is delivered to a garage company for washing, the duty rests upon the company of exercising reasonable care in keeping and returning the machine to the owner; and in case of theft of the machine, the duty of exercising reasonable diligence on the part of the garage to recover it attaches, and there is not an exercise of reasonable diligence in attempting to recover the stolen machine where the garage keeper delays for two days in making a start to pursue the thief. *Tacoma Auto Livery Co. v. Union Motor Car Co. (1915) 87 Wash. 102, 151 Pac. 243, 10 N. C. C. A. 1007.*

VII. Unauthorized use by garage keeper.

In *Bush v. Fourcher (1907) 3 Ga. App. 43, 59 S. E. 459*, where a recovery was sought against a repairer of automobiles for the unauthorized use of a machine placed in his hands for repairs and sale, it was held that in case an unauthorized use of the machine was shown, he would be liable for reasonable hire for its use; and where no contract for hire was shown, it was held that the question of whether such person "made a practice of using it" was immaterial, since he was lia-

ble only for reasonable hire for the time which he actually used the machine.

VIII. Damages resulting while car is being taken to garage.

Where an employee of a garage is sent to get the car of a customer, the possession of the car is that of the garage keeper, and the latter is liable for damage to it, due to the driver's negligence, although, at the time it occurred, he had deviated from the regular route between the garage and the customer's house. *Southern Garage Co. v. Brown (1914) 187 Ala. 484, 65 So. 400.* (See also, as to effect of deviation, *Roberts v. Kinley (1913) 89 Kan. 885, 45 L.R.A. (N.S.) 938, 132 Pac. 1180, supra, III.*)

And where, in connection with the contract of sale of an automobile, the seller agrees to give the buyer free monthly inspection service, in rendering such service the seller is not performing a gratuitous act, but there is a mutual benefit bailment under which the seller becomes liable for an injury to the car by ordinary negligence of its servants while driving it to the seller's garage for the purpose of rendering the service. *Harnstrom v. Anderson Electric Car Co. (1918) 210 Ill. App. 395.*

In *Beaucage v. Mercer (1910) 206 Mass. 492, 138 Am. St. Rep. 401, 92 N. E. 774*, it was held that if the authority, real and apparent, of an agent sent out by a garage to tow in a disabled car, is limited to the selection of only the necessary number of men to perform the work, and he selects more, the surplus number cannot be regarded as the servants of the principal; but if the agent is entitled to send as many men as he thinks necessary, and, acting upon such authority, he sends such men as he believes to be necessary, but in fact more than are needed; or, if he has power to send as many men as he pleases, and sends more than are necessary,—in either of these cases all the men sent may be considered as the servants of the principal. And in this case, which was an action against a proprietor of a garage for injuries to the person and

to an automobile while being towed by a machine sent from a garage, where there was evidence to support a recovery on the ground that the cars were negligently hitched together, and also on the ground that the towing car was negligently managed, it was held erroneous to instruct that no recovery can be had if the plaintiff knew and appreciated the risk attendant upon the negligent hitching together of the cars. And it was also held that evidence of what a witness saw, or had seen, the employee who despatched the towing car do, was admissible upon the question of the scope of his authority, but that the inference which the witness drew from these facts should be excluded. *Ibid.*

In an action for personal injuries, where it is shown that the defendants, in connection with their general business as retail merchants, maintained a department for selling and repairing automobiles, and made a practice of sending men out to bring in automobiles to be repaired, and delivering them when repaired, but did not undertake to carry passengers; and that the plaintiff telephoned a personal friend, who was employed in another department of the defendant's store, and requested him to send a competent man to repair her automobile and run it back to the city with her as a passenger,—no recovery can be had, although her request was complied with, and after the repairs were made, and on the return trip, the machine was upset and she was injured; since there is nothing in the case to show that the employee who was telephoned to had any connection with the automobile department, or that the manager of the department had any authority to contract to bring the plaintiff back to the city as a passenger, or that he made or was requested to make such a contract. *Gresh v. Wanamaker* (1912) 237 Pa. 13, 84 Atl. 1108.

IX. Change of place of storage without owner's consent.

If the owner of an automobile contracts with a garage keeper to keep his machine at a garage in the city,

and the garage keeper removes it to another garage outside of the city without the owner's consent, and it is there damaged by the falling in of the roof of the garage, the garage keeper is liable for the damage without reference to the question of negligence, as such act is a violation of the contract of bailment. *Pilson v. Tip-Top Auto Co.* (1913) 67 Or. 528, 136 Pac. 642. (Generally as to liability of bailee for loss or injury to goods kept at a place other than that originally intended, see annotation in 12 A.L.R. 1322.)

X. Damage while in storage.

Where it is shown that an automobile body when delivered at a garage for storage was in good condition, and that upon redelivery about three years later it was broken and the upholstery was moth-eaten, so as to render it worthless, a prima facie case is made out against the bailee, and he will be liable unless he shows in rebuttal the degree of care exercised, the conditions existing in the garage, the impossibility or improbability of moths frequenting a place where large quantities of gasoline were in use, or that it was not customary for warehouses engaged in storing automobiles to inspect them and report their condition to the owners, and establishes knowledge by the plaintiff on that point. *Wimpfheimer v. A. T. Demarest & Co.* (1912) 78 Misc. 171, 137 N. Y. Supp. 908.

XI. Defective repairs; damage during repairs.

Generally, as to liability of one contracting to make repairs for damages from improper performance of the work, see annotation in 1 A.L.R. 1654. When a garage takes a repair job, and the contrary does not appear, so far as the customer is concerned, it undertakes for itself the whole job, and whether the garage does all the work is immaterial in so far as the garage keeper's liability is concerned. *Russell's Express v. Bray's Garage* (1920) 94 Conn. 520, 109 Atl. 722. The court said: "It appears that defendant conducted a general repair garage. It did not do welding, but had what it be-

hieved a competent welder, to whom welding jobs were turned over. When a garage takes a repair job, and the contrary does not appear, so far as the customer is concerned, it undertakes for itself the whole job. Whether the garage does all the work is quite immaterial. Should the job require work to be done outside the capacity of its shop, as that of a carriage maker, painter, glass cutter, the garage gets the work done on its own account, being equally responsible to the customer whether the work is done by its immediate employees or by specialists in the different lines of work required to be done. The garage company necessarily does all its work by employees, and whether they are permanently employed or only for special jobs can make no difference."

It was further held in the Russell Case that the conclusion that the plaintiff relied upon the defendant to see that the repairs to his machine were properly done was justified by the evidence where it appeared that the plaintiff took his disabled truck to the defendant's garage, and, upon its being found that a part of the car needed welding, inquired of the defendant if he had a competent welder, and received an affirmative reply, and that the welding was done by a third person to whom the defendant sent the part, and that, upon its return, the plaintiff did not see the welding, but that the defendant inspected it and put the part into the machine. The court, in denying the defendant's contention that the plaintiff, by special terms of the contract, did not rely upon the defendant garage keeper for the welding, but authorized him to employ a welder to do the work on the plaintiff's account, said: "There is no question of agency disclosed or undisclosed. The contract between plaintiff and defendant was one of bailment for repairs, *locatio operis faciendi*, to use the older nomenclature. The defendant was bailee of this truck to put it in good repair, welding included. Its duty was to use ordinary care, not merely to select competent employees, as defendant claims, but to do the work re-

quired with ordinary skill and judgment. It is said that in this class of bailments 'ordinary care' is a term of intense relativity. The bailee promises the skill of his art. In such a contract the bailee may use the usual means of executing the bailment. . . . It is also a rule of such bailments that, unless the contract requires the personal services of the bailee, he may have the work completed by third persons. Dobie, *Bailm. & Carr.* § 66, citing 1 *Laws of England* (Halsbury) p. 560. In a note Dobie says: 'Frequently the size and variety of the work . . . would conclusively show that the bailee could not personally perform all the services himself, but must delegate it in whole or part to others, for whose work, while acting within the scope of their employment, the bailee is, of course, responsible.' That is exactly the present case. The court having found that the welding by solder and not iron was negligent, careless, and improper, the law as to negligence in the performance of the contract of bailment for repair applies, and the defendant is liable for the negligent soldering as much as though it had been done in its own shop by its regular employees. It is liable not because of any misrepresentations of the defendant in turning the car over to the plaintiff, but because the work undertaken to be done by the defendant was in fact negligently, carelessly, and improperly done."

In *Kendick v. Rolle* (1920) 182 N. Y. Supp. 775, it was held error to dismiss a counterclaim for damage to the defendant's car by a misplacing of the starter, which it was necessary to remove in making the repairs for which the garage keeper sought recovery.

In an action to recover for labor and repair on an automobile, where it appeared that after the job was completed the car was taken out for a trial run and found to work all right, but as it was about to return to the garage the casing broke and the gears were injured, and that the plaintiff took the car apart and showed the defendant the broken parts, and gave him every opportunity of inquiry and

inspection, and offered to do the work necessary to repair the damage, the evidence was held insufficient to show that the damage resulted from the plaintiff's negligence, and a verdict in his favor was sustained. *Duffy's Garage v. Sweeley* (1917) 66 Pa. Super. Ct. 583.

In *Wyckoff, Church & Partridge v. Lansden Co.* (1908) 112 N. Y. Supp. 1052, it was held that a recovery against a garage keeper based upon a charge that he had, through negligence, damaged the defendant's automobile by filling the cells of the battery with sulphuric acid, instead of distilled water, could not be had where an employee of the garage testified that when the machine was brought in on a certain day he noticed that the battery was hot, and stated positively that he filled it with distilled water, and described minutely the process of filling; and the only evidence for the owner of the machine was that it was brought to the garage on the day in question, and that the next day it would not move, and that the battery was hot and filled with gases, and that after a heavy charge it did not work properly that day, and the chemist who repaired it testified that he found sulphuric acid in the cells, there being nothing, however, in the owner's evidence to show that no one else had put the injurious substance in the batteries between the time when they were taken from the garage and when the examination was made by the chemist, since the evidence in such case is not sufficient to maintain the affirmative, which rests upon the owner.

In *Slattry v. Tillman* (1917) 197 Mich. 849, 163 N. W. 938, where the question was involved as to a car owner's liability for repairs necessitated by damage which occurred while the car was being tested at the request of owner's son, who was driving, to ascertain if repairs made were satisfactory, the jury's finding that there was no contract, either express or implied, by the terms of which the owner either ordered or agreed to pay for the repairs, was held justified by the evidence.

The owner of a car is not estopped from setting up a cross demand for damage to his car because he had made partial payments to the plaintiff for repairing it. *Thomas v. Hackney* (1915) 192 Ala. 27, 68 So. 296.

XII. Freezing.

As to prima facie case, see *infra*, XVIII.

As to effect of custom or usage, see *supra*, II.

The keeper of a garage with whom an automobile is stored for hire is bound to use such ordinary care as a man of ordinary prudence and discretion ought to exercise and would be expected to exercise if the property were his own, to prevent injury to the car by draining the water from the cooling system in freezing weather. *SIMMS v. SULLIVAN* (reported *herewith*) ante, 678.

And a garage keeper is liable, where he undertook to store an automobile, upon his express promise to furnish sufficient heat to keep the machine from freezing, and failed to do so, by reason of which the water jacket on the car was cracked. *Bussy v. Hatch* (1920) — N. J. L. —, 111 Atl. 546.

Where the owner of a car stored it in a steam-heated garage, he had a right, at least, to expect that the temperature would be kept above the freezing point; but if, owing to the severity of the weather, the garage keeper could not keep the temperature above the freezing point, although he had done everything that a reasonable and ordinarily prudent man could do so to keep it, still he is not relieved from the precaution of either drawing off the water from the cooling system, or taking other obvious precautions to prevent the water from freezing and bursting the pipes; and the fact that the car owner had taken his key to the ignition system with him, although it might have some bearing upon the defendant's failure to run the motor, would not excuse his neglecting other obvious precautions that a reasonably prudent person would have exercised in the care of like property of his own. *Smith v. Economical Garage* (1919) 107 Misc. 430, 176 N. Y. Supp. 479

And a charge in the Smith Case that the degree of care that a person has to use is such as is commensurate with the circumstances of each case, was held erroneous, since the jury should have been charged that the measure of the defendant's liability was that degree of care that an ordinary prudent man would exercise concerning his own property.

Where a garage keeper undertook to supply a sufficient amount of heat to keep the water jacket of a car from freezing, the question whether the owner directed the garage keeper to drain the water from the radiator could not affect the defendant's liability for failure to supply the requisite heat, by reason of which the water jacket was cracked, and consequently the exclusion upon an erroneous ground of evidence contradicting the owner's testimony that he so directed does not present a ground for reversing a judgment in favor of the car owner. *Bussy v. Hatch* (N. J.) *supra*.

XIII. Negligent operation of garage elevator.

As to presumption of negligence, see *infra*, XVIII.

In *Einhorn v. West 67th St. Garage* (1920) 191 App. Div. 1, 180 N. Y. Supp. 704, affirming (1919) 177 N. Y. Supp. 887, it was held error to dismiss the complaint in an action to recover against a garage keeper for damage to plaintiff's automobile while it was being lowered in the garage elevator, although the defendant claimed that the employee operating the elevator had no authority to do so, and was acting against his instructions, there being testimony by the plaintiff's chauffeur that the employee in question had frequently operated the elevator for him, and that, so far as he knew, he was the regular operator, and it appearing that, although the employee was still in the defendant's employ, and was in court, he was not called to contradict the chauffeur's testimony, the court stating that the frequent operation of the elevator by the employee in question justified the pre-

sumption that the defendant had notice thereof, and an inference that the elevator was operated by him with defendant's consent. The court, in the opinion in 177 N. Y. Supp. 887, stated that if a perfect stranger had been operating the elevator, it might be that the garage keeper would have been liable for a failure to guard against such a contingency.

In *Regan v. Burr & Co.* (1913) 159 App. Div. 131, 144 N. Y. Supp. 84, where plaintiff's automobile, which had been delivered to the defendant for the purpose of having a new body attached, was damaged through the fall of an elevator upon which it had been placed, it was held that the evidence in relation to the construction, mode of operation, and circumstances attending the fall of the elevator was not sufficient to sustain a finding of negligence on the part of defendant, or to support a verdict for plaintiff.

XIV. Delay in making repairs.

Where the owner of an automobile delivers it to the proprietor of a garage for the purpose of having repairs made, and no agreement is made as to the time in which they are to be completed, the question as to what is a reasonable time is for the determination of the jury. *Sisson v. Roberts* (1920) — Ga. App. —, 104 S. E. 910.

In *Bertschy Motor Co. v. Brady* (1914) 168 Iowa, 609, 149 N. W. 42, which was an action by a garage keeper to recover for repairing an automobile, in which the defendant counterclaimed on account of unreasonable delay in making the repairs, the evidence, which showed three hundred and fifty hours expended in labor upon the machine from the 19th of March to the 19th of September, was held to establish an unreasonable delay in completing the work, on account of which the defendant was entitled to an allowance.

XV. Damage by fire.

As to effect of posting notice that garage keeper is not liable for fire, see *Parris v. Jaquith* (1921) — Colo. —, 197 Pac. 750; *Hoel v. Flower City Fuel & Transfer Co.* (1919) 144 Minn. 280, 175 N. W. 300, *supra*, II.

A garage keeper is not relieved from liability to return the machine by its destruction by fire unless he has exercised ordinary care for its protection. *Beck v. Wilkins-Ricks Co.* (1920) 179 N. C. 231, 9 A.L.R. 554, 102 S. E. 313.

A complaint in an action against a garage keeper for the loss by fire of an automobile stored in his garage, which alleges that the garage keeper neglected to remove the plaintiff's car from the garage, or to allow other persons to remove it, and that, by reason of such negligence, the property was destroyed, was held to allege sufficiently the negligence of the defendant; and a finding that the plaintiff's car was burned through the defendant's negligence was held sustained where there was evidence that, after the danger of destruction by fire became imminent, and the defendant's attention had been drawn to the danger, he stood by for a period of twenty or thirty minutes, watching the fire, without making any effort to remove the automobile from the garage. *Hobson v. Silvea* (1921) — Cal. App. —, 194 Pac. 525.

In *Parris v. Jaquith* (Colo.) *supra*, where recovery was sought against a garage keeper for the destruction of an automobile by fire, and there was evidence that the garage was heated by a furnace situated directly under an oil-soaked floor upon which cars were stored, and which was supported by a wooden post, and that on the night of the fire ashes had been raked out of the furnace and allowed to remain about the wooden post, and that a fire had started and climbed this post to the main floor, such evidence was held to rebut the probability that the fire originated in any other manner, and the evidence was held to justify a finding that it was negligence per se on the part of the defendant, and that evidence of custom, methods of construction, heating, etc., in other garages, was immaterial.

And in the *Parris* Case an instruction that the care required increased in proportion to the danger was held to have special application to the fur-

nace and its surroundings, and to be correct.

And it has been held that where the purchaser of an automobile shipped it to one of the concern's stores for repairs, the concern, upon receiving it, became a bailee for hire, and responsible only for ordinary care. *Ford Motor Co. v. Osburn* (1908) 140 Ill. App. 633. And in this case, in accord with the decision in *Allen v. Fulton Motor Car Co.* (N. Y.) set out *infra*, XVIII., it was held that where the machine was shown to have been destroyed by fire while in the company's building, it was incumbent upon the owner, in an action to recover for its loss, to prove a want of ordinary care or negligence on the part of the bailee.

Generally as to presumption and burden of proof in case of destruction or damage by fire, see *infra*, XVIII.

In the *Ford Motor Co.* Case, it was also held that a detention of the machine by the company for about two weeks was not unreasonable, where the owner, who was not a resident of the city, but who was frequently there, by his statement had induced the company to believe and expect that he would call at their place of business and accompany an employee while the machine was tried out.

In *Hobson v. Silvea* (Cal.) *supra*, it was held that an action against the owner of a garage for a failure to exercise ordinary care in removing the plaintiff's car and preventing its destruction by fire can be maintained without reference to a tender of any storage charges, and that an allegation in the complaint that such charges had been paid is not necessary.

XVI. Loss of articles left in garage.

A garage keeper cannot be held liable for the loss of articles left with his employees which they had no authority to receive.

Thus, in *Chesley v. Woods Motor Vehicle Co.* (1909) 147 Ill. App. 588, where a traveling man, whose employer's automobile was kept at the defendant's garage, and who was in the habit of leaving his sample case with the porter who

received and cared for the automobile, upon leaving the machine for repairs, delivered his sample case to the porter, and did not call for it until three months later, and until after the garage had been moved to another place and the porter had been discharged, it was held that no recovery could be had against the keeper of the garage for the loss of the case, since there was nothing showing that the porter was acting within the scope of his employment in receiving it. And it was held that the unauthorized possession by the porter of the sample case did not make such possession that of the garage keeper, and did not constitute him a gratuitous bailee, or create any liability on his part for the loss of the property. *Chesley v. Woods Motor Vehicle Co. (Ill.) supra*. The court said: "The evidence does not even cast upon defendant the duty of a voluntary bailee or any other legal responsibility in relation to the sample case of plaintiff. Nor does plaintiff contend that any liability is fastened upon defendant from any direct evidence, but argues that liability arises by implication from the facts in evidence, and that, by applying to such evidence 'all such presumptions and inferences arising from it,' the porter is proven to be the agent of defendant to receive the sample case of plaintiff. We are not able to follow either such logic or reasoning to the extent of holding that any inference or presumption of agency is justified, upon any legal theory known to us, from proof of that or like character."

In *University Garage v. Heiser* (1913) 142 N. Y. Supp. 315, which was an action by a garage keeper against the owner of automobiles to recover for the storage of machines, it was held that the defendant should be allowed a claim for a gas tank which he alleged was stolen from his car while in storage, where the preponderance of testimony was that the garage keeper had recognized his liability to pay for the tank, and had agreed to replace it without charge.

And where a truck which was driven into a garage at night had

quicksilver valued at \$500 loaded upon it, and, with the consent of the garage owner, the quicksilver was placed in the office, and the chauffeur notified the custodian of the garage that he would take the truck and quicksilver at a certain hour in the morning, and before the hour mentioned an unidentified man called, and took the truck and the quicksilver with the consent of the custodian of the garage, who was not the man in charge the night before, and who did not ask for any evidence of authority on the part of the person calling for the truck, it was held that the garage keeper was liable for the loss resulting, regardless of whether the service of storing the quicksilver was a mere gratuity or not, since adequate measures to guard against the loss of the property were not taken. *Rubin v. Forwarder's Auto Trucking Corp. (1920) 111 Misc. 376, 181 N. Y. Supp. 451.*

XVII. Effect of transfer of garage.

Where a garage keeper undertook to store the plaintiff's car for a certain sum per month, and to charge for extras, the contract continued until the plaintiff consented to change it, or until he had notice that the defendant would no longer undertake to perform it; and the act of the defendant in selling out his business did not relieve him from the performance of his contract, and he is liable for damage to the car, caused by the negligence of the "night man," who was driving the car from the owner's residence to the garage, before the plaintiff had received notice that the defendant had sold the business. *Banks v. Strong* (1917) 197 Mich. 544, 164 N. W. 398. The court in this case said: "Defendant urges that each time the machine was delivered to plaintiff's home from the garage, or from the garage to the home, constituted a new contract; and that, inasmuch as he was out of the business at the time of the accident, and the business was owned by Owen, he is not liable. We think the trial court was correct in declining to accept this theory. There was no dispute as to what the contract was. It con-

templated storage and extras which are incidental to garage service. Conveyance to and from the residence was an incident and a part of such service; it was an extra, charged to and paid for by the plaintiff. The contract relied upon, and to which defendant was a party, involved in its performance the doing of services such as were being performed when the car was injured. Whether, when the contract was made, defendant had a partner, or afterwards had a partner, would not affect his own liability as bailee. Nor is he in a position to question, nor does he question, the nonjoinder of other defendants. The case was tried upon the theory that defendant made a contract of bailment and breached it; that, having made such contract with the plaintiff, it continued until plaintiff consented to change it, or until he had notice that defendant would no longer undertake to perform it, and that the act of selling out the business alone did not relieve defendant from the performance of his contract with the plaintiff. In submitting the case to the jury upon this theory, and in refusing to direct a verdict for the defendant, the court committed no error."

XVIII. Presumption and burden of proof.

The general subject of the presumption and burden of proof where subject of bailment is destroyed or damaged by fire is treated in the annotation in 9 A.L.R. 559. As there shown, there is considerable difference of opinion, or, at least, diversity of judicial expression, on this subject. It is only possible in the present annotation to show how the question has been treated in cases falling within its limited scope as to character of the bailee and the nature of the subject of the bailment.

For presumption as to damage while in storage, see *supra*, X.

See also *Ford Motor Co. v. Osburn* (1908) 140 Ill. App. 633, set out *supra*, XV.

It is held that the failure of a garage keeper to return a machine left for repairs in good condition is a breach of the contract of bailment,

which, if unexplained, entitles the bailor to recover. *Beck v. Wilkins-Ricks Co.* (1920) 179 N. C. 231, 9 A.L.R. 554, 102 S. E. 813.

The owner of a car makes out a *prima facie* case against a garage keeper where he shows that he delivered his car in good condition to the defendant to care for, and that, when called for within a day or two, the car was damaged. *Smith v. Economical Garage* (1919) 107 Misc. 430, 176 N. Y. Supp. 479.

And a *prima facie* case is made out where there is proof that an automobile was delivered to a garage keeper in good condition, and that he failed to produce it in condition similar to that in which he received it. *Smith v. Bailey* (1917) 195 Mich. 105, 161 N. W. 822, 15 N. C. C. A. 308.

Upon the plaintiff's making out a *prima facie* case of damage to his car while in the defendant's garage, it then becomes the duty of the latter to rebut the *prima facie* case by showing that he used due care as bailee. *Smith v. Economical Garage* (N. Y.) *supra*.

Ordinarily the burden of proof is upon him who alleges the negligence relied upon for a recovery; but when a car is damaged or injured while in the exclusive custody of a garage keeper, it is incumbent upon him to satisfy the jury that the injury was not occasioned by the negligence of himself or his servants. *Morgan Millwork Co. v. Dover Garage* (1919) 7 Boyce (Del.) 383, 108 Atl. 62.

And in *Southern Garage Co. v. Brown* (1914) 187 Ala. 484, 65 So. 400, it was held that the burden was on a garage keeper to show that property damaged while in his possession was not damaged by a want of ordinary care on his part.

In *Regan v. Burr & Co.* (1913) 159 App. Div. 131, 144 N. Y. Supp. 84, where an automobile had been damaged while in the custody of one to whom it had been delivered for the purpose of attaching a new body, it was held that when the bailee fails, on demand, to deliver to the bailor property to which the latter is entitled, a presumption of liability arises; but

that such *prima facie* case may be overcome when it is made to appear that the loss was occasioned by some misfortune or accident not within the control of the bailee, and that then the onus continues upon the bailor to prove that it was chargeable to the want of care by the bailee.

In *Duffy's Garage v. Sweeley* (1917) 66 Pa. Super. Ct. 583, it was held that where property is damaged while in the possession of the bailee, and the bailor alleges negligence, the burden of proving it is upon him; but where the property bailed is returned in a damaged condition, it is incumbent upon the bailee to give some account of how the injury occurred, so that the bailor may be enabled to test the accuracy of the bailee's report.

In *Thomas v. Hackney* (1915) 192 Ala. 27, 68 So. 296, where the evidence established the injury to the defendant's car while in the possession of plaintiff, who undertook to make repairs on it gratuitously, the burden of proof was held to be upon the plaintiff to show the exercise of that degree of care on his part which the law required when the car was injured.

It has been held that where an automobile is stolen from a public garage, the burden is upon the garage keeper of proving that the loss did not come from his negligence; and this is not merely the burden of going forward with proofs, or a shifting burden. *Hoel v. Flower City Fuel & Transfer Co.* (1919) 144 Minn. 280, 175 N. W. 300.

And in another Minnesota case, in an action against a garage keeper to recover for the loss of a car stored in the garage for hire, and which had been stolen therefrom, the burden was held to be on the garage keeper to show that he was free from negligence; that is, that he exercised such care to keep the car safely as a prudent man would ordinarily exercise under similar circumstances. *Steenon v. Flower City Fuel & Transfer Co.* (1920) 144 Minn. 375, 175 N. W. 681.

In *Travelers Indemnity Co. v. Fawkes* (1913) 120 Minn. 353, 45 L.R.A.(N.S.) 331, 139 N. W. 703, where, in an action by the owner of

an automobile against a garage keeper, the latter admitted receipt of the car and his inability to return it, a *prima facie* case was held to be established, to meet which it devolved upon the defendant to prove that he exercised ordinary care in keeping the machine.

And proof that a motor car, when delivered to a garage keeper, was in good order, but, when called for a few days later, it was found that the water jacket had frozen and burst, makes out a *prima facie* case against the garage keeper. *Smith v. Economical Garage* (1919) 107 Misc. 430, 176 N. Y. Supp. 479; *SIMMS v. SULLIVAN* (reported herewith) ante, 678.

In *Austin v. Simon* (1918) — Mo. App. —, 204 S. W. 193, an amended statement in an action by the owner of an automobile against one to whom it had been delivered for repairs, which alleged that the car was injured by the defendant negligently allowing the elevator to fall, was held to be an allegation of general negligence, and not of specific act of negligence, and the doctrine of *res ipsa loquitur* was held to apply, there being evidence that the defendant permitted the elevator to fall, and there being no evidence to explain the falling of the elevator.

In *Allen v. Fulton Motor Car Co.* (1911) 71 Misc. 190, 128 N. Y. Supp. 419, where the evidence showed that an automobile was delivered to a garage keeper for repairs, and was placed in a barn not connected with the defendant's garage, and that the owner subsequently was notified that the repairs had been completed, and that, upon going for his machine, he found the barn in which it had been stored burned and the remains of his machine in the ruins, it was held that a nonsuit should be entered, the burden of proof being upon the plaintiff in such case, and there being nothing in such evidence to show that the loss in question occurred by reason of the bailee's negligence. The court said: "This was a case of bailment for hire. The contract was for the mutual advantage of both the bailor, Allen, and the bailee, the Fulton Motor Car Company. When it accepted the property,

the Fulton Motor Car Company was bound to bestow upon it ordinary diligence, such as every man of common prudence takes of his own property. As the contract was for the mutual benefit of the parties, the defendant was only liable for loss occurring by reason of its negligence, and was not liable for loss due to accident or irresistible force. It was answerable only for ordinary neglect. If the machine was lost or damaged for want of ordinary care and diligence, the defendant is, of course, responsible. When called upon for the return of the car, it was the duty of the defendant to deliver it to its owner, or account for its default by showing a loss by some violence, theft, or accident. It seems to me in this case that when the evidence disclosed the fact that this car was lost by fire, or, in other words, its loss was accounted for, the burden continued upon the plaintiff to show that its loss was occasioned by some negligence or want of ordinary care upon the part of the defendant. The case of *Claffin v. Meyer* (1878) 75 N. Y. 260, 31 Am. Rep. 467, seems to me to be directly in point with the case under consideration here. There can be no question but that the doctrine is well settled in this state that where a bailee of goods, although liable to recover for their loss only in case of negligence, fails, nevertheless, upon demand, to return them to the owner, or account for his failure to return them, a prima facie case of negligence is made out against the defendant. It seems to me that the presumption of negligence in such a case is somewhat artificial, and results from the fact that the bailee is in a position to have exclusive knowledge of the facts, and that he should give explanation for his failure to return, if any such explanation may exist other than his own fault. But, as Hand, J., in *Claffin v. Meyer* (N. Y.) supra, says: 'Where the refusal to deliver is explained by the fact appearing that the goods have been lost, either destroyed by fire or stolen by thieves, and the bailee is therefore unable to deliver them, there is no prima facie evidence of his want of

care, and the court will not assume, in the absence of proof on the point, that such fire or theft was the result of his negligence.' (Generally as to presumption and burden of proof where subject of bailment is destroyed or damaged by fire, see annotation, 9 A.L.R. 559.)

After the owner of an automobile which was left at a garage for repairs shows that it was destroyed by fire while in the possession of the repair man, the latter must go forward with evidence showing that he used proper care in the bailment, in order to escape liability for the loss. *Beck v. Wilkins-Ricks Co.* (1920) 179 N. C. 231, 9 A.L.R. 554, 102 S. E. 313.

In *Hight Accessory Place v. Lam* (1921) — Ga. App. —, 105 S. E. 872, where an automobile had been delivered to a garage keeper for repairs, and he held it for charges, it was held in a suit by the bailor, in which it was pleaded that, because of the negligence of the bailee, the property delivered had been destroyed by fire, that, upon proof of the allegations laid in the petition, the burden was upon the bailee of showing that he exercised due care and diligence in protecting and keeping the property.

And in *Glende v. Spraner* (1916) 198 Ill. App. 584, it was held in an action by a bailor against a bailee to recover damages for the loss of his vehicle, that where the plaintiff shows the delivery of the bailment to defendant, and the failure of defendant to make a redelivery, the burden is on defendant to show the exercise of the degree of care required by the nature of the bailment; but that where it appears that the vehicle was stolen, lost, or destroyed by fire, the burden of proving negligence is on the plaintiff.

One seeking to hold a garage keeper liable for the destruction by fire of an automobile left for repairs has the burden of showing negligence on his part. *Beck v. Wilkins-Ricks Co.* (N. C.) supra.

In *Knight v. Willard* (1913) 26 N. D. 140, 143 N. W. 346, where recovery was sought for damage to a machine by reason of defective oil which the defendants had sold, it was held in-

cumbent upon the plaintiff to show that the oil was defective and also that such defect caused the damage to his car; and the evidence in the case upon these points was held insufficient to establish these facts.

XIX. Damages.

In an action against a garage keeper to recover damages for an injury to an automobile taken from the garage, the measure of damages is the difference between the value of the machine before and after its injury; and in estimating this difference it is proper for the jury to consider the cost and expenses of repairs, and in some instances this may be the damage which a party may be entitled to recover. *Farrall v. Universal Garage Co.* (1920) 179 N. C. 889, 102 S. E. 617.

And in *Morgan Millwork Co. v. Dover Garage Co.* (1919) 7 Boyce (Del.) 383, 108 Atl. 62, an action against a garage company to recover damages for injuries to an automobile left with it for storage for hire, the plaintiff was held entitled to recover such a sum as would reasonably compensate it for the damages sustained, the measure of which is the difference between the value of the automobile immediately before and its value immediately after it was damaged, with interest from the date of the damage.

In *Anthony v. Moore & M. Co.* (1909) 135 App. Div. 203, 120 N. Y. Supp. 402, it was held in an action for a breach of an agreement to build and place a body upon an automobile within a stated time and for a stipulated consideration, that the true measure of damages was the cost and expense reasonably necessary to make the work and materials conform to the requirements of the contract, and not the difference between the value of the automobile as it was when the defendant delivered it to the plaintiff, and its value if the agreed work had properly been done.

In an action against a garage keeper for refusing to deliver the plaintiff's car to him, and thereby converting it to his own use, the plaintiff is

not entitled to recover as damages the cost of the hire of a horse and wagon to replace the automobile during its detention. *Bernheim v. Roth* (1916) 157 N. Y. Supp. 902.

Evidence as to the value of an automobile a week or as much as a month prior to the time it was placed in the hands of a garage keeper for repairs is admissible, and may be considered by the jury in determining the highest market value of the machine between the time of conversion and the date of the trial, where the defendant did not plead or attempt to show that there had been any change in the condition of the property after delivery to him, and it appeared that it had been taken down and dismantled, and that the parts were distributed around the shop among other like parts, so as to make it impracticable, without putting the parts together again, to give an opinion as to the value of the machine, for which the owner brought trover after demand for a return of the property, claiming that it had been kept for an unreasonable time, and claiming that he, at the time of demand, offered to pay whatever charges for repairs had accrued up to that time. *Sisson v. Roberts* (1920) — Ga. App. —, 104 S. E. 910.

And as a basis for fixing damages in an action of replevin for the unlawful detention of the plaintiff's automobile, evidence that the car had been in use up to the day it was delivered to the defendant for repairs, and that it had earned in the preceding month an average of a certain sum per day, which was substantiated by books of account, was held not inadmissible on the ground that it was wholly speculative and conjectural. *Slattery v. Tillman* (1917) 197 Mich. 349, 163 N. W. 938.

In *Holcomb Co. v. Clark* (1912) 86 Conn. 319, 85 Atl. 376, where recovery was sought for damage to a car by the negligence of a garage keeper, evidence that repairs made by the garage keeper were improperly done, and had to be done over at the car owner's expense, and testimony of an expert as to the cost of repainting and renewing certain woodwork on the car, rendered

necessary by the garage keeper's negligence, were held properly admitted.

In an action of replevin to recover possession of an automobile, a verdict of \$100 damages for wrongful detention is not excessive where the record shows that the plaintiff was in the real-estate business, and used the car extensively in making trips in his business, and was deprived of its use for more than three months. *Harnstrom*

v. Anderson Electric Car Co. (1918) 210 Ill. App. 395.

Where it was shown that a car which was stolen from a garage had been run only a short time, and that the catalogue price, with freight and accessories, was \$2,443, a judgment of \$2,400 was held not excessive. *Tacoma Auto Livery Co. v. Union Motor Car Co.* (1915) 87 Wash. 102, 151 Pac. 243, 10 N. C. C. A. 1007. J. T. W.

HENRY COHEN, Appt.,

v.

FIRST NATIONAL BANK OF NOGALES.

Arizona Supreme Court — May 27, 1921.

(— Ariz. —, 198 Pac. 122.)

Bank — crediting check on itself — right to charge back.

1. A bank, which, having received from a depositor a check on itself for credit to his account, has mailed him a notice and deposit slip showing that the credit was made, cannot charge back the check when it proves to be an overdraft.

[See note on this question beginning on page 709.]

—necessity of debit of check.

2. To complete a credit by a bank to its customer of a check drawn on itself it is not necessary that the check shall be debited to the drawer and marked "Paid."

— effect of crediting check.

3. When a bank gives a depositor credit on general deposit for a check drawn on itself the relation of debtor and creditor is established, and the transaction cannot be rescinded except for fraud or mutual mistake.

[See 3 R. C. L. 526.]

— crediting check as payment.

4. Crediting a check on itself to a depositor's account by a bank is a payment, and not an acceptance requiring writing under the Negotiable Instruments Law.

Appeal — raising question for first time.

5. The question of authority of a clerk to bind the bank by crediting a

check to a depositor's account cannot be raised for the first time on appeal.

[See 2 R. C. L. 69.]

Bank — liability for acts of clerk.

6. A bank cannot avoid responsibility for a notice of deposit mailed upon its blank by a clerk having authority to answer correspondence and prepare mailing matter, on the ground that he did not have authority to accept the deposit.

Estoppel — retention of returned check — effect.

7. One who has sent by mail to his bank for deposit a check drawn upon it is not estopped to take advantage of its credit to his account by the fact that, after the check had been credited, the bank telegraphed him that there were no funds to meet it, and returned the check to him, which he retained, if the bank did not change its position to its disadvantage in any way by reason of his conduct in the matter.

APPEAL by plaintiff from a judgment of the Superior Court for Santa Cruz County (O'Connor, J.) in favor of defendant in an action brought to recover an amount alleged to have been on deposit with it to plaintiff's credit. *Reversed.*

Statement by Baker, J.:

An unusually full statement of facts is essential to an understanding of this case. They are substantially as follows: On August 6, 1919, Henry Cohen sent by mail, from his place of residence, Culiacan, Mexico, to the First National Bank of Nogales, situated at Nogales, Arizona, a check on said bank for \$3,567.50, payable to his order and drawn by Octavo Gaxiola. The check was indorsed by Cohen, "Pay to the order of First National Bank of Nogales." In the letter inclosing the check Cohen requested that the same be placed to his credit, and that he be advised by return mail. At the time both Cohen and Gaxiola were depositors in the bank. The letter and check were received by the bank on Saturday, August 9, 1919. Upon receipt of the bank's mail it was opened by Mr. Grover Marsteller, assistant cashier of the bank, and by him passed to Miss Barney, who at the time was acting in the absence of the regular mail clerk, and whose duty it was to acknowledge receipt of letters, make out deposit slips of inclosed items, etc., and pass the items to the tellers and bookkeepers of the bank. Miss Barney addressed a letter to Cohen, in which she inclosed a printed form of acknowledgment. The form was prepared by the bank, and used by the bank in acknowledging the receipt of remittances from its customers. The form was as follows, the blanks therein being filled in by Miss Barney:

Nogales, Arizona, 8-9, 1919.

Henry Cohen,
Culiacan, Sin.

Dear Sir:—

We beg to acknowledge receipt of your favor of 8-6. We have entered to your credit \$3,567.50.

All other items than those drawn on this bank are credited subject to final payment.

Very truly yours,
By EMB. Theron Richardson,
Cashier.

The name "Theron Richardson,

Cashier," was printed, being part of the printed form. The letters "EMB." were written or typed by Miss Barney. Miss Barney also, at the same time, made out a deposit slip in form as follows:

Deposited in the First National Bank,
Nogales, Arizona, by Henry Cohen.
(Please list each check separately.)

Currency

Gold

Silver

(Mail Aug. 9, 1919)

Checks

L 8-6 \$3,567.50
(American money.)

A copy of this deposit slip was also sent to Cohen by Miss Barney in the same letter in which the printed form was inclosed. Miss Barney took the check and the deposit slip so made out by her to a teller. This teller made a notation of the check on his sheet, then placed the check on one spindle and the deposit slip on another. Later on the same day a bookkeeper came to the teller's cage and got all the checks and deposit slips on the spindles, which by that time the teller had assorted alphabetically. The checks and deposit slips were divided amongst the bookkeepers. There were three bookkeepers: No. 1, who handled all accounts from A to F; No. 2, who handled accounts from G to O; and so on. The deposit slip to Cohen went to bookkeeper No. 1, and the check of Gaxiola went to bookkeeper No. 2. Bookkeeper No. 1, when he came to the letter C, posted, under the name of Cohen, the amount which the deposit slip showed as a deposit made by Cohen on that day; that is to say, he credited the account of Cohen with the amount of the deposit slip, \$3,567.50. Bookkeeper No. 2, who actually received the Gaxiola check when he reached Gaxiola's account, saw there were not sufficient funds to Gaxiola's credit to pay the check, so he did not post up the check in the account of Gaxiola, but marked the check "Ins.," meaning insufficient funds, and placed it aside in "suspense" for instructions, he having no authority to allow over-

drafts. This was all done on Saturday, August 9, the day the check was received. Monday, August 11, on the opening of the bank, the clerk in charge of the Gaxiola check called the attention of the vice president to the check and the state of Gaxiola's account. The vice president directed that the check should not be paid, and that a telegram be sent to Cohen, advising him the check was not good. The item of the check was thereupon charged back to the account of Cohen. On the same day a telegram was sent by the bank to Cohen, advising him that the check was not paid for lack of funds. A letter was also mailed to Cohen, with the check inclosed. The letter also advised that the check was not paid for want of funds. Cohen received the telegram on August 12, and on the same day wired the bank as follows: "If you returned Gaxiola check, hold money to cover it. If not paid in three days, wire me and I will leave for there."

To this telegram the bank, on August 13, wired in reply: "Your wire. No funds deposited to cover Gaxiola check, which we returned."

After these telegrams had reached Cohen he received, by mail, the letter of acknowledgment dated August 9, which Miss Barney had sent, inclosing the printed form and deposit slip. On August 14, Cohen wired the bank as follows: "I cashed Gaxiola check with metallic gold so he could pay export on garbanzos. If you think it won't be paid, wire me so I can get there and attach same."

To this the bank replied by wire: "Yours yesterday. We recommend you take steps to protect your interest."

On August 19, Cohen went to the bank and asked for a statement of his account. This was given to him. The statement shows, under the head of "Deposits," the following: "August 9, \$3,567.50"—and under the head of "Checks in Detail" the following: "Aug. 11, \$3,567.50," being the credit and debit of the Gaxiola check, copied from the

ledger of the bank. On August 22, 1919, Cohen drew a check on the bank, in favor of himself, for \$3,567.50, and presented same for payment. The bank refused to pay it on account of insufficient funds. Cohen then instituted this suit against the bank. The account of Octavo Gaxiola as it appeared in the ledger of the bank showed that the balance to the credit of Gaxiola on August 9, 1919, when the bank received the check, and thereafter, did not exceed \$49.66. The check was never stamped "Paid" by the bank.

Messrs. Duffy & Purdum and Flanagan & Murry, for appellant:

A contract had been entered into and had been completed and executed between plaintiff and the bank, and it then and there became legally liable to him for the amount of the check.

Morse, Banks & Bkg. p. 321; First Nat. Bank v. Burkhardt, 100 U. S. 686, 25 L. ed. 766; Bryan v. First Nat. Bank, 205 Pa. 7, 54 Atl. 480; 2 Michie, Banks & Bkg. p. 912, ¶ 126; Thompson v. Riggs, 5 Wall. 662, 18 L. ed. 704; Marine Bank v. Fulton County Bank, 2 Wall. 252, 17 L. ed. 785; Davis v. Elmira Sav. Bank, 161 U. S. 275, 40 L. ed. 700, 16 Sup. Ct. Rep. 502; Oddie v. National City Bank, 45 N. Y. 735, 6 Am. Rep. 160; Wasson v. Lamb, 120 Ind. 514, 6 L.R.A. 191, 16 Am. St. Rep. 342, 22 N. E. 730; Walton v. Riverside Bank, 28 Misc. 449, 58 N. Y. Supp. 1008, affirmed in 29 Misc. 304, 60 N. Y. Supp. 519; American Nat. Bank v. Miller, 229 U. S. 517, 57 L. ed. 1310, 33 Sup. Ct. Rep. 883; American Exch. Nat. Bank v. Gregg, 138 Ill. 596, 32 Am. St. Rep. 171, 28 N. E. 839; 3 R. C. L. 526, ¶ 153; Woodward v. Savings & T. Co. 178 N. C. 184, 5 A.L.R. 1561, 100 S. E. 304; National Bank v. Burns, 44 Am. Rep. 142; Re Franklin Bank, 1 Paige, 249, 19 Am. Dec. 416; National Bank v. Berrall, 70 N. J. L. 757, 66 L.R.A. 599, 103 Am. St. Rep. 821, 58 Atl. 189, 1 Ann. Cas. 630; Manufacturers' Nat. Bank v. Swift, 70 Md. 515, 14 Am. St. Rep. 381, 17 Atl. 336; Riverside Bank v. First Nat. Bank, 20 C. C. A. 181, 38 U. S. App. 676, 74 Fed. 276; Consolidated Nat. Bank v. First Nat. Bank, 129 App. Div. 538, 114 N. Y. Supp. 308.

Messrs. Selim M. Franklin and Frank J. Barry, for appellee:

No actual credit was given by the bank to plaintiff for the Gaxiola check.

Ocean Park Bank v. Rogers, 6 Cal. App. 678, 92 Pac. 879.

Before the defendant bank can be held or charged as having accepted the Gaxiola check, it must be shown that the acceptance was in writing and signed by the bank, through an authorized officer or agent.

5 R. C. L. 517; 1 Morse, Banks & Bkg. 2d ed. ¶¶ 80, 98, p. 206.

Plaintiff was estopped from claiming that the check was paid or credited to his account, or that the bank was indebted to him for or on account of the same.

Hazlett v. Commercial Nat. Bank, 182 Pa. 118, 19 Atl. 55.

Mr. W. L. Kinder also for appellee.

Baker, J., delivered the opinion of the court:

This is an appeal from a judgment of the superior court of Santa Cruz county, in favor of the bank. The action is to recover the sum of \$3,567.50, claimed to have been on deposit with the bank, to the credit of the plaintiff.

While the facts in the case, as will be observed from the foregoing statement, are a little unusual, we see no difficulty in the application of one or two very plain principles of law which have been long established.

The natural and obvious meaning of the language used in the notice which the bank sent to the plaintiff, through the mail, is that credit had been given to the plaintiff to the extent of the amount of the check. No ingenuity of interpretation, or stretching of the meaning of the words, can bring the language into harmony with any other hypothesis. That the bank intended to give the plaintiff credit for the amount of the check is plainly evinced not only by the notice and deposit slip, but is further demonstrated by the fact that on the same day that the letter was sent the bank entered a credit upon its books, in favor of the plaintiff, for the amount of the

Bank-crediting check on itself—right to charge back.

check. As a matter of law, when the bank mailed the notice and deposit slip, the transaction was closed. In the eye of the law it became a com-

pleted transaction. Thus it is stated in 13 C. J. 300: "Where a person makes an offer and requires or authorizes the offeree, either expressly or impliedly, to send his answer by post or telegraph, and the answer is duly posted or telegraphed, the acceptance is communicated, and the contract is complete from the moment the letter is mailed or the telegram sent."

See also 6 R. C. L. 610-613.

The result of the foregoing rule is that it is immaterial whether the letter of acceptance actually reaches the offerer (6 R. C. L. 612), and it may be added that it is also immaterial whether the letter is delayed in the mails two or three days (13 C. J. 301).

However, as we understand the argument of counsel for the bank, a distinction is sought to be drawn where a check is sent through the mail to a bank to be deposited, and where the holder of the check appears in person in the bank and offers to deposit it. But in principle there can be no such distinction. There can be no question that a contract can be made between persons who are at a distance from each other by and through the mail. By treating the postoffice as the agency of both parties, courts manage to harmonize the legal notion that it is necessary that the minds of the parties should meet. 6 R. C. L. 612.

But nevertheless the bank contends that the transaction in this case was not completed. It is argued that the steps taken by the bank were only tentative and preliminary, and that final credit for the check was never given to the plaintiff. As already pointed out, the bank plainly evinced the intention to pay the check by mailing the letter with the inclosures. It is true that a mere intention to pay is not equivalent to payment, but we are here confronted with a situation where the bank executed its intention. It is also true that the proper records were to be made upon the books, but payment of the check or giving credit therefor (which is

(— *Ariz.* —, 198 Pac. 122.)

equivalent to payment) was effected at the time the letter was posted, and was valid even without any record. So far as respected the plaintiff, it was not essential to the completion of the contract that the bank should have stamped the check

—necessity of
debit of check.

"Paid" or debited the Gaxiola account with the amount of the check. These steps did not concern the plaintiff; they were matters pertaining to the system of bookkeeping conducted by the bank for its own convenience and to expedite its own business.

The bank was not obliged to take the check or send the letter, but if it chose to do both it must stand by the contract thereby made. Under the completed transaction the relation between the parties was that of banker and depositor, and the bank became the debtor to the plaintiff for the amount of the general deposit placed to his credit. And its liability could be discharged only by payment of the debt. After the discovery that the funds in the Gaxiola account were insufficient to take care of the check, the bank attempted to retrace its steps. This it could not do. It was too late. The transaction was already completed. The discovery could not operate to change the nature of the contract or discharge the bank from liability. Consequently marking the check with the letters "Ins," indicating the insufficiency of funds in the Gaxiola account, and charging back the amount of the check to the plaintiff's account, were immaterial acts, and of no effect. And the subsequent action of the bank in telegraphing the plaintiff that the check was worthless and returning it to him were also ineffective and powerless to discharge the liability of the bank. It may be, if the condition of the Gaxiola account had been examined before the letter was mailed, credit would not have been given, but the bank did not see fit to make the examination. It waived all inquiry and sent the letter. Manifestly the present dilemma of

15 A.L.R.—45.

the bank is due wholly to its own laches.

The law is firmly settled that where a check, drawn on a particular bank, is presented to that bank for <sup>—effect of credit-
ing check.</sup> general deposit, and

the bank gives the depositor credit therefor, the relation between the bank and the depositor is that of debtor and creditor; since the giving of credit under such circumstances is practically and legally the same as if the bank had paid the money to the depositor and had received it again on deposit. The transaction is thus complete, and cannot be rescinded except for fraud or in case of mutual mistake. Tiffany, Banks & Bkg. pp. 38, 39; 2 Morse, Banks & Bkg. ¶ 569. "When a bank credits a depositor with the amount of a check drawn upon it by another customer, and there is no want of good faith on the part of the depositor, the act of crediting is equivalent to a payment in money, and the bank cannot recall or repudiate the payment because, upon an examination of the accounts of the drawer, it is ascertained that he was without funds to meet the check, though, when the payment was made, the officers labored under the mistake that there were funds sufficient. In such a case the bank could have received the check conditionally, and have come under obligations to account to the holder for it, only in the event that on an examination of the accounts of the drawer it was found he had funds to meet it, or in the event that he provided funds for its payment. Or it could have asked for time to examine the accounts, that it might determine whether it would accept and pay or dishonor the check. It would have been within the option of the holder to have accepted or rejected either of these propositions. But when the holder presented the check with his pass book, that the check might be entered as a deposit to his credit, it was a request for the payment of the check; and there can be no distinction between a request for pay-

ment in moneys and a request for payment by a transfer to the credit of the holder." 3 R. C. L. 526.

The court says in *First Nat. Bank v. Burkhardt*, 100 U. S. 689, 25 L. ed. 768: "In *Morse's* well-considered work on Banking, p. 321, it is said: 'But if at the time the holder hands in the check he demands to have it placed to his credit, and is informed that it shall be done, or if he holds any other species of conversation which practically amounts to demanding and receiving a promise of a transfer of credit, as equivalent to an actual payment, the effect will be the same as if he had received his money in cash, and the bank's indebtedness to him for the amount will be equally fixed and irrevocable.' We regard this as a sound and accurate exposition of the law upon the subject, and it rests upon a solid basis of reason."

In the more recent case of *American Nat. Bank v. Miller*, 229 U. S. 517, 57 L. ed. 1310, 33 Sup. Ct. Rep. 883, the Supreme Court of the United States, speaking through Mr. Justice Lamar, says: "There are some disadvantages of sending a check for collection directly to the bank on which it is drawn, but when such bank performs the dual function of collecting and crediting, the transaction is closed, and, in the absence of fraud or mutual mistake, is equivalent to payment in usual course. . . . In the present case it was as though an officer of the Macon Bank had presented the check to the teller of the Nashville Bank, and on receiving the money had paid it back over the counter for deposit to the credit of the Macon Bank."

In *Oddie v. National City Bank*, 45 N. Y. 735, 6 Am. Rep. 160, Chief Justice Church, in stating the opinion of the court, says:

"Financial business is transacted at banks in large amounts, with great rapidity, but according to definite and certain rules, which are well understood and acted upon by those engaged in that business.

Very little is said, but very much is understood, and there is an absence of all formalities which tend to embarrass the facility of doing the business.

"In determining the legal effect of such transactions, we must apply the same rules applicable to all contracts and business affairs, and effectuate and carry out the intention of the parties, to be gathered from their acts and declarations, and the accustomed and understood course of the particular business. Applying these rules, there can be no doubt but there was an express demand on one side, and consent on the other, that this check should be placed to the credit of the plaintiffs as a deposit. The legal effect of the transaction was precisely the same as though the money had been first paid to the plaintiffs, and then deposited. When a check is presented to a bank for deposit, drawn directly upon itself, it is the same as though payment in any other form was demanded. It is the right of the bank to reject it, or to refuse to pay it, or to receive it conditionally, as in *Pratt v. Foote*, 9 N. Y. 463; but if it accepts such a check and pays it, either by delivering the currency or giving the party credit for it, the transaction is closed between the bank and such party, provided the paper is genuine.

"In the case of a deposit, the bank becomes at once the debtor of the depositor, and the title of the deposit passes to the bank. The bank always has the means of knowing the state of the account of the drawer, and if it elects to pay the paper, it voluntarily takes upon itself the risk of securing it out of the drawer's account or otherwise. If there has ever been any doubt upon this point, there should be none hereafter."

The chief justice further said, in the course of the opinion: "Here the plaintiffs clearly put in the check as a deposit, and the defendants as clearly received it as such, and credited the plaintiffs with it. The cred-

it on the deposit ticket was as significant an act, evincing the consent of the defendants to the payment of it, as if made upon the pass book of the plaintiffs, and entered upon the books of the bank."

To the same effect are *Burton v. United States*, 196 U. S. 283, 49 L. ed. 482, 25 Sup. Ct. Rep. 243; *Security Nat. Bank v. Old Nat. Bank*, 154 C. C. A. 1, 241 Fed. 1; *Wasson v. Lamb*, 120 Ind. 514, 6 L.R.A. 191, 16 Am. St. Rep. 342, 22 N. E. 729; *Woodward v. Savings & T. Co.* 178 N. C. 184, 5 A.L.R. 1561, 100 S. E. 304; *City Nat. Bank v. Burns*, 68 Ala. 267, 44 Am. Rep. 138; *American Exch. Nat. Bank v. Gregg*, 32 Am. St. Rep. 171, and note, 138 Ill. 596, 28 N. E. 839; *Nineteenth Ward Bank v. First Nat. Bank*, 184 Mass. 49, 67 N. E. 670.

We are cited to the cases, *National Gold Bank & T. Co. v. McDonald*, 51 Cal. 66, 21 Am. Rep. 697, and *Ocean Park Bank v. Rogers*, 6 Cal. App. 678, 92 Pac. 879, as supporting the contention of the bank that no credit was actually given. *National Gold Bank & T. Co. v. McDonald* was a case in which a depositor presented a check drawn in his favor upon the plaintiff's bank. He was credited in his bank book for the amount of the check, but when the day's business was reviewed it was discovered that the drawer had no funds on deposit. Accordingly the bank charged the depositor's account with the amount of the check. It was held that the transaction of itself did not import an agreement by the bank to accept the check as cash. The substance of that decision is that a bank has until the close of business hours for the day to determine whether or not final credit will be given for a check drawn upon and payable by itself. The facts of that case and *Ocean Park Bank v. Rogers* are almost identical. Neither case goes so far as to hold that no agreement is possible whereby the bank in which a check is deposited may receive it as cash. Laying aside the thought that

these cases appear to be out of line with the general current of authorities, we do not think that they are applicable to the facts of the present case. In these cases the act of charging back the checks to the account of the depositors was done on the same day that the credit was given. Here the amount of the check was charged back to the account of the plaintiff on the second day (including Sunday) after it was received and the letter to the plaintiff was mailed. If under the California cases the bank had the right to charge back the item of the check to the plaintiff's account at the end of the day's business upon which the check was received, surely that right cannot be said to go on *ad ininitum*.

The bank seems to rely upon the proposition that the transaction was only an acceptance of the check, and that under the Negotiable Instruments Law of this state (Civ. Code, § 4277) such an acceptance must have been in writing and signed by some officer of the bank in order to be valid. But we think the bank loses sight of the fact that payment and acceptance are essentially different.

"Payment is the natural, expected, and intended end of a check. Acceptance strengthens the vitality of a check and serves to prolong rather than to terminate the life of it. . . . Payment ends the life of a check. Acceptance reinvigorates it." *Hunt v. Security State Bank*, 91 Or. 362, 179 Pac. 248.

See also *Guthrie Nat. Bank v. Gill*, 6 Okla. 560-565, 54 Pac. 436.

Here there was actual payment. We know of no rule of law that requires —crediting check as payment. that such payment must be evidenced by a written instrument signed by some officer of the bank.

The bank argues that it is not liable in this case for the amount of the check, because Miss Barney, the young girl who mailed the letter and

inclosures, had no authority to extend the credit of the bank. The argument is unsound for two very good reasons. In the first place, want of authority on the part of

Appeal—raising question for first time. Miss Barney was not pleaded. The

question has been raised for the first time since the case reached this court. In the second place, it is not questioned but that Miss Barney was an employee of the bank. Her duties were to answer correspondence and prepare mailing matter. The letter of advice sent to the plaintiff in its printed form was supplied by the bank to its employees for the very purpose

Bank—liability for acts of clerk. for which this one was used. It is not

questioned but that Miss Barney was authorized to prepare the letter and send it. It would be monstrous to hold that because the name of the cashier of the bank was printed the bank was not liable. The paper was the paper of the bank; its form was prepared by the bank, and used by the bank in notifying its customers of the receipt of remittances. The paper speaks for itself; therefore it was the bank extending credit, and not Miss Barney.

We are unable to perceive why the telegrams sent by the plaintiff to the bank or the retention of the returned check—**Estoppel—retention of returned check—effect.** check by him operated as an estoppel,

as claimed by the bank. The elements of an estoppel have been concisely stated to be as follows: "To constitute it, the person sought to be estopped must do such act or make such admission with an intention of influencing the conduct of another, or that he had reason to believe would influence his conduct, and which act or admission is inconsistent with the claim he proposes now to make. The other party, too, must have acted upon the strength of such admission or conduct." *New York Rubber Co. v. Rothery*, 107

N. Y. 310, 1 Am. St. Rep. 822, 14 N. E. 269.

The bank returned the check to the plaintiff. It voluntarily parted with its possession. It would seem that it was the duty of the bank to request the return of the check if it considered it to be of any value. There is, however, no pretense whatever that the bank suffered any loss or changed its attitude to its disadvantage in any way by reason of the telegrams or the retention of the check. The bank could have recovered on the check as against Gaxiola, although the check had remained in plaintiff's possession. The doctrine of estoppel can have no application to this case.

We have reached the conclusions stated in this decision with a great deal of reluctance. It seems to be one of those cases where a party has the right to stand upon his legal rights, no matter how selfish and harsh such conduct may appear to be. While we may not condemn the conduct of the plaintiff, we are not compelled to approve it. The case is decided as it is because we think it would be an extremely pernicious thing to throw doubt upon the scope of the doctrine governing negotiable paper. These doctrines are of immense value to every form of industry. To seek too readily for exceptions from the well-settled rule of this branch of law, in pursuit of a supposed equity, would tend to impair the value of the principles of commercial law, which depend largely upon their certainty. As much as this was said by Judge Cooley in the case of *First Nat. Bank v. Burkhams*, 32 Mich. 328, which case is often cited in opinions dealing with the subject.

The judgment is reversed, with directions to enter a judgment for the plaintiff, Cohen, for the amount of the check, \$3,567.50, and costs.

Ross, Ch. J., and McAllister, J., concur.

ANNOTATION.

Right of bank to charge back check drawn upon itself, which it has credited to a depositor under mistaken belief that the drawer's account is good.

The right of a bank which had entered as a credit in the pass book of a depositor or notified him of the credit, as in the reported case (*COHEN v. FIRST NAT. BANK*, ante, 701), the amount of a check drawn upon it by another depositor, to charge back the credit upon discovering that the drawer has not sufficient funds to meet it, depends upon the intention with which the entry is thus made or notice given; at least, in the absence of circumstances precluding the bank from asserting its intention as against the depositor. It is undeniable that the bank may receive the check subject to the right to cancel the credit if the drawer's account is not good—in other words, may receive it for collection; or it may receive the check as so much cash. In *First Nat. Bank v. Burkhardt* (1880) 100 U. S. 689, 25 L. ed. 766, it was left to the jury to say whether, when the check was presented at the bank and left with the teller, it was received by the bank on deposit, or upon the condition that the depositor was not to be credited therewith until the bank had time to look up the drawer's account to determine whether or not it was good. No question as to the right to charge back was involved, however. Whether a bank which has issued a deposit slip to the holder of a check, drawn by another depositor on the bank, intended to pay the check thereby, is a question of fact; if it did so intend to pay the check by the issuance of such a deposit slip, it cannot thereafter rescind it, but is liable to the holder for the amount notwithstanding the account of the drawer is not good for the amount of the check. *Arkansas Trust & Bkg. Co. v. Bishop* (1915) 119 Ark. 373, 178 S. W. 422.

In very few cases is there any express agreement as to the matter; the intent of the parties must be inferred from what has been done. In

some cases, the only thing that was done was to make an entry of the credit upon the depositor's pass book. It is held that the bank has not the right to cancel the credit thus entered. *Bryan v. First Nat. Bank* (1903) 205 Pa. 7, 54 Atl. 480; but see California cases, *infra*. The right to cancel a credit has been denied where the credit was on a deposit ticket. *Oddie v. National City Bank* (1871) 45 N. Y. 735, 6 Am. Rep. 160.

In *City Nat. Bank v. Burns* (1880) 68 Ala. 267, 44 Am. Rep. 138, a case in which the bank was denied the right to cancel the credit entered, although there was more done than the entry of the credit upon the depositor's pass book, it appears from the general discussion of the court that the entry upon the pass book was the significant fact. In still other cases in which the holder of the check was credited with the amount thereof on the books of the bank, it is held that such credit cannot be canceled without the consent of the depositor. *American Exch. Nat. Bank v. Gregg* (1891) 138 Ill. 596, 32 Am. St. Rep. 171, 28 N. E. 839; *Woodward v. Savings & T. Co.* (1919) 178 N. C. 184, 5 A.L.R. 1561, 100 S. E. 304.

The facts in *American Exch. Nat. Bank v. Gregg* (Ill.) *supra*, are stated by the court as follows: "The check *Kershaw & Company* [the drawers] gave to *D. Eggleston & Son* was presented to the bank for payment, properly indorsed by the payees. The bank received the check, stamped it, paid it, and placed the amount thereof to the credit of *D. Eggleston & Son* upon the books of the bank." In another part of the opinion, the court says that the bank accepted the check, stamped it, paid it, and placed the amount thereof to the credit of the holder. This, according to the court, must be regarded as a payment of the check. The transaction was as com-

plete a payment as if the bank, when the check was presented, had paid in money the amount thereof into the hands of the holders, and they in turn had deposited the money in the bank to their credit. When the check was presented and accepted by the bank and canceled, and thus deposited to the credit of the holders, as between the depositors, and the bank the transaction was closed, and the bank had no authority afterward, without the consent of the depositors, to charge the check back to their account.

The general theory of all these cases is that the transaction is equivalent to a payment of money by the bank and a redeposit by the customer. In *Oddie v. National City Bank* (1871) 45 N. Y. 735, 6 Am. Rep. 160, where the credit was made on a deposit ticket, but where this is stated to be as significant an act as if made upon the pass book of the plaintiff and entered upon the books of the bank, the court said: "In determining the legal effect of such transactions we must apply the same rules applicable to all contracts and business affairs, and effectuate and carry out the intention of the parties to be gathered from their acts and declarations and the accustomed and understood course of the particular business. Applying these rules there can be no doubt but there was an express demand on one side and consent on the other that this check should be placed to the credit of the plaintiffs as a deposit. The legal effect of the transaction was precisely the same as though the money had been first paid to the plaintiffs and then deposited. When a check is presented to a bank for deposit, draw directly upon itself, it is the same as though payment in any other form was demanded. It is the right of the bank to reject it, or to refuse to pay it, or to receive it conditionally, . . . but if it accepts such a check and pays it either by delivering the currency or giving the party credit for it, the transaction is closed between the bank and such party, provided the paper is genuine." In *Bryan v. First Nat. Bank* (1903) 205 Pa. 7, 54 Atl. 480, the checks in

question, with other small checks and some cash, were presented to the bank by the depositor. The bank passed the checks in question, together with the remainder of the deposit, to the depositor's credit, and stamped the checks in question "Paid." At the time of the deposit the books of the bank showed a credit in favor of the drawer sufficient to meet the checks, but part of this credit was made up of checks which the drawer had deposited and which were subsequently dishonored. Upon the dishonor of the checks the bank charged the checks in question back to the depositor's account, returning the checks to him. In holding that the credit could not thus be charged back, the court says: "When the bank gave to Bryan, one of its depositors, credit on his pass book for the two checks drawn on it by another of its depositors, having on its books ample funds to pay them, such credit was equivalent to a payment to Bryan in cash of the amount of the checks."

The extent to which the bank has gone in completing the charge and credit has been emphasized. In *City Nat. Bank v. Burns* (1880) 68 Ala. 267, 44 Am. Rep. 138, the cashier had entered the check as a deposit on the bank book of the depositor presenting it, and placed it on the file of checks to be charged on the books of the bank, and subsequently the holder of the check was credited and the drawers charged with the check on those books. It was shown not to have been the bank's course of business to receive for collection checks of which it was the drawee, nor were checks received for collection placed on the file on which this particular check was placed. In the afternoon of the day on which the above transaction occurred, the drawers of the check failed, and, on examining their account, it was ascertained that the check was an overdraft, whereupon the bank endeavored immediately to give the holder notice and made an offer to return it on the next day, but the holder declined to receive it and claimed that it was paid and the bank was liable to him for its amount as

money deposited with it. That the court was of the opinion that the entry upon the pass book was the significant fact is evidenced by the following language: "There is here an entry of the check on the pass book of the depositor not materially different, it may be fairly inferred, from that which would have been made if he had demanded the money on the check, and it had been paid to him, and he had handed it back to the cashier, with the request that it be entered to his credit as a deposit, an entry which would not have been made if the check had been received as a mere security, to be converted into money by collection or otherwise. The check was defaced and made to bear marks of cancelation by being placed on the file with checks which were paid and were to be charged to the drawers, and it was on the books of the bank credited to the holder, and debited to the drawers. These facts, taken in connection with the fact that the bank did not in its usual course of business receive for collection checks of which it was the drawee, distinguished this case from the case of *Boyd v. Emmerson* (1834) 2 Ad. & El. 184, 111 Eng. Reprint, 71, 4 Nev. & M. 99, 4 L. J. K. B. N. S. 43, and of *Kilsby v. Williams* (1822) 5 Barn. & Ald. 815, 106 Eng. Reprint, 1388, 1 Dowl. & R. 476, 24 Revised Rep. 564; they are evidence of a complete executed transaction by which the check was paid, Hudson-Kennedy & Company [the drawers] ceasing to be the debtor of the appellee, and the bank becoming his debtor. It is difficult to discover in the transaction any element of agency, or any fact indicating any purpose on the part of the appellee to create, or on the part of the bank to enter into, that relation. The check was not treated by the bank as it would have treated a check of which some other bank or banker was the drawee, and in reference to which it would assume no other duty than that of collection, transferring to the credit of the holder only what may have been derived from it. . . . It seems impossible from these facts to attribute any other intention to the parties than that the

check should be received by the appellants and placed to the credit of the appellees as cash, as money deposited by him. . . . It is not very material in what form a bank manifested the acceptance of a check drawn upon it. Whatever may be clearly intended by it as an acceptance, and is received by the holder as sufficient, ought not to be repudiated in courts of justice. The acceptance, by which we mean an acknowledgment that the check is good, is as clearly manifested by a transfer of it to the credit of the holder, as it would be by noting or certifying it as good when he may desire to use it in other transactions with strangers. It is not of importance that the transfer is shown only by an entry on the pass book of the holder. There must be an interval during which that entry will be the only written evidence of the acceptance. The length of that interval depends wholly on the usages founded on the convenience, and the care and diligence, of the officers of the bank in making entries on his own book. The entry on the pass book of the holder is the evidence usually given him for his own purposes in the ordinary course of business, to which he can resort to ascertain the state of his accounts,—the indebtedness of the bank to him. The bank, preserving for itself evidence of its transactions and liabilities, may, and will, cause entries to be made on its own books. These, after acceptance of the check had been manifested by an entry to the credit of the holder on his pass book, are no more than memoranda of a past completed transaction."

It appears in *Oddie v. National City Bank* (1871) 45 N. Y. 735, 6 Am. Rep. 160, that subsequent to the receipt and entry of the check in question, the bank continued to pay the checks of the drawers and also to certify their checks although their account was in fact overdrawn. These facts are stated to throw light upon the intention of the bank to receive this check as a deposit, and to take the risk of the account being made good by subsequent deposits or of an indemnity from collaterals which the bank

held, and the evidence was competent for that purpose.

In the *Oddie Case* (N. Y.) *supra*, some stress was laid in argument upon the circumstance that the check was presented to the receiving instead of the paying teller. In answer to this contention it is said that it was not claimed but that the receiving teller had the authority to receive deposits and to determine what checks upon the bank it would receive, and the depositors are not to be prejudiced by his misjudgment or want of information, since easy access to such information was within his reach; but in this case there was no want of full knowledge on the part of both tellers that the drawer's account was overdrawn largely at the time.

In *Walnut Hill Bank v. National Reserve Bank* (1910) 141 App. Div. 475, 126 N. Y. Supp. 430, where a New York bank on which another bank drew a draft in favor of a third bank sent the draft directly to the drawee, with instructions to credit the third bank with the amount, and the New York bank thereupon sent to the third bank a postal card acknowledging the receipt of the draft for its credit, and on the same day sent to the drawer a similar card acknowledging receipt of the draft for credit of the third bank, the New York bank was held entitled to avoid liability to the third bank, where, in point of fact, the amount of the draft was never placed to its credit, because the drawer had not on deposit a sufficient amount to cover, and on the same day the New York bank notified the drawer that the amount of the draft could not be placed to the credit of the payee until the account of the drawer was made good, but gave no notice to this effect to the third bank. In distinguishing this case from the case of *Oddie v. National City Bank* (N. Y.) *supra*, the court says: "Here it appears beyond contradiction that the defendant never did credit the amount of the Merchants & Farmers Bank's draft to the credit of plaintiff, and therefore never evinced by that act an intention to assume responsibility for the draft.

The notice to the plaintiff that the amount had been placed to its credit was merely an erroneous statement, and was not the equivalent of an actual credit." Compare facts with those in the reported case (*COHEN v. FIRST NAT. BANK*, ante, 701).

An estoppel was also urged in the *Walnut Hill Bank Case* (N. Y.) *supra*, from the notice given to the third bank; but it was held that in order to work an estoppel it must appear that the third bank, in reliance upon such a notification, had done something or refrained from doing something to its damage, a thing that did not appear in the case.

The view has been taken that the mere fact of the receipt of the check by the receiving teller and the entry of it in the depositor's pass book does not of itself raise an implied agreement by the bank to accept the check as cash. *National Gold Bank & T. Co. v. McDonald* (1875) 51 Cal. 64, 21 Am. Rep. 697; *Ocean Park Bank v. Rogers* (1907) 6 Cal. App. 678, 92 Pac. 879.

The court in *National Gold Bank & T. Co. v. McDonald* (Cal.) *supra*, argues as follows: "When checks on another bank are deposited with the receiving teller and a credit for them entered in the pass book, it is not contended that they are received as cash or otherwise than for collection. If not paid on due presentation they may be returned and the credit in the pass book canceled. But it is insisted that a different rule obtains in respect to checks drawn on the same bank; and the argument is that the officers of a bank must be presumed to know, and are chargeable with notice of the fact, whether the drawer has funds to his credit when the check is offered for deposit; that, if in fact he has no funds to his credit, and the receiving teller nevertheless receives the check and enters a credit for it in the pass book, the bank must be held to have adopted the check, and to have received it as cash, assuming the risk of its being made good and of the solvency of the drawer. The argument assumes that the mere fact of the receipt of the check by the receiving teller and the entry of it in

the pass book of itself implies an agreement by the bank to accept it as cash, and is to be deemed in law as equivalent to the payment of the check. The proof shows that nothing more was done in this case. The check was handed by the defendant's clerk to the receiving teller, together with the pass book, without any remark, so far as is shown by the evidence, and the teller made the entry in the pass book and handed it back. If anything more occurred the evidence fails to disclose it. Does this transaction of itself import an agreement by the bank to accept the check as cash? Is it in law equivalent to a payment of the check? There can be no doubt that if the bank through its teller, expressly or by reasonable implication from his acts and declarations at the time, agrees to accept the check as cash and to enter a credit to the depositor for the amount, it will be bound by the agreement, whether the drawer of the check has funds to his credit or not. . . . The rule we intend to lay down is that when a check on the same bank is presented by a depositor with his pass book to the receiving teller, who merely receives the check and notes it in the pass book, nothing more being said or done, this does not of itself raise a presumption that the check was received as cash or otherwise than for collection."

In *Ocean Park Bank v. Rogers* (Cal.) supra, the court says: "Had it been drawn upon another bank and payment thereof refused, the bank could have charged it back to Rogers, notwithstanding the fact that she had received credit therefor in her pass book. Why should a different rule apply when drawn upon the bank which receives the check and enters the credit in the pass book? In either case, in the absence of any agreement to the contrary, it is received for collection. If in the one case it be paid, the amount is placed to the credit of the depositor; in the other, if there are sufficient funds to the credit of the drawer, the amount of the check is transferred on the books of the bank from the account of the drawer to the account of the depositor. If, upon presentation of the check, the account

of the drawer is insufficient to cover it, he may nevertheless make deposits during business hours of the day in amounts sufficient to pay it, in which case such funds to the amount of the check should be transferred to the account of the party presenting the check is presented, the account of banking hours, on the day when the check is presented, the account of the drawer is insufficient to pay it, the bank must then elect to either pay the check itself, charging the amount thereof to the account of the drawer as an overdraft, or return the check to the party presenting it as unpaid for want of funds. If the check is drawn upon another bank, the bank wherein it is deposited has a reasonable time within which to present it for payment, and when drawn upon the bank wherein it is deposited, the bank likewise, in the ordinary transaction of business, has a reasonable time to ascertain the condition of the drawer's account, and, in the absence of a demand for cash, the bank has until the close of banking hours on the day of the deposit, for the reason that the drawer of the check may deposit funds during banking hours sufficient to pay it. This is not an unreasonable rule, inasmuch as the depositor may by inquiry ascertain the condition of the drawer's account or call for cash in payment of the check." The court concludes: "When a check on the same bank is presented to the receiving teller for a deposit by a depositor, with his pass book together with a deposit slip upon which the amount of the check together with other deposits is entered, and said teller receives the same and enters the amount thereof in the pass book to the credit of the depositor, stamps the check paid, and impales the same upon a file, nothing more being said or done, this does not of itself raise the presumption that such check was received as cash or otherwise than for collection; and the bank has until the close of banking hours on the day of deposit to ascertain whether the account of the drawer will permit of a transfer of the amount of the check to the depositor's account. If it will not, then, in the absence of any element of estop-

pel (and there is none here), the bank may charge back the amount to the depositor and return the check. Notwithstanding the fact that there are no funds to pay the check, the bank may elect to honor it as an overdraft, in which case the transfer of the amount from one account to the other is made upon the books of the bank. To constitute such transfer two acts are necessary, namely, charging the one account, and crediting the other, with the amount of the check. In the case at bar it appears that the books of the bank were posted in alphabetical order, and that Mrs. Rogers's account was credited with the check, but no charge or entry was made against the account of Widney, for the reason that he had no funds therein. Under these circumstances the credit given Rogers did not constitute any transfer of the amount of the check to Rogers's account, nor did the act show an intent on the part of the bank to recognize the check as a cash deposit."

The fact that the bank, on the same day in which it credited a depositor with the amount of a check in a considerable sum, drawn by another depositor, cashed other of the drawer's checks for small amounts, is wholly immaterial as indicating an intention to accept the check which it has credited in the holder's pass book as a cash credit. *Ocean Park Bank v. Rogers* (Cal.) *supra*.

In the *Ocean Park Bank Case* (Cal.) *supra*, the amount of the check had not only been entered upon the pass book of the depositor, but had been credited to him on the books of the bank. The custom of the bank was to post the checks received for deposit in the ledger in alphabetical order, and the check was, by the bookkeeper, credited upon this ledger to the account of the depositor, and it was not discovered that the drawer's account was overdrawn until the bookkeeper turned to the drawer's account for the purpose of charging it with the amount of the check, whereupon he referred the matter to the cashier, and the amount of the check was immediately charged back to the account of the holder, and the check,

with a printed notice stating that there were not sufficient funds, together with a letter to the depositor signed by the cashier stating that his account was charged with the amount thereof, was inclosed in an envelop duly addressed and mailed to him.

Where there is no credit entered anywhere, it seems clear that the bank is not obligated to pay the check. This was the fact in *Boyd v. Emmer-son* (1834) 2 Ad. & El. 184, 111 Eng. Reprint, 71. In that case the holder of the check went to the banking house, and, while giving directions to the cashier and confidential clerk about another matter, laid the check in question upon the counter, saying, "Place this to my account." No intimation was given to him that the request would or would not be complied with, or that the drawer had overdrawn his account. The cashier knew at the time the check was presented that the drawer was indebted to the bank in a large amount, and doubted whether the check would be honored by the bank, but made no statement to the holder. A few minutes after the holder left the banking house, the cashier took the check from the counter, but did not debit the drawer with the amount, or credit the holder with it, or cancel the check; subsequently the bank decided not to honor the check, and on the following day gave the holder notice of the dishonor. In holding that the bank was not liable to the holder, the court says: "I think the plaintiff, when he presented the check, should have given distinct notice whether he presented it as a check to be paid or to be merely placed to his account like other securities. In the absence of such a statement by him, I draw the inference that the check was received in the latter character, and I therefore think the defendants are entitled to our judgment."

But it has been held that the holder of a check who paid the same in at the bank by which it was received, without anything being said or any entry made, may recover the amount thereof of the bank, although there were not sufficient funds to the credit

of the drawer to pay it, where, on the following day, the bank wrote a letter to the plaintiff, stating that the check was not paid, and that they would keep it in the hope of there being money to pay it, and they promised the holder to pay it when they had funds, and where on that date sufficient funds were deposited to make the drawer's balance more than the amount of the check. Such check was held to have a preference over a debt owing to the bank by the drawer, and also to two other checks which were presented on the same day, but subsequently to the time of presentation of the check in question. *Kilsby v. Williams* (1822) 5 Barn. & Ald. 815, 106 Eng. Reprint, 1388, 1 Dowl. & R. 476, 24 Revised Rep. 564.

If the holder of the check presents the same, with knowledge that the drawer has no funds to meet it, he is guilty of such fraud as entitles the bank to cancel the credit. *Peterson v. Union Nat. Bank* (1866) 52 Pa. 206, 91 Am. Dec. 146. This was held, although it was credited to the holder and charged against the drawer.

That the bank may cancel the credit if the holder is guilty of fraud seems to be the opinion of the court in *City Nat. Bank v. Burns* (1880) 63 Ala. 267, 44 Am. Rep. 138, although the extent to which the express holding in this case goes is that if the holder of a check has full knowledge that the drawer is without funds in the bank to meet it, and has no just reason to believe that the check will be honored in the absence of funds, he is wanting in good faith if he demands and receives payment, especi-

ally if it is known to him that the drawer is insolvent, and the bank is ignorant of the insolvency.

Courts admitting the correctness of the majority rule have held that the bank may charge the amount of the credit back, if this was the agreement of the parties. Thus, it is held in *Snyder v. Hamilton Nat. Bank* (1918) 65 Colo. 24, L.R.A.1918F, 807, 172 Pac. 1069, that a bank which credits to the account of a customer checks upon itself drawn by another customer, against a deposit of a stranger's check on another bank, is entitled to charge back the check so credited when payment of the one against which they are drawn is stopped; and the fact that the checks were upon itself does not render the transaction a payment of the checks rather than an extension of credit, if such was the intention of the parties as evidenced by the immediate revocation of the credit by the bank, acquiesced in by the depositor.

A usage of banks, known to the depositor, of crediting checks drawn by another customer upon the bank in which the deposit is made, in the pass book of the customer presenting them, subject to the right of the bank to reject the deposit and charge the amount back to the depositor at any time within the day on which the deposit is made, if the bank discovers that the drawer of the check has not sufficient funds on deposit to pay the same, is sufficient to raise an implied agreement authorizing the bank to charge back a credit thus given. *Pollack v. National Bank* (1912) 168 Mo. App. 368, 151 S. W. 774.

W. A. E.

HOMER MONTGOMERY

v.

BOARD OF EDUCATION OF LIBERTY TOWNSHIP, UNION COUNTY.

Ohio Supreme Court — March 29, 1921.

(— Ohio St. —, 131 N. E. 497.)

Schools — contract to transport pupils — suspension.

One who entered into a contract, entire in its nature, with a board of

Headnote by the COURT.

education, providing that he should convey pupils to and from school during a school year, of eight and one-half months, at a stipulated compensation payable monthly, is entitled to such compensation during a period of suspension of the schools by the board of education, though it be upon the direction of the board of health as a precautionary health measure, there being no provision in the contract relative to such contingency, and it appearing that the suspension was temporary, and the person so employed was required to and did continue ready and willing at all times to perform his duties under the contract, which he in fact did upon the resumption of school after such period of suspension.

[See note on this question beginning on page 725.]

CERTIFICATION by the Court of Appeals for Union County for review and final determination by the Supreme Court, upon reversal of a judgment of the Court of Common Pleas in favor of plaintiff, of an action brought to recover an amount alleged to be due under a contract for the conveyance of pupils during suspension of school. *Reversed.*

Statement by Matthias, J.:

The plaintiff in error, Homer Montgomery, brought action in the court of common pleas of Union county, against the board of education of Liberty township in said county, to recover a sum claimed to be due him from the board of education, by virtue of a contract entered into, whereby he agreed to convey pupils from a certain section of the school district to and from school during the school term of eight and one half months at the rate of \$3 per day, payable monthly. Evidence was introduced supporting the claim of plaintiff below, which discloses that, during the period for which the plaintiff seeks to recover compensation, the schools were closed by reason of an epidemic of influenza, pursuant to the order of the local board of health, as a precautionary health measure, the order being that the schools be closed until further notice. During the period in question, the plaintiff was required to, and did, keep himself in readiness to resume the transportation of pupils upon notice, for which purpose he kept and maintained a team of horses, and was ready and willing at all times to do and perform all things on his part to be done and performed under the terms and provisions of his contract.

Judgment was rendered in his favor in the court of common pleas, but was reversed by the court of appeals on the ground that the performance of the contract for the period of time in question was made impossible by order of the health authorities. That court, upon finding that its judgment was in conflict with that of the court of appeals of Franklin county, in the case of *Cashdollar v. Board of Education*, 12 Ohio App. 298, certified the record of the case to this court for review and final determination.

Mr. C. A. Hoopes, for plaintiff:

Parties entering into a contract subject to temporary suspensions of a school are bound, if they wish to provide against liability during those periods, to stipulate accordingly, in cases where the terms of the contract require either party to keep himself at all times in readiness to perform.

State ex rel. Jewett v. Sayre, 91 Ohio St. 85, 109 N. E. 636; *Cashdollar v. Clotts* (Ohio) decided Feb. 12, 1920; *Carthage v. Gray*, 10 Ind. App. 428, 37 N. E. 1059; *Libby v. Douglas*, 175 Mass. 128, 55 N. E. 808; *Randolph v. Sanders*, 22 Tex. Civ. App. 331, 54 S. W. 621; *McKay v. Barnett*, 21 Utah, 239, 50 L.R.A. 371, 60 Pac. 1100; *Smith v. School Dist.* 89 Kan. 225, 131 Pac. 557, Ann. Cas. 1914D, 139; *Board of Education v. Couch*, 63 Okla. 65, 6 A.L.R. 740, 162 Pac. 485;

(— *Ohio St.* —, 131 N. E. 497.)

Dewey v. Union School Dist. 43 Mich. 480, 38 Am. Rep. 206, 5 N. W. 646.

Mr. Milo L. Myers, for defendants:

A contract includes not only what is expressly stated, but also what is necessarily to be implied from the allegations used; and the terms which may clearly be implied from a consideration of the entire contract are as much a part thereof as though plainly written on its face.

Groff v. Hertenstein, 12 Ohio C. C. N. S. 515; *Marvel v. Phillips*, 162 Mass. 899, 26 L.R.A. 416, 44 Am. St. Rep. 370, 38 N. E. 1117; *Stewart v. Loring*, 5 Allen, 306, 81 Am. Dec. 747; 13 C. J. 558; *Weil v. State*, 46 Ohio St. 453, 21 N. E. 643; *Smith v. Parsons*, 1 Ohio, 239; *Banks v. De Witt*, 42 Ohio St. 263.

When from the nature of the contract it is evident that the parties contracted on the basis of the continued existence of the person or thing, condition or state of things, to which it relates, the subsequent perishing of the person or thing, or cessation of the existence of the condition, will excuse the performance; a condition to such effect being implied, in spite of the fact that the promise may have been unqualified.

State ex rel. Jewett v. Sayre, 91 Ohio St. 95, 109 N. E. 636; 13 C. J. 642; *Groff v. Hertenstein*, 12 Ohio C. C. N. S. 515; *Levy v. Caledonian Ins. Co.* 156 Cal. 527, 105 Pac. 598; *Cameron-Hawn Realty Co. v. Albany*, 207 N. Y. 377, 49 L.R.A.(N.S.) 922, 101 N. E. 162; *School Dist. v. Howard*, 5 Neb. (Unof.) 340, 98 N. W. 666; 9 Cyc. 629; *Speliopoulos v. Schick*, 129 Wis. 556, 109 N. W. 568; *Cordes v. Miller*, 39 Mich. 581, 33 Am. Rep. 430; *United States v. Dietrich*, 126 Fed. 671; *Hooper v. Mueller*, 158 Mich. 595, 133 Am. St. Rep. 399, 123 N. W. 24; *People v. Globe Mut. L. Ins. Co.* 91 N. Y. 174; *Greil Bros. Co. v. Mabson*, 179 Ala. 444, 43 L.R.A.(N.S.) 664, 60 So. 876; *Adler v. Miles*, 69 Misc. 601, 126 N. Y. Supp. 135; *Meade v. Lamarche*, 150 App. Div. 42, 134 N. Y. Supp. 479; *Pabst Brewing Co. v. Howard*, — Mo. App. —, 211 S. W. 720.

Matthias, J., delivered the opinion of the court:

The contract entered into by and between Montgomery and the board of education, as found by the trial court from the evidence, and which there was ample evidence to support, was an entire contract, wherein it

was agreed that Montgomery should transport pupils to and from school during the school term of eight and one half months, at the rate of \$3 per day, payable monthly. There was no stipulation in the contract whereby either of the parties should be relieved from the obligations thereof by reason of any conditions which might thereafter arise. It is to be observed that the direction of the local health officer, pursuant to which the sessions of the school were suspended, was that the school be closed until further notice. It was therefore required of the plaintiff, in order to perform his contract, to constantly and continuously maintain a team and equipment, and hold himself in readiness at any and all times, upon notice, to transport the pupils of the district to and from school. He could not make any engagements whatever that would prevent the faithful and prompt discharge of his duties under the terms and conditions of his contract. Such was his obligation during the entire period of eight and one-half months which the contract covered.

The only question of law presented by the record in this case is whether under the terms of such contract, and the circumstances and conditions to which reference has been made, the plaintiff in error is entitled to compensation for that portion of the period covered by the terms of such contract during which the schools were closed by the order of the local health authorities as a precautionary health measure, on account of an epidemic of influenza.

The view that the plaintiff is entitled to such compensation, and that recovery thereof in this case is justified, is amply supported, both by reason and authority. The right to recover under similar circumstances frequently has been sustained in behalf of teachers in the public schools, and no reason is perceived why the same rule should not apply to one occupying such relation to the

Schools—contract to transport pupils—suspension.

public schools as does the plaintiff in this case.

It is quite generally held that no deduction can be made from the salary of a teacher in the public schools for the time the school is closed by reason of contagious disease, where the teacher remains ready to continue his duties under his contract of employment, unless there is a stipulation in the contract of employment covering such possible occurrence. 35 Cyc. 1099.

Numerous decisions may be cited in support of this proposition, from which we have selected the following, because of the sound reasoning supporting the conclusion announced, which apply directly to the case under consideration: *Dewey v. Union School Dist.* 43 Mich. 480, 38 Am. Rep. 206, 5 N. W. 646; *McKay v. Barnett*, 21 Utah, 239, 50 L.R.A. 371, 60 Pac. 1100; *Randolph v. Sanders*, 22 Tex. Civ. App. 331, 54 S. W. 621; *Libby v. Douglas*, 175 Mass. 128, 55 N. E. 808; *Smith v. School Dist.* 89 Kan. 225, 131 Pac. 557, Ann. Cas. 1914D, 139; *Board of Education v. Couch*, 63 Okla. 65, 6 A.L.R. 740, 162 Pac. 485, and *Carthage v. Gray*, 10 Ind. App. 428, 37 N. E. 1059. In each of these cases the suspension of school was temporary, and the person whose compensation was in issue was required to, and did, remain in readiness to resume active and actual discharge of his prescribed duties.

In this case the plaintiff in error necessarily was subject to the daily direction and order of the board of education, and could not make any engagement or undertake any service which would interfere with his

constant readiness to resume the active discharge of the duties imposed. During all such period, therefore, upon each school day, his time and service, and the service of his team, which he must necessarily provide and constantly maintain, continued subject to the order of the board of education; and his employment, in so far, at least, as it prevented his engagement in other occupation or undertaking inconsistent with his duties under his contract, was continuous throughout all of the period in question. He did in fact, upon the resumption of school after such period of suspension, convey the pupils of the district to and from school during the remainder of the school year.

The contingency which here occurred was one which might well have been foreseen and provided against in the contract, but was not. The law will not insert by construction, for the benefit of one of the parties, an exception or condition which the parties, either by design or neglect, have omitted from their own contract.

The judgment of the Court of Appeals is reversed, and that of the Common Pleas affirmed.

Marshall, Ch. J., and Johnson, Hough, Wanamaker, Robinson, and Jones, JJ., concur.

NOTE.

The effect upon a contract other than with teachers, of the interruption of a school session, is considered in the annotation following *SANDREY v. BROOKLYN SCHOOL DIST.* post, 725.

WILLIAM A. SANDRY, Respt.,
v.
BROOKLYN SCHOOL DISTRICT NO. 78 of Williams County, Appt.

North Dakota Supreme Court — April 4, 1921.

(— N. D. —, 182 N. W. 689.)

Schools — closing — recovery on transportation contract.

1. In an action brought by a driver to recover the compensation stipulated in a driver's contract with a school district for the transportation of teachers and pupils to and from a consolidated school, where the plaintiff seeks to recover upon his own contract and upon claims arising under three similar contracts of which he is assignee, for a period of thirteen weeks, during which the school was closed on account of an epidemic of influenza, it is held, the driver's contract is not so far analogous to a teacher's contract that the driver, upon showing readiness to perform during a period when the school is closed on account of an epidemic, may recover the agreed compensation as upon a full performance.

[See note on this question beginning on page 725.]

Contract — service — inability to receive — liability.

2. The driver's contract is a contract for personal service, and if, without fault of either party, its performance is rendered practically impossible for a period of time, the party thus unable to give or receive performance during the period is not liable for breach of the contract.

[See 6 R. C. L. 999, 1011.]

—substantial performance — compensation.

3. Where compensation is agreed upon as an equivalent for full performance, and where there is excusable nonperformance for an extended period, the service actually rendered under the contract is not a substantial performance of the entire contract such as will enable the plaintiff to recover the full compensation.

[See 6 R. C. L. 1012.]

Headnotes by BIRDZELL, J.

(Bronson and Grace, JJ., dissent.)

APPEAL by defendant from a judgment of the District Court for Williams County (Leighton, J.) in favor of plaintiff in an action brought to recover the amount alleged to be due upon certain transportation contracts. *Reversed.*

The facts are stated in the opinion of the court.

Mr. William G. Owens, for appellant:

School-district officers have and may exercise only such powers as are expressly or impliedly granted by statute.

Kretchmer v. School Bd. 34 N. D. 412, 158 N. W. 993; Pronovost v. Brunette, 36 N. D. 288, 162 N. W. 300; Harney v. Wirtz, 30 N. D. 292, 152 N. W. 803.

Mr. George A. Gilmore, for respondent:

The drivers were prevented through no fault of theirs from performing the contract, and by holding themselves

in readiness to perform when the board had the right to cancel the contracts, which it did not do, the drivers, in keeping with contracts of service like teachers' contracts, can collect for the full term of employment.

Libby v. Douglas, 175 Mass. 128, 55 N. E. 808; Randolph v. Sanders, 22 Tex. Civ. App. 331, 54 S. W. 631; Dewey v. Union School Dist. 43 Mich. 480, 38 Am. St. Rep. 206, 5 N. W. 646; 35 Cyc. 1098, 1099; McKay v. Barnett, 21 Utah, 289, 50 L.R.A. 371, 60 Pac. 1100; 1 Cyc. 694; 5 C. J. 864; Rodgers v. Torrent, 111 Mich. 680, 70 N. W. 335.

Birdzell, J., delivered the opinion of the court:

This is an appeal from a judgment for \$775 in an action upon four transportation contracts. The plaintiff brought action in his own right upon one of these contracts, and as an assignee of three others. The contracts cover the conveyance of the teachers and pupils of the defendant school district for the period of nine months, beginning September 23, 1918. They prescribe the routes of travel and the compensation of each driver. The school was open two weeks in September and October of 1918, when it was closed on account of the epidemic of influenza, and did not reopen until January 3, 1919. The drivers performed under the contracts during the time the school was open, and were paid for their services according to the contract rate. They were not paid, however, for the period during which the school was closed. This action is brought to recover the stipulated compensation as upon a performance of the contract during the thirteen weeks the school was closed.

The trial court instructed the jury that under the written contract the drivers would be entitled to recover the full amount stipulated as compensation if they at all times held themselves in readiness to perform and were prevented from performing by the action of the board in closing the school; that it would make no difference in this respect whether the school was closed by the order of the board of health on account of the epidemic; that the method of avoiding liability upon the contract for this period would have been by cancelation; and that the contract had not been canceled. The court also left it to the jury to determine whether or not under the evidence the parties themselves had placed a contrary interpretation upon the contract. This instruction was occasioned by evidence to the effect that at other times when the school had been closed for short periods the board, in compensating the

drivers, deducted for the days the school was so closed. There was evidence that the drivers had received compensation on this basis without objection, but it was explained that the matter was of too trivial a nature to warrant any attention being paid to it.

In our opinion this case turns upon the legal interpretation of the contracts. They are substantially the same, being upon printed forms. The following may be taken as typical:

"Witnesseth:

"(1) That the said William A. Sandry is to provide the safe conveyance of such teachers and pupils of the school in Brooklyn school district as live on or near the route designated in this contract, to the school in said school district by 8:45 A. M. of every school day, and back to their homes or places designated herein, being ready to leave the school by 4:10 P. M. of every school day, during the school term of (9) nine months commencing on the 23d day of September, 1918.

"(2) That the said William A. Sandry shall furnish all necessary blankets and robes during inclement weather for the sufficient comfort of the persons conveyed.

"(3) That it shall be the duty of the said William A. Sandry to preserve orderly conduct on the part of the children while in his care to or from the school and to report all misconduct on the part of such children to the teacher or principal.

"(4) That the said William A. Sandry hereby expressly agrees to exercise great care in performing his duties as driver and in preventing accidents to the children while in his care.

"(5) That in case the said William A. Sandry should wish to engage any other person than himself to act as driver, written permission must first be granted by the president of the school board, but the said William A. Sandry is still responsible to the school board for the performance of this agreement.

"(6) That the route of travel to and from the school shall be as follows (unless a deviation from this route shall be granted by the president of the school board): For route No. two (2) between December 1st and April 1st to arrive at schoolhouse at 9:20 A. M., and be ready to leave the schoolhouse at 3:45 P. M.

"(7) That for these services truly rendered the school board of said Brooklyn school district, Williams county, North Dakota, agrees to pay the said William A. Sandry at the expiration of each school month of service the sum of sixty-five and no/100 (\$65) dollars:

"Provided, that the school board reserves the right to withhold such part of the month's wages as, in their opinion, is equitable in case the services do not meet this agreement.

"Provided, further, that the school board may at any time cancel this contract in case of the nonperformance of this agreement by the driver, or in case of the discontinuance of school."

The plaintiff regards this as a contract for personal services, and claims for each the same legal effect as the ordinary's teacher's contract. The authorities relied upon to support recovery are principally those dealing with teachers' contracts, where recovery has been allowed in circumstances similar to those presented here, on the ground that the teacher's services are engaged for a stipulated term. It is held that where, during a portion of the term when the school was closed without the fault of the teacher, he or she necessarily remained in an attitude of readiness to perform, the compensation had, in effect, been earned.

Under the statutes of this state, teachers' contracts are required to contain an express stipulation against compensation in case the school be discontinued for the causes stated in the statute. Comp. Laws 1913, § 1189. The statute has not assigned prevalence of an epidemic as a ground for discontinuance. From the fact that the law requires

this provision to be inserted, it may fairly be implied that the district agrees to pay the teacher the stipulated salary during the term of the engagement if the schools are temporarily closed for some such cause as an epidemic. Other statutory provisions require the teacher to be compensated for legal holidays (Comp. Laws 1913, § 1382) and for periods of attendance upon teachers' institutes (Comp. Laws 1913, § 1385). A teacher is required to have certain qualifications and to have a certificate as a prerequisite to a right to receive compensation. Comp. Laws 1913, § 1382. The teacher is generally a person coming from outside the district, and the duties involved in the performance of the contract effectually preclude other employment for the period. In these circumstances it is a fair inference that the parties intend that the teacher should be compensated during periods of temporary suspension while he or she is held in a position of readiness to perform. *Libby v. Douglas*, 175 Mass. 128, 55 N. E. 808; *Dewey v. Union School Dist.* 43 Mich. 480, 38 Am. Rep. 206, 5 N. W. 646; *Carthage v. Gray*, 10 Ind. App. 428, 37 N. E. 1059; *Randolph v. Sanders*, 22 Tex. Civ. App. 331, 54 S. W. 621; *McKay v. Barnett*, 21 Utah, 239, 50 L.R.A. 371, 60 Pac. 1100; 3 Williston, Contr. § 1958; 3 Page, Contr. § 1376.

Is the driver's contract of the same character? We are of the opinion that it is not. No specific qualifications are prescribed. The contract is generally entered into between the district and some person

**Schools—closing
—recovery on
transportation
contract.**

within it. Its performance involves little or no preliminary preparation. The driver is not required to furnish the bus or other vehicle of conveyance. Performance does not require the whole time of the driver, and while personal performance is contracted for, it clearly appears from the evidence in this case that the school district readily paid for the service though the work of driv-

ing was delegated to suit the convenience of the driver. The dissimilarity of these two contracts gives rise to widely different points of view in construing them for the purpose of ascertaining the true intention of the parties. We think it quite clear that the holding in readiness required of the driver during a period of prolonged suspension involves so little inconvenience on his part that it cannot reasonably be said to be the intention of the contracting parties that he should be paid for such period. In these circumstances the ordinary rule applicable to personal service contracts applies. They are subject to the implied condition, on the one side, of ability to perform, and, on the other, of ability to receive performance. Either party is excused if, without his fault, performance for a period becomes impossible. Such impossibility may arise upon the sickness or death of either party, or the inability of one party to give or receive performance, occasioned by the prevalence of an epidemic. *Lake-man v. Pollard*, 43 Me. 463, 69 Am. Dec. 77.

Contract—service—inability to receive—liability.

is not such a substantial performance as to entitle the plaintiff to full compensation. See *Littell v. Webster County*, 152 Iowa, 206, 131 N. W. 691, 132 N. W. 426; 2 Williston, Contr. § 838. See also *Lacy v. Getman*, 119 N. Y. 109, 6 L.R.A. 728, 16 Am. St. Rep. 806, 23 N. E. 452. As we view the contracts in the instant case, the situation of the parties is in no respect different from what it would have been had they, in January, 1919, upon the reopening of the school, rescinded the contracts made in September and entered into new agreements for the remainder of

—substantial performance—compensation.

the term. In that event we do not think it could have been reasonably claimed by the plaintiff that the actual conveyance of the pupils for two weeks under these contracts was a substantial performance for fourteen or fifteen weeks.

Being of the opinion that the contracts in question must be construed as above indicated, it follows that the plaintiff may not recover the agreed compensation for the period during which the school was closed.

The judgment is reversed and the action dismissed.

Robinson, Ch. J., and Christian-son, J., concur.

Robinson, Ch. J.:

This is an appeal from a judgment on a verdict for \$775. The plaintiff is one of four persons who made similar contracts to drive a school conveyance for the school year commencing in September 1918, to convey teachers and children to and from the school. The plaintiff sues for a breach of his contract and for a breach of the other contracts, claiming under an assignment from the other drivers. The complaint avers that the plaintiff and the other drivers were duly paid for their services during the first two weeks, from September 23d to October 5, 1918, and from January 6th to the end of the school year. But for an interim of thirteen weeks, from October 7, 1918, to January 3, 1919, during which time the school was closed and no services rendered, the defendant refused to pay. The complaint does not aver that during said thirteen weeks the drivers performed any services or did a single thing under the contract.

As the record shows beyond dispute, the drivers were fully paid for all services actually rendered, but that they were not paid for the thirteen school weeks during which the school was closed and during which time they claimed to have stood in watchful waiting for the school to open. As shown by exhibit A and the oral testimony, the

school was closed pursuant to an order promulgated by the county board of health. The order directs the school board to close all schools and places of public amusement, saying: "This is not only a board of health measure, but it is the substance of a telegram received by the state board of health from the Surgeon General at Washington. It is therefore a war measure."

The court will take judicial notice of the fact that the flu was a very infectious and fatal disease, and that it prevailed to an alarming extent over the state and the nation. The order was fully authorized; the closing of the school was compulsory. Indeed, it was an act of God, and the drivers had due notice of the closing, as well as the opening, of the school. There was no occasion for any watchful waiting. When the time came for the opening of the school, the drivers were notified, and resumed the work and accepted their monthly pay without protest. As the answer avers, during the thirteen weeks the drivers rendered no services whatever. The school was closed by order of the county board of health, and because of the prevalence of the flu. The defendant school district was not responsible for the epidemic or the closing of the school. "No man is responsible for that which no man can control." Comp. Laws, § 7263. And, except as given by statute, the school board had no power to contract for the conveying of pupils to and from the school. The board had no power to contract for the payment of drivers at a time when the school was closed and when the drivers could not possibly render any services. Hence, on the undisputed facts, the action should be dismissed.

But the court instructed the jury that if the drivers at all times held themselves in readiness to perform under the terms of the contract and were prevented from so doing by reason of the action of the board, then they were entitled to recover the full amount claimed in the complaint, \$775, and that it made no

difference that the school was closed by order of the board of health on account of the epidemic. The instruction is clearly erroneous. The closing of the school was by compulsion and by act of God, and not by any action of the defendant. If the closing was rightful, as it was, the defendant was not liable. If the closing was wrongful, then the district would be liable for a breach of its contract. However, the instruction was clearly erroneous. It holds, in effect, that when a contracting party holds himself in readiness to perform a contract, it is the same as performance. Under such a rule a person contracting to build a house for \$5,000 might recover the contract price without doing a thing if he only held himself in readiness to perform and the other party forbade performance. But such is not the law. If the board wrongfully closed the school, if it wrongfully prevented the drivers from performing the services under the contract, then the statute gives a measure of damages thus: "The amount" that "will compensate the party aggrieved for all" loss "proximately caused" by the breach of contract, "or which in the ordinary course of things would be" liable "to result therefrom." Comp. Laws, § 7146.

And "damages must in all cases be reasonable." § 7183. In this case plaintiff sues to recover for the breach of contract, and not for services actually rendered. He sues to recover on each of the four contracts for thirteen weeks of idleness. He wants pay for fifty-two weeks or one year of doing nothing. Of course that is not reasonable. It is grossly unconscionable. It seems like an attempt to hold up and rob the defendant of \$775 under the forms and technicalities of the law. If the defendant had legal capacity to hire the drivers to do nothing for thirteen weeks and then wrongfully discharged them and prevented the performance of the contract, the liability is the same as that of a farmer hiring help to work on a farm and discharging the help be-

fore the time. In all such cases the liability is for the proximate loss. If a man is hired to serve for a year and is at once recalled or discharged without cause his proximate loss is the difference between the contract wage and that which he may earn during the year. He cannot pass a year in idleness and collect for it the same as if he had been faithfully at work.

Then there is another rule that a contract must be binding on both parties, or neither is bound. If the drivers were not legally bound to serve, and if they had a right to jump the contract, the school district had the same right, and under the statute, if constitutional, any person, whether singly or in concert, may at any time terminate any relation of employment or labor, and even persuade others to do the same. Laws 1919, chap. 171. And it is generally known that as a rule employees no longer consider contracts for services or labor binding on them. They feel free to jump and disregard any such contract. In this case the question is: Did the school board make with the drivers a valid and binding contract to pay them for services during the thirteen weeks of idleness, whether school kept or not, and to pay each of them for thirteen weeks of idleness and doing nothing while the school was closed without any fault of the school board? As I maintain, the school board made no such contract. It had no legal right to make it. The school was closed by compulsion, and no man is responsible for that which no man can control. Comp. Laws, § 7260. The drivers have had pay for their work, and this court should not aid them in holding up the school district. Hence the action should be dismissed.

Bronson, J., dissenting:

The opinion of Justice Birdzell treats the contract involved as continuing for the period prescribed. Right of recovery is denied because of the failure of the drivers to sub-

stantially perform the contract during the period of time that the school was closed.

In this case no breach of the contract on the part of the drivers is presumed or proved. Confessedly, the failure of the drivers to perform the contract services during the time the school was closed is due entirely to the action of the defendant. Whatever breach of the contract occurred was the act of the defendant. The case was tried and submitted upon the theory that the drivers were entitled to recover, if at all, the contract rate stipulated. In this regard, I am of the opinion that there was an error. The record justified the finding of the jury that the closing of the school operated as a breach of the drivers' contracts. Upon the holding in the opinion referred to, the breach of the contract by the defendant leaves the drivers without right to recover the detriment, if any, they have suffered. In this case the statutory rule permitting the party aggrieved to recover the detriment proximately caused through the breach of a contract should be applied. Comp. Laws 1913, § 7146. See *McLean v. News Pub. Co.* 21 N. D. 89, 129 N. W. 93. See note in 6 L.R.A.(N.S.) 94.

The judgment should be reversed, and a new trial ordered.

Grace, J., dissenting:

The contract in this case was for a definite period of time.

All the rights and duties of the parties were definitely specified in the contract. The evidence warranted the finding by the jury that the plaintiffs had substantially performed their contracts. There was no evidence to show to the contrary, nor was there any evidence showing that the defendants were entitled to any reduction from the full contract price, by reason of having performed other services for other persons. If there were any such evidence, the jury passed upon the same, and disposed of it by its verdict in favor of plaintiff. Their verdict is conclusive in this case on

this court, on the questions submitted to them, which were all questions of fact in the case.

It seems to us the construction placed by the majority upon the contract is such that a contract of this character would be of little force or effect; and, as it appears to my mind, the court, by its decision, permits the impairment of the contract. It was by no means a one-sided contract. The amount which the plaintiffs were paid for performing the service specified in the contract was a very small sum per month. We may draw on our common knowledge of the surrounding condition to demonstrate this. For instance, the time of the commencement of the performance of the contract was in the latter part of September, 1918. From that time until about the first part of November, at least, any of the plaintiffs could have taken his team, and, in all probability, for the use of the team and himself, gotten \$10 per day, threshing. Then, commencing again on, say, the 1st day

of April, 1919, and from that time onward until the time specified as the time of the termination of the contract, certainly a man and team would be worth several times as much per day in the field at farm work, as they would receive for performing the service specified in the contract. Again, it may be taken into consideration that, during the winter months, plowing back and forth through the snow, and delivering the children, and redelivering them at their homes, would be no easy task. In the state of the evidence at the close of the case, the trial court could do nothing less than give the instruction which it gave.

We do not regard the analysis of the majority opinion, which endeavors to distinguish between this contract and a teacher's contract, as at all correct. Both are contracts, and the principles of law which are applicable to written contracts, which are wholly complete, are as applicable to one as to the other, in the circumstances of this case.

ANNOTATION.

Interruption of school session as affecting contract other than with teacher.

The weight of authority seems to be to the effect that a teacher is entitled to compensation while the school is closed on account of epidemic. See the annotation to *Clune v. School Dist.* 6 A.L.R. 736. In *SANDRY v. BROOKLYN SCHOOL DIST.* (reported herewith) ante, 719, a distinction is made between the right of a teacher to compensation under his contract and that of one employed to transport pupils, on the ground that the latter usually resides in the school district, and his keeping in readiness to perform his service under his contract does not ordinarily interfere with his doing other work. It is held, two judges dissenting, that where a school is closed temporarily by the order of a board of health acting under a direction given as a war measure by the Surgeon General at Washington, there is an impossibility of performance,

which prevents a person employed to transport pupils from recovering the compensation provided for in his contract during the period in which the school is closed.

It will be observed that the Ohio supreme court in *MONTGOMERY v. BOARD OF EDUCATION* (reported herewith) ante, 715, takes a different view under a very similar state of facts. That case accepts the analogy of the teachers' cases, which the *SANDRY CASE* rejects. The view taken in the Ohio case is supported by an Oregon decision upon a substantially similar state of facts. *Crane v. School Dist.* (1920) 95 Or. 644, 188 Pac. 712. In view of the quarantine and other powers conferred by the Oregon statutes on the state board of health, it was held that neither the board nor a health officer acting under its direction had the legal power to close a

school, and that the closing of a school by his order did not therefore amount to a suspension by operation of law of a contract of one employed to transport children to the school. The court said: "Under its general powers of control and supervision, the closing of the schools for any reason rests in the sound discretion of the school board, and therefore it is not a question of law. The legislature has rightly assumed that in all such matters the school boards will work in harmony with the boards of health to prevent, suppress, control, and regulate the existence and spread of contagious diseases. It will be noted that in the instant case the defendant specifically alleges that the school was closed in obedience to the order of the health officer, and not otherwise, and hence it must follow that defendant's school was not closed by operation of law. Neither is it a sequence that the closing of the school would suspend the contract between plaintiff and defendant, which by its terms was confined only to the transporting of pupils to and from school. The contract does not contain any provisos or exceptions, and no order was made by

anyone which would in any manner prohibit the carrying out of its terms. As stated in 3 Elliott on Contracts, § 1891: 'The general doctrine' that, when a party voluntarily undertakes to do a thing without qualification, performance is not excused because by inevitable accident or other contingency not foreseen it becomes impossible for him to do the act or thing he agreed to do, is well settled. As a man consents to bind himself so shall he be bound. Where no express or implied provision as to the event of impossibility can be found in the terms or circumstances of the agreement, it is a general rule of construction, founded on the absolute and unqualified terms of the promise, that the promisor remains responsible for damages, notwithstanding the supervening impossibility or hardship.'" In the Oregon case, also, it appeared that the board of health purported to act under an order issued as a war measure by the Surgeon General of the United States, but the court pointed out that the order of the Surgeon General did not refer to the closing of schools.

W. S. R.

MINTIE BLAKE, Appt.,

v.

EFFA M. WILSON, Written also as Effie M. Wilson.

Pennsylvania Supreme Court — December 31, 1920.

(268 Pa. 469, 112 Atl. 126.)

Workmen's compensation — casual employment — painting silo.

1. The employment of a school-teacher who undertakes to cover and paint a silo for a farmer is casual, and not within the course of the employer's business, within the meaning of an exception in the Workmen's Compensation Act, and no recovery can therefore be had under such statute for his injury while so employed.

[See note on this question beginning on page 735.]

Appeal — agreement as to question to be raised — effect.

2. Counsel cannot, by agreeing that the only issue on appeal is the question of the constitutionality of a statute, preclude the court from raising

another issue which is fundamental in character, where all the facts necessary to its consideration appear in the record, since the appellate court will take notice of such an error whether assigned or not.

Statute — construction — rule.

3. If the language is so far ambiguous as to be fairly susceptible of more than one meaning the court must interpret a statute by considering the

objects of the enactment, its purpose, and the appropriateness of the language used to the supposed purpose in view of the legislature.

[See 25 R. C. L. 1012, 1013.]

APPEAL by claimant from an order of the Court of Common Pleas for Lawrence County (Emery, P. J.) affirming a decision of the Compensation Board disallowing her claim in a proceeding under the Workmen's Compensation Act to recover compensation for the death of her husband while in the employ of defendant. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. William McElwee, Jr., for appellant:

Claimant was entitled to recover.

Marsh v. Groner, 258 Pa. 473, L.R.A. 1918F, 213, 102 Atl. 127.

The work in which deceased was engaged at the time of the accident was not casual.

Lewis v. Lofley, 92 Ga. 804, 19 S. E. 57; Re Appropriations, 13 Colo. 316, 22 Pac. 464; United States v. New York, O. & W. R. Co. 216 Fed. 702; Gaynor's Case, 217 Mass. 86, L.R.A. 1916A, 363, 104 N. E. 339, 4 N. C. C. A. 502; Crookshank v. Home of Aged Protestants, 1 Mackey (Pa.) 183; Broderick v. Dickson Stores Co. 1 Mackey (Pa.) 199; Hulihan v. Curran, 26 Pa. Dist. R. 1049.

Messrs. Martin & Martin, for appellee:

Claimant cannot attack the validity of the statute.

Clay v. Smith, 3 Pet. 411, 7 L. ed. 723; Eustis v. Bolles, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 731; Pierce v. Somerset R. Co. 171 U. S. 641, 43 L. ed. 316, 19 Sup. Ct. Rep. 64; 6 R. C. L. § 95.

Stewart, J., delivered the opinion of the court:

On the argument of this appeal it was suggested by the court to counsel that another question than that raised by the assignments of error, which challenges the constitutionality of the act entitled, "A Supplement to an Act Entitled 'The Workmen's Compensation Act of 1915,'" approved June 3, 1915 (P. L. 777), would seem necessarily to arise because of its fundamental character, and which had not been adverted to, namely, whether the work in which the employee was engaged when he met with the accident which resulted in his death was casual in char-

acter, and not in the regular course of the business of the employer, as required by § 104 of the Workmen's Compensation Act of 1915 (P. L. 736). Inasmuch as all the facts necessary for a proper consideration of the question appeared, and since there was no occasion for further delay, counsel on each side submitted at bar a brief. In appellant's brief the consideration of the question suggested is objected to because the several counsel had agreed in writing, in order to save the printing of the testimony taken before the referee, that the only issue involved in the appeal was the constitutionality of the act of assembly approved June 3, 1915 (P. L. 777), entitled "A Supplement to an Act Entitled 'The Workmen's Compensation Act of 1915,'" exempting from the provisions of the original act "domestic servants and agricultural laborers," and that the testimony taken before the referee was not material to the adjudication of the issue involved in this appeal. This objection is fully met by what was said in Canole v. Allen, 222 Pa. 156, 70 Atl. 1053, as follows: "Where the record of the case shows departure from established rules and procedure, affecting only the rights of the parties to the action, and no specific complaint is made with respect thereto, we assume that the departure was made by and with mutual consent,—*conventio legem vincit*. Not so, however, where the departure manifests a clear disregard of recognized public policy, or is in violation of expressed statutory provisions. Restrictions so

imposed are not subject to the pleasure of the parties or the power of the courts. In such case this court will take notice of the error, whether assigned or not."

And, further, the question suggested needs for its determination nothing outside of the record before us. The one question to be considered arises in connection with a single finding of fact by the referee, and it is one of law purely. Be-

cause, to our mind, it is the governing question, upon the solution of which

the facts of this appeal depend, we shall give it first consideration.

The appeal is from a judgment of the court of common pleas of Lawrence county, to which court an appeal had been taken from an award by the workmen's compensation board disallowing a claim of appellant for compensation for the injuries sustained by her husband while in the employ of the appellee, which injuries resulted in his death. From the opinion of the compensation board dismissing the claim we extract the following:

"The avowed purpose of this appeal, as stated by counsel for the claimant, is for the purpose of challenging the constitutionality of the Act of June 3, 1915 (P. L. 777), exempting domestic and agricultural workers from the provisions of the Workmen's Compensation Act of June 2, 1915. . . . One of the grounds of the appeal is as to the following language: 'On November 12, 1918, Garrett H. Blake was employed by the husband of Effa M. Wilson, who was running the farm, to paint the silo, which Garrett H. Blake agreed to do for about \$15,' etc.

"Under the amended Compensation Act we will modify this finding of fact for the purposes of this appeal, and find that Effa M. Wilson was the owner of the said farm, was operating it in her own behalf, and that her husband was her authorized agent in employing the said Garrett H. Blake to perform the

said work; in other words, there is no question about the responsibility of Effa M. Wilson as owning and operating her own farm, and liability for the exemption under consideration is unconstitutional."

No other facts are needed than those we have here. The concluding sentence states a legal proposition, the affirmance of which would negative the suggested question which we are about to consider, as will readily be seen, and may therefore be passed.

The Workmen's Compensation Act of 1915 by § 104 expressly excludes from the operation of its provisions "persons whose employment is casual in character and not in the regular course of the business of the employer." The person injured was a workman in the employ of the appellee, a married woman, the owner of the farm upon which she resided and which she operated in her own behalf. Outside of the operation of her farm she was engaged in no other business activity. She had begun the construction of a silo upon this farm, the work on which had been interrupted for some time. What remained to complete it was to roof the structure and paint it. She engaged the husband of the claimant to finish the job, and it was while he was so engaged that he met with the accident that caused his death. Was the employment in which he was so engaged casual in character, and not in the regular course of the business of his employer? It may be conceded that the several terms in the exemption clause above quoted are so far ambiguous as to be fairly susceptible of more than one

Statute—construction—rule.

meaning. When such uncertainty arises in legislative enactments, the duty of interpreting the meaning of the legislature, as it may be derived from the language used, devolves upon the court. The one rule which the court is allowed to apply in such case is limited to a consideration of the objects of the enactment, its purpose, and the appropriateness of

Appeal—agreement as to question to be raised—effect.

the language used to the supposed purpose in view of the legislature. There can be no two views as to the general purpose of the act in question. All will agree that its primary and general purpose was to substitute a method of accident insurance in place of common-law rights and liabilities for substantially all employees, except such as are by express terms or necessary implication excluded from its operation. It corresponds, so far as general purpose is concerned, with a like act in Massachusetts, of which it has been said in the case of *Young v. Duncan*, 218 Mass. 346, 106 N. E. 1: "It was a humanitarian measure enacted in response to a strong public sentiment that the remedies afforded by actions of tort at common law and under the Employers' Liability Act had failed to accomplish that measure of protection against injuries and of relief in case of accident which it was believed should be afforded to the workman. It was not made compulsory in its application, but inducements were held out to facilitate its voluntary acceptance by both employers and employees."

It will be helpful, perhaps, to keep in mind this general purpose of the enactment when we come to consider the special purposes of the act in exempting certain employees from its operation, and the language employed in their destination.

We pass to the question: Is the language used in denoting exceptions to the act appropriate to the supposed purpose the legislature had in view? A primary and general purpose of the act was, as we have said, to afford a workman a measure of protection against injuries and relief in case of accident, which was denied under existing law. The exception of certain classes of labor in the act is conclusive that it was not intended by the act to extend its benefits to all of the laboring classes. It is only so much of the act as defines the exceptions that we are concerned with in the present inquiry, and the in-

quiry may be limited still further to only so much of the exceptions as have been held applicable to the present case, and this would limit the consideration to the words "exclusive of persons whose employment is casual in character, and not in the regular course of the business of the employer." We have said that the words here employed to designate the class excluded are so far ambiguous—that is to say, lacking in precise and definite meaning—as to be fairly susceptible of more than one meaning. But this does not answer the present inquiry. Whatever else by construction they may be able to embrace, the only question is: Do they with sufficient clearness,—not by forced construction, but allowing the words used their common and popular meaning,—include in the exception the employee who meets with an accident while engaged in doing the work he had engaged to do, but which in character is casual and outside the regular course of his employer's business? This is to be resolved by interpretation rather than by construction. Interpreting the meaning of the words used, having regard to the connection in which they are used, we think it apparent that two conditions were in the legislative thought, which, however, because of the conjunction used connecting them, must both concur, neither of itself being sufficient to constitute an exception. We have then the two conditions to consider: (1) The casual employment; (2) the regular course of the employer's business. Allowing the words used in these several phrases their ordinary meaning, do they appropriately designate such employee as was the complainant's husband at the time he received his injury, or are they in any sense contradictory? We think that the expression "casual in character" had a distinct reference to the engagement or contract to render service, and an implied reference, as well, to a distinction that naturally arises when the service stipulated for is outside

the regular business of the employer; so that both are included in the exception. The injured employee was by occupation a school-teacher, but not for the time being engaged at his regular employment, in consequence of temporary suspension of the schools, when he undertook to complete the silo. The character of his employment may well be regarded as casual, considering not only that it was out of the line of his regular employment, and occurred only because of the temporary suspension of that employment, but as well because of the accident, or whatever it was, that had occasioned the suspension of the work on the silo that left it incomplete, and the very limited time that would be required to complete the work for which he engaged. We can conceive of cases where the contract for the service engaged might be in its character casual, and yet the employment within the course of the business of the employer. To make certain of the exclusion of such, the act further provides, "and not in the regular course of the business of the employer." An employee's engagement is casual in character when it comes about by chance, fortuitously, and for no fixed duration of time. In this case it was the concurrence of two fortuitous events that gave rise to the employment—the expiration of the school term, and the convenience of the employer for a resumption of work on the silo. There is nothing in the facts to warrant a belief that such contingency was foreseen.

The question remains: Was the employment itself in the regular course of the employer's business? In the case of *Marsh v. Groner*, 258 Pa. 473, L.R.A.1918F, 213, 102 Atl. 127, we found occasion to place interpretation upon the phrase "in the regular course of the business of the employer," as used in this act. The claim in that case was for compensation for injuries received by a person employed by a married woman, as owner of her house, who was engaged in remodeling it, and

had employed a workman to do some plastering in connection therewith. While the workman there was so engaged the scaffolding on which he was standing gave way, and in the fall he sustained the injury he complained of. It was nowhere suggested, that aside from the remodeling of her home, the woman sought to be charged with liability had anything of a business character to engage her time and attention. It was contended that the mere circumstance of the owner being engaged in the work of enlarging her home the time consumed in this work—the best part of a year—constituted her a person engaged in regular business and made her liable under the act to any employee who might be injured while engaged upon such work. In the opinion in that case, sustaining the rejection of the claim by the court below, we said:

"What gives rise to the question is the indefiniteness and want of precision of meaning of the word 'business' as it occurs in the act. It is a word which embraces a wide variety of subjects, and being without a technical or precise meaning, excluding any other, it may convey an entirely different meaning in one connection from what it imports when used in another. In such cases, when, as here, no help can be derived from the context and none from the use of the same word in other sections of the act, the interpreter has no other recourse than to the presumption that the word was used in the popular sense, if that be found agreeable; that is, not contradictory to the object and intention of the lawmaker.

"Statutes are presumed to employ words in their popular sense, and when the words used are susceptible of more than one meaning, the popular meaning will prevail. Where the meaning involves no absurdity and is not in conflict with the other parts of the act, it is the only one that can be presumed to have been intended, and there is no room for construction. *Cooley*,

Const. Lim. p. 68. There are few words more current in our speech than the word 'business;' few that include a greater variety of subjects, and yet none which, in popular speech, has greater or more marked singleness in denotement. When one's business is the subject of common speech, no one can be in doubt as to the reference. It would be a very exceptional person—we do not know how to otherwise describe him—who would not understand that the reference is to the habitual or regular occupation that the party was engaged in with a view to winning a livelihood or some gain. These objects are necessarily implied when one's business is spoken of. . . . What we have said as to the popular understanding of the word 'business' is just what Webster defines it: 'Some particular occupation or employment habitually engaged in for livelihood or gain.' The points of difference between the employment the defendant was engaged in and the business which is contemplated by the act and understood in common parlance are so marked that the two cannot be confounded; one cannot be the equivalent of the other. The defendant's employment was not in any way dependent on patronage; it had not for its object profit or gain, but simply her own personal gratification and comfort; it was not regular or habitual, but it terminated with the completion of the one thing that engaged her attention at the time, and there is not the slightest indication that she contemplated resuming or doing a like service for another, nor indeed that she had ever attempted anything of the kind before. Other points of difference can readily be suggested, but these are quite sufficient for our purpose. Our conclusion is that the defendant was not engaged in any business within the proper meaning of that term as used in the act, and therefore the claimant, when injured, was not employed in the manner prescribed by the act. His employment, like that of his employer, was casual in character."

With such understanding of the legislative meaning of the word "business," as it is here employed, it ought not to be difficult to interpret the true meaning of the phrase "in the regular course of the employer's business." With the particular object determined, the regular course of the business can only refer to the experience and custom in the conduct of the business as is of usual, if not daily, occurrence and observation. It is suggested that, if such had been the meaning the legislature had intended to convey, an apter expression would have been "in the course of the regular business of the employer." We think, on the contrary, such change in phraseology would have made the thought obscure. Not only so, but there can be no warrant for transposition of the terms; the meaning, as it stands, is not doubtful when it is considered that the word "regular," as it is used, does not qualify the word "business," but the course of the conduct of that business; when that is "regular," the condition of the act has been met.

Upon this further review of the act we see no reason why we should not adhere to the interpretation of the clause we have given in the case above cited. We are supported in this conclusion by recent decisions in other states where a similar law exists in which like language is used, notably in New York, Michigan, and California, in which states the phrase "not in the regular course of the business of the employer" has received judicial interpretation. In *Pelton v. Johnson*, 179 App. Div. 949, 165 N. Y. Supp. 1103, the appellate division unanimously reversed an award and dismissed the claim in a case in which it was sought to hold a hotel proprietor liable for injuries to a carpenter who was engaged in repairing his hotel. In *Holbrook v. Olympia Hotel Co.* 200 Mich. 597, 166 N. W. 876, the supreme court of Michigan says: "It would seem that occasionally renovating the rooms of a building, or the building itself,

owned and occupied by the owner as a home, with paint or paper or both, is not in the usual course of the trade, business, profession, or occupation of the owner, unless he is himself in the business of painting and decorating."

To the same effect is *Maryland Casualty Co. v. Pillsbury*, 172 Cal. 748, 158 Pac. 1031. There a machinist was employed by a farmer merely to repair a tractor, and it was held that the repairing of the tractor was not in the usual course of the occupation of the farmer. In that opinion it is said by the court: "It was no more farm labor [because the work was done on a farm] than it would have been if the machine had been taken to [the machinist's] shop . . . and there repaired."

Because of the views expressed in this opinion, we have reached the

Workmen's compensation—casual employment—painting silo.

conclusion that the claim for compensation in this case falls within the exceptions expressed

in § 104 of the Workmen's Compensation Act of 1915 (P. L. 736), because the employment in which the injury was sustained was casual, and not in the regular course of the employer's business. It was there-

fore properly refused, and we now so decide. Even though we were to agree with appellant in the contention so vigorously pressed that the act entitled "A Supplement to an Act Entitled 'The Workman's Compensation Act of 1915,' to Exempt Domestic Servants and Agricultural Workers from the Provisions Thereof," approved June 3, 1915, is unconstitutional,—as to which we express no opinion,—it would be without result in the present controversy, since, leaving out of consideration the supplement, there is that in the general act sufficient to defeat the claim, and it is upon its provisions exclusively that we rest our decision.

Judgment is affirmed.

The foregoing opinion written by Mr. Justice Stewart was adopted by the court after his death and is now filed as its opinion.

NOTE.

The liability of a property owner under workmen's compensation acts for injury to workmen building or repairing structures is considered in the annotation following *DAVIS v. INDUSTRIAL COMMISSION*, post, 735.

IDDELL E. DAVIS, Plff. in Err.,

v.

INDUSTRIAL COMMISSION et al.

(Two cases.)

Illinois Supreme Court—February 15, 1921.

(297 Ill. 29, 130 N. E. 333.)

Workmen's compensation — injury in repairing apartment building — liability.

1. A merchant who owns and maintains an apartment building for rent is not relieved from liability under the Workmen's Compensation Act, for injuries to workmen engaged in repairing the building, by the fact that his business as merchant is not hazardous, and therefore does not come within the provisions of that act.

[See note on this question beginning on page 735.]

(297 Ill. 29, 130 N. E. 333.)

Principal and agent—authority of agent—making repairs.

2. An agent having authority to contract for the making of small repairs on a building may be found to have had authority to contract for the cleaning of the outside of the building.

Master and servant—relation within Compensation Act—knowledge of principal.

3. The relation of employer and employee between the owner of a building and one undertaking to clean the outside of it is not affected by the fact that the latter did not know who the owner was at the time he was employed to do the work.

ERROR to the Circuit Court for Cook County (Torrison, J.) to review a judgment affirming an award of the Industrial Accident Commission in favor of claimants respectively, in separate proceedings brought under the Workmen's Compensation Act to recover compensation for injuries received during the course of their employment. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Zimmerman, Mack, & Garrett and Bernstein, Zolla, & Bernstein for plaintiff in error.

Mr. John G. Riordan, for defendant in error:

Whether an agency has been created is to be determined by the relations of the parties as they, in fact, exist under their agreement or acts.

Bradstreet Co. v. Gill, 72 Tex. 115, 2 L.R.A. 405, 13 Am. St. Rep. 768, 9 S. W. 753; 6 R. C. L. 819.

Generally, authority given to an agent to accomplish a given end includes the use of all means used to accomplish that end.

Michigan S. & N. I. R. Co. v. Day, 20 Ill. 375, 71 Am. Dec. 278; Field v. Kane, 99 Ill. App. 1; 21 R. C. L. 853; Wood, Mast. & S. § 285; 18 R. C. L. 793.

There is sufficient competent evidence in the record to establish the fact that Nathan Davis was the agent of plaintiff in error Davis.

Faber-Musser Co. v. William E. Dee Clay Mfg. Co. 291 Ill. 240, 126 N. E. 186; Mabley v. Irwin, 16 Ill. App. 362; 2 Greenl. Ev. § 60; Story, Agency, § 45; Tiffany, Agency, § 7; Jefferds v. Alvord, 151 Mass. 94, 23 N. E. 734; Gannon v. Ruffin, 151 Mass. 204, 24 N. E. 37; Ford v. Linehan, 146 Mass. 283, 15 N. E. 591; Dyer v. Swift, 154 Mass. 159, 28 N. E. 8.

The Industrial Commission, having found that Nathan Davis was the agent of plaintiff in error, Iddell E. Davis, and that as such agent he entered into a contract with William E. Greenough, this court, in the absence of fraud, is bound by such findings if there is any legal evidence in the record to support them.

Munn v. Industrial Bd. 274 Ill. 70, 113 N. E. 110, 12 N. C. C. A. 652; Schwarm v. George Thomson & Sons Co. 281 Ill. 486, 118 N. E. 95; Swift & Co. v. Industrial Commission, 288 Ill. 132, 123 N. E. 267, 19 N. C. C. A. 546.

The business of Greenough in washing and painting the stone trim of a three-story building being an extrahazardous occupation, in fact, the business of maintaining the structure and causing it to be cleaned and painted was necessarily of the same character.

Johnson v. Choate, 284 Ill. 214, 119 N. E. 972; Storrs v. Industrial Commission, 285 Ill. 595, 121 N. E. 267.

Greenough, the contractor and employer of Miller and Nichols, having neglected to insure his men while working on the Davis building, and being insolvent and unable to pay compensation, plaintiff in error becomes liable to pay said compensation.

Butler Street Foundry Co. v. Industrial Bd. 277 Ill. 70, 115 N. E. 122, 15 N. C. C. A. 486; American Steel Foundries v. Industrial Bd. 284 Ill. 99, 119 N. E. 902; Milwaukee v. Fera, 170 Wis. 348, 174 N. W. 926.

Farmer, J., delivered the opinion of the court:

This is a writ of error to review a judgment of the circuit court of Cook county, affirming an award under the Workmen's Compensation Act in favor of defendants in error, respectively, in separate claims prosecuted by them individually. Jacob Miller and James Nichols were employed by William Greenough, who was engaged in the business of

cleaning the outside walls of buildings. While engaged in cleaning parts of the outside walls of a three-story apartment building belonging to plaintiff in error, Iddell E. Davis, the scaffold on which Miller and Nichols were working fell with them about 25 feet, and they were both injured. Greenough was insolvent. He had no insurance for his men, and they each claimed compensation from plaintiff in error. They were each awarded compensation by an arbitrator, which was confirmed by the Industrial Commission and by the circuit court. A writ of error was allowed in both cases, and as both claims are dependent on the same facts, the two cases were consolidated in this court for hearing, and will be disposed of in one opinion.

Plaintiff in error denied he ever employed Greenough or the men working for him. The facts disclosed by the testimony on this question are; in substance, that plaintiff in error and his father, Nathan Davis, owned and operated a paint and hardware business in a store on Halsted street, under a corporate organization. The building where the accident occurred belonged to plaintiff in error, and was located at Forty-ninth street and Forestville avenue. It was a three-story building, 45 feet high, and contained fifteen apartments. Nathan Davis lived in one of them. Greenough testified he was employed by Nathan Davis to clean the building; that he did not know who owned the building; that Davis came to the place where he was working on another building, and employed him to clean the building where the accident occurred. Greenough testified Davis saw him twice about it, and the first time he asked him to look the building over and tell him what it would cost. He did look at the building, and later told Davis he would do it for \$86. Subsequently Davis directed Greenough to do the work. Davis admitted talking to Greenough about doing the work, and asking him to

state what it would cost. He claimed Greenough was to submit a proposition in writing, but never did so, and that there was never any employment by him. Plaintiff in error testified his father had no authority to employ Greenough, but admitted his father, who lived in the building, had authority to "do small matters" in repairing and maintaining the building. The witness said he himself was a busy man and owned other buildings, and that his father had authority to handle small matters, because the witness did not wish to be bothered with them; that the witness never drew any particular line as to what should be considered small matters, and that whether his father had authority to hire the building cleaned would depend upon whether it was considered a small matter.

It cannot be said that the evidence did not reasonably warrant the inference that Nathan Davis's act in hiring Greenough was within the scope of his authority, and binding on plaintiff in error. *Lumbermen's Mut. Ins. Co. v. Bell*, 166 Ill. 400, 57 Am. St. Rep. 140, 45 N. E. 130; *Mechem, Agency*, 2d ed. 296. It is not material that Greenough was not informed as to who the principal was at the time he was employed. *Barker v. Garvey*, 83 Ill. 184.

Principal and agent—authority of agent—making repairs.

Master and servant—relation within Compensation Act—knowledge of principal.

While the evidence on the subject of agency was somewhat conflicting, the testimony of Greenough was positive as to his employment by Nathan Davis, and it is undeniable that the testimony on the question of his agency for the plaintiff in error warranted the conclusion that in making the employment he was acting within the scope of his authority.

It is also contended by plaintiff in error that he is not liable under § 31 of the Workmen's Compensation Act (Hurd's Rev. Stat. 1919, chap. 48, § 152d). His argument is, he was engaged in the business of

a hardware and paint merchant, and while he owned the building in question, and some others, which he maintained and rented for income, he was not engaged in the business of maintaining the building, and the business in which he was engaged was not embraced in the Workmen's Compensation Act. His own testimony shows that he owned the building in question, and some others, which he rented for income, and that he kept them in condition and repair for that purpose. We do not understand that it is required by the Workmen's Compensation Act that one shall be exclusively engaged in one of the hazardous occupations enumerated to make him liable to compensation. This court has held that a man may engage in two kinds of business—one not extrahazardous, or within the Workmen's Compensation Act, unless the party so elects; and the other may be within the act, without election, because it is extrahazardous. *Vaughan's Seed Store v. Simonini*, 275 Ill. 477, 114 N. E. 163, Ann. Cas. 1918B, 713, 14 N. C. C. A. 1075. The work being done at the time the accident happened was done in maintaining the building. It was in fact dangerous and extrahazardous. *Chicago Cleaning Co. v. Industrial*

Workmen's
compensation—
injury in repairing
apartment
building—
liability.

Bd. 283 Ill. 177, 118 N. E. 989. If it was being done for plaintiff in error in maintaining his building, we do not see how it could reasonably be said that Greenough, as the employer of defendants in error, was bound by the Compensation Act; but if he was insolvent, and had no insurance, the owner of the building, his employer, would not be bound by the act. Other cases more or less pertinent, in which this question has been discussed, are *Johnson v. Choate*, 284 Ill. 214, 119 N. E. 972; *Seggebruch v. Industrial Commission*, 288 Ill. 163, 123 N. E. 276, and *Storrs v. Industrial Commission*, 285 Ill. 595, 121 N. E. 267. The liability under § 31 has been sustained in *American Steel Foundries v. Industrial Bd.* 284 Ill. 99, 119 N. E. 902, and *Butler Street Foundry Co. v. Industrial Bd.* 277 Ill. 70, 115 N. E. 122, 15 N. C. C. A. 486.

No question of the constitutionality of the Workmen's Compensation Act, or any provision of it, was raised in the circuit court, and it cannot be raised in this court for the first time. *Savoy Hotel Co. v. Industrial Bd.* 279 Ill. 329, 116 N. E. 712.

The judgment is affirmed.

Petition for rehearing denied April 8, 1921.

ANNOTATION.

Workmen's compensation: liability of property owner for injury to workmen engaged in building or repairing structure.

- I. In general, 735.
- II. Under provisions as to casual employment and employments not in the regular course of employer's business:
 - a. Generally, 736.
 - b. Casual employment, 736.
 - c. Regular or usual course of business, 739.

I. In general.

It may be observed that the compensation acts are not applicable to all employments. The provisions of the acts in this respect are not uni-

- III. As affected by distinction between employee and independent contractor, 742.
- IV. Under specific provisions in relation to construction, repairs, and the like, 745.
- V. Under provisions as to hazardous business or employment, 746.
- VI. Under exception as to farming, 748.

form, but vary in the several jurisdictions, although a similarity runs through many of the statutes. Some apply only where the employment is a hazardous one; many exclude from

their operation employments casual in character, and not in the regular course of the business of the employer, etc. The questions with respect to the liability of a property owner for an injury to a workman in building or repairing a structure arise under these several provisions, and no general rules governing the question can be laid down, other than those subsequently stated.

In *Lauzier v. Industrial Acci. Commission* (1919) — Cal. App. —, 185 Pac. 870, it was held that the mere owning and renting of four small houses for investment, by an individual who had no particular business, did not bring him within a provision of the Compensation Act that the work, trade, business, or profession should be taken to include any undertaking actually engaged in with some degree of regularity, and the owner was held not liable under the act for an injury to one employed to fix the roof of one of the houses.

II. Under provisions as to casual employment and employments not in the regular course of employer's business.

a. Generally.

In some jurisdictions the act, employing the conjunctive, excludes from its benefits persons whose employment is casual, "and" not in the usual course of the employer's trade, business, profession, or occupation; and in other jurisdictions the act, employing the disjunctive, excludes persons whose employment is casual "or" not in the ordinary course of the employer's business, etc.

As pointed out in *Caca v. Woodruff* (1919) — Ind. App. —, 123 N. E. 120, where the statute employs the conjunctive "and," one may be within the act, even though his employment is casual, if it is in the usual course of the employer's business. And see to the same effect, *Walper v. Industrial Acci. Commission* (1918) 177 Cal. 737, L.R.A.1918F, 212, 171 Pac. 954, *infra*, II. c.

In some cases the decision turns on the question whether the employment was casual within the meaning of the exception; in others, on the question

whether the employment was in the regular or usual course of the employer's business; and in still other cases both questions were considered.

In *Re Pelton* (1917) 179 App. Div. 949, 165 N. Y. Supp. 403, where the court unanimously reversed an award and dismissed the claim in a case in which it was sought to hold a hotel proprietor liable for injuries to a carpenter who was engaged in repairing his hotel, it does not appear which of these questions was considered.

b. Casual employment.

In *Armstrong v. Industrial Acci. Commission* (1918) 36 Cal. App. 1, 171 Pac. 321, one employed by a property owner to work as a carpenter at day wages, in the erection of a house to be occupied by the owner, and who had been employed for about three months when injured, was held not a "casual" employee within the exception.

And in *Miller & Lux v. Industrial Acci. Commission* (1916) 32 Cal. App. 250, 162 Pac. 651, the injury sustained by a foreman in charge of the construction of a fourteen-room building for a company authorized to carry on the business of wholesale butcher, and incidentally to construct and repair necessary buildings, was held to have been suffered in the usual course of the employer's business, and the employment was held not a "casual" one, within the meaning of the act.

In *Jones v. Industrial Acci. Commission* (1921) — Cal. App. —, 200 Pac. 50, the evidence was held sufficient to support the finding that the employment of the claimant, who was seeking compensation for an injury sustained in falling from the roof of a house which he was repairing, was not a casual one, but was one which reasonably required work extending over a period of more than ten days, the period fixed by the act to determine the casual nature of an employment, there being testimony by the claimant exactly what work the property owner told him he wished done, and that the work mentioned would take him three or four weeks to perform.

And the employment of one undertaking to wreck a smokestack for a company was held not casual, there being no proof that the job was one which would last but three or four days. *American Steel Foundries v. Industrial Bd.* (1918) 284 Ill. 99, 119 N. E. 902.

And in *Allen v. American Mill. Co.* (1918) 209 Ill. App. 73, the employment of one working for a milling company as carpenter and millwright, who was injured while working upon an addition to the mill plant, was held not "casual," within the meaning of the Compensation Act, and the erecting of the addition was held necessarily a part of the milling company's business.

In *Holmen Creamery Asso. v. Industrial Commission* (1918) 167 Wis. 470, 167 N. W. 808, the work of repairing the building in which a creamery was conducted was held a part of the company's business, and the employment of one to do such repairing was held not casual within the meaning of the act, which, at the time of the injury, excluded from the term "employee" any person whose employment is but casual, or is not in the usual course of the trade, business, profession, or occupation of his employer. The act was subsequently amended by striking out the words, "is but casual or." The court said: "The defendant creamery association was engaged in the business of conducting a creamery. For the proper conduct of such a business a building was necessary. It is the common experience of mankind that buildings need repairs from time to time. Indeed, it is so common that the Income Tax Law allows for the deduction of repairs from rentals received, and all business concerns of any magnitude provide for a repair account, or a fund to meet such expenses. It is in evidence that the claimant here had several times repaired this building. The making of repairs, therefore, belongs to the category of things to be expected and provided for. True, repairs come at irregular intervals, and one cannot accurately foretell just when they will be needed. But

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needed they will be in any business that endures for any considerable length of time. They are, therefore, a part of the employer's business, to be anticipated and met when necessity or convenience dictates. Being an essential and integral part of every business employing material things in its prosecution, no reason is perceived why one employed to make them should not be classed as an employee of the one for whom they are made. They are essential to the successful prosecution of every business whose implements are subject to the corroding touch of time, and a usual concomitant thereof. They are foreseen, provided for, and made, when necessary or convenient. The fact that one cannot exactly foretell just when they will have to be made is immaterial."

And in *F. C. Gross & Bros. v. Industrial Commission* (1918) 167 Wis. 612, 167 N. W. 809, where one who had been employed by a packing company to assist in loading fertilizer, and, after finishing that, was put to work cleaning up around the premises in connection with the building of a new ice box, and other repairs, it was held that he was not engaged in a casual employment, but was engaged in repair work. The court said: "Repairs about an industrial plant, whether such repairs are what might be called usual and to be anticipated, or are of such a nature that they may occur but once in a long industrial life, are none the less repairs, and work on such repairs, either general or special, is neither casual nor without the usual course of the business of the employer, as we now construe those terms in this statute."

But in *Blood v. Industrial Acci. Commission* (1921) 30 Cal. App. 274, 157 Pac. 1140, it was held that the employment was "casual" and not in the usual course of the employer's business, where the owner of a two-story frame building, used for storage and as a residence, employed a painter to apply two coats of paint, and agreed to furnish the materials, and pay the painter a certain sum per day, and it appeared that the employ-

ment was not for any definite period, but that the work would be reasonably done within two weeks, and there being no evidence that the petitioner was engaged in any business.

And in *LaGrande Laundry Co. v. Pillsbury* (1916) 173 Cal. 777, 161 Pac. 988, the employment was held casual, and not in the course of the employer's business, where a carpenter was hired temporarily by a laundry company to assist the company's regular carpenter in making repairs on a house of one of the stockholders of the company, without pay.

And one employed to shingle a house at a certain sum per thousand, who had practically finished his employment, and who left another job temporarily to make a small repair on a chimney which he had volunteered to fix, was held engaged in a casual employment, in *Bedard v. Sweinhart* (1919) 186 Iowa, 655, 172 N. W. 937.

And one employed by a property owner to repair a well, whose work occupied two hours, was a casual employee, so that the property owner was not liable under the Compensation Act for an injury to him. *Otmer v. Perry* (1919) — N. J. L. —, 108 Atl. 369.

And in *BLAKE v. WILSON* (reported herewith) ante, 726, the employment was held "casual in character, and not in the regular course of the business of the employer," where a school-teacher, during the temporary suspension of school, was employed by the owner of a farm to complete a silo by putting on a roof and painting it. The court here states that an employee's engagement is casual when it comes about by chance, fortuitously, and for no fixed duration of time, and that the term "regular course of business" could only refer to the experience and custom of the conduct of the business as is of usual, if not daily, occurrence and observation.

And in *Oliphant v. Hawkinson* (1921) — Iowa, —, — A.L.R. —, 183 N. W. 805, where one section of the Compensation Act provided that the act should not apply to persons whose employment was of a casual nature,

and another section, defining "workman," excepted from the provisions of the act a "person whose employment is purely casual, and not for the purpose of the employer's trade or business," it was assumed that for a workman to be outside the act he must be one whose employment was casual, and also whose employment was not for the purposes of the employer's trade or business, and it was held that a carpenter employed by a retired farmer by the hour, to build a corn crib on a farm which he owned and leased, was a "casual" employee, but it was held that the employment was "not for the purpose of the employer's trade or business," within the meaning of the statute, and that the employer was not engaged in an industrial employment "for pecuniary gain," within the meaning of the provision of the act declaring industrial employment to include only employment in occupations, callings, businesses, or pursuits which are carried on by the employer for the sake of pecuniary gain.

And the employment was held casual in *Ritchings v. Bryant* (1913) 6 B. W. C. C. (Eng.) 183, where a window cleaner, who was injured, had cleaned the windows of a private house for the same employer once a month for about four years, but no definite arrangement had been made in advance as to the regular time for the work.

And in *Hill v. Begg* [1908] 2 K. B. (Eng.) 802, 77 L. J. K. B. N. S. 1074, 99 L. T. N. S. 104, 24 Times L. R. 711, 52 Sol. Jo. 581, a man who was sent for by the occupier of a house to wash windows whenever they needed it, and was paid a certain sum per day, was held engaged in a casual employment, although he had been doing the work stated for about two years.

And in *Rennie v. Reid* [1908] S. C. (Scot.) 1057, the employment was held casual where a window cleaner about once a month went to clean the windows of the house of a doctor, who used a portion of the house in connection with his practice, there being no formal contract between the par-

ties, but the workman calling and doing the work without receiving on each occasion a special invitation, or special permission.

And in *Miles v. Dawe* (1915) 8 B. W. C. C. (Eng.) 225, where one employed on a weekly stipend to collect rents and make repairs for a property owner, who conducted no business, without the property owner's knowledge, hired a man for a short time to help him paint and the man sustained an injury, it was held that the employment was casual, and that there could be no recovery under the Compensation Act.

In *Manton v. Cantwell* [1920] A. C. (Eng.) 781, a farm laborer, who was employed by a farmer to thatch the roof of his farmhouse, and was injured while so doing, was held not "a person whose employment is of a casual nature, and who is employed otherwise than for the purposes of the employer's trade or business," within the provision that "workman" does not include such a person. Lord Birkenhead, L. C., said: "My lords, what are the facts here? A farmer living in a modest steading, in the middle of his farm, is under the necessity of thatching the roof of his farmhouse. It is a very frequent practice in the neighborhood for the farmers to carry out this work themselves. The material which is used for the thatching is, of course, as everyone knows, a by-product of that which is grown upon the farms; it has itself a commercial value; be that high or be it low, it could no doubt be disposed of by the farmer if he did not require it for his own purposes; but it is the habit, as the evidence before the county court judge abundantly established, for farmers in that neighborhood to do their own thatching, and it is necessary to observe very closely that it would not be possible to carry out the business of farming without the provision of either a farmhouse or some substituted premises. However small be the economy of the particular farm, however rudimentary the processes by which its business is conducted, some record, at least, must be pre-

served of them; in other words, it is hardly possible to conceive of the case of a farm in which at least some office work must not be carried on, and, as Mr. Scanlon in his very ingenious and clear argument was driven to admit, the only office which he could suggest in this case would be the farmhouse, the case of which we are now considering. The result, therefore, is that we find a man, who is earning his living by the processes of agriculture, finding himself compelled by his own rustic arts to effect a reparation in the roof of the office which is necessary for his business, and without the decent convenience of which he could not carry out his business. He provides the raw material which is required for his premises by using a commodity, itself a subject of barter in agriculture, and which he could dispose of in such a manner if he did not require it for the purpose of restoring his dwelling house. He does not, as he has often done before, and as many of his neighbors, the local farmers, did, carry out the repairs himself. He employs the deceased man to effect these repairs. My lords, I am not able to conceive how the argument can be successfully put forward that a man who employs another in a task of this kind is not employing him for the purposes of his trade or business, and I reach—hesitating to differ from all the lord justices in the Irish court of appeal, but nevertheless quite clearly—the conclusion that the deceased man was so engaged, that the decision of the county court judge upon this point, amounting as it did to a finding of fact, was right, and that the decision of the Irish court of appeal must be reversed."

See also *Walker v. Industrial Acci. Commission* (1918) 177 Cal. 737, L.R.A.1918F, 212, 171 Pac. 954, *infra*, II. c.

c. Regular or usual course of business.

It has been held that the owner of a hotel was not pursuing the "usual course of his business" within the meaning of the Compensation Act, where he occasionally had rooms in

the hotel painted and decorated, although it was usual for him to have such work done. *Holbrook v. Olympia Hotel Co.* (1918) 200 Mich. 597, 166 N. W. 876.

And a married woman, in remodeling her family residence, is not engaged in business within the meaning of a Compensation Act, excluding from its operation persons whose employment is casual in character, and not in the regular course of business of their employer, and therefore is not liable for injury to a plasterer, who was injured by fall of a scaffold while engaged in a job of a couple of days' duration on the property, although the entire work on the residence extended over the greater part of a year. *Marsh v. Groner* (1917) 258 Pa. 473, L.R.A.1918F, 213, 102 Atl. 127. The court said: "Admittedly, she had never been engaged in trade. It is the contention of the appellant that the mere circumstance of her being engaged in such work as the remodeling and enlarging of her house, the time consumed in this work extending over the best part of a year, constituted her a person engaged in regular business, and made her liable, under the act, for compensation to any employee who might be injured while engaged upon such work. It is an indispensable condition to his recovery under this act that the claimant show that he received his injury while engaged in the regular course of the business of his employer. Section 104 of the act reads: 'The term "employee," as used in this act, is declared to be synonymous with servant, and includes all natural persons who perform services for another for a valuable consideration, exclusive of persons whose employment is casual in character, and not in the regular course of the business of the employer.' We derive from this, by necessary implication, that only such employers are made liable under the act as are themselves engaged in regular business. This must be so, if any effect whatever is to be given the exclusion clause. Without attempting to elaborate further this proposi-

tion, we proceed at once to inquire as to the actual situation here. Do the facts, as we have indicated them, show that the employer, the appellee, was engaged in any regular business, within the meaning of that term as used in the act? If they do, or can be reasonably so construed, then the case was improperly decided against the claimant; if otherwise, he could have no right to recover, since the act expressly excludes all not employed in the course of the regular business of the employer. If the employer have no regular business, it follows that the employee was not injured within the condition prescribed. What give rise to the question are the indefiniteness and want of precision of meaning of the word 'business,' as it embraces a wide variety of subjects, and being without a technical or precise meaning, excluding any other, it may convey an entirely different meaning in one connection from what it imports when used in another. In such cases, when, as here, no help can be derived from the context, and none from the use of the same word in other sections of the act, the interpreter has no other recourse than to the presumption that the word was used in the popular sense, if that be found agreeable; that is, not contradictory to the object and intention of the lawmaker. Statutes are presumed to employ words in their popular sense, and, when the words used are susceptible of more than one meaning, the popular meaning will prevail. Where the meaning involves no absurdity, and is not in conflict with the other parts of the act, it is the only one that can be presumed to have been intended, and there is no room for construction. *Cooley, Const. Lim.* p. 68. There are few words more current in our speech than the word 'business:' few that include a greater variety of subjects, and yet none which, in popular speech, has greater or more marked singleness in denotement. When one's business is the subject of common speech, no one can be in doubt as to the reference. It would be a very exceptional person

—we do not know how to otherwise describe him—who would not understand that the reference is to the habitual or regular occupation that the party was engaged in, with a view to winning a livelihood or some gain. These objects are necessarily implied, when one's business is spoken of. Eliminate them,—livelihood, and gain,—and it is no longer business, but amusement, which no one ever confounds with business. What we have said as to the popular understanding of the word 'business' is just what Webster defines it: 'Some particular occupation or employment habitually engaged in for livelihood or gain.' The points of difference between the employment the defendant was engaged in, and the business which is contemplated by the act and understood in common parlance, are so marked that the two cannot be confounded; one cannot be the equivalent of the other. The defendant's employment was not in any way dependent on patronage; it had not for its object profit or gain, but simply her own personal gratification and comfort; it was not regular or habitual, but it terminated with the completion of the one thing that engaged her attention at the time, and there is not the slightest indication that she contemplated anything of the kind before. Other points of difference can readily be suggested, but these are quite sufficient for our purposes. Our conclusion is that the defendant was not engaged in any business, within the proper meaning of that term as used in the act, and therefore the claimant, when injured, was not employed in the manner prescribed by the act. His employment, like that of his employer, was casual in character."

And in *Bargewell v. Daniel* (1907) 98 L. T. N. S. (Eng.) 257, where the owner of several cottages which were leased to tenants employed one who earned his living by making repairs, to repair one of the cottages; he was held not a workman employed for the purposes of the employer's trade or business, and the act was also regarded as inapplicable because he

was engaged in a casual employment.

In *Globe Indemnity Co. v. Industrial Acci. Commission* (1919) — Cal. App. —, 187 Pac. 452, an injury to a carpenter employed by one engaged in the dairy business, to build a silo, was held sustained in the course of the employer's business, it appearing that the silo was for storing corn to feed cows.

And in *Walker v. Industrial Acci. Commission* (1918) 177 Cal. 737, L.R.A.1918F, 212, 171 Pac. 954, the employment at intervals by a boarding-house keeper of assistants to keep the house clean by taking up carpets, cleaning walls, windows, etc., although casual, was held not within the provision which excludes any person "whose employment is both casual and not in the usual course of the trade, business, profession, or occupation of his employer."

And in *Caca v. Woodruff* (1919) — Ind. App. —, 123 N. E. 120, where the act defined "employee" as including every person, "except one whose employment is both casual and not in the usual course of the trade, business, occupation, or profession of the employer" the employment of a carpenter hired by a mill owner to construct a new room on, and repair, the mill, was held in the usual course of the employer's business, and an award was held proper for an injury sustained while performing the work, which extended over a number of weeks. The court said that it was not necessary to discuss the question as to who is, and who is not, a casual employee.

And in *State ex rel. Lundgren v. District Ct.* (1918) 141 Minn. 83, 169 N. W. 488, a lumber company which, for the purpose of adding fuel as a line of its business, constructed a coal shed, was held liable under the act for an injury to a workman on the shed, as the injury was held to have occurred in the usual course of the employer's business.

And in *Johnston v. Monasterevan General Store Co.* (1908) 42 Ir. L. T. 268, 2 B. W. C. C. 183, where a workman was employed to assist in repairing the roof of a building used en-

tirely for business, it was held that, notwithstanding the casual nature of the employment, a recovery might be had under the act, as the repairs were a part of the employer's business.

See also cases under *supra*, II. b, in which the question whether the employment was in the course of the employer's business was decided in connection with the question whether it was casual.

III. As affected by distinction between employee and independent contractor.

The question frequently arises whether the person injured was an employee of the property owner within the definition of the act, or, on the other hand, was an independent contractor or an employee of an independent contractor.

In *Litts v. Risley Lumber Co* (1918) 224 N. Y. 321, 120 N. E. 730, one who agreed with a lumber company to paint its smokestacks for a certain sum, the tackle to be furnished by him, and the paint and an assistant to be supplied by the company, was held an independent contractor, and not an employee, within the meaning of the Compensation Act. The court said: "The act contains this definition: 'Employee' means a person engaged in one of the occupations enumerated in § 2, or who is in the service of an employer whose principal business is that of carrying on or conducting a hazardous employment upon the premises or at the plant of his employer; and shall not include farm laborers or domestic servants.' Sec. 3, subd. 4. This definition is not inimical to and does not disturb the distinctions established in the common law between a servant or employee and an independent contractor. The rules which demarcated the relation of master and servant from that of employer and independent contractor are operative in the consideration of claims made under the act. From the definitions and language of the act, it is manifest that it deals with employers and employees, and an independent contractor is not within its protection. In the instant case, *Litts* was

an independent contractor. He agreed to do a specific piece of work for the company. In doing it he had absolute control of himself and his helper. He was independent as to when, within a reasonable time after the agreement was made between him and the company, and as to where, he should commence the work. He was free to proceed in the execution of it entirely in accordance with his own ideas. He was not, to any extent, subject to the directions of the company in respect of the method, means, or procedure in the accomplishment. He was not subject to a discharge by the company because he did the painting in one way rather than in another. Those facts, considered by themselves, would constitute him an independent contractor. In the relation of employer and employee, the employer has control and direction, not only of the work, or performance, and its result, but of its details and method, and may discharge the employee disobeying such control and direction."

And in *Barrett v. Selden-Breck Constr. Co.* (1919) 103 Neb. 850, 174 N. W. 866, where the workmen injured contracted with a construction company to clean brickwork, and point the stone and terra cotta work in a building for a certain sum, to be paid weekly according to the work done, and agreed to maintain workmen's compensation insurance to protect both parties from liability, it was held that he was an independent contractor, and not an employee within the act, and that the construction company was not liable for the injury. The court said: "The right to supervise, control, and direct the work is one of the tests for determining the nature of the relation which exists, but it is not, as plaintiff seems to contend, the sole test. The owner or principal contractor has the right to see that the contract is being carried out in conformity with the specifications, and reasonably to call defects to the attention of the subcontractor. 14 R. C. L. p. 68, § 4. It is quite often difficult to distinguish between the relation of employee and inde-

pendent contractor. There is no one criterion known to the law, but several elements may enter into the determination. A test is whether the contract requires the work to be done by the particular person contracting, or whether his personal services are not required, and any person whom he may employ may, under the agreement, do the job."

And in *Holbrook v. Olympia Hotel Co.* (1918) 200 Mich. 597, 166 N. W. 876, it was held that a painter who contracted with the owner of a hotel to put on paint and paper, furnished by the latter, at a specified price per hour, was an independent contractor, and that the hotel proprietor was not liable under the Compensation Act for an injury sustained by him.

And in *Prince v. Schwartz* (1920) 190 App. Div. 820, 180 N. Y. Supp. 703, the injured workman was held an independent contractor, and not an employee within the meaning of the Compensation Act, where he was employed by the owner of an apartment house to paint certain windows with his own brushes, in his own manner, and for a stated sum.

And in *Hungerford v. Bonn* (1918) 183 App. Div. 818, 171 N. Y. Supp. 280, a painter and paper hanger who took contracts for work, and also worked by the day, and hired his own men, and obtained insurance protecting them, was held a special contractor, and not an employee within the meaning of the act.

And in *Otmer v. Perry* (1919) — N. J. L. —, 108 Atl. 369, one employed by a property owner to repair a well at a stated sum per hour, whose work occupied two hours, was held an independent contractor, so that the employer was not liable under the Compensation Act for an injury to him.

In *Kackel v. Serviss* (1917) 180 App. Div. 54, 167 N. Y. Supp. 348, where it was sought to charge the owner of a house, upon which a workman was injured while painting, as his employer within the meaning of the act, there was evidence that the owner agreed with a third person to paint the house for a stated sum, and that the injured workman's wages

were to come out of this, but there was no evidence that the property owner hired the person injured, or authorized the third person to do so, a finding that such person became the owner's agent in employing the person injured, and that such person was the owner's employee, was held wholly unsupported by the evidence.

In *Connolly v. Industrial Acci. Commission* (1916) 173 Cal. 405, 160 Pac. 239, where a carpenter was killed while working on a ranch putting up a shed and porch, and his widow claimed compensation under the act, it was held that she had not sustained the burden of proving that the relation of employer and employee existed, and not that of independent contractor, practically all of the evidence relied on by her being hearsay.

In a number of cases arising under the provision here considered, the injured workman has, upon the facts, been held an employee and not an independent contractor.

Thus, in *Rheinwald v. Builders' Brick & Supply Co.* (1915) 168 App. Div. 425, 153 N. Y. Supp. 598, a painter employed for a certain sum by a brick and supply company under a written agreement to repaint a large sign, used for advertising the company's business, which he had originally painted, was held to be not an independent contractor, but an employee within the meaning of the Compensation Act, it appearing that he had done other work for the company, and that he usually performed it personally, and it not appearing that control and direction were not reserved by the company. This case gives the act a liberal construction, and contains a valuable discussion as to the determination of the question of who are employees within the act, as distinguished from independent contractors.

And in *McNally v. Fitzgerald* (1913) 48 Ir. L. T. 4, 7 B. W. C. C. 966, a finding that a plumber was a workman, and not an independent contractor, was held justified, where it appeared that he was called in by the proprietor of a hotel, who had similarly employed him before, to re-

pair discharge pipes for wages at a certain rate; that he furnished his tools, but no material, and that the hotel proprietor frequently visited him while the work was being done, and gave directions.

And in *Abromowitz v. Hudson View Constr. Co.* (1919) 188 App. Div. 356, 177 N. Y. Supp. 187, affirmed without opinion in (1920) 228 N. Y. 509, 126 N. E. 898, a finding that the workman injured was not an independent contractor, but was the "employee" of a construction company which owned and engaged in the maintenance of apartment houses, was held justified, there being evidence that the workman was an awning hanger and remover, and that the construction company hired him to remove awnings from designated houses at so much an awning, and that it retained the right to discharge him in case he did not do his work properly.

And in *Greene County v. Shertzer* (1920) — Ind. App. —, 127 N. E. 843, one employed to paint and paper at a specified amount an hour for painting and an agreed sum per roll for papering, and who was to be his own boss, although the materials and scaffolding were to be furnished by the employer, was held an employee and not an independent contractor.

And in *Cummings v. Underwood Silk Fabric Co.* (1918) 184 App. Div. 456, 171 N. Y. Supp. 1046, the workman was held an employee, and not an independent contractor, and an award under the Compensation Act, as amended in 1916, was affirmed, where it appeared that he was a mechanic, and was engaged by a company manufacturing gloves, etc., to erect a smokestack; that he was to furnish the help needed, except two men who were furnished by the company; that he obtained the necessary tackle, and had entire charge of the work; that the men were paid by the company, and that after his death the company paid his heirs a bill presented for ten hours' work at a stated sum.

In *Welden v. Skinner & E. Corp.* (1918) 103 Wash. 243, 174 Pac. 452, where a firm of engineers entered in-

to a contract with a shipbuilding company to take charge of the erection of additional buildings for the plant, and to act as agents for the company, and be guided in all matters by its instructions, it was held that the firm was not an independent contractor, and that men employed by it to work on the buildings were employees of the shipbuilding company within the meaning of the Compensation Act.

And in *Optiz v. Hoertz* (1917) 194 Mich. 626, 161 N. W. 866, where "contractors" agreed with a manufacturing company to superintend the work of clearing a building site and erecting buildings and co-operate with the owner in purchasing material and employing men, furnish the necessary tools, and do the work in accordance with the company's wishes, it was held that they were not independent contractors, but merely agents or servants, as they were subject to the company's control as to the means of accomplishing the result, and that the company was liable under the Compensation Act for injuries to workmen engaged in the work.

It will be observed that the cases thus far considered did not turn upon provisions specifically designed to abrogate or modify the distinction between employee and independent contractor. But in some jurisdictions such provisions have been adopted.

In *American Steel Foundries v. Industrial Bd.* (1918) 284 Ill. 99, 119 N. E. 902, where the Compensation Act provided that any person or corporation who undertakes to do, or contracts with others to do, or have done for him, any work enumerated as extrahazardous, and does not require the person or firm undertaking to do the work to insure his or its liability to pay compensation to employees, shall be included in the word "employer," and, with the immediate employer, be jointly and severally liable to pay the compensation provided for, it was held, construing the provisions of the act, that it was not intended to apply alone in case there was a contractor and subcontractor, but that

the purpose of the act was to provide compensation for injuries, sustained by employees engaged in hazardous work generally, and a company was held liable under the act for the death of a foreman employed by one who had contracted to wreck a smokestack and whom the company had not required to insure his liability.

The Vermont statute defines "employer" so as to include any person "who is virtually the proprietor or operator of the business, . . . but who, by reason of there being an independent contractor, or for any reason, is not the direct employer of the workmen," and in *Packett v. Moretown Creamery Co.* (1917) 91 Vt. 97, L.R.A.1918F, 173, 99 Atl. 638, a creamery company which let the construction of a building for use in its business to an independent contractor was held not liable for an injury to an employee of the latter during the performance of the work, since the creamery company was not the virtual proprietor of the business in which the injury occurred.

IV. Under specific provisions in relation to construction, repairs and the like.

A farmer employing carpenters by the day to construct a shed on his land was held in *Uphoff v. Industrial Bd.* (1915) 271 Ill. 312, L.R.A.1916E, 329, 111 N. E. 128, Ann. Cas. 1917D, 1, 13 N. C. C. A. 80, not to be engaged in an occupation, business, or enterprise within ¶ (b) or § 3 of the Workmen's Compensation Act, which reads: "(b) The provisions of ¶ (a) of this section shall only apply to an employer engaged in any of the following occupations, enterprises, or businesses, namely: (1) The building, maintaining, repairing or demolishing of any structure." The court said in effect that, to bring the farmer within these provisions, it must be held that in building the shed he was engaged in an occupation, enterprise, or business. It was not seriously contended that the building of the shed could be properly classified as the business or occupation of the plaintiff in error, but it was urged that it could properly be considered

under the term "enterprise." The court said in reply to that contention: "The building of this shed might be classed under the head of something projected or attempted, but hardly as an important undertaking requiring courage or energy, or one that was arduous or hazardous. To say that the word 'enterprise' covered the building of any structure, however small, would lead in some instances to absurd consequences. . . . From any fair construction of the act the legislature never intended to call working on every farm structure, no matter how small, as extrahazardous." The pertinency of the last observation is due to the fact that, if the operation in question were to be held "an enterprise," the act itself would characterize it as extrahazardous.

In *Alabach v. Industrial Commission* (1920) 291 Ill. 338, 126 N. E. 163, under an act providing that anyone engaged in maintaining, remodeling, or altering any structure should be liable to pay compensation to employees of any contractor or subcontractor, unless they should have procured insurance against his liability, it was held that one who carried on a retail grocery was not liable for an injury to an employee of another who had contracted to repair the foundation of his dwelling house, the only enterprise in which he was engaged being the grocery business, which did not include the providing of a home for his family. But see *DAVIS v. INDUSTRIAL COMMISSION* (reported herewith) ante, 732, where the appellant owned the building in question, an apartment house, and others, which he maintained and rented for income.

And in *Storrs v. Industrial Commission* (1918) 285 Ill. 595, 121 N. E. 267, one who was engaged in no other business than the managing, maintaining, and keeping in repair of some twelve or fifteen buildings, most of which belonged to him, and who kept a foreman and several painters, was held engaged in the business of maintaining buildings, which was an employment included under the Compensation Act, and an award against

him in favor of a workman who suffered an injury to his eye while working on one of the buildings was held proper.

In *Coleman v. Bartholomew* (1916) 175 App. Div. 122, 161 N. Y. Supp. 560, one who owned and conducted a farm, and employed men to repair his barn, was held not engaged in a hazardous employment within the meaning of the Compensation Act, enumerating among such employments "structural carpentry," "roofing," and "construction and repair of buildings" for pecuniary gain.

And in *Re Schmidt* (1917) 221 N. Y. 26, 116 N. E. 382, a superintendent of an apartment house, who was injured while engaged in planing off the top of a door, was held not engaged in "structural carpentry" or "construction, repair, and demolition of buildings," within the meaning of the Compensation Act.

And in *Geller v. Republic Novelty Works* (1917) 180 App. Div. 762, 168 N. Y. Supp. 263, the casual engagement of a carpenter by the hour to add shelving in a store was held not to make the proprietor of the store engaged in "structural carpentry," within the meaning of the act, and such employer was held not liable for an injury sustained by the carpenter in June, 1916.

And in *Hungerford v. Bonn* (1918) 183 App. Div. 818, 171 N. Y. Supp. 280, the owner of a house who employed one to kalsomine the walls was held not engaged in the "construction, repair, and demolition of buildings," or in any other work denominated as hazardous by the Compensation Act, and the fact that the kalsominer found it necessary to smooth the ceiling and fill a little hole with plaster, in order to do his work properly, was held not to bring the employer within the hazardous business of plastering for profit.

And in *Kammer v. Hawk* (1917) 221 N. Y. 378, 117 N. E. 576, reargument denied in (1917) 222 N. Y. 585, 118 N. E. 1064, where the superintendent and general repair man of a building was injured while handling a radiator, with the intention of installing

it in one of the buildings, it was held that he was not engaged in "heating," "engineering," nor the "installation and covering of pipes," within the meaning of the Compensation Act.

And in *Maloney v. Levy & G. Co.* (1917) 223 N. Y. 631, 119 N. E. 1057, the work of transporting a 9,000-gallon water tank from the railroad and setting it up in a position on the roof of a building, where it was to be connected with a sprinkler system, was held not the installation of "boilers, engines, or heavy machinery," within the meaning of the Compensation Act.

V. Under provisions as to hazardous business or employment.

It will be observed that the court in *DAVIS v. INDUSTRIAL COMMISSION* (reported herewith) ante, 732, decided that a merchant who owned and maintained an apartment building for rent was not relieved from liability under the Workmen's Compensation Act, for injuries to a workman engaged in repairing the building, by the fact that his business as merchant was not hazardous, the court stating that a man may engage in two kinds of business, and that the work being done at the time of the injury, that of maintaining the building, was extra-hazardous.

And in *Wendt v. Industrial Commission* (1914) 80 Wash. 111, 141 Pac. 311, 5 N. C. C. A. 790, a carpenter employed by a department store, who was killed by an electric shock while engaged in a repair shop maintained by the company, which shop was operated primarily for the repair of its vehicles, and contained a carpenter's bench, a power lathe, and other machinery operated by electric current, was held engaged in an extrahazardous employment within the meaning of the Washington act.

And in *Welden v. Skinner & E. Ccrp.* (1918) 103 Wash. 243, 174 Pac. 452, a carpenter employed on a building being erected as an addition to a shipbuilding plant, who worked 35 feet from a galvanizing tank, which exploded, was held engaged in extra-

hazardous work within the Compensation Act.

In *Bargey v. Massario Macaroni Co.* (1916) 218 N. Y. 410, 113 N. E. 407, a carpenter and builder employed to alter the factory of a macaroni manufacturer was held not an employee entitled to compensation under the act, although it designated canning and preparation of food as a hazardous business, but further provided that employment included only employment in a trade or business carried on by the employer for pecuniary gain, the court holding that the injured workman was not employed in the preparation of macaroni, which was the business carried on by the employer for pecuniary gain.

This case was followed in *Solomon v. Bonis* (1918) 223 N. Y. 689, 119 N. E. 1078, affirming (1918) 181 App. Div. 672, 167 N. Y. Supp. 676, where it was held that a plasterer, which occupation was designated as a hazardous employment, who was employed by the owner of an apartment house carried on for pecuniary gain, which was a nonhazardous employment, to repair the plaster in a room, and who was injured October 8, 1916, was not entitled to recover under the Compensation Act, as it then existed.

And in *Re Schmidt* (1917) 221 N. Y. 26, 116 N. E. 382, it was held that a superintendent of an apartment building, who was injured while planning off the top of a door, was not engaged in a hazardous business carried on by the owner of the apartment for pecuniary gain.

Subsequent to the decision in the *Bargey Case* (N. Y.) *supra*, the New York act was amended by a clause providing that "employee" should mean a person engaged in one of the occupations enumerated in § 2, or who was in the service of an employer whose principal business was that of carrying on or conducting a hazardous employment; and in *Dose v. Moehle Lithographic Co.* (1917) 221 N. Y. 401, 117 N. E. 616, 16 N. C. C. A. 633, it was held, under this provision, that a bricklayer employed by a lithographing company, which was classified as a hazardous employment, to

point up the walls of its plant and repair the cracks therein, was an employee, and entitled to recover under the act. The court said: "As bearing upon the purpose of the amendment, the brief of counsel for the industrial commission calls attention to the report of the state industrial commission to the legislature for the year 1915, wherein the commission recommended an amendment to the law which would 'cover employees called in to do construction or repair work, as in the *Bargey Case*, and also clerical office employees and others who are not definitely and clearly included within the scope of the act at the present time,' and to a memorandum made by the governor approving the amendment. While the documents referred to indicate the intention of the legislature in the enactment of the amended statute, and a construction of the same by the executive, it is obvious from a comparison of the earlier law with the amended statute that, under the statute before the amendment, an employee, to be entitled to an award, must have been engaged in a hazardous employment in the service of an employer conducting a hazardous employment. Such was the construction of the law in the *Bargey Case*. The amendment of 1916 was intended to and does embrace an additional class of employees, viz., those in the service of an employer carrying on a hazardous employment, even though such employee is not actually engaged in a hazardous employment. The claimant *Dose* was clearly within the class embraced in the amended law."

And in *Cummings v. Underwood Silk Fabric Co.* (1918) 184 App. Div. 456, 171 N. Y. Supp. 1046, it was held that since the amendment of 1916 of the New York act, a casual employee, in the service of an employer whose principal business is that of conducting a hazardous employment, is within the act, and a recovery was allowed in this case for the death of one engaged to erect a smokestack, at a plant where a hazardous employment was carried on by the employer.

In *Zubradt v. Shepard* (1917) 180

App. Div. 20, 167 N. Y. Supp. 306, a janitor in an apartment house, who was injured while cleaning the windows, which occupation was classed by the amendment of 1916 as a hazardous employment, was held within the protection of the act, although the business of operating an apartment house was not a hazardous occupation.

And in *Alterman v. A. I. Namm & Son* (1919) 190 App. Div. 76, 179 N. Y. Supp. 584, where a department store had a carpenter shop in the store, in connection with its business, and employed several carpenters to do work about the store, it was held that the company was, in so far as the carpenters were concerned, conducting a hazardous business.

See also New York cases, under IV. *supra*.

VI. Under exception as to farming.

In *Coleman v. Bartholomew* (1916) 175 App. Div. 122, 161 N. Y. Supp. 560, one whose regular occupation was farm labor, and who was hired by the owner of a farm to repair a dairy barn, was held a "farm laborer," within the exclusion of the Compensation Act. The court said: "It was the clear intent of the legislature to exclude farm laborers from the benefits of the Workmen's Compensation Law, and it only remains for us to define 'farm laborers.' . . . The common hired man on a farm is required to perform a great variety of work. His duties are not confined to plowing, planting, and harvesting. Tilling the soil and garnering the crops may be the principal work of the farm laborer, but they are by no means his exclusive work. All the multifarious work of operating a farm must be done by somebody; and who is to do it except the farm laborer? It is, of course, necessary to keep the farm machinery in repair—the reapers, mowers, corn harvesters, sulky plows, wagons, harnesses, etc. It is just as necessary to keep the farm buildings in repair, and occasionally to make small additions to them. This is a part of the routine work of the farm laborer; just as

much so as milking the cows, cleaning off the horses, building fences, putting a new point on a plow, doctoring a sick horse, butchering the hogs, greasing the wagons, assisting the threshers, driving the team to market, and innumerable other familiar duties. Is the hired man who pounds his finger while shingling the pigpen any the less a 'farm laborer' than when he pounds his finger while building a fence? It is the duty of the farm laborer to build a load of hay; it is likewise his duty to help shingle the barn to protect the hay from the elements. Both processes are necessary in order to preserve the hay. Both are essentially within the scope of the duties of the farm laborer, and it makes no difference, in principle, whether he breaks his leg by falling from the roof of the barn or the load of hay. Many of the employments on the farm are as hazardous in fact as shingling a roof; breaking a fractious colt, for instance; handling an ugly bull; ringing an adult boar; harnessing a vicious horse. But all these are incidents which go with the work of the farm laborer, although they are not, strictly speaking, the process of tilling the soil. The fact that the claimant in this case was employed only temporarily for this particular job signifies nothing. The same exemption applies to the day laborer on the farm as to the man employed by the month or year."

But in *Miller & Lux v. Industrial Acci. Commission* (1916) 32 Cal. App. 250, 162 Pac. 651, carpenters regularly employed by a wholesale meat company to erect and repair buildings on its ranch properties were held not engaged in farm labor, within the meaning of an exception of the Compensation Act.

And in *State ex rel. Foss v. Nelson* (1920) 145 Minn. 123, 176 N. W. 164, the owner of a rented farm, when building a barn to replace one burned, was held not liable for an injury to a carpenter, under a Compensation Act which provided that it should not apply to farm laborers, or persons whose employment was cas-

ual and not in the usual course of the business of the employer. And a like result was reached in *State ex rel. Lennon v. District Ct.* (1917) 138 Minn. 103, 164 N. W. 366, where a carpenter employed by one who owned a rented farm was injured while erecting a temporary shed.

Although it was unnecessary for the court in *Oliphant v. Hawkinson* (1921) — Iowa, —, — A.L.R. —, 183

N. W. 805, to decide whether a carpenter, employed by the hour by a retired farmer to build a corn crib on a farm which he leased to a tenant, was "a laborer engaged in agricultural pursuits" within a provision of the act making it applicable to such employments, the court stated that there was respectable authority sustaining the conclusion that he was.

J. T. W.

MOUNT PLEASANT STABLE COMPANY

v.

LOUIS STEINBERG et al.

Massachusetts Supreme Judicial Court—May 31, 1921.

(— Mass. —, 181 N. E. 295.)

Damages — mitigation — breach of contract for trucking.

1. The rule that one contracting to render personal services must seek other employment upon breach by the other party to the contract, in order to minimize damages, has no application to breach of a contract to utilize teams to be furnished by plaintiff for trucking.

[See note on this question beginning on page 751.]

— for breach of trucking contract.

2. The damages for breach of a contract to utilize for a specified time the teams of the other contracting party for trucking are the difference between the contract price and the cost of performance for the time specified, with interest from the date of the writ.

[See 8 R. C. L. 511.]

— loss in equipment.

3. One undertaking to do trucking for another cannot, upon breach of the contract by the latter, recover the loss in disposing of equipment secured for purposes of the contract, if the loss of profits can be determined.

[See 8 R. C. L. 495, 496.]

REPORT by the Superior Court for Suffolk County (Keating, J.) on report of the auditor, for determination by the full bench of a question arising in an action brought to recover damages for alleged breach of a trucking contract. *Judgment entered for the plaintiff on the findings.*

The facts are stated in the opinion of the court.

Messrs. Lee M. Friedman and Samuel J. Freedman for plaintiff.

Messrs. Stoneman & Hill, for defendants:

The claimed damages must be such as reasonably and proximately might have been expected and foreseen and contemplated by the parties.

Curtis v. Boston Ice Co. — Mass. —, 129 N. E. 444; *Hetherington v. William Firth Co.* 210 Mass. 8, 95 N. E. 961; *Leavitt v. Fiberloid Co.* 196

Mass. 440, 15 L.R.A.(N.S.) 855, 82 N. E. 682.

It is the duty of a party claiming damages for breach of a contract for personal services to make all reasonable effort to secure another contract. 13 Cyc. 74.

The rule of damages under a contract for the use of some special equipment or instrumentality is the same as in a contract for personal services.

17 C. J. 775; *Mimms v. J. L. Betts*, Co. 9 Ga. App. 718, 72 S. E. 271; *Heavilon v. Kramer*, 31 Ind. 241; *Hopkins v. Sanford*, 41 Mich. 243, 2 N. W. 39; *Waterman Lumber & Supply Co. v. Holmes*, — Tex. Civ. App. —, 161 S. W. 70.

Carroll, J., delivered the opinion of the court:

The parties entered into a written contract dated June 25, 1914, by which the plaintiff was to furnish, at an agreed price, single and double teams to do the defendants' trucking. There was evidence that after the parties had operated under the contract for a few months the defendants broke the contract. The auditor found that at the time of the breach the contract had four hundred and fifty days to run; that the defendants were using during the period, on an average, "four and one-half teams a day," and that the profit to the plaintiff would be \$1 for each team, making the total profit \$2,025. He also found that the plaintiff purchased for special use in the defendants' business, two "Cliest" horses, for which it paid \$625, and sold them for \$485, sustaining a loss thereby of \$140. The defendants contend that the plaintiff is entitled to damages only from the time the work under the contract was discontinued to the date of sale; that the rule of damages is the same as in a contract for personal services, and it is the duty of the party claiming damages for the breach of such contract, to make all reasonable efforts to secure another contract. In the superior court the case was heard on the auditor's report. The judge found for the plaintiff in the sum of \$2,025 for damages, and interest from the date of the writ; and the case was reported to this court on the question of damages only, on the pleadings and the auditor's report.

The auditor found that, eight days after the contract was broken, the plaintiff sold all its horses, caravans, and other equipment, at public auction; that at this time there was a demand for horses and caravans,

and it could have found a ready market for their use at a price equal to what it was to receive from the defendant; that the plaintiff could have found use for its horses and wagons, had it made any real effort to do so, at the contract price; and that if the plaintiff was entitled to damages only from the time of the breach to the time of the sale, it is entitled to recover \$36.

The rule that when a contract calls for the personal services of a party, he is required, in case the contract is broken by the other party, to use reasonable efforts to obtain other employment reasonably adapted to his abilities, thereby lessening the damages (*Maynard v. Royal Worcester Corset Co.* 200 Mass. 1, 6, 85 N. E. 877; *Hussey v. Holloway*, 217 Mass. 100, 104 N. E. 471), has no application to the case at bar. The auditor found that the contract did not re-

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quire on the part of the plaintiff any special skill, and could be performed by its employees. In *Dixon v. Volunteer Co-op. Bank*, 213 Mass. 345, 100 N. E. 655, the plaintiff was hired by the defendant to act as its attorney for one year. His work was to examine titles to land offered to the bank as security. Before he was discharged he had the right to do additional work without accounting to the defendant for the profits received. It was held that this was not lessened by the defendant's breach of the contract, that the plaintiff's time did not belong to the defendant under his contract, and he was not its servant and not bound to minimize the damages suffered by him, and that the rule of damages which is applicable when a contract for personal service is broken, did not apply. The same rule governs the case at bar. *Wolf v. Studebaker*, 65 Pa. 459; *Allen v. Murray*, 87 Wis. 41, 47, 48, 57 N. W. 979.

The contract did not preclude the plaintiff from carrying on as many other contracts as it saw fit. Its

(— Mass. —, 131 N. E. 295.)

time did not belong to the defendants, and the contract did not call for personal services on the part of the plaintiff. The defendants, having broken the contract, became liable to the plaintiff for all damages which would compensate it for its loss and such as the parties were supposed to have contemplated would result from its breach. The plaintiff was entitled to recover damages measured by the difference between

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trucking con-
tract.

the contract price and what it would have cost it to have performed the contract, or, as found by the auditor, a profit of \$1 on each wagon from the time the contract was broken until its expiration according to its terms. *Olds v. Mapes-Reeve Constr. Co.* 177 Mass. 41, 58 N. E. 478; *Hanson v. Wittenberg*, 205 Mass. 319, 91 N. E. 383; *Hetherington v. William Firth Co.* 210 Mass. 8, 21, 95 N. E. 961; *Dixon v. Volunteer Co-op. Bank*, supra; *Nelson Theatre Co. v. Nelson*, 216 Mass. 30, 34, 102 N. E. 926; *Pipolo v. Fred T. Ley & Co.* 216 Mass. 246, 103 N. E. 475.

The auditor found that the plaintiff bought two "Cliest" horses specially for use in connection with the defendants' business, for which he paid \$625, and sold them at a loss

of \$140. The plaintiff contends it is entitled to recover this amount in addition to the profits on the contract. If the plaintiff had completed the contract it could recover only the contract price. This expenditure for preliminary outlays could not be received in addition, and, by recovering the profits on the —loss in equip-
ment.

contract, full compensation is given for its loss. See *Holt v. United Secur. L. Ins. & T. Co.* 76 N. J. L. 585, 597, 599, 21 L.R.A.(N.S.) 691, 72 Atl. 301; *Worthington v. Gwin*, 119 Ala. 44, 51, 43 L.R.A. 382, 24 So. 739. It is not necessary to decide in this case, if a contract is broken what damages should be recovered for expenses in preparing for its performance, where the profits cannot be determined. See *Pond v. Harris*, 113 Mass. 114, 121, 122.

The plaintiff is entitled to interest from the date of the writ. *Cormier v. Brock*, 212 Mass. 292, 98 N. E. 1038; *Jackson v. Brockton*, 182 Mass. 26, 94 Am. St. Rep. 635, 64 N. E. 418; *Speirs v. Union Drop Forge Co.* 180 Mass. 87, 61 N. E. 825. According to the report, judgment is to be entered on the findings.

So ordered.

ANNOTATION.

Contracts within the rule which requires one to use reasonable effort to obtain other employment in order to minimize damages from breach of contract.

- I. Scope, 751.
- II. Rule in general, 752.
- III. Particular applications:
 - a. Contracts for teams and transportation, in general, 753.
 - b. Logging and timber contracts, 756.
 - c. Contracts relating to mines and quarries, 759.
 - d. Building and construction contracts, 761.

I. Scope.

A distinction has been made in numerous cases, with respect to the measure of damages, between con-

III. —continued.

- e. Manufacturing contracts, generally, 763.
- f. Farming contracts, 765.
- g. Contracts for drilling wells, 768.
- h. Contracts with physicians, attorneys, and other professional men, 769.
- i. Contracts with insurance agents, 770.
- j. Contracts with salesmen, 771.
- k. Miscellaneous, 772.

tracts requiring merely personal services, as those for the employment of clerks, agents, etc., and contracts requiring performance of some specific

act or service. The damages in the former class, it is well settled, may be reduced or mitigated by showing that the employee could have obtained other similar employment. The present annotation purports only to treat the question as to what contracts are subject to the rule which requires one to use reasonable efforts to obtain other employment in order to minimize damages for breach of contracts. It does not include that large class of contracts which admittedly are subject to the rule, as those involving clearly exclusive personal services of an employee. The class of cases with which it is, in general, concerned, is that involving contracts for the performance of specific acts or services, or, if the contract requires personal services, only part time is required. In this class of cases the application of the rule may be doubtful. And it is with this class of cases that the annotation is concerned. In other words, the question is as to the applicability of the rule as regards various kinds of contracts, it being assumed that the rule itself as to certain personal contracts is well established.

The annotation should not be construed as covering the question of the measure of damages in the various classes of cases considered. It is rather, as above indicated, an endeavor to show the application and limitations of a certain rule with respect to damages. In certain instances the line between this point of view and that merely respecting a proper measure of damages becomes difficult to trace, yet this distinction should not be disregarded.

Cases involving merely contracts of sale of specific articles are in general beyond the scope of the annotation.

The annotation does not cover the question of burden of proof as to whether other employment could be obtained, since this phase of the matter is common to the class of cases under consideration, and also to contracts for personal employment generally. This question is, however, sometimes incidentally referred to.

II. Rule in general.

The weight of authority is to the

effect that the rule requiring one to use reasonable effort to obtain other employment in order to minimize damages from breach of a contract does not apply where the contract does not require the use of some special instrumentality, and is not one which must be performed by the party personally, but may be carried out by his subordinates, and which does not, therefore, preclude his entering upon the performance of other similar contracts concurrently with the first, and obtaining a profit from all of such contracts as he may be able to secure and perform at the same time.

Florida. — *Sullivan v. McMillan* (1896) 37 Fla. 134, 56 Am. St. Rep. 239, 19 So. 340.

Iowa.—*Klingman v. Racine-Sattley Co.* (1910) 149 Iowa, 634, 128 N. W. 1109.

Kentucky.—*Hollerbach & M. Contract Co. v. Wilkins* (1908) 130 Ky. 51, 112 S. W. 1126; *Harness v. Kentucky Fluor Spar Co.* (1912) 149 Ky. 65, 147 S. W. 934, Ann. Cas. 1914A, 803; *Stearns Lumber Co. v. Inman* (1913) 154 Ky. 251, 157 S. W. 23; *Owensboro Shovel & Tool Co. v. Moore* (1913) 154 Ky. 431, 157 S. W. 1121; *R. Burleigh & Sons v. Overton* (1917) 173 Ky. 70, 190 S. W. 472; *Horn v. Carroll* (1906) 28 Ky. L. Rep. 839, 90 S. W. 559; *Sagamore Coal Co. v. Clark* (1908) 33 Ky. L. Rep. 134, 109 S. W. 349.

Massachusetts. — *MT. PLEASANT STABLE CO. v. STEINBERG* (reported herewith) ante, 749; *Olds v. Mapes-Reeve Constr. Co.* (1900) 177 Mass. 41, 58 N. E. 478.

Missouri.—*Crescent Mfg. Co. v. N. O. Nelson Mfg. Co.* (1889) 100 Mo. 325, 13 S. W. 503.

New York.—*Graves v. Hunt* (1887) 8 N. Y. S. R. 308; *Simon v. Levinson* (1911) 126 N. Y. Supp. 659.

Texas.—*Jefferson & N. W. R. Co. v. Dreeson* (1906) 43 Tex. Civ. App. 282, 96 S. W. 63; *McKinnon v. Porter* (1917) — Tex. Civ. App. —, 192 S. W. 1112.

Washington. — *Watson v. Gray's Harbor Brick Co.* (1891) 3 Wash. 283, 28 Pac. 527.

Wisconsin.—*Nilson v. Morse* (1881)

52 Wis. 240, 9 N. W. 1; *Allen v. Murray* (1894) 87 Wis. 41, 57 N. W. 979. See also *Cameron v. White* (1889) 74 Wis. 425, 5 L.R.A. 493, 53 N. W. 155.

It was said in *Watson v. Gray's Harbor Brick Co.* (Wash.) *supra*: "There is a well-defined distinction drawn by all the authorities between contracts for hire, or for personal services, and the contract to do a specific act. In the former case, if the plaintiff gets employment at the same wages, it is plain that he is not damaged, and when he does not his damages are easily ascertained. In the latter species of contract, where the employer refuses to accept of the services, or to have the work contracted for performed, or prevents the employee from performing the same in any manner, the usual measure of damages, where the contract relates to the manufacture of an article, or the construction of a building, or the performance of some other specified act, is the difference between the price agreed to be paid and what it would have cost the employee to complete it, provided such cost would be less than the contract price. . . . The duty to seek employment is dependent upon the original contract being one of employment or hire. It is not applicable to every contract."

It may be observed, however, that even though the contract is not one which requires the personal services of the contracting party, yet to some extent, at least, his time must be occupied in supervising, or obtaining others to supervise, the work. And to the extent that he is relieved of this personal obligation and enabled to devote more time personally to other work, the damages may be reduced, by adding to the cost of performing the contract the reasonable value of the plaintiff's time which the circumstances show would have been required or devoted to this particular work. This is shown in various cases subsequently set out, in which, in determining damages, the court has made an allowance because of the fact that the plaintiff would be relieved of performance, even though the contract was not one for personal services and did not pre-

clude the assumption of other similar contracts.

It is to be observed, however, that, in general, the note excludes the question whether, in determining the profit that would have been realized in carrying out the contract, any allowance should be made, as a part of the expense of performing the contract, on account of the time which it would have been necessary for the plaintiff to have devoted to supervision.

The above rule will be more clearly understood by a reference to the cases cited below, showing the circumstances under which it has been applied or at least considered as possibly applicable. It will be observed, however, that on particular sets of facts the holdings are frequently quite conflicting.

III. Particular applications.

a. *Contracts for teams and transportation, in general.*

For contracts for hauling in connection with logging contracts, see *infra*, III. b.

It was held in the reported case (*Mt. Pleasant Stable Co. v. Steinberg*, ante, 749) that the rule making it the duty of the party claiming damages for breach of a contract of employment to make reasonable effort to secure another contract did not apply to a contract by which the plaintiff was to furnish teams to do the defendant's trucking, since the contract did not call for special skill or require the personal services of the plaintiff, and did not preclude his carrying on as many other contracts as he saw fit.

While the *STEINBERG CASE* seems sound in principle and within the general rule above stated, there are cases of the class here under consideration in which a different conclusion has been reached. Some, at least, of these cases, however, leave the impression that the courts did not have clearly before their minds the possibility of making the distinction upon which the decision in the reported case turns.

Thus, in an action for breach of a contract whereby the plaintiff was to haul and distribute railroad ties along the defendant's railroad at a certain

price per tie, the court in *Waterman Lumber & Supply Co. v. Holmes* (1913) — Tex. Civ. App. —, 161 S. W. 70, held that an instruction that the measure of damages for breach of the contract was the profits, if any, that the plaintiff would realize from its performance, was erroneous because it disregarded the amount which the plaintiff could have earned by the use of his teams in other work while not using them in the performance of his contract, after the contract had been breached. The court said: "We understand the law to be that if the appellant did breach the contract. Holmes could not sit idly by and wait until the completion of the hauling and then recover from appellant the net profits he would have made had the contract not been breached, but that it was his duty to make use of his wagons and teams in other employment, if there was any he could get, and the amount that he could have so made, or ought reasonably to have made in this, should be deducted from the amount he would be entitled to recover had he carried out the contract."

The applicability of the doctrine of mitigation of damages through obtaining other employment seems to be assumed in *Waldrup v. Hill* (1912) 70 Wash. 187, 126 Pac. 409, where the plaintiff sought to recover damages for breach of an alleged contract by which he was to furnish four teams, with drivers, for hauling for the defendant, who was engaged in street contracting work. It was unnecessary, however, to decide this question directly, because the evidence in support of the defendant's contention that the plaintiff, with due diligence, could have procured work for and earned with his teams during the period of the contract an equal or greater amount than he would have earned in its performance, rested upon evidence tending to show that he had offered to permit plaintiff to haul sand at a stated price per load; it appearing that although the nature of the work would have been substantially the same as under the contract, the plaintiff would have been compelled to hire

another man for loading the wagons, and his profits would have been somewhat uncertain; and, further, that the new contract might have been offered by way of a substitute, and the plaintiff by accepting it might have waived all his rights under the original contract. It was held that the refusal on the part of the plaintiff to accept this new contract offered him by the defendant did not, under the circumstances, show a want of due diligence on his part in earning money with his teams during the time they were not employed under the original contract.

Assuming that the rule requiring one whose contract of employment is broken to mitigate damages by obtaining another contract was applicable to a case where the owner of a canal boat and team agreed to transport sand for a certain period at a specified sum per week, and was prevented by the other party from carrying out his contract, the court in *Milage v. Woodward* (1906) 186 N. Y. 252, 78 N. E. 873, held that the defendant, who had breached the contract, had not sustained the burden of proof resting upon him to show that the plaintiff found, or could have found, employment elsewhere. The court called attention to the fact that the case was not one for personal services exclusively; but stated that it was doubtless the law that the obligation of a plaintiff to reduce reasonably, if possible, the damages which a defendant may suffer by reason of a breach of contract, is not alone applicable to contracts of service. The circumstances in this case seem fairly to warrant the construction that the contract required the personal services of the plaintiff.

Where the plaintiff sued for breach of a contract for the hire of a certain number of teams, with implements and teamsters, to be furnished by him to the defendants for work in railroad grading, the court in *Porter v. Burkett* (1886) 65 Tex. 383, held that it was not necessary for the plaintiff to allege that he could not have obtained other work, but stated that if it were shown on the trial that the plaintiff could, by this means, have

reduced his losses or saved himself harmless, this fact would be a good defense, in whole or in part, to the action.

There is an obiter statement in *Smith v. Carter* (1909) 136 Mo. App. 529, 118 S. W. 527, that after the breach of contract it was the plaintiff's duty to do all that he could to minimize his damages, in a case where the plaintiff had purchased certain teams and wagons which the defendants, who were merchants, used for their hauling, and as a part of the contract it was agreed that the plaintiff should do all of the defendants' hauling, at a stated rate, for a year.

And in an action for breach of contract for the furnishing by the plaintiff to the defendant of teams for grading work, the court in *Smith v. Ohler* (1907) 31 Ky. L. Rep. 1275, 104 S. W. 995, said that it was the duty of the plaintiff to minimize his damages so far as he could by ordinary care in obtaining other suitable employment for his teams. This statement, however, seems unnecessary to the decision, the appeal being by the defendant, and the court affirming the judgment for the plaintiff.

So, the proposition that one who claims damages for breach of contract arising from loss of time and the use of his teams must show that they were not or could not have been profitably employed during that time, seems supported by *Crescent Stave Co. v. Brown* (1918) 181 Ky. 787, 205 S. W. 937, where the plaintiff sued for damages for breach of a contract to make and deliver staves to the plaintiff at a certain place, and the defendant set up a claim for damages by reason of the plaintiff's stopping the defendant's team in hauling the staves. The court said that the evidence introduced by the defendant in support of its claim for loss of time of teams stopped from hauling staves by the plaintiff's inspector was insufficient because there was no showing that the teams, while stopped from hauling staves, were not and could not have been otherwise as profitably employed.

In an action for breach of a contract to hire the plaintiff's two boats

for a certain term for canal repair work, the plaintiff to manage the boats himself and to furnish the necessary men and teams, it was held in *Dunn v. Allen* (1901) 59 App. Div. 561, 67 N. Y. Supp. 218, that the measure of damages would be the contract price, with certain deductions, less also any sum which the plaintiff, his teams, and boats earned, or by the exercise of reasonable diligence could have earned, in other employment during the contract period.

Among possibly other cases to the effect that damages for breach of a contract to furnish freight for a vessel may be reduced or mitigated by showing that the shipowner procured other freight, or by the exercise of reasonable diligence could have done so, are *Dalbeattie S. S. Co. v. Card* (1893) 59 Fed. 159; *Leblond v. McNear* (1900) 104 Fed. 826, affirmed in (1903) 61 C. C. A. 564, 123 Fed. 384; *Cornwall v. J. J. Moore & Co.* (1903) 125 Fed. 646, later proceedings in (1904) 132 Fed. 868, affirmed in (1906) 75 C. C. A. 180, 144 Fed. 22; *Utter v. Chapman* (1869) 38 Cal. 659; *Greenebaum v. Smith* (1921) — Cal. App. —, 197 Pac. 675; *Bailey v. Bamon* (1854) 3 Gray (Mass.) 92; *Dean v. Ritter* (1853) 18 Mo. 182; *Ashburner v. Balchen* (1852) 7 N. Y. 262; *Shannon v. Comstock* (1839) 21 Wend. (N. Y.) 457; *Hecksher v. McCrea* (1840) 24 Wend. (N. Y.) 304; *Medbery v. Sweet* (1851) 3 Chand. (Wis.) 321, 3 Pinney, 210.

It may be observed that these cases, at least so far as the contract contemplated shipment by a special vessel, come within the general rule as to contracts which require the personal services of the other party or the use of a specific instrumentality.

The rule is frequently stated, as in *Greenebaum v. Smith* (1921) — Cal. App. —, 197 Pac. 675, *supra*, as follows: "In actions against the charterer of a ship for a total breach of his contract, such measure is the net amount which would have been earned by the vessel under the charter, less the net amount earned, or which might with reasonable diligence have been earned, by the vessel during the time

required for the performance of the voyage named in such contract of charter."

b. Logging and timber contracts.

There are a number of cases of this class which illustrate well the application of the rule above stated where the contract does not call for personal services.

Thus, in an action for breach of a contract whereby the plaintiff agreed to pull all the stumps on the land of the defendant and to clear the land at a certain price per stump, it was held in *Nilson v. Morse* (1881) 52 Wis. 240, 9 N. W. 1, that the rule applicable to contracts for personal services did not apply, and that the measure of damages was not, therefore, the difference between the contract price and the sum which the plaintiff actually received from other employment during the time he would have been employed in completing the work in question, but was the profits which he would have realized had he been permitted to perform the work.

And for breach of a contract by which the plaintiff agreed to cut, haul, and deliver to the defendant all the logs of a specified size growing on certain lands, at a fixed price, the breach alleged being that the defendant, after the plaintiff had begun work under the contract, compelled him to abandon the same and refused performance, it was held that the measure of damages was the profits which the plaintiff would have made, and that evidence, offered in mitigation of damages, was properly excluded of another logging contract made by the plaintiff with another party after the breach of the contract with the defendant. *Allen v. Murray* (1894) 87 Wis. 41, 57 N. W. 979. It was said that the contract was not one for personal services, and it did not appear but that plaintiff might have obtained means and resources with which to perform both contracts.

It was held that the doctrine of minimizing damages did not apply; and that the court, therefore, properly refused an instruction that the plaintiff should not be allowed for

any damages that he could have avoided by reasonable effort if the defendant was at fault in breaching the contract, where the plaintiff undertook to furnish a sawmill, engine, teams, etc., for the manufacture into lumber of certain timber on the defendant's land, under an arrangement for a division of operating expenses and a share in the output of the mill. *McKinnon v. Porter* (1917) — Tex. Civ. App. —, 192 S. W. 1112.

So, where one agreed to manufacture timber into ties, at a certain price per tie, and was prevented from completing the contract by the other party, it was held that he was not obliged to use diligence to obtain other employment in order to mitigate his damages, since he had not agreed to perform personal services, but could have had the ties made by someone employed by him for that purpose. *Horn v. Carroll* (1906) 28 Ky. L. Rep. 839, 90 S. W. 559.

In *R. Burleigh & Sons v. Overton* (1917) 173 Ky. 70, 190 S. W. 472, the court called attention to the fact that the contract in question by an owner of timber to sell and deliver all timber of a certain kind was not one for personal services where the party injured in person or property was required to exercise reasonable care and diligence to avoid loss or to minimize a resulting damage.

The rule requiring one to use reasonable efforts to obtain other employment in order to minimize damages was held inapplicable, in *Stearns Lumber Co. v. Inman* (1913) 154 Ky. 251, 157 S. W. 23, to a contract by which the plaintiff agreed to cut and haul a certain quantity of timber for the defendant, at a specified price, the court saying that the contract was not one for personal services, and that therefore the failure of the plaintiff to use due diligence to secure other employment could in no way affect his right to recover for a breach of the contract.

So, the rule has been held inapplicable to a contract by which the plaintiff agreed to saw a certain quantity of timber for the defendant, the breach being that the defendant refused to furnish the timber, there

being nothing to show that the plaintiff was to give the sawing his personal attention, or that he was prohibited from sawing for others at the same time. *Owensboro Shovel & Tool Co. v. Moore* (1913) 154 Ky. 431, 157 S. W. 1121.

It was held also in *Sullivan v. McMillan* (1896) 37 Fla. 134, 56 Am. St. Rep. 239, 19 So. 349, that the rule did not apply to a contract by which the plaintiff agreed to deliver to the testator of the defendants all the logs of certain dimensions growing upon the testator's land, the breach alleged being that the defendants refused to receive the logs, there being nothing in the contract to show that its execution required all or any great portion of the time or personal attention of the plaintiff, or that it was impracticable for him to be engaged in other business and the performance of other contracts contemporaneously with the performance of the contract in controversy. It appeared that it would have taken the plaintiff two years from the time the contract was broken to have completed it, and that after the breach, he engaged in the work of delivering logs under other contracts to other parties. The defendants sought to prove the profits made through the plaintiff's labor and the use of his teams in such other work during the time it would have taken him to perform his contract with the defendants, but this evidence was held properly excluded.

And in an action for breach of a contract by which the plaintiff agreed to drive logs for the defendant, it was held in *Beckett v. Kinner* (1915) 167 Ky. 335, 180 S. W. 530, that the petition was not demurrable because it failed to allege that after the breach of the contract the plaintiff used reasonable diligence to obtain other employment, but failed to do so; the court saying that this was not a case of master and servant or principal and agent, based on a breach of a contract for personal services, but was a breach of an ordinary contract, where no such relation existed, and where the plaintiff had the right to do the

work himself, or obtain others for that purpose.

And where the plaintiffs sued for breach of a contract to purchase lumber to be gotten out and delivered by them to the defendant lumber company, which repudiated the contract before the plaintiffs had sawed any of the lumber, but after they had purchased the logs out of which it might be sawed, it was held that the measure of damages was the profits which the plaintiffs would have made on the contract had they been permitted to perform it, and not the difference between the contract price and that at which the plaintiffs afterwards sold the lumber. *Cameron v. White* (1889) 74 Wis. 425, 5 L.R.A. 493, 53 N. W. 155.

But, under statutory provisions (not fully set out), the court in *Mimms v. J. L. Betts Co.* (1911) 9 Ga. App. 718, 72 S. E. 271, held that if, by the exercise of ordinary care and diligence, the plaintiff could have employed his teams profitably in other work, it was his duty to do so in order to mitigate damages, where a contract was made by which the plaintiff was to cut and haul logs for the defendant, and place them on a tramroad, the plaintiff to use for that purpose as many teams, not exceeding seven, as he should be able to purchase. The contract was to continue for a year; and it appeared that in pursuance of the contract the plaintiff purchased five teams and for several months proceeded to work under the contract. The court said: "The defendant, having breached the contract in June by refusing to allow the plaintiff any longer to perform, became liable for such damages as arose 'naturally and according to the usual course of things from the breach, and such as the parties contemplated, when the contract was made, as the probable result of its breach.' Civ. Code 1910, § 4395. Under the particular facts in this case the plaintiff would primarily be entitled to recover as damages the gross amount he would have earned with his teams during the remainder of the period throughout which the contract was to continue, less such expenses as he was saved by

reason of not being required to perform the contract. However, upon the defendant's breach of the contract, the plaintiff became in duty bound to lessen the damages as far as practicable by the use of ordinary care and diligence. Civ. Code 1910, § 4398. It consequently became his duty to make the deduction, to which the defendant would be entitled under the measure of damages stated above, as large as possible; that is, it was his duty to cut out as much of the expenses as possible, or else to make the property which was causing the expense earn an income as an offset against the damages. If it were not for this duty imposed on the plaintiff of lessening damages, he might have kept his teams idle until the end of the year and have held the defendant liable for the full amount he would have earned by performing the contract; for it costs just as much to keep idle teams as it does to keep working teams. If by the exercise of ordinary care and diligence the plaintiff could have employed his teams profitably in other work, it was his duty to do so." A later appeal is reported in (1914) 14 Ga. App. 786, 82 S. E. 474.

And there are other cases in which the rule as to mitigation of damages through obtaining other employment has been properly held applicable, where the parties evidently contemplated or contracted for the use of a particular instrumentality which could not be devoted to other use consistently with the contract, as where the owner of a sawmill contracted to saw logs delivered at the mill, or where the contract expressly required the personal services of the claimant for damages.

Thus, it was held in *Hopkins v. Sanford* (1879) 41 Mich. 243, 2 N. W. 39, that it is the duty of a mill owner, in case of a breach of contract by one who had agreed to deliver a specified quantity of logs at the mill for sawing, to obtain logs from other sources, if possible, in order to keep the mill in operation and reduce the damages.

And where the owner and operator of a portable sawmill sued for breach of a contract by which he was to re-

move his mill to the defendants' land and saw at a certain price a specified quantity of logs for them, to be furnished by the defendants, the breach alleged being that they failed to deliver the logs, it was held in *Heavilon v. Kramer* (1869) 31 Ind. 241, that an instruction was erroneous that the plaintiff was entitled to recover the amount of the profits which he would have made on the sawing of the logs if they had been furnished. The court said this was not the rule of damages, there being evidence that the plaintiff need not have allowed his mill to remain idle, since other employment was offered; that this rule would give him more than compensatory damages, which the case was not of a nature to warrant.

Also where a contract to cut and haul logs to a lumber mill, and to transport the lumber to a certain point, expressly required the personal attention of the promisor, who was to furnish the necessary hands, teams, and wagons, it was held in *Madison-Jackson-Estill Lumber & Development Co. v. Coyle* (1915) 166 Ky. 108, 178 S. W. 1170, that for breach of a contract by the other party, damages could not be recovered for loss resulting from the nonuse of teams and equipment subsequent to the breach, where the evidence failed to show his inability to obtain other work for his teams, or that he was reasonably diligent in attempting to obtain such work. The court, however, does not discuss the point under consideration.

And it was held in *Frazier v. Clark* (1889) 88 Ky. 260, 10 S. W. 806, 11 S. W. 83, that nominal damages only should have been awarded for breach of a contract by which the plaintiffs agreed to saw for the defendant all the timber on a certain tract of land, at a specified rate, the plaintiffs to begin sawing on a certain day and to continue until they completed their contract, and to saw exclusively for the defendants until the timber was exhausted, where, although the plaintiffs had purchased a mill and the defendant had refused to permit them to perform the contract, it appeared that they at once proceeded to saw for oth-

ers, and operated the mill continuously for seven months until they sold it, making as much or more profit than if there had been no violation of the contract. The court said: "They had equally as profitable employment in the same county and neighborhood, and therefore lost nothing, looking to their own testimony. . . . The principle governing this case is similar to that in regard to contracts for personal service. . . . Here the appellant had contracted for the service of the appellees, in connection with the operation of their mill, for such a time as would enable them to saw the timber on his farm, the use of the mill to be applied to the sole purpose, and no other, without the consent of the appellant. . . . If A, with his machine, undertakes to thresh the grain of B on a named day, at a fixed price per bushel, and B declines to permit the work to be done, it does not follow as a matter of law that A can recover the contract price, less the costs of his hands, as his damages. If he should employ his machine in threshing a like quantity of grain for others on the same day, with no loss of time or inconvenience by reason of B's conduct, the injury is nominal only."

So the special terms of the contract controlled the decision in *Studdard v. Carter* (1919) 120 Miss. 246, 82 So. 70. Where a contract for the sawing of timber provided that the mill owner should not purchase timber, either standing or in logs, from anyone else during the time he was employed to cut the timber in question, and that if other timber were offered to him he should submit the offer to the other party to the contract, and, if the purchase were made, it should be made by such other party's direction. The court held that the owners of timber who had breached the contract were not in a position to invoke the rule that the mill owner's damages should be reduced by such sums as he could, with reasonable diligence, have earned by taking other contracts, in the absence of any notice by them that they were willing for the mill owner to make such contracts. The court said it was the duty of the timber owners,

if they were willing that the other party should make such contracts, to give him notice to that effect.

In *Snell v. Remington Paper Co.* (1905) 102 App. Div. 138, 92 N. Y. Supp. 343, the court held that, in assessing damages sustained by a mill owner for breach of a contract by the defendant to deliver logs for sawing, the value of the plaintiff's time in personally supervising the mill, from which work he was relieved by the breach and so enabled to perform other work, should be taken into consideration. The plaintiff's evidence showed in this case that after the making of the contract he was at the mill nearly half the time, but the referee, in assessing damages, erroneously failed to charge up to the expense of doing the work anything for the plaintiff's own time in overseeing the mill and the work.

And where the plaintiff sued for breach of a contract by which he was to construct a boat and recover drifted and sunken logs for the defendant, at a certain price per log, it was held in *Bunham v. Orange Lumber Co.* (1910) 59 Tex. Civ. App. 268, 125 S. W. 89, that in computing the damages it was proper to deduct, as part of the expense of carrying out the contract, a reasonable compensation for the services of the plaintiff, confining this, however, to such services as he would have personally rendered in the matter.

Attention is called, also, to *Long v. McCauley* (1887) — Tex. —, 3 S. W. 689, where, in an action for breach of a contract by which the plaintiff was to float and deliver logs for the defendants, the court held that the measure of damages was the contract price, less the cost to the plaintiff of performance, this cost including the value of his own services.

c. Contracts relating to mines and quarries.

In an action for breach of contract by which the plaintiff agreed to remove the remaining coal from the defendant's mines it was held in *Sagamore Coal Co. v. Clark* (1908) 33 Ky. L. Rep. 184, 109 S. W. 349, that an in-

struction was properly refused which required the jury to find for the defendant if, during the time the plaintiffs would have been engaged in working the mine except for the defendant's violation of the contract, they obtained and performed other mining work which paid them as much as they would have made by way of profits in working the defendant's mine.

And it was held that the rule requiring reasonable effort to obtain other employment did not apply where the plaintiff agreed to "mine and prepare ready for the wagons all the fluor spar" in a certain portion of the defendant's mines, and agreed to "leave the collar around the main shaft, and to timber up the ground in a substantial manner, using timbers of good quality, sufficient to hold the ground except in cases of accident or from the rotting of the timbers," the plaintiff agreeing to furnish everything necessary for the mining operations except machinery and tools, which the defendant agreed to furnish under certain conditions. *Harness v. Kentucky Fluor Spar Co.* (1912) 149 Ky. 65, 147 S. W. 934, Ann. Cas. 1914A, 803. The trial court held that the agreement was to perform labor personally, and not an undertaking by a contractor to have the labor performed through others, and reached the conclusion accordingly that the petition was defective because it failed to allege that the plaintiff sought and failed to find other employment during the time he would have been engaged in carrying out the contract sued on. It was held that this ruling was erroneous because the contract was not one requiring personal services.

And that, if the contract does not require personal services, the rule as to mitigation of damages through accepting other employment does not apply, seems implied in *Raven Red Ash Coal Co. v. Herron* (1912) 114 Va. 103, 75 S. E. 752, where, in an action by a contractor who had entered into an agreement to mine coal in the defendant's mines, it appeared that, after the plaintiff ceased work under the contract, he obtained other work at a fixed sum per month; and the court

said that this item, of course, should be considered in ascertaining the damages, since it was clear from the contract that the plaintiff was to give the work his personal attention.

Where, but for the defendant's breach of contract to furnish transportation, the plaintiff, a coal mining company, would doubtless have sold just the particular quantity of coal more than it did, the fact that prices of coal advanced and the company was able to sell this quantity at an excess over the contract price was held in *Hughes v. Chesapeake & O. Coal & Coke Co.* (1921) — C. C. A. —, 269 Fed. 589, not to diminish the damages. The company was engaged in the business of mining, selling, and shipping coal; it maintained a large reservoir of coal at a certain point from which it drew indiscriminately to fulfil its contracts as transportation was available, contracting for sale with reference to quantity and grade and not with reference to any particular coal. It appeared that deliveries were limited by transportation facilities rather than by the company's supply of coal. The court said it was readily seen that this was not a case where a vendor, after refusal by the vendee to accept specific goods contracted for, disposed of them to someone else, where his damages would be the difference between the contract and the resale price.

And it was held that the rule requiring one to use reasonable effort to obtain other contracts in order to minimize damages for breach of contract was not applicable where the owner of a stone quarry agreed to furnish a contractor a certain quantity of broken rock at a specified price, the contractor having refused to receive the same. *Hollerbach & M. Contract Co. v. Wilkins* (1908) 130 Ky. 51, 112 S. W. 1126. The court said: "Where there is a contract for personal services, and there is a breach, the party whose services are to be engaged may not sit down and supinely permit the amount of his damages to grow. It is his duty to seek employment elsewhere, and the other party is only liable to the extent of the injury after

the exercise of ordinary diligence by the complainant to obtain other employment still leaves him a sufferer by reason of the breach. In the case in hand the appellee had a rock quarry, and, although it might be true that he could have sold 4,000 cubic yards of rock to another party, that would not have diminished his damages in not being allowed to carry out his contract with appellant, because he was entitled, if he could, to sell all the rock in his quarry; and it in no wise minimized the damages he may have sustained by the breach of appellant's contract that he might, perchance, have sold 4,000 yards of broken rock to someone else. This is quite different from a contract for personal services. There the contract cannot be performed for two different parties, and, when the employer refuses to carry out his contract for the personal services of the servant, the latter must look for another employer, and thus reduce the damages arising from the breach as much as possible. We do not mean to be understood as limiting the application of the principle of avoidance of damages to breaches of contracts for personal service; on the contrary, the rule is of much broader application, and it would, perhaps, not be going too far to say that the duty of those complaining of violations of contracts to minimize their damages as much as the exercise of reasonable diligence will accomplish is the general rule appertaining to the right to recover damages therefor. The complainant should reduce his damages whenever the principle can be applied without sacrificing any substantial right. . . . Appellee was entitled to enjoy the benefit of the profits of his contract with appellant, and, if he could have made as beneficial a contract with another, he was entitled to the benefits of that also. In other words, he was entitled to carry forward as many such contracts as he could make, and, if he succeeded in making more than one, he was entitled to both profits. Receiving the profits of one such contract would not tend to recoup his loss by reason of the breach of another."

d. Building and construction contracts.

The rule as to the duty to mitigate damages by obtaining other employment or other contracts was held inapplicable in *Graves v. Hunt* (1887) 8 N. Y. S. R. 308, where a contractor undertook to build a barn, and sued for damages for breach of the contract, since the work might be done by his employees, under his superintendence, and need not be done by him personally, and he could therefore carry on the construction of several buildings at the same time, and be entitled to the profits which he could make upon each.

And it was held in *Olds v. Mapes-Reeve Constr. Co.* (1900) 177 Mass. 41, 58 N. E. 478, that profits made by a subcontractor who, after a breach of his contract by the original contractor, entered into an agreement with the owner to complete that part of the work, should not be considered in diminution of damages, in an action by the subcontractor against the contractor for the breach. The court, after stating the rule applicable under a contract for personal services requiring the employee who is wrongfully discharged to mitigate damages by obtaining other employment if possible, said: "But there is this difference between the case of one who is discharged while under a contract to render personal services, and a case like the present. In the former case the person discharged, whose personal services come back to him, is bound to dispose of them in a reasonable way, so as to make the damages to the other party not unreasonably large, while, in a case like the present, one deprived of his contract is under no obligation to enter into new contracts with a view to make profits for the other party. In a contract of the kind before the court, personal services are not necessarily included. The labor or supervision may be personally performed by the contractor or may be furnished through agents or employees. . . . The plaintiffs were at liberty to leave this work entirely to the care of hired servants, and to take as many other contracts as they chose elsewhere, and to give their personal time and atten-

tion to any occupation that they might choose. The question is, whether the profits from the new contract with the landowner were a direct result of the defendant's breach of contract, or whether they came from an independent, intervening cause. It does not appear, and it is not to be assumed, that the plaintiffs were not competent to carry on several contracts at one time, and the making of profits on a new contract does not appear to be because of relief from the obligations of the old one. There is usually plenty of work to be contracted for, and the addition of one more possible job for which contractors may bid does not make the subsequent contract to do the work a direct result of the increase of opportunities for work. The addition of a new piece of work is merely a condition of the subsequent contract to do the work, and not a direct or proximate cause of it. . . . If the contract had resulted in a loss to them, they could not have charged the defendant with the loss, to the increase of their damages. As the contract resulted in a gain to them, there is no reason why the defendant should receive this gain in diminution of the damages for which it was liable."

But in an action for breach of a building contract, where the plaintiffs had undertaken to furnish the labor and materials and erect a building for the defendants, and damages were sought for loss of anticipated profits, the court in *Ryan v. Miller* (1893) 52 Ill. App. 191, stated that the plaintiffs' recovery, so far as it rested upon loss of wages, might be reduced by the defendants by showing that the plaintiffs did earn, or could reasonably have earned, wages at similar employment, had they diligently endeavored to secure such work. The case appears authority, however, only for the proposition that the burden of proving such matters, in order to reduce damages, is upon the defendant in such a case; and that, where there is no proof to show that the contractor did or could have otherwise employed his time, or tending to show what compensation he did receive, or might have received, during the time he was

released from performing the work in question, any reduction of damages on account of other work was properly disallowed. The decision is affirmed in (1894) 153 Ill. 138, 38 N. E. 642, in which the court, without passing on the question whether in any event in such contracts damages may be reduced by showing that the contractor might have engaged in other work after the breach, said: "The defendants could not ask for a mitigation of the plaintiffs' damages on the ground that the plaintiffs were relieved from employing their time in and about the performance of the contract, without showing affirmatively that they either had, or by the exercise of reasonable diligence could have, employed their time in some other work, and the wages or profits which they had or might have thus made. No attempt whatever was made to introduce any evidence on that point, and there was, therefore, no basis for a mitigation of damages by charging the plaintiffs with the results of their labor in other employments during the time that would have been spent in the performance of their contract with the defendants." As before indicated, the annotation does not cover the question of burden of proof.

See also *Cincinnati, I. St. L. & C. R. Co. v. Lutes* (Ind.) under III. k, *infra*.

The doctrine that the defendant in an action for a breach of contract of employment may mitigate the damages by showing that the plaintiff might have protected himself by entering into other employment after he was prevented by the defendant from completing his contract was regarded in *Danley v. Williams* (1863) 16 Wis. 582, as applicable to a contract by which the plaintiff was to do the carpenter work upon a house for a specified sum.

And it has been held that where the contractor sues for breach of a construction contract which would have required a series of years for its performance, it will not be assumed that he and his machinery and implements will remain idle for the remaining years of the contract period, but that,

in determining damages, consideration should be given to the value to the contractor of being released from the contract and of having control of his time for other business. *McMaster v. State* (1888) 108 N. Y. 542, 15 N. E. 417, *supra*.

So, where a contractor sues for damages for refusal of the other party to permit him to perform the contract, a deduction "for the less time engaged" by him because of the breach has been regarded as proper. See, for example, *Insley v. Shepard* (1887) 31 Fed. 869; *Danforth v. Tennessee & C. R. Co.* (1890) 98 Ala. 614, 11 So. 60; *Harris v. Faris-Kesl Constr. Co.* (1907) 13 Idaho, 211, 89 Pac. 760; *McMaster v. State* (1888) 109 N. Y. 542, 15 N. E. 417. Attention is called, also, in this connection, to *United States v. Speed* (1869) 8 Wall. (U. S.) 77, 19 L. ed. 449, although that case did not involve a building or construction contract, in which the court said, regarding the rule for the measure of damages: "We do not believe that any safer rule, or one nearer to that supported by the general current of authorities, can be found than that adopted by the court; to wit, the difference between the cost of doing the work and what claimants were to receive for it, making reasonable deduction for the less time engaged, and for release from the care, trouble, risk, and responsibility attending a full execution of the contract."

In *Joske Bros. v. Pleasants* (1897) 15 Tex. Civ. App. 433, 39 S. W. 586, the court held that the measure of damages in an action by a building contractor for breach of a contract to erect a building for the defendants was the "difference between the contract price and the actual cost of construction according to the contract, less the value of the contractor's time (if he found other employment in which his time was equally or more valuable) that would have been employed in the performance of the contract."

In an action for breach of a contract whereby the plaintiff was to superintend the erection of a school building for the defendant, where it

appeared that performance of the contract would have occupied the plaintiff's time only for a few hours daily, the court in *Pond v. Wyman* (1851) 15 Mo. 175, held that the contract price constituted the measure of damages unless the defendants showed that the damages which the plaintiff actually sustained were less than such price. The court said: "The plaintiff, who has been prevented by the act of the defendant from receiving the compensation agreed upon, when he is without fault, is entitled to ask a full indemnity, and the onus of reducing the recovery is properly thrown upon the defendant. . . . To the extent that the time of the plaintiff, which would be required to perform his contract, has been employed in business not more laborious, and equally profitable, it is evident he would not be injured by the violation of the contract. Yet, to give him the full benefit of his contract, he must be entitled to the difference in advantage, in ease, and profit, between the service he was to perform and the business substituted for that service, although his whole time may have been employed. If a portion only of the time was so employed, then the same rule will apply to the reduction for such portion, and the contract price will furnish the scale of compensation for the time unemployed. But, if for any of the time unemployed, offers of employment, within the range of his general occupation, and in the same region, were made to him, upon reasonable terms, such offers are to be regarded as equivalent to business engaged in and performed, and should have the same effect in reducing the damages."

e. Manufacturing contracts, generally.

It may be observed that the annotation does not cover the general question as to the measure of damages, and that there are other cases on that question, not included herein, which indirectly might be regarded as supporting the doctrine of some of the cases cited below.

It was held that the contract was not one of employment, and that the earnings of the plaintiffs since the breach and during the term of the

contract should not, therefore, be taken into consideration in mitigation of damages, where the plaintiffs agreed to manufacture coats at a certain price per coat for the defendants, who agreed to supply cloth and material for their manufacture, the breach alleged being that the defendants wrongfully terminated the agreement and refused to supply the materials. *Simon v. Levinson* (1911) 126 N. Y. Supp. 659. The court said that it clearly appeared from the pleadings and the evidence that the plaintiffs were employed as contractors to manufacture coats, the nature of the work called for by the contract being such that a certain result was to be attained for the defendants, irrespective of any personal service of the plaintiffs.

And in an action for damages for breach of a contract whereby the plaintiff agreed to manufacture barbed wire for the defendant from plain wire to be furnished by the latter, which it refused to furnish, resulting in the plaintiff's mill being closed for several months, it was held that evidence offered for the defendant in mitigation of damages, tending to show that the plaintiff could have made other contracts for barbing wire for at least a part of the unexpired term of the contract at the same prices which the defendant agreed to pay, was properly excluded. *Crescent Mfg. Co. v. Nelson Mfg. Co.* (1889) 100 Mo. 325, 13 S. W. 503. The court said: "Where a servant is wrongfully discharged during his term and lays his damages at the contract wages for the balance of the term, it is generally held that evidence may be introduced in mitigation of damages of what he might have earned in the interim by using reasonable efforts to procure other employment. So, in general, where a party has been injured, or damaged, by a breach of a contract, he should do whatever he can to lessen the injury. Many cases asserting these principles of law are cited by the defendant, but they have no application to the case in hand. The plaintiff owned its factory and the machinery, and the contract constituted

no such relation as that of master and servant. It had the right to make as few or as many other contracts as it saw fit whilst executing the contract with defendant, and it is entitled to the profits which it might have made on this particular contract. The evidence offered in mitigation of damages was properly excluded."

The fact that the manufacturer, after breach of the contract to produce certain articles, sold the goods at the agreed price, was held in *Pratt v. Auto Spring Repairer Co.* (1912) 116 C. C. A. 261, 196 Fed. 495, not a reason for reduction of damages, so as to warrant a departure from the ordinary rule in such cases, that the measure of damages is the difference between the contract price and the cost of production, where it did not appear that the merchandise was of a peculiar character for which there was no convenient market. The court said that, so far as appeared, the refusal of the other party to the contract to perform it limited the manufacturer's market to that extent.

But where a manufacturer of automobiles entered into a contract with a machine company by which the latter was to furnish materials, with certain exceptions, and to build motors for a specified sum, it was held, in an action by the company for breach of the contract, that evidence was admissible that it had entered into other contracts which fully occupied its time, and that therefore it had sustained no damages from the breach. *Harrington-Wiard Co. v. Blomstrom Mfg. Co.* (1911) 166 Mich. 276, 131 N. W. 559. The court said: "This was proper cross-examination. It was competent and material to show upon cross-examination of this witness the terms of the contract with the Hupp Automobile Company. If that contract was such that it occupied the entire time, and force employed, of the plaintiff, and the profits therefrom were such that they would offset the loss of profits under the second contract with defendant, it had the right to show it, as bearing on the question of damages. The doctrine is well settled that, when there has been a

breach of contract, the injured party must do all in his power to diminish the damages suffered, or which he may suffer. If he has an opportunity to protect himself from loss and does not do so, he cannot be heard thereafter to complain."

So, the view has been taken that if a miller, after refusal of a creditor to deliver corn to him to be ground, under a contract that the miller should grind enough corn to pay his debt at a certain price per bushel of the meal delivered, receives from other persons employment more or less lucrative for the machines which would have been occupied in grinding the corn, or by reasonable effort on his part might have received such employment, the profit that was or might have been made must be deducted from the profit he would have made had the contract been performed, in order to ascertain the actual damage caused by the breach. *Oldham v. Kerchner* (1878) 79 N. C. 106, 28 Am. Rep. 302.

And in an action by a steel company for breach of a contract to make and deliver steel rails to the defendant, which the latter refused to accept after the plaintiff had purchased the material but before it had manufactured the rails, it was held in *Pittsburgh, Bessemer Steel Rail Co. v. Hinckley* (1883) 17 Fed. 584, that the measure of damages was the profits which the steel company would have made, less the profit realized on rails which the company had made under a subsequent contract for another party, from the material purchased for the defendant. The decision is affirmed in (1887) 121 U. S. 264, 30 L. ed. 967, 7 Sup. Ct. Rep. 375, the Federal Supreme Court approving the rule adopted as to the measure of damages. But the question under consideration was not discussed and possibly was not within the mind of the court.

1. *Farming contracts.*

The authorities which involve contracts relating to the rental of farm land are not in accord. If the contract requires exclusive personal services, it would seem that the rule as to mitigation of damages would be ap-

plicable; and various cases support the doctrine that, in actions for breach of contracts for the raising of crops on shares, where the tenant or cropper is ousted before he has been permitted to raise a crop, the landowner may show in mitigation of damages what the tenant or cropper earned, or by reasonable diligence could have earned, in other business or employment, presumably of the same general nature, although this qualification is frequently not stated. *T. L. Farrow Mercantile Co. v. Riggins* (1915) 14 Ala. App. 529, 71 So. 963; *Gardenhire v. Smith* (1882) 39 Ark. 280; *Somers v. Musolf* (1908) 86 Ark. 97, 109 S. W. 1173; *Crews v. Cortez* (1908) 102 Tex. 111, 38 L.R.A.(N.S.) 713, 113 S. W. 523; *Rogers v. McGuffey* (1903) — Tex. Civ. App. —, 75 S. W. 817; *Wagoner v. Moore* (1907) 45 Tex. Civ. App. 308, 101 S. W. 1058; *Smith v. Milam* (1911) — Tex. Civ. App. —, 143 S. W. 293; *Brooks v. Davis* (1912) — Tex. Civ. App. —, 148 S. W. 1107; *Bost v. McCrear* (1914) — Tex. Civ. App. —, 172 S. W. 561; *Taylor v. Jackson* (1915) — Tex. Civ. App. —, 180 S. W. 1142; *Lott v. Ballew* (1917) — Tex. Civ. App. —, 198 S. W. 645; *Rupert v. Swindle* (1919) — Tex. Civ. App. —, 212 S. W. 671. See also *Rogers v. McGuffey* (1903) 96 Tex. 565, 74 S. W. 753, and *Brannen v. McCarley* (1910) — Tex. Civ. App. —, 146 S. W. 299.

In *Crews v. Cortez* (1908) 102 Tex. 111, 38 L.R.A.(N.S.) 713, 113 S. W. 523, the court held that in determining the damages to be awarded a tenant cropping on shares, who is wrongfully expelled from property before the crop is matured, there must be deducted from the value of his share of the matured crop such sums as himself and the members of his family turned out of employment could, by reasonable diligence, have earned elsewhere during the remainder of the cropping period. The court said that such contracts so far partake of the nature of those for personal services as to make it just to take into consideration the principles by which the damages for breaches of those contracts are ascertained.

But while it was held that the earnings of the lessee after the breach should be taken into consideration in computing damages, it was held that the earnings of his two brothers should not be deducted, but only their cost to the lessee, where the contract for lease of a farm on shares provided that the lessee should, with his family (which, it was conceded, included the brothers), give his and their entire time to the management of the farm. *Somers v. Musolf* (1908) 86 Ark. 97, 109 S. W. 1173, *supra*.

The rule requiring reasonable effort to obtain other employment was applied in *T. L. Farrow Mercantile Co. v. Riggins* (Ala.) *supra*, in an action for breach of a contract by which the plaintiff rented land on shares, and the contract was repudiated by the other party after the crops were planted, where the contract required the plaintiff's personal services. The court, after observing that the relation between the parties was that of tenants in common, and that the contract was not one of hire, within the meaning of the Code so as to give the plaintiff a lien on the crops, said: "But since the contract, as alleged, shows that 'the plaintiff was to do the work,'—not to have it done or to furnish the labor,—it partakes of the nature of a contract for personal services, the compensation to be one half of the crop; and, with reference to a diminution of the damages, so far as other employment is concerned, we think it proper that the rule applicable to the breach of a contract for personal services be applied to it. . . . The defendants should be permitted in the present case to show, in diminution of damages, that the plaintiff accepted, or was offered at the same place, employment of the same general nature, or that he failed to make reasonable effort to obtain such employment at the same place, and that if he had done so such employment could have been obtained by him. . . . And if the plaintiff accepted employment of a different kind, at the same place or at another place, his earnings from that employment should be considered in diminution of damages, because, if he

had continued under the contract, the contemplated return from his services would be included in the value of his one half of the crops which he is entitled to receive. The burden of proof as to these matters rests on the defendant."

And in other cases where the court held that in assessing the damages a deduction should be made of the amount which the lessee earned, or by the use of reasonable diligence might have earned, in other work, after the breach and during the term of the lease, the personal services of the lessee evidently were contemplated. Thus, in *Waggoner v. Moore* (1907) 45 Tex. Civ. App. 308, 101 S. W. 1058, *supra*, where the court applied the rule indicated in determining the damages, the contract, in addition to the provision that the tenants were to plant, cultivate, and harvest the crops, for a share thereof, provided that the landowner should furnish them a house in which to live, also supplies for themselves and their teams sufficient to enable them to cultivate and gather the crops.

And in *Somers v. Musolf* (Ark.) *supra*, the contract was one whereby the defendant leased his farm to the plaintiff for a term of years and employed him to manage and cultivate it, it being said that the contract seemed to be in the nature both of a lease of the lands and a contract for hire of the services of the plaintiff and his family. It will be observed that the contract in this case required the lessee, with his family, to give his and their entire time to the management of the farm.

The nature of the contract in several other cases cited above may be noted. In *Bost v. McCrea* (1914) — Tex. Civ. App. —, 172 S. W. 561, *supra*, the landowner agreed to furnish teams, feed, and tools, and there were provisions for care of the horses by the cropper and for cultivation of the land in a workmanlike manner.

So, in *Brooks v. Davis* (1912) — Tex. Civ. App. —, 148 S. W. 1107, *supra*, the lease was of certain land, with residence, the landowner agreeing to furnish a team, tools, and seed, and the tenant agreeing to cultivate

and gather the crop and furnish all labor necessary for that purpose.

And in *Smith v. Milam* (1911) — Tex. Civ. App. —, 143 S. W. 293, supra, the contract provided that the tenant should furnish the labor necessary to cultivate, harvest, and market a crop, and that the landowner should furnish to the tenant the land, together with necessary teams, feed, and implements.

In *Rogers v. McGuffey* (1903) — Tex. Civ. App. —, 75 S. W. 817, supra, the court approved an instruction to the effect that the measure of damages for the wrongful ousting of the tenant before maturity of the crop, where the contract provided that the defendant should furnish the land, tools, teams, and food necessary to make a crop, and should receive as compensation one half of the crops produced on the land, would be "the reasonable market value of one half of all the corn and cotton which plaintiff would be reasonably expected to have raised upon said premises during the term of said lease, less such amount as plaintiff is shown to have earned, or by the use of reasonable diligence he might have earned, by engaging in a similar or different business after the breach of said contract."

The proposition that the amount which a cropper earned after his wrongful discharge should be considered in mitigation of damages is supported by the language of the court in *Gardenhire v. Smith* (1882) 39 Ark. 280, supra, where the contract evidently contemplated personal services in making a crop on the defendant's land with tools, teams, etc., furnished by the defendant.

But in assessing damages for the wrongful ousting of a tenant on shares, before maturity of the crops, the court in *Wendt v. Smith* (1921) — Cal. App. —, 194 Pac. 736, held that the defendant was not entitled to credit for earnings of the plaintiff at other work after the breach and prior to the expiration of the term of the contract. It was said: "The lease did not require that respondents should personally labor upon the land. It was not,

therefore, a contract for personal services. This being true, appellant would have no further claim upon their time or services, and their earnings, if any, would not be involved in a consideration of the damages resulting to them from a breach of his contract." The contract in this case provided that the lessee should furnish all labor necessary to the planting, irrigating, and harvesting of the crops, and the maintenance of ditches, etc.

And the rule requiring the plaintiff in a suit for breach of a contract of hire to show that he has not been able to obtain other employment was held to have no application, in *Fagan v. Vogt* (1904) 35 Tex. Civ. App. 528, 80 S. W. 664, in an action by tenant on shares against the landowner for conversion of the crop.

In a number of other cases, the fact that the lessee could have obtained, or did obtain, other land, has been held immaterial.

Thus, in *Taylor v. Bradley* (1868) 39 N. Y. 129, 100 Am. Dec. 415, where, on the defendant's refusal to permit occupancy of his farm under a contract between him and the plaintiff, the latter procured another farm and removed thereto, the court, in an action for damages for breach of the contract, held that the measure of damages was the value to the plaintiff of the contract; and that the fact that he had hired another farm and incurred expenses in removing thereto was immaterial. The opinion discusses largely the question of the relationship of the parties under the contract; since the measure of damages depended on the question whether the relationship was that of lessor and lessee or master and servant. The court held that neither relationship, strictly speaking, was created, but that a special contract arose having the characteristics of both relationships. Under the agreement the defendant let to the plaintiff a certain farm, the parties to contribute in the stocking of the farm and in the furnishing of supplies, and to share equally the expenses and profits.

Also in *Ecker v. Cottrell* (1897) 24

App. Div. 496, 48 N. Y. Supp. 1031, the court held in an action for breach of an agreement by which the defendant agreed to rent his farm to the plaintiff, who was to cultivate the land under the defendant's direction, for a share of the crops, that the measure of damages was the value to the plaintiff of the contract at the time of the breach, and that the court had erroneously adopted as the measure of damages the value of the plaintiff's share of the crops actually raised, less the amount earned by him during the contract period.

And in *Baumier v. Antiau* (1890) 79 Mich. 509, 44 N. W. 939, where it was contended that it was the duty of the plaintiffs, after being ousted from the defendant's farm, to seek other farms and other employment, the court held that, as the relation of employer and employee did not exist between the parties, but rather that of lessor and lessee, it was no defense that the plaintiff obtained, or might have obtained, another lease. And in this case, where the plaintiff testified that after he was ousted from the defendant's farm he moved to another, which he worked on shares, it was held that the court properly refused to permit the defendant to show that the plaintiff, after he was ousted, made another contract more advantageous to him than the one with the defendant.

So, the rule was laid down in *Devers v. May* (1907) 124 Ky. 387, 99 S. W. 255, that it is not necessary, in order for the lessee to recover general or special damages from a lessor who has refused to place and keep him in possession according to the terms of the lease, to allege or prove any effort upon his part to rent other land, or to engage in other occupations, since "recovery is not sought on account of loss of time or services, but as damages for the breach of a distinct contract for the use and possession of specific property."

A distinction as to mitigation of damages between the ordinary contract of hiring requiring personal services, as in contracts for the hire of clerks, laborers, and domestic serv-

ants, and a contract for the performance of some specific undertaking, is pointed out in *Wolf v. Studebaker* (1870) 65 Pa. 459, in which it was held in an action for breach of a contract of lease of the farm of the defendant, to the plaintiff, that the court erroneously admitted evidence, offered for the defendant in mitigation of damages, that, after the breach of the contract, the plaintiff had engaged in hauling for a bridge company, and that this employment was more profitable to him than the lease of the farm.

g. Contracts for drilling wells.

The rule requiring one to seek other employment in order to minimize damages for breach of a contract was held in *Watson v. Gray's Harbor Brick Co.* (1891) 3 Wash. 283, 28 Pac. 527, not applicable to a contract by which the plaintiff agreed to sink a well for the defendant at a stipulated price per foot, but was prevented by the defendant from entering upon the work under the contract.

But in *Robertson v. Vandeventer* (1915) 51 Okla. 561, 152 Pac. 107, the contract for drilling of a well expressly provided for the plaintiff's personal services as well as for the use of his drilling outfit; and it was held that an instruction was proper that if the jury found for the plaintiff, the damages would be the difference between the contract price and the amount he was reasonably able to earn by other employment of a similar character during the contract period, after deducting the expenses of such other employment.

And the doctrine of mitigation of damages by obtaining other employment was regarded by the court in *Osage Oil & Ref. Co. v. Lee Farm Oil Co.* (1921) — Tex. Civ. App. —, 230 S. W. 518, as applicable to a contract by which the plaintiffs agreed to drill an oil well for the defendants, although the controlling question related, in this instance, to the burden of proof as to whether the plaintiffs could have obtained other employment. The court said: "It is true that, if the plaintiffs could have secured other employment for their ma-

chinery and diminished thereby their damages, they would not be entitled to recover such damages as they could thus have avoided. The courts apply a similar rule in such case, as in the case of contracts for personal service. . . . But the burden is upon the defendant as to such matter. . . . While the evidence shows that the plaintiffs could have secured other employment for their drilling outfit, it is not shown to what extent the damages would have been diminished thereby, and the jury would have had no basis for a reduction of the damages on this account."

h. Contracts with physicians, attorneys, and other professional men.

If the contract does not require the whole of the time of the party who is to perform services, the rule as to mitigation of damages by earnings in other employment will apparently not apply, unless it is shown that such earnings were inconsistent with performance and could not have been received had there been no breach of the contract. To that extent it would seem that the subsequent earnings may reduce the damages. In other words, the question is one as to whether the services were inconsistent and exclusive. It may be observed that, in this connection, only such cases are included as present this particular question, which is distinctive to those situations where the contract, although requiring personal services, does not require all of the time of the contracting party.

The rule that a discharged employee must seek other employment, and that the sum which he has made, or could have made, by engaging in such other employment, may be shown in mitigation of damages for breach of the employment contract, was held inapplicable in *Galveston County v. Ducie* (1898) 91 Tex. 665, 45 S. W. 798, in an action for breach of a contract to employ the plaintiff for a certain time, at a specified monthly salary, as county physician, to treat prisoners, paupers, and insane persons as medical attention was required by them, where the services in this capacity would not

require all of his time, but were of a nature consistent with the pursuit of his profession, and it was intended that they should be discharged concurrently with his regular practice. The court said, however, that if the evidence showed that, after he was discharged, the physician was able to earn in the practice of his profession a greater sum than he could have earned if he had continued in the discharge of the duties imposed by the contract, then that sum should be deducted from the agreed price in determining the amount for which the county was liable.

And the doctrine that if one is hired as a physician by an insurance company, as a medical examiner, the damages for breach of the contract cannot be diminished by his earnings in other employments, as "there can be no mitigation where the plaintiff is a professional man and is to be paid a fixed price for certain work," is supported by *Sturgeon v. Pioneer L. Ins. Co.* (1916) — Mo. App. —, 186 S. W. 1192.

But it was held also in *Sturgeon v. Pioneer L. Ins. Co.* (Mo.) supra, that if the plaintiff, who had not been licensed to practise medicine in that state, was employed not as a physician, but as "medical director," of the insurance company,—in other words, if he was employed merely to perform the functions of an executive officer of the company,—the court had erroneously instructed the jury that his recovery could not be diminished by his earnings in other employments.

The rule that the measure of damages, in case of wrongful discharge of an employee, is the amount that he would have earned under the contract after deduction therefrom of any sum which he actually earned, or might by due diligence have earned, during the period of the contract, was held inapplicable in *Nuckolls v. College of Physicians & Surgeons* (1907) 7 Cal. App. 233, 94 Pac. 81, where the plaintiff, a dentist, was employed by a medical college under a contract requiring him to give his time only in the afternoon, and the amount which he received from the practice of his profession

after his discharge, and during the term of the contract, although in fact earned in the afternoon, could have been earned in the forenoon, had the contract continued, and not have interfered with the services required by the contract.

A lawyer's time does not belong wholly to his client within the rule, and no reduction of damages can justly be made in a case of wrongful discharge, on the assumption that it was wholly occupied by other professional business. *Brodie v. Watkins* (1878) 33 Ark. 545, 34 Am. Rep. 49.

The fact that, so far as appears, the plaintiff, who was employed by the defendant bank to examine land titles for prospective borrowers, might have performed this service, had he not been wrongfully discharged, in addition to any other work which he did as attorney after his dismissal, seems to be the basis of the decision in *Dixon v. Volunteer Co-op. Bank* (1913) 213 Mass. 345, 100 N. E. 655, which is cited in the reported case (*MT. PLEASANT STABLE Co. v. STEINBERG*, ante, 749.) The court held that the plaintiff was not the defendant's servant and therefore bound, on being wrongfully discharged, to make use of his time so as to minimize the damages suffered. But since the examination of land titles required, to some extent at least, the personal services of the attorney, the court said that if it was shown that an attorney employed for this purpose could not do any other work in addition thereto, he could not, before he was wrongfully discharged, take on other work; and that in such a case, if he undertook additional work after being wrongfully discharged, it would seem that he would have to account for the profits. But the evidence in this case did not show that his work for the bank would so necessarily occupy his time that he could not perform additional work; and there was nothing in the case, the court said, calling for instructions on the possible limitation, above indicated, of the general rule that an attorney wrongfully discharged need not account for additional work performed by him after the breach.

In *Horn v. Western Land Asso.* (1875) 22 Minn. 233, where an attorney sued for breach of a contract whereby he was employed for a year at a stated salary as attorney for the defendant land association, it was held that if, as claimed by the defendant, the plaintiff, within the term of the contract, obtained other employment and compensation inconsistent with his engagement under the contract, this fact was affirmative matter in recoupment of his claim, which it was incumbent on the defendant to set up and establish.

4. Contracts with insurance agents.

Ordinarily, the rule requiring one to use reasonable efforts to obtain other employment in order to minimize damages for breach of contract seems applicable to contracts for employment of insurance agents, so that, in an action against the company by the agent for breach of the contract, the defendant may show in mitigation of damages the amount which the plaintiff earned, or by reasonable diligence might have earned, in other employment of a similar nature during the remainder of the contract time. Thus, in *Lewis v. Atlas Mut. L. Ins. Co.* (1876) 61 Mo. 534, it was held that in such an action the court erroneously refused to allow the defendant to show that the plaintiff had made a contract with another insurance company and had entered into its service shortly after he ceased to be a general agent for the defendant.

And the rule was regarded as applicable in *Barker v. Knickerbocker L. Ins. Co.* (1869) 24 Wis. 630, in an action on a contract by which the defendant insurance company agreed to employ the plaintiff as general agent for five years at a stated annual salary. But the court held that an instruction authorizing a reduction of damages on account of what the plaintiff might have earned elsewhere after his wrongful discharge was properly refused, because the defendant had not discharged the burden resting upon it to show affirmatively that the plaintiff might have obtained other employment.

But in an action against an insurance company for breach of a contract to employ the plaintiff for a specified time as an insurance agent, where it appeared that the plaintiff had performed the contract for several years and expended money in building up an insurance agency which promised increased returns during the remainder of the contract time, it was held in *Richey v. Union Cent. L. Ins. Co.* (1909) 140 Wis. 486, 122 N. W. 1030, that the damages should not be reduced by showing the earnings of the plaintiff at other employment after breach of the contract, although it appeared that the contract required the plaintiff to devote all of his time and efforts to that business. It was said: "The point is made that the amount of damages so found should have been reduced by what the respondent earned outside of the contract employment, after breach and before trial. The court properly refused this deduction. This is an action to recover the damages caused by the breach of the contract to respondent's agency business, built up under this agreement. When appellant terminated the agreement and destroyed the business, its liability became fixed. It was responsible for the value of the agency business as it then existed, and which went out of existence by its illegal act."

3. Contracts with salesmen.

The purpose of the present annotation being to consider the extent and application of the rule as to mitigation of damages through earnings in other employment after the breach of contract, and the existence of the rule in ordinary contracts of employment requiring personal services being assumed, the annotation does not include that class of cases involving employment of salesmen, where the contract evidently contemplated that the salesman should devote substantially his whole working time to his employer. Under such circumstances, it seems clear that the ordinary rule in cases involving personal services of an employee would apply, and that earnings after the breach of contract in

work of the same general nature could be shown in mitigation of damages. *Bertholf v. Fisk* (1918) 182 Iowa, 1308, 166 N. W. 713, is a case of this kind, involving a contract of employment of an automobile salesman on a salary and commission, in which the ordinary rule, permitting subsequent earnings to be shown in mitigation of damages, was held applicable. The questions presented in such cases, assuming that the rule itself is applicable to that kind of a contract, are beyond the scope of the annotation.

Assuming that in ordinary cases, where the contract is for the whole time and services of an employee, the employer, in an action for breach of the contract, may reduce the damages by the amount which the employee actually earned or might by reasonable diligence have earned after his dismissal, the court in *Jaffray v. King* (1871) 34 Md. 217, held that this rule did not apply where the contract between merchants and a salesman, as construed by the court, did not require the latter to give his whole time to the business, but merely required him to serve efficiently and in good faith as salesman in a certain city, for a certain monthly salary, and he could, without violating his agreement, occupy the remainder of his time in any other pursuit advantageous to himself, provided it was not inconsistent with his contract, nor detrimental to his employer's interests, and did not impair the value of his services to them. Under these circumstances the court held that, in an action by the salesman for wrongful discharge, if the defendants sought to reduce the damages by showing the earnings of the salesman after his dismissal, they must show not simply the amount which the plaintiff actually earned, or might have earned, after his dismissal, but must also show that he could not have earned the same without a violation of his duty under the contract if he had not been discharged.

And it was held that no deduction should be made from the damages to which a discharged employee was entitled, for what he thereafter

earned during the time he would have been engaged in fulfilling his contract, where he was engaged in selling goods for the defendant in connection with other lines of goods not competing with them, and no additional time was consumed in selling the defendant's goods. *Spencer Medicine Co. v. Hall* (1906) 78 Ark. 336, 93 S. W. 985.

The fact that, after his wrongful discharge, a salesman who was employed on commission and was not bound to devote his time exclusively to the work, earned more than before the breach of the contract of employment, was held in *Barnett v. Caldwell Furniture Co.* (1916) 199 Ill. App. 510, affirmed in (1917) 277 Ill. 286, 115 N. E. 389, not to affect the right to recover for breach of the contract, the damages not being subject to reduction by the amount of such earnings. It does not appear whether the increased earnings arose because of the fact that the plaintiff had been relieved of his contract, in which case it seems that the damages might be accordingly reduced. This would not be true, however, if the increased amount might have been earned without any impairment of the contract earnings. Only the abstract of the decision of the lower court is reported, and the question is not discussed on appeal.

Where the plaintiff was employed as a salesman for a certain yearly sum, and sued for damages for breach of contract, the defense being that at the time of his discharge the plaintiff was in partnership in a coal and wood business, and continued in that business for the remainder of the term of employment, and therefore was not damaged in any amount, it was held in *Kyle v. Peu* (1895) 96 Ga. 166, 23 S. E. 114, that, under the rule that the employee is *prima facie* entitled to recover the entire sum and the burden is on the defendant to show anything which will reduce the amount of recovery, the burden was on the defendant to show that the amount, if any, received by the plaintiff from the partnership business, was derived from personal services, and the jury

was not required to make any deduction on account of such earnings, where, so far as appeared, the plaintiff derived his profit from the capital invested by him in the partnership business and not from personal services, and so might have received the same amount had he remained in the defendant's employ.

Of a somewhat different class from the cases above cited is *Klingman v. Racine-Sattley Co.* (1910) 149 Iowa, 634, 128 N. W. 1109, where the plaintiffs made a contract with a corporation engaged in the selling of agricultural implements, by which the plaintiffs obtained the right for five years to make use of the defendant's warerooms to sell at retail its machinery within certain territory; and it was held in an action for prospective profits, on the defendant's breach of the contract, that evidence was immaterial as to what the plaintiffs were able to earn above expenses after they were put out of business by the breach. The court said: "We think that in a case like this, where recovery is not asked for loss of personal earnings, but for loss of profits in business only, the question as to what plaintiffs were able to make in a similar business in a different locality is wholly immaterial. If plaintiffs had established loss of prospective profits, it would have been wholly immaterial whether, in another business or by other undertakings, they could have made profits offsetting those lost, for, as already stated, the carrying out of their contract with defendant did not necessarily involve personal services."

k. Miscellaneous.

The rule requiring one to seek other employment, on breach of a contract, in order to mitigate the damages, was regarded in *Cincinnati, St. L. & C. R. Co. v. Lutes* (1887) 112 Ind. 276, 11 N. E. 784, 14 N. E. 706, as applicable to a contract by which the plaintiff agreed to drive certain piles at bridges for the defendant railway company. But it was held that, since the defendant did not show that the plaintiff could have procured other work

from which profits would have accrued, an instruction which made the profits to be derived from the contract the measure of damages was not erroneous.

The doctrine that one is not entitled to recover for a breach of contract for personal services when he obtains other employment equally as remunerative during the period of the contract was held inapplicable in *Jefferson & N. W. R. Co. v. Dresson* (1906) 43 Tex. Civ. App. 282, 96 S. W. 68, an action against a railway company for damages for breach of a contract by which the plaintiff was to grade and clear the right of way for a railroad track for the defendant. The court said this was not a contract for personal services, but for the performance of certain stipulated work which might have been performed by the employees of the plaintiff, and he was entitled to the profits which he would have realized from performance.

And it was held that the doctrine requiring one to obtain other employment on breach of contract, in order to mitigate damages, did not apply where the plaintiff agreed to plow certain fireguards along the track of the defendant railway company, the contract requiring the plaintiff to hold himself and his teams in readiness to do the work on the demand of the defendant at any time before a specified date, and the evidence showed that the railway company breached the contract about that date by discharging the plaintiff, having in the meantime, in violation of its contract, employed others to do the work. *Pecos & N. T. R. Co. v. Stoker* (1911) — Tex. Civ. App. —, 142 S. W. 971. The court intimates that in any event the contract was not such as called for the application of this rule, although the decision seems to turn, at least in part, on the fact that the plaintiff was first notified that his services would not be required on or about the date of the expiration of the limit fixed for the doing of the work.

Where the plaintiff was employed as a tailor under a contract with the

defendant, it was held in *Kantrowitz v. Silverman* (1906) 50 Misc. 608, 99 N. Y. Supp. 528, that whether his services under another contract were inconsistent with performance of the contract in question was an issue that should be left for the decision of the trial court, and that a new trial should be granted on the ground of newly discovered evidence in this regard.

Where the contract of employment did not require full time, but only performance of such services as might be required, and, after breach by the employer, the employee accepted other employment and earned a certain sum before the expiration of the contract term, which it was claimed should be taken into consideration in an action for the salary due under the contract, it was held to be a question of fact for the jury whether the nature of this outside work was such as to be inconsistent with the employee's obligation under the contract if it had continued; and that therefore it was erroneous wholly to disregard this claim of credit in directing a verdict for the full amount of unpaid salary. *Breakwater Co. v. Donovan* (1914) 134 C. C. A. 148, 218 Fed. 340. The nature of the employment does not appear.

An instruction which required the plaintiff to account for what he earned during the time he would have been engaged in work for the defendant under the terms of the contract was held erroneous in *Stevens v. Crane* (1889) 37 Mo. App. 487, as permitting the jury to base its verdict merely on conjecture, where the plaintiff agreed to perform such duties as might be required of him pertaining to the care and management of an estate, there being no limitation as to time, and the defendant, if he deemed it necessary for that purpose, had the right to require all of the plaintiff's time.

Although somewhat beyond the scope of the annotation, attention is called to the holding in *Allgeyer v. Rutherford* (1898) — Tex. Civ. App. —, 45 S. W. 628, that money earned at night by a discharged employee, after his discharge, should not be taken into consideration in mitigation of dama-

ges, where it does not appear but that he could also have earned this sum had he been regularly employed in the occupation from which he was discharged.

Where, in an action for breach of contract by which the plaintiff agreed to do all the pressing of garments manufactured by the defendants, there was evidence which made it, at least, a question of fact for the jury whether the agreement did not require the plaintiff's personal services to the full extent thereof, it was held that the court erroneously excluded evidence offered by the defendant in mitigation of damages as to the personal earnings of the plaintiff in the interval between the breach of the contract and its expiration. *Levine v. Rosenschein* (1909) 134 App. Div. 157, 118 N. Y. Supp. 890. In this case the work of pressing the garments was carried on in the defendant's factory, the tools being furnished by

the defendant, and there were other circumstances tending to show that the personal services of the plaintiff were contemplated.

And the fact that the contract might include not only the personal services of the plaintiff, but also that of others under his employ, it was held, would not of itself prevent application of the rule requiring reduction of damages by acceptance of other employment. *Levine v. Rosenschein* (N. Y.) *supra*.

Advertising contracts such as were before the court in *Collier v. Kindy* (1920) 146 Minn. 279, 178 N. W. 584, *Savage v. Drs. K. & K's U. S. Medical & Surgical Asso.* (1886) 59 Mich. 400, 26 N. W. 652, and *Railway Adv. Co. v. Standard Rock Candy Co.* (1908) 83 App. Div. 191, 83 N. Y. Supp. 338, affirmed without opinion in (1904) 178 N. Y. 570, 70 N. E. 1108, are beyond the scope of the annotation.

R. E. H.

ETHEL PAINTER HOOD, Appt.,

v.

JOHN MIFFLIN HOOD.

Maryland Court of Appeals — April 8, 1921.

(— Md. —, 113 Atl. 895.)

Divorce — alimony pendente lite — wife with ample funds.

1. A wife who has ample means of her own for her support and maintenance, and to enable her to prosecute or defend a divorce suit brought by or against her, is not allowed alimony pendente lite.

[See note on this question beginning on page 781.]

— alimony for support of children.

2. Alimony pendente lite will not be allowed a wife with ample means for support of minor children which she took with her when instituting a suit for divorce against her husband.

— effect of statute.

3. A statute giving equity jurisdic-

tion of cases relating to custody of children, with power to direct who shall be charged with their support, has no application to a prayer for alimony pendente lite for support of the children in a divorce suit by a wife who has taken the children with her.

APPEAL by plaintiff from an order of the Circuit Court of Baltimore City (Stanton, J.) denying alimony pendente lite in a suit by her for divorce and for general relief. *Affirmed*.

The facts are stated in the opinion of the court.

Messrs. Isaac Lobe Straus, and William Pinkney Whyte, for appellant:

The order nisi of \$150 per week, allowed plaintiff for the maintenance and support of the children of the marriage, was in proportion to the incomes of the parties when compared with the total outlay necessary for their support and maintenance, and was most equitable and fair.

Thompson v. Dorsey, 4 Md. Ch. 149; *Addison v. Bowie*, 2 Bland, Ch. 606; *Butler v. Freeman*, 3 Atk. 60, 26 Eng. Reprint, 836; *Gill v. Read*, 5 R. I. 343, 73 Am. Dec. 73; *Rumney v. Keyes*, 7 N. H. 571; *Pretzinger v. Pretzinger*, 45 Ohio St. 452, 4 Am. St. Rep. 542, 15 N. E. 471; *Alvey v. Hartwig*, 106 Md. 254, 11 L.R.A. (N.S.) 678, 67 Atl. 132, 14 Ann. Cas. 250; *Gilley v. Gilley*, 79 Me. 292, 1 Am. St. Rep. 307, 6 Atl. 623; *LaRue v. Kempf*, 186 Mo. App. 57, 171 S. W. 588; *Rutledge v. Rutledge*, 177 Mo. App. 470, 119 S. W. 489; *Penningroth v. Penningroth*, 71 Mo. App. 438; *McCloskey v. McCloskey*, 93 Mo. App. 401, 67 S. W. 669; *Rankin v. Rankin*, 83 Mo. App. 335; *Westphal v. Westphal*, 132 Md. 380, 103 Atl. 846.

Messrs. Hershey, Machen, Donaldson, & Williams for appellee.

Boyd, Ch. J., delivered the opinion of the court:

The appellant filed a bill on September 28, 1920, against the appellee, for a divorce a mensa et thoro, alleging cruelty of treatment and abandonment. It alleges that they have three children living, one daughter twelve years, and another seven years, and a son four years of age. It prays for a divorce a mensa, that the plaintiff be awarded the custody of their children, for permanent alimony, and for alimony pendente lite for the support and maintenance of herself and the infant children, for counsel fees and suit money. There is also a prayer for general relief.

On the 29th of September the court passed an order requiring the defendant to pay to the plaintiff \$150 per week during the continuance of the suit, as alimony pendente lite for herself and the minor children named in the bill, unless cause to the contrary be shown. An answer was filed to that order, in which the defendant protested that

the charges against him were wholly without foundation in fact, and alleging that the plaintiff owns and possesses in her own right an estate of a present value of approximately \$2,000,000, yielding an assured annual income of more than \$85,000, with possibilities of considerable increase in the future, and that the property owned by him is insignificant in amount in comparison with the separate estate of the plaintiff, and that his income is very much less than hers.

Without deeming it necessary to state at length the testimony in the case, which was taken in open court, on the matter of alimony pendente lite, it is sufficient to say that it shows that the plaintiff and defendant were living at Roland park, in Baltimore city, in a house owned jointly by them, and the plaintiff claimed to have owned the greater part of the furniture. On the 10th of September, 1920, the plaintiff left the home and took with her the three children, claiming to have been compelled to leave on account of the treatment of the defendant, which he denied. She went to the Belvidere Hotel, in Baltimore, was there when she filed this bill, and was living at great expense. She alleged in her bill that she was about to go to Atlantic City with her children, for her own and their health, and that the defendant stated that he hoped she would never again darken the door of their home, and the allegation is that defendant had abandoned her not only by telling her that, but his treatment compelled her to leave. While he was away on business his wife took all of the furniture out of the house at Roland park, excepting a few articles, placed as much as she could in a house she rented at Guilford, and stored the rest. He said he had made a contract to refurnish the house, and his mother was living with him; that he would be glad to have the children, and would furnish what was necessary for their maintenance, education, and support, if they returned to his home.

The evidence showed that the plaintiff had an annual income of \$88,000, and the defendant had a salary of \$30,000 and \$6,000 of other income. The defendant denied in his answer the charges in the bill, but the merits of the case have not yet been inquired into. At the hearing on the matter of alimony pendente lite on December 13, the plaintiff and defendant testified in open court, and were the only witnesses examined, and on the 22d of that month an order was passed, reciting that the income of the plaintiff is \$88,000 a year, and ordering "that no alimony pendente lite be allowed to the plaintiff at this time, but that the petition of the plaintiff for alimony pendente lite be retained to enable the court to consider any change in the circumstances of the plaintiff which may develop before the case can be heard and determined on its merits." From that order this appeal was taken.

The question to be determined is whether, under the circumstances, the lower court was right in refusing to allow alimony pendente lite, there being nothing said in the order appealed from about counsel fees and suit money. It will, of course, be conceded that ordinarily the primary duty of supporting infant children is upon the father. That is "correlative to his right to the custody, control, and earnings of his minor child." 20 R. C. L. 622. That he is under legal obligation to support his wife is as true now as it was at common law, except as modified by statutes or under special circumstances, notwithstanding the many and broad rights conferred upon her by statute. The Act of 1898, chap. 457, together with other acts in force in this state, practically places married women in the same position as if they were unmarried, so far as their property and contractual rights are concerned; but § 21 of article 45, being the article on "Husband and Wife," provides that "nothing in this article shall be construed to relieve the husband from liability for the debts, contracts, or engagements which the

wife may incur or enter into upon the credit of her husband, or as his agent, or for necessities for herself or for his or their children, but as to all such cases his liability shall be or continue as at common law," although in § 5 of that article it is provided "nor shall any husband be liable upon any contract made by his wife in her own name and upon her own responsibility." These two sections are considered and explained in *Noel v. O'Neill*, 128 Md. 202, 97 Atl. 513. There is, therefore, not much significance, in passing on the question now before us, in the fact that primarily it is the duty of the father to support the infant children of his wife and himself; for ordinarily an equal duty rests upon him to support his wife, and if he without just cause deserts or wilfully neglects to provide for the support and maintenance of his wife or minor child he is deemed guilty of a misdemeanor, and upon conviction may be punished by fine, or imprisonment in the Maryland house of correction for not more than a year, or both. Sec. 75, art. 27.

That statute, as originally passed, was referred to in *Alvey v. Hartwig*, 106 Md. 254, 11 L.R.A. (N.S.) 678, 67 Atl. 132, 14 Ann. Cas. 250, where the father was held to be primarily liable for the support of his infant children, although a divorce had been granted to his wife and the custody of the children awarded to her, in a suit against him as a nonresident, in which he was not summoned.

It is difficult to understand how the defendant could be held liable for alimony pendente lite for the benefit of his infant children if he could not be for the benefit of his wife. But let us see just when alimony pendente lite is allowed, and when it is not, in so far as the facts of this case call upon us to do so. The definition of alimony is not always given in precisely the same language, but there is no material difference between the authorities, unless possibly, in some instances, as result of statutes. In *Bouvier's*

Law Dictionary it is: "The allowance which a husband by order of court pays to his wife, living separate from him, for her maintenance." In the leading case of Wallingsford v. Wallingsford, 6 Harr. & J. 485, it is: "Alimony is a maintenance afforded to the wife where the husband refuses to give it, or where from his improper conduct compels her to separate from him. It is . . . a provision for her support, to continue during their joint lives, or so long as they live separate." In 1 R. C. L. 864: "Alimony, which signifies literally nourishment or sustenance, is the allowance which a husband may be compelled to pay to his wife for her maintenance when she is living apart from him, or has been divorced. Like the alimentum of the civil law, from which the word was evidently derived, it has for its sole object the provision of food, clothing, habitation, and other necessities for the support of the wife." The general rule is that the wife is a privileged suitor in divorce cases, and if she is "without an income competent for her support and the maintenance of the suit," living separated from her husband, the court will allow her alimony pendente lite and money to carry on her suit without inquiring into the merits. Daiger v. Daiger, 2 Md. Ch. 335; Coles v. Coles, 2 Md. Ch. 341, 346; Tayman v. Tayman, 2 Md. Ch. 393, 397; McCurley v. McCurley, 60 Md. 185, 189, 45 Am. Rep. 717; Buckner v. Buckner, 118 Md. 263, 266, 84 Atl. 471; Mulhall v. Mulhall, 120 Md. 22, 26, 87 Atl. 490; Crane v. Crane, 128 Md. 214, 220, 97 Atl. 535; and many other cases could be cited.

But it is equally well established that when the wife has ample means of her own for her support and maintenance, and to enable her to prosecute or defend her suit, she is not allowed alimony pendente lite. Sometimes there may be reasons for allowing her

counsel fees and money for other expenses, when the court, in the exercise of the discretion vested in it, will not grant alimony pendente lite. In the order appealed from there was no question about those expenses, but only as to temporary alimony. In every one of the cases just cited the principle announced as to the right of the wife to alimony pendente lite is conditioned upon her not having sufficient income of her own. Although there may be no occasion for referring to other decisions, there is practically no difference between the authorities on this subject, as controlled by statute. In 2 Am. & Eng. Enc. Law, 105, it is thus stated: "It must appear that the wife is without means to maintain herself and to enable her to properly conduct her suit or defense; when it is shown that she has sufficient means, alimony pendente lite will not be allowed." "As the purpose of temporary alimony is to provide maintenance for the wife during the pendency of the suit, the reason for making her a temporary allowance for such purpose does not exist when the income of her separate estate is sufficient; accordingly, a temporary award will not be made unless it is shown that she is without sufficient means." 1 R. C. L. 894. See also 2 Bishop, Marr. & Div. § 965; 2 Nelson, Marr. Div. & Sep. § 855.

It being clear that the appellant is not entitled to alimony pendente lite for her own support and maintenance, can it be allowed to her for the support of the children? It seems to us that it would be illogical to hold that the wife, in a suit for divorce, is entitled to be allowed alimony pendente lite because the husband is primarily bound to support his minor children, although she cannot be allowed it for herself, because she has ample means for her support and maintenance as well as for expenses. It may be that the husband can be required to support his minor children; but, if so, it cannot be an "alimony" under any

Divorce—
alimony
pendente lite—
wife with ample
funds.

definition of that term given above,
 —alimony for support of children. or elsewhere, so far as we are aware. A

divorce suit is not the kind of proceeding, under our practice, in which to compel the father to support his minor children while the suit is pending. In this state a wife can sue for alimony, although she does not ask for a divorce (*McCaddin v. McCaddin*, 116 Md. 567, 82 Atl. 554; *Taylor v. Taylor*, 108 Md. 129, 69 Atl. 632); but, when the allegations of the bill of complaint are insufficient to support either form of divorce, they are insufficient to support a bill for alimony alone (*Outlaw v. Outlaw*, 118 Md. 498, 84 Atl. 383; *Walker v. Walker*, 125 Md. 649, 660, 94 Atl. 346, Ann. Cas. 1916B, 934; *Polley v. Polley*, 128 Md. 60, 97 Atl. 526). Under such a bill, could the husband be required to furnish support for minor children? It would be an anomaly if he could be. If, upon the hearing of a suit for divorce a mensa et thoro for cruelty of treatment or abandonment brought by the wife, it be determined that she is not entitled to a divorce because she failed to prove either ground, can the court still require "alimony" to be paid the wife for the support of the minor children? The practice is to dismiss the bill under those circumstances. In *Murray v. Murray*, 134 Md. 653, 107 Atl. 550, the court decided that, under § 38 of article 16 of the Code, courts are given no power to make provision as to the guardianship or custody of children until a divorce is decreed. That section of the Code at that time provided that "in all cases where a divorce is decreed, the court passing the same shall have full power to award to the wife such property or estate as she had when married . . . and shall also have power to order and direct who shall have the guardianship and custody of the children, and be charged with their support and maintenance, and may at any time thereafter annul, vary, or modify such order in relation to the children."

In passing on the question we

said: "The question of the custody of the children is an element of the case entirely incidental upon the main relief sought,—the divorce of the parties,—and unless the latter be granted, the court is without authority to make any disposition of the children."

That case was decided in June, 1919, and at the next session of the legislature two acts were passed to which we have been referred. They are chapters 573 and 574 of the Acts of 1920. The former seems to be the one mainly relied on by the appellant, and is the only one cited in her brief. We confess we do not see how that can in any way aid the appellant in this proceeding. It provides that "the several equity courts of this state shall have original jurisdiction in all cases relating to the custody or guardianship of children, and may on bill or petition filed by the father or mother or relative or next of kin or next friend of any child or children to direct who shall have the custody or guardianship of such child or children, and who shall be charged with his, her or their support and maintenance, and may from time to time thereafter annul, vary or modify its decree or order in relating to such child or children," etc.

It is not necessary for us to now determine whether, when there is pending a bill for divorce which contains a prayer for the custody of the infant children, as this bill does, the father or mother could properly seek relief under that section, as no bill or petition has been filed under it. The father was under no more obligation to file one than the mother was, if as much, if it could properly be done. She took the children away from their home, without the consent of the father, and, although perfectly able to support them, she wants the defendant to be required to do so, while this case is pending, although she has deprived him of their custody. That statute shows very clearly that, when the custody and support of children are to be passed on by the

courts, they are no longer to be necessarily governed by common-law rules as to such custody or support.

Chapter 574 of the Acts of 1920 amended § 38 of article 16, quoted above, in that now it provides that the court "shall also have power, in all cases in which the care and custody of the children of parties forms part of the relief prayed, whether a divorce is decreed or denied;" then follows the language of the original section. The custody of the children does "form part of the relief prayed" in this case; but that question cannot be satisfactorily determined in the divorce case until it is heard on its merits. It would seem to be clear that it was never contemplated under § 38, as it stood before or since the amendment, that the extremely important questions as to the custody and support of the children should be passed on by the court until it was ascertained whether the grounds relied on for divorce were proven. It would practically require two trials of the case, involving the merits, if those questions could be determined in advance. That would certainly be undesirable, if permissible. It may be that conditions may exist which would require some action of the court as to the custody and support of infant children before the divorce case is heard on its merits, but, without saying more as to that subject, there is nothing in this record which would have justified the court in doing so. It seems clear to us that neither of those statutes affects

—effect of
statute.

the question now before us, which is whether the wife is entitled to alimony pendente lite. That is what she asked for in her bill, and what the appeal from the order of the court presents for our consideration. Chapter 573 has nothing to do with alimony, and chapter 574 was passed to authorize the court to determine the question of the custody and support of the children in divorce proceedings, whether a decree of divorce be granted or denied.

In fixing the amount of alimony pendente lite for a wife who is entitled to it, the court may undoubtedly take into consideration the fact that she is supporting one or more minor children. We have been referred to several reported cases in this state, and there may be others, where alimony pendente lite was allowed a wife for the support of herself and child, and it is often done in the lower courts. One of those referred to is *Coles v. Coles*, 2 Md. Ch. 341, 346; but there the allowance of alimony depended upon whether the wife had sufficient means for the support of herself and infant child, and the chancellor said: "I am not satisfied that this petitioner has the means of supporting, with comfort, herself and her child, even with such assistance as she may receive from her mother, and therefore, not looking at all to the merits, I shall pass an order making some allowance for that purpose."

It was not intimated that, if the wife had sufficient means to support herself, alimony should be allowed for her child. The other case referred to was *Westphal v. Westphal*, 132 Md. 330, 103 Atl. 846, where the court allowed the wife alimony pendente lite for the support of herself and four children living with her. The court said: "The wife in this case, it appears, owns no property, and her financial condition is one of absolute dependency upon her husband for support and for the maintenance of her four minor children."

Under such circumstances there could be no possible reason for not allowing alimony pendente lite, if the husband had sufficient means, but it is allowed to the wife for herself and minor children living with her; and there is no case in this state, as far as we are aware, or any cited from other jurisdictions which we feel called upon to follow, where alimony pendente lite was allowed because the wife had a minor child or children of herself and husband living with her, if she had ample means of her own.

It is said in *Stewart on Marriage & Divorce*, § 406, that, "in fixing the amount of alimony, the wife's expenses for a child intrusted to her are often considered, but alimony is an allowance to the wife; it is not affected by the death of the child, and does not affect the child's right to support."

In the case of death of one of the parties, the remarriage of the wife, or their mutual consent to live together, alimony ceases. *Wallingford v. Wallingford*, 6 Harr. & J. 485; *McCaddin v. McCaddin*, 116 Md. 567, 82 Atl. 554; *Emerson v. Emerson*, 120 Md. 584, 87 Atl. 1033. Those cases show that the right of the wife to have taken into consideration the fact that she has the custody of minor children, when she is entitled to alimony and the amount to be allowed is under consideration, is a very different matter from requiring the father to support his minor children, when he is under legal obligation to do so.

The only cases which the appellant has cited which seem to take a different view from what we have indicated are *Penningroth v. Penningroth*, 71 Mo. App. 438, and *Rutledge v. Rutledge*, 177 Mo. App. 469, 119 S. W. 489. Those cases were decided by an intermediate court, and not by the highest court of that state, although presided over by some very able judges, and the court stands high for its decisions. In the first case, after holding that an allowance for counsel fees or for the maintenance of the wife could not be sustained, as it was admitted she had an estate of a probable value of \$75,000, the court said: "But she is entitled to something for the support of the child. This duty primarily rested on the defendant, and, if he permitted the child to remain with the plaintiff, he must furnish the necessary means for its support"—and directed the lower court to make an allowance for that. No authority is cited, and we do not know whether there is a statute in that state which authorized that to be done, or what the practice in that state is; but, if it was done regard-

less of such a statute, we cannot approve of the decision, as it is clearly contrary to the practice in this state. In the other case cited, the court cited no authority except *Penningroth v. Penningroth* to sustain its action. Of course, we do not question what the court said as to the primary duty of the father to maintain his infant children; but we cannot agree that the minors could receive such support in the divorce cases, on an application for alimony pendente lite, when the wife is not entitled to it, unless there be some statute authorizing it to be done in such cases. Just what the court meant by speaking of the father permitting the child to remain with his wife, we do not know, but it could hardly be said that the husband in this case "permits" their children to remain with his wife. She took them away from their home without asking his permission, and filed this bill, which included a prayer for alimony pendente lite, very shortly afterwards. The only other case we have found that apparently adopted that view is *Foss v. Foss*, 100 Ill. 576; but, upon examination of that, it will be seen that the court relied on its interpretation of a statute in force in that state.

As this opinion is already longer than desirable, we will not prolong it by discussing other questions, or citing more authorities, but we will affirm the decree. We, of course, do not pass on the question as to the right of the wife to have permanent alimony allowed her, if the divorce is granted, or as to the liability of the appellee to the appellant for the support of the children in some other proceeding. Our statute (§ 38 of article 16) would seem to be broad enough to cover all questions concerning the care and custody of the children, as well as their support and maintenance; but we deem it to be clear that it does not contemplate having those questions determined until the divorce proceeding is heard on its merits.

Decree affirmed, the appellant to pay the costs.

ANNOTATION.

Wife's possession of independent means as affecting her right to temporary alimony or allowance for support of children.**I. Scope of note, 781.****II. Wife's means inadequate for proper support:**

- a. Support of wife and children, 781.
- b. Support of wife alone, 781.

1. Scope of note.

This note discusses the effect of the possession of independent means by the wife on her right to temporary alimony, or an allowance for the support of the children, pending an action for divorce or separation. While excluding the allowance of counsel fees generally, it includes the cases where, on a general application for a temporary alimony, counsel fees have been awarded and the courts have failed to discuss the two allowances separately. The right of the wife to a permanent allowance is not included.

II. Wife's means inadequate for proper support.**a. Support of wife and children.**

Though a wife has some independent means, if they are inadequate for the support of herself and the children, an allowance of temporary alimony may be made.

Thus, in *Davis v. Davis* (1913) 174 Mo. App. 538, 160 S. W. 829, it was held that the sum of \$35 per month for the support of the wife and child, pending a divorce suit, was not excessive, where the wife had only very small means, and the husband's property was worth about \$5,000.

So, in *Meyer v. Meyer* (1898) 5 Cal. Unrep. 944, 52 Pac. 486, wherein it was shown that the wife had an income of \$135 per month, and the husband's net income was \$275 per month, it was held that an order requiring the husband to pay alimony pendente lite in the sum of \$125 per month for the support of the wife and child was excessive, and should be reduced to \$50 per month.

Similarly, it was held in *Stiehm v. Stiehm* (1897) 69 Minn. 461, 72 N. W.

III. Wife's means adequate for proper support:

- a. Support of children, 784.
- b. Support of wife, 785.

IV. Wife not required to impair corpus of her estate, 788.

708, that it was not an abuse of judicial discretion to allow a wife the sum of \$8 a month for the support of herself and her child, where each spouse had property worth about \$500.

But in *Harding v. Harding* (1892) 144 Ill. 589, 21 L.R.A. 310, 32 N. E. 206, it was held to be error for the court to make an order for an allowance to a wife for the support of her minor children, in the absence of a court order giving her their custody, though her income was insufficient for their adequate maintenance according to their station in life, the father being guilty of no neglect of them, and being amply able and willing to support them in his own home.

b. Support of wife alone.

Where a wife has some means, but is not able to support and maintain herself properly while an action for divorce is pending, it is generally held to be proper for the court to compel the husband to contribute an amount which, together with the wife's means, will be sufficient for her support and maintenance.

California.—*Kowalsky v. Kowalsky* (1904) 145 Cal. 394, 78 Pac. 877.

Illinois.—*Harding v. Harding* (1892) 40 Ill. App. 202, modified in (1892) 144 Ill. 588, 21 L.R.A. 310, 32 N. E. 206; *Lumpkin v. Lumpkin* (1898) 78 Ill. App. 324; *Cooper v. Cooper* (1899) 85 Ill. App. 575, affirmed in (1900) 185 Ill. 163, 56 N. E. 1059.

Indiana.—*Sellers v. Sellers* (1894) 141 Ind. 305, 40 N. E. 699; *Snider v. Snider* (1913) 179 Ind. 583, 102 N. E. 32.

Iowa.—*Campbell v. Campbell* (1887) 73 Iowa, 482, 35 N. W. 522.

Kentucky.—*Logan v. Logan* (1841) 2 B. Mon. 142.

Louisiana.—*Cignoni v. Cignoni* (1916) 139 La. 978, 72 So. 707; *Hava v. Chavigny* (1920) 146 La. 84, 83 So. 417.

Michigan.—*Rose v. Rose* (1884) 58 Mich. 585, 19 N. W. 195.

Minnesota.—*Wetter v. Wetter* (1920) — Minn. —, 177 N. W. 491.

Missouri.—*Stark v. Stark* (1905) 115 Mo. App. 436, 91 S. W. 413; *Coen v. Coen* (1908) 130 Mo. App. 480, 109 S. W. 1083; *Robertson v. Robertson* (1909) 137 Mo. App. 93, 119 S. W. 533; *Hedrick v. Hedrick* (1911) 157 Mo. App. 633, 138 S. W. 678.

New Jersey.—*Perkins v. Perkins* (1899) — N. J. Eq. —, 42 Atl. 336. See also *Marker v. Marker* (1856) 11 N. J. Eq. 256.

New York.—*Merritt v. Merritt* (1885) 99 N. Y. 643, 1 N. E. 605; *Graves v. Graves* (1911) 143 App. Div. 923, 128 N. Y. Supp. 499; *Hoffman v. Hoffman* (1868) 7 Robt. 474. See also *Seitz v. Seitz* (1920) 192 App. Div. 924, 183 N. Y. Supp. 79.

North Carolina.—*Bailey v. Bailey* (1900) 127 N. C. 474, 37 S. E. 502.

Ohio.—See *Adkins v. Adkins* (1912) 33 Ohio C. C. 592.

Pennsylvania.—*Banes v. Banes* (1871) 8 Phila. 250; *Laciar v. Laciar* (1888) 6 Pa. Co. Ct. 406; *Seads v. Seads* (1902) 27 Pa. Co. Ct. 26.

West Virginia.—*Kittle v. Kittle* (1920) 86 W. Va. 46, 102 S. E. 799.

Canada.—*Moon v. Moon* (1912) 22 West. L. R. 179, 6 D. L. R. 46.

In *Harding v. Harding* (1892) 144 Ill. 588, 21 L.R.A. 310, 32 N. E. 206, modifying (1891) 40 Ill. App. 202, the court said: "If the income of the wife be sufficient to suitably support her, there will ordinarily exist no reason for making an allowance for that purpose. But if the income of the wife be insufficient, and that of the husband be ample, equitable considerations and the weight of authority require, as we think, that such a sum should be allowed from the husband's income as will, when added to her own, enable the wife to live comfortably pending the litigation, in the station in life to which he has accustomed her."

In *Snider v. Snider* (Ind.) supra, the court said: "Although the fact that the wife has some property is a matter to be considered by the court in determining whether an allowance shall be made, as well as the amount of it, still, if it is not sufficient properly to support her, and at the same time afford her the means to secure her an efficient preparation of her case and a fair trial, without exhausting her own resources, an allowance is within the discretion of the court."

In *Marker v. Marker* (N. J.) supra, on an application by the wife for alimony pendente lite, the court said: "The statute has changed the common law, and secures to the wife the ownership and disposition of property she may have at her marriage, or may acquire afterwards. When the wife is a suitor in court, the question will be whether she has property independently of her husband, and the court will exercise its discretion in the allowance of alimony and costs, having reference to the respective pecuniary circumstances of the husband and wife."

Where it appeared that the husband had an income of over \$600 per month, and the wife's property consisted only of corporate stock to the value of about \$700, it was held to be within the discretion of the court to make an allowance to the wife of \$100 per month as alimony pendente lite, in an action for divorce. *Kowalsky v. Kowalsky* (1904) 145 Cal. 394, 78 Pac. 877.

It was held in *Wetter v. Wetter* (1920) — Minn. —, 177 N. W. 491, that the wife was entitled to a contribution from her husband as temporary alimony, where it was shown that her estate did not exceed \$2,200, and the husband's property was worth not less than \$56,000.

It was held in *Hedrick v. Hedrick* (1911) 157 Mo. App. 633, 138 S. W. 678, that, although the wife had \$1,000 of her own money, the sum of \$150 per month as alimony pendente lite was not excessive, in view of the fact that before the husband abandoned her he considered \$300 per month necessary for her support, and it was shown that he had an income of \$5,000 per year.

In *Sellers v. Sellers* (1894) 141 Ind. 305, 40 N. E. 699, wherein it appeared that the value of the wife's property was not more than \$1,200, it was held that an allowance of \$4 per week as temporary alimony was not an abuse of judicial discretion.

So, in *Campbell v. Campbell* (1887) 73 Iowa, 482, 35 N. W. 522, it was held not to be an abuse of discretion to allow a wife the sum of \$350 as temporary alimony, although she was the owner of 120 acres of land and a small amount of personal property.

In *Stark v. Stark* (1905) 115 Mo. App. 436, 91 S. W. 413, the court held that where the wife had about \$800, and the husband's property amounted to not more than \$3,900, an allowance of temporary alimony in the sum of \$225 was excessive, and should be reduced to \$100.

Where a wife's total resources were only \$373, and the husband had an income of \$250 per month, an allowance of \$50 per month as temporary alimony, pending a suit for separation, was held not to be excessive. *Cignoni v. Cignoni* (1916) 139 La. 978, 72 So. 707.

In *Graves v. Graves* (1911) 143 App. Div. 923, 123 N. Y. Supp. 499, it was held that an allowance of \$15 per week to the wife as temporary alimony was not improper, although she possessed between six and seven thousand dollars.

It was held in *Merritt v. Merritt* (1885) 99 N. Y. 643, 1 N. E. 605, that, though the fact that the wife had some property was a question to be considered by the court, nevertheless an allowance of \$18 per month as alimony pendente lite would not be considered excessive, where the value of the wife's property did not exceed \$3,000, and it appeared that the property had not come to her from her husband.

In *Hoffman v. Hoffman* (1868) 7 Robt. (N. Y.) 474, temporary alimony to the amount of \$10 per week was allowed to the wife, pending an action for divorce, although she had money and property to the extent of several hundred dollars, it appearing that she was unable to obtain employment, and

that the husband was earning \$1,200 per year.

In *Perkins v. Perkins* (1899) — N. J. Eq. —, 42 Atl. 336, alimony pendente lite in the amount of \$7 per week was allowed to a wife, pending her action for support and maintenance, where it appeared that her property amounted to not more than \$500.

In *Bailey v. Bailey* (1900) 127 N. C. 474, 37 S. E. 502, it was held that a wife was entitled to a small monthly allowance as temporary alimony, pending her action for divorce, where the husband had real estate of a considerable value, although she had, prior to their separation, in consideration of the sum of \$1,450, agreed to release him of all the rights she had acquired, or might acquire, by reason of their marriage.

It has been held that temporary alimony was properly allowed where the wife's annual income was less than \$200 and the husband derived an income from his business of about \$2,000 per year. *Rose v. Rose* (1884) 53 Mich. 585, 19 N. W. 195.

In *Logan v. Logan* (1841) 2 B. Mon. (Ky.) 142, it was held that where the husband's annual income was \$2,500, and that of the wife was \$250, a contribution of \$300 by the husband to the wife as temporary alimony was not excessive.

An allowance of \$40 per month as temporary alimony has been held not to be an abuse of discretion, where the husband's property amounted to several hundred thousand dollars, and the wife's income amounted to not more than \$75 per month, and the property from which she derived the income was encumbered with a small mortgage. *Robertson v. Robertson* (1909) 137 Mo. App. 93, 119 S. W. 533.

It has been held not to be an abuse of discretion to allow a wife \$20 per month as alimony pendente lite, where the husband's income amounted to \$2,000 per year, and the annual income of the wife from her property amounted only to about \$250. *Lumpkin v. Lumpkin* (1898) 78 Ill. App. 324.

In *Seads v. Seads* (1902) 27 Pa. Co.

Ct. 26, an application by a wife for alimony pendente lite in an action for divorce, it was held that an allowance of \$20 per month was not excessive, where the wife received a monthly income of \$80, and the husband had an income of \$100 per month. The court said: "The discretion which rests in a court should not be exercised in favor of a decree for ad interim alimony to the wife, in a case where she has sufficient means to prosecute her suit; but it is the duty of the court to make such allowance where her means to do so are inadequate, and the husband is able."

In *Laciar v. Laciar* (1888) 6 Pa. Co. Ct. 406, the court considered that the income from an \$800 mortgage owned by the wife was not sufficient for her maintenance, pending an action for divorce, and ordered an allowance of \$4 per week to her, pending the litigation, it appearing that the husband was enjoying a lucrative practice as a physician.

In *Banes v. Banes* (1871) 8 Phila. (Pa.) 250, it was held that as the wife's income was not sufficient for her support, pending proceedings in a divorce action, an allowance of \$5 per week as alimony pendente lite should be made, the husband having productive property worth \$40,000.

In *Kittle v. Kittle* (1920) 86 W. Va. 46, 102 S. E. 799, it was held that the wife should not have been denied temporary alimony pending an action for divorce, where it appeared that her income amounted to less than \$100 per year, and her husband's annual income was \$3,000. The court said: "If she has ample income from her estate to maintain herself and prosecute her suit, the court might, within its discretion, deny her temporary alimony and suit money; but, where her income is inadequate for these purposes, the necessity which the statute contemplates is present."

In *Cooper v. Cooper* (1899) 85 Ill. App. 575, affirmed in (1900) 185 Ill. 163, 56 N. E. 1059, it was held that the husband should be required to contribute to the wife's support, according to her station in life, where it was shown that, though she owned sepa-

rate property, she received no income therefrom.

In *Hava v. Chavigny* (1920) 146 La. 84, 83 So. 417, it was held that a wife was entitled to alimony pendente lite, where it was shown that property and funds belonging to her were not available at the time, and the husband's income amounted to \$2,000 per year.

In *Moon v. Moon* (1912) 22 West. L. R. (Can.) 179, 6 D. L. R. 46, alimony to the extent of \$20 per month was allowed to a wife, where, although she had property, it was not shown that she was deriving any benefit therefrom, and the husband had an annual income of \$300.

In *Coen v. Coen* (1908) 130 Mo. App. 480, 109 S. W. 1083, temporary alimony and counsel fees to the extent of \$75 was allowed, where it was shown that the wife's income for her support was \$20 per month, and the husband owned real property of the value of \$1,000.

III. *Wife's means adequate for proper support.*

a. *Support of children.*

There seem to be but few cases wherein the courts have passed on the right to temporary alimony of a wife who has means adequate for the support of herself and the children, and the decisions reached are conflicting in result, and seemingly based on the facts and circumstances of each particular case.

In the reported case (*Hood v. Hood*, ante, 774) a husband was not compelled to make an allowance to the wife for the temporary support of the children, where she left the husband, taking the children with her, and it appeared that she had an independent income of \$88,000 per year.

But in *Penningroth v. Penningroth* (1897) 71 Mo. App. 438, it was held that, although a wife owned a separate estate sufficient for her support, nevertheless she was entitled to an allowance from her husband for the support of their children, from the commencement of the suit until its final determination, if the husband permitted them to remain with her.

So, it was held in *Rutledge v. Rut-*

ledge (1909) 177 Mo. App. 469, 119 S. W. 489, that a husband was liable for the support of the minor child where it remained with his wife, who had means adequate for its support, although she was not, under the circumstances, entitled to alimony pendente lite. The court said: "There can be no doubt about the obligation of the husband to provide a reasonable amount for the support of his fifteen-year-old son, even though the matter of divorce be undetermined. It appears this son resides with the mother. The duty primarily rests upon the plaintiff husband to maintain him. If he permits the son to remain with his wife, he must furnish to the mother the necessary means for his support."

Likewise, it was held in *Spatz v. Spatz* (1920) 189 App. Div. 438, 178 N. Y. Supp. 567, that a wife should receive an amount from the husband sufficient for their child's support, where the child was left with the wife, although the wife had, a short time prior to her application for temporary alimony, become possessed of nearly \$700 of the husband's money.

b. Support of wife.

The rule seems to be that, if the wife has independent means sufficient for her support according to her station in life, the husband will not be compelled to pay her temporary alimony.

California. — *Turner v. Turner* (1889) 80 Cal. 141, 22 Pac. 72.

Florida.—*Chaires v. Chaires* (1863) 10 Fla. 308; *Haddon v. Haddon* (1895) 36 Fla. 413, 18 So. 779. See also *Underwood v. Underwood* (1868) 12 Fla. 434.

Georgia.—*Killiam v. Killiam* (1858) 25 Ga. 186. See also *Pinckard v. Pinckard* (1856) 22 Ga. 31, 68 Am. Dec. 481.

Illinois.—*Arado v. Arado* (1917) 281 Ill. 123, 4 A.L.R. 28, 117 N. E. 816; *Rawson v. Rawson* (1888) 37 Ill. App. 491; *Carlin v. Carlin* (1896) 65 Ill. App. 160; *Steller v. Steller* (1904) 115 Ill. App. 323. See also *Harding v. Harding* (1892) 144 Ill. 588, 21 L.R.A. 310, 32 N. E. 206.

15 A.L.R.—50.

Indiana.—See *Kenemer v. Kenemer* (1866) 26 Ind. 330.

Kentucky.—See *Logan v. Logan* (1841) 2 B. Mon. 142.

Maryland.—*HOOD v. HOOD* (reported herewith) ante, 774. See also *Coles v. Coles* (1851) 2 Md. Ch. 341.

Michigan.—*Ross v. Ross* (1881) 47 Mich. 185, 10 N. W. 193.

Mississippi.—*Evans v. Evans* (1921) — Miss. —, 88 So. 481. See also *Porter v. Porter* (1866) 41 Miss. 117; *Ross v. Ross* (1906) 89 Miss. 66, 42 So. 382.

Missouri.—*Arnold v. Arnold* (1920) — Mo. —, 222 S. W. 996; *Penningroth v. Penningroth* (1897) 71 Mo. App. 438; *Lambert v. Lambert* (1904) 109 Mo. App. 19, 84 S. W. 203; *Rutledge v. Rutledge* (1909) 177 Mo. App. 469, 119 S. W. 489. See also *Stark v. Stark* (1905) 115 Mo. App. 436, 91 S. W. 413.

New Jersey.—*Westerfield v. Westerfield* (1882) 36 N. J. Eq. 195. See also *Suydam v. Suydam* (1911) 79 N. J. Eq. 144, 80 Atl. 1057.

New York. — *Collins v. Collins* (1880) 80 N. Y. 1; *Maxwell v. Maxwell* (1888) 28 Hun, 566; *Richardson v. Richardson* (1905) 94 N. Y. Supp. 582; *Sawyer v. Sawyer* (1920) 108 Misc. 447, 178 N. Y. Supp. 472; *Spatz v. Spatz* (1920) 189 App. Div. 438, 178 N. Y. Supp. 567; *Brand v. Brand* (1917) 178 App. Div. 822, 166 N. Y. Supp. 90. See also *Ashbrooke v. Ashbrooke* (1909) 132 App. Div. 907, 116 N. Y. Supp. 1100.

Pennsylvania.—*Schireman v. Schireman* (1819) 7 Pa. Co. Ct. 110; *Shoemaker v. Shoemaker* (1896) 5 Pa. Dist. R. 449. See also *Toole v. Toole* (1874) 1 W. N. C. 96; *Seads v. Seads* (1902) 27 Pa. Co. Ct. 26.

Tennessee.—*Thompson v. Thompson* (1859) 3 Head, 527. See also *Lishey v. Lishey* (1873) 2 Tenn. Ch. 1.

Texas.—See *Wright v. Wright* (1851) 6 Tex. 29.

Washington.—See *Dilatush v. Dilatush* (1918) 102 Wash. 504, 173 Pac. 431.

West Virginia.—See *Kittle v. Kittle* (1920) 86 W. Va. 46, 102 S. E. 799.

England.—*Coombs v. Coombs* (1866) L. R. 1 Prob. & Div. 218, 12 Jur. N. S. 673, 14 L. T. N. S. 294; *Powell v. Powell* (1873) L. R. 3 Prob. & Div. 55.

Canada.—*Allison v. Allison* (1913) 6 Alberta L. R. 127, 23 West. L. R. 570, 9 D. L. R. 418. See also *Smith v. Smith* (1873) 6 Ont. Pr. Rep. 51.

In *Rawson v. Rawson* (1888) 37 Ill. App. 491, wherein it appeared that the wife had sufficient separate property for her adequate support, the court said: "We regard the law as well settled that when the wife brings suit against her husband for either a divorce or separate maintenance, and applies to the court for an allowance out of her husband's means to enable her to prosecute the suit, or for temporary alimony, and it is made to appear that she has sufficient separate property for the purpose, the application should be denied."

In *Schireman v. Schireman* (Pa.) supra, the court discussed the general rule, and held that, where the wife was self-supporting, she would not be allowed alimony pendente lite during proceedings for divorce, adding: "If she has an income of her own sufficient to pay for her support and to cover the expenses of litigation, the necessity upon which arose the practice of giving the wife alimony does not exist, and the allowance will be refused."

In *Thompson v. Thompson* (1859) 3 Head (Tenn.) 527, the court said: "According to the course of decision in this state, in a divorce case brought by or against the wife, if she be not possessed of sufficient separate property or means of her own, adequate to her support and to defray the expenses of the suit, she is entitled, as against her husband, to alimony pendente lite, and also to such amount of money as shall be necessary to defray the reasonable expenses of the suit, including counsel fees. If this were not so, the wife, destitute of means of her own, would be denied justice. If, however, she has adequate means of her own, no such allowances will be made, pending the suit. . . . This doctrine is subject, however, to the qualification that the wife is prosecuting or defending the suit in good faith."

In the case of *Ross v. Ross* (1881) 47 Mich. 185, 10 N. W. 193, the court,

in reversing an order which directed the husband to pay temporary alimony to the wife, said: "It is only in cases where it is made to appear by the bill of complaint or petition that the wife has no separate property of her own to support herself and enable her to carry on her suit, and her husband has property, that the court will compel him to make a suitable allowance for her maintenance, and to enable her to employ counsel."

In *Evans v. Evans* (1921) — Miss. —, 88 So. 481, the court said: "It appears from the evidence that the appellee has a separate estate amounting to \$4,200, and there is nothing in the evidence to indicate that it is insufficient to enable her to maintain herself and to prosecute this suit; consequently, she is not entitled to alimony pendente lite."

Referring to the discretion of the court in allowing temporary alimony, it was said in *Turner v. Turner* (1889) 80 Cal. 141, 22 Pac. 72: "It is a discretion to be exercised in view of the circumstances of the parties, their several necessities, and the pecuniary ability of the husband. A sum absolutely small may be relatively excessive, and where, as in this case, the wife is plaintiff, where she has possession of the homestead, where she has burdened herself with but two out of six young children, where her property, or that which she enjoys the use of, is more valuable and productive than the husband's, and where, as above stated, it appears that his burdens and necessities are greater, and his means less, than hers, it is an excess of any discretionary power of the court to award temporary alimony."

In *Haddon v. Haddon* (1895) 36 Fla. 413, 18 So. 779, temporary alimony was denied, it appearing that the wife had several thousand dollars, and that the husband's estate was worth much less. The court said: "The law seems to be well settled that two things must concur, and must be made to appear, before a court is justified in making any allowance to the wife in divorce proceedings for temporary alimony and for counsel fees: (1) A necessity therefor must appear on the

part of the wife, from her want of means, or of sufficient means, to maintain herself during the litigation, and with which to employ counsel; (2) and it must also appear that the husband has the pecuniary means to supply that necessity."

In a case wherein it appears that a wife, by a separate agreement, had accepted property worth \$1,200, the husband's property being worth five or six thousand dollars, she was not allowed a further sum as temporary alimony, in an action by the husband for divorce. *Killiam v. Killiam* (1858) 25 Ga. 186, wherein the court said: "When the separation by agreement took place, the wife was content to take back the property she brought into the marriage. She deemed this enough for her maintenance, and we leave her to abide by it."

In *Spatz v. Spatz* (1920) 189 App. Div. 438, 178 N. Y. Supp. 567, it appeared that the wife, a short time prior to her application for temporary alimony, had received nearly \$700 of her husband's money, and it was not shown that she had expended the amount for her support. It was held that she was not justified in asking for temporary alimony.

In *Collins v. Collins* (1880) 80 N. Y. 1, temporary alimony was refused to the wife, in an action for divorce, it appearing that some time prior to the action the parties had entered into a separation agreement, under which the husband paid the wife \$5,000 and conveyed certain real estate to trustees for her use. The court said: "The fact that a wife is destitute of means to carry on her suit, and to support herself during its pendency, is as essential as any other fact, to authorize the court to award temporary alimony. This is not mere matter of discretion, but a settled principle of equity."

In *Powell v. Powell* (1873) L. R. 3 Prob. & Div. (Eng.) 55, it appeared that a husband covenanted to pay his wife a certain amount annually under a deed of separation. Subsequently, the husband acquired a large increase of fortune, and, in an action by him for a divorce, the wife applied for an

additional allowance as alimony pendente lite. The application was denied, as it appeared that the wife had been content with the original allowance, and the court considered that it would be unfair to the husband to compel him to give her a greater allowance, after he had charged her with acts which gave him a right of action for a divorce.

In *Steller v. Steller* (1904) 115 Ill. App. 323, alimony pendente lite was denied to the wife in her action for separate maintenance, it appearing that her financial condition was superior to that of her husband, that he was unable to work, and that he was justified in living apart from her.

In *Arado v. Arado* (1917) 281 Ill. 123, 4 A.L.R. 28, 117 N. E. 816, alimony was denied, it being shown that the wife had a separate and private income of \$250 per month, and there being no evidence that she was unable to support herself.

In *Carlin v. Carlin* (1896) 65 Ill. App. 160, alimony pendente lite was denied in an action by a husband for a divorce, it appearing that the wife had an income of \$5,000 per year, the court saying that a showing of necessity is prerequisite to such an allowance.

In *Penningroth v. Penningroth* (1897) 71 Mo. App. 438, alimony pendente lite was refused to the wife, where it appeared that she had a separate estate worth \$75,000, although the husband admitted he was worth \$45,000.

It was held in *Arnold v. Arnold* (1920) — Mo. —, 222 S. W. 996, that where the wife failed to ask for temporary alimony until the end of the divorce suit, and it was shown that she had an income of \$100 per month, temporary alimony would not be allowed.

In *Lambert v. Lambert* (1904) 109 Mo. App. 19, 84 S. W. 203, wherein it appeared that the wife owned separate property to the extent of several thousand dollars, the court refused to grant her temporary alimony, pending a proceeding for a divorce.

So, in *Rutledge v. Rutledge* (1909) 177 Mo. App. 469, 119 S. W. 489, tempo-

rary alimony was denied, notwithstanding the fact that the husband owned property of the value of \$100,000, and the wife's property was worth only \$5,000. The court said: "The doctrine repeatedly declared by this court is to the effect that if the wife has sufficient property in her own right to conduct or defend her action, and to support herself during its pendency, there can be no reason for imposing this burden on her husband. . . . It is now a settled principle of equity that the fact which confers power upon the court to award alimony pendente lite for the support of the wife, and suit money for the purpose of the prosecution or defense of a divorce action, is that the wife is destitute of sufficient means to meet these charges. . . . Or, if she has sufficient in part, the husband must supply the residue."

In *Richardson v. Richardson* (1905) 94 N. Y. Supp. 582, temporary alimony was denied to the wife, in an action for separation, where it appeared that she had a small amount of money, and was in receipt of an income from personal services sufficient for her support. The decision seems to be based on the theory that, as the wife's services belonged to the husband, the income she was receiving was to be considered as having been given by him to her.

Temporary alimony was denied in the case of *Sawyer v. Sawyer* (1919) 108 Misc. 447, 178 N. Y. Supp. 472, wherein the court said: "As the papers in the case at bar do not show that the plaintiff is destitute of means to carry on her suit and to support herself during its pendency, but, on the contrary, show that plaintiff has nearly \$1,400 in one bank, and had nearly \$450 in another bank on July 14, 1919, the motion must be denied, with leave to plaintiff to renew her application on a proper showing that she is without means to carry on her suit and to support herself during its pendency."

In *Maxwell v. Maxwell* (1883) 28 Hun (N. Y.) 566, wherein it appeared that a wife had money and property to the extent of several thousand dollars,

it was held that she was not destitute of the means of livelihood, and her application for temporary alimony pending an action for separation from her husband should be denied.

In *Westerfield v. Westerfield* (1882) 36 N. J. Eq. 195, an application for alimony pendente lite was denied, because it appeared that the wife's annual income was over \$1,400 and the husband's income did not exceed \$500.

Where a wife holds property belonging to her husband worth \$6,000, and is apparently in possession of means sufficient for her support, and the husband's property is heavily encumbered, alimony pendente lite will not be allowed to the wife, pending her action for divorce. *Shoemaker v. Shoemaker* (1896) 5 Pa. Dist. R. 449.

In *Allison v. Allison* (1913) 23 West. L. R. (Can.) 570, 3 West. Week. Rep. 1042, 9 D. L. R. 418, wherein it appeared that the annual income of a wife was \$900 per year, and that of the husband was \$200 per month, it was held that the husband would not be required to pay alimony pendente lite.

In *Coombs v. Coombs* (1866) L. R. 1 Prob. & Div. (Eng.) 218, 12 Jur. N. S. 673, 14 L. T. N. S. 294, alimony pendente lite was not allowed, it appearing that the wife was in possession of funds from which she could be alimented pending the action, and that the husband's income did not exceed \$300 per year.

In *Washington, in Dilatash v. Dilatash* (1918) 102 Wash. 504, 173 Pac. 481, the court was of the opinion that, although the wife was in possession of independent means, she would nevertheless be entitled to temporary alimony out of the proceeds arising from community property of which she and her husband were possessed. The allowance was denied, however, because it appeared that the community property was not earning more than current expenses, and the wife was living in the same place, under the same circumstances as before, and was being supported by the husband.

IV. Wife not required to impair corpus of her estate.

A few cases hold squarely that,

though a wife has independent means, she will not be compelled to use the corpus of her estate for her support before calling on her husband for temporary alimony. *Farrar v. Farrar* (1920) — Cal. App. —, 188 Pac. 289; *Cignoni v. Cignoni* (1916) 139 La. 978, 72 So. 707; *Cooper v. Cooper* (1899) 85 Ill. App. 575, affirmed in (1900) 185 Ill. 163, 56 N. E. 1059; *Miller v. Miller* (1876) 75 N. C. 70; *Kittle v. Kittle* (1920) 86 W. Va. 46, 102 S. E. 799. See also *White v. White* (1893) 50 Ill. App. 149; *Moon v. Moon* (1912) 22 West. L. R. (Can.) 179, 6 D. L. R. 46.

Thus, it was held in *Farrar v. Farrar* (Cal.) supra, that the husband could be compelled to pay temporary alimony to the wife, where the wife owned property but was receiving no income therefrom. See to the same effect, *Cooper v. Cooper* (1899) 85 Ill.

App. 575, affirmed in (1900) 185 Ill. 163, 56 N. E. 1059.

So, in *Cignoni v. Cignoni* (1916) 139 La. 978, 72 So. 707, it was held that where a wife had about \$375 in money, and the husband's income was \$250 per month, she would not be compelled to use her money for her support, during her suit for separation.

And in *Miller v. Miller* (1876) 75 N. C. 70, wherein it was found that the income from a wife's separate estate was not sufficient for her support, pending her action for divorce, it was held that she would not be required to use the corpus or capital of her separate estate, but was entitled to such temporary alimony as should appear just and proper, having regard to the circumstances of the parties. See to the same effect, *Kittle v. Kittle* (1920) 86 W. Va. 46, 102 S. E. 779. L. W. B.

LOUIS A. EVERETT, Appt.,

v.

FRANCES E. FORST.

District of Columbia Court of Appeals—January 3, 1921.

(— App. D. C. —, 269 Fed. 867.)

Judicial sale — right to advance bid.

1. One intending to bid for property at a judicial sale through an agent must give instructions to submit the highest bid he is willing to make, and cannot wait until the property is struck off to another, and then secure an opening of the sale to let in a higher bid.

[See note on this question beginning on page 793.]

—inadequate price—setting aside sale.

2. Inadequacy of price so gross as to shock the conscience, accompanied by unfairness or undue advantage on the part of the purchaser, or misleading or surprise on the part of the property owner, will render a judicial sale fraudulent and void, or permit the owner to redeem.

[See 16 R. C. L. 97.]

—advance of 20 per cent—opening bid.

3. An order nisi confirming a bid at a judicial sale will be opened to let in an advance bid of more than 20 per cent, from one having no opportunity to bid at the sale.

[See 16 R. C. L. 98; see also note in 11 A. L. R. 411.]

APPEAL by petitioner from a decree of the Supreme Court holding Probate Court, ratifying a sale of real estate. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. Harry F. Kennedy, for appellant:

The trial court erred in vacating an order of acceptance, nisi, of an offer of \$37,500 by appellant, for the property involved, and reopening the biddings.

Hunt v. Whitehead, 19 App. D. C. 116; Auerbach v. Wolf, 22 App. D. C. 538; Pewabic Min. Co. v. Mason, 145 U. S. 349, 36 L. ed. 732, 12 Sup. Ct. Rep. 887; Graffam v. Burgess, 117 U. S. 180, 29 L. ed. 839, 6 Sup. Ct. Rep. 686; Ayers v. Baumgarten, 15 Ill. 444; Comstock v. Purple, 49 Ill. 158; George v. Norwood, 77 Ark. 221, 113 Am. St. Rep. 143, 91 S. W. 557, 7 Ann. Cas. 171; Johnson v. Dorsey, 7 Gill 269; Tyson v. Mickle, 2 Gill, 377; Allen v. Martin, 61 Miss. 78; Stump v. Martin, 9 Bush, 285; Littell v. Zuntz, 2 Ala. 256, 36 Am. Dec. 415; Page v. Kress, 80 Mich. 85, 20 Am. St. Rep. 504, 44 N. W. 1052; Wagner v. Cohen, 6 Gill, 97, 46 Am. Dec. 660; Garrett v. Moss, 20 Ill. 549.

Messrs. Wade H. Ellis, Abner H. Ferguson, and Woodson P. Houghton, for appellee:

The action of the lower court in setting aside the sale was within the sound discretion of that court, and should not be disturbed.

Auerbach v. Wolf, 22 App. D. C. 538; Re Shea, 61 C. C. A. 219, 126 Fed. 153; Slack v. Cooper, 219 Ill. 138, 76 N. E. 84; Nugent v. Nugent, 54 Mich. 557, 20 N. W. 584; Brewer v. Landis, 111 Mich. 217, 69 N. W. 493; German-American Bank v. Dorthy, 39 App. Div. 166, 57 N. Y. Supp. 172.

Van Orsdel, J., delivered the opinion of the court:

This case arose through the sale of real estate by a guardian under an order of court.

It appears that appellee, as guardian for an infant, was directed by the court to sell certain lots in the city of Washington, belonging to the estate. After a number of offers for the property had been submitted, the guardian reported that appellant had made an offer of \$37,500, whereupon the court entered an order nisi, to "become final and absolute on the 26th day of January, 1920, unless cause to the contrary shall be shown on or before said date."

On January 27th, one day after

the date when the order nisi was decreed to become final, appellant petitioned the court for ratification of the order. On the same day the guardian reported that on January 24th, she had received an offer of \$39,000 from one Doyle, representing one Daisy Edelin, and called attention to the fact that, when the order nisi was made, "the court stated that he would ratify the sale at \$37,500 nisi, with the understanding that he would not reopen the matter unless a materially increased offer was made for the property, and thereafter the court stated to counsel that he would not consider any offer of less than \$1,500 above the offer of said Everett as a substantial increase."

Upon this report, the court entered an order vacating and setting aside the order nisi, dismissing appellant's petition, and directing the guardian to receive further bids for the property. From this, appellant appealed to this court, where the appeal was dismissed, for the reason that the order appealed from was not a final order. When the mandate went down, the court renewed the order directing the guardian to receive bids for the purchase of the property from the former bidders, and from such others as might be interested in the purchase of the property. Accordingly, the guardian reported a bid of \$45,600 from one Louis Tashof. Appellant then petitioned the court that his bid of \$37,500 be accepted and the guardian authorized and directed to convey the property to him.

The court dismissed the petition of appellant, and ordered the guardian to accept the offer of Tashof and to convey the property to him. From this order the case was appealed.

The sole question is whether the court erred in refusing to confirm the order nisi. The early English rule in chancery sales upheld the reopening of the sale to bidders, prior to confirmation, upon a mere offer to advance the price 10 per centum, but this practice was condemned by

Lord Eldon as tending to diminish confidence in judicial sales. *White v. Wilson*, 14 Ves. Jr. 151, 33 Eng. Reprint, 479. Adopting Lord Eldon's view, the Supreme Court, speaking through Mr. Justice Bradley, in *Graffam v. Burgess*, 117 U. S. 180, 191, 29 L. ed. 839, 842, 6 Sup. Ct. Rep. 686, announced the following rule: "It was formerly the rule in England, in chancery sales, that, until confirmation of the master's report, the bidding would be opened upon a mere offer to advance the price 10 per centum. 2 Dan. Ch. Pr. 1st ed. 924; 2d ed. by Perkins, **1465, 1467; Sugden, Vend. & P. 14th Eng. ed. 114. But Lord Eldon expressed much dissatisfaction with this practice of opening biddings upon a mere offer of an advanced price, as tending to diminish confidence in such sales, to keep bidders from attending, and to diminish the amount realized. . . . In this country Lord Eldon's views were adopted at an early day by the courts, and the rule has become almost universal that a sale will not be set aside for inadequacy of price, unless the inadequacy be so great as to shock the conscience, or unless there be additional circumstances against its fairness; being very much the rule that always prevailed in England as to setting aside sales after the master's report had been confirmed. *Livingston v. Byrne* (1814) 11 Johns. 555, 566; *Williamson v. Dale* (1818) 3 Johns. Ch. 290, 292; *Howell v. Baker* (1819) 4 Johns. Ch. 118; *Tiernan v. Wilson* (1822) 6 Johns. Ch. 411; *Duncan v. Dodd* (1830) 2 Paige, 99; *Collier v. Whipple* (1834) 13 Wend. 224, 226; *Tripp v. Cook*, 26 Wend. 143; *Lefevre v. Laraway*, 22 Barb. 167, 173; *Seaman v. Riggins*, 2 N. J. Eq. 214, 34 Am. Dec. 200; *Eberhart v. Gilchrist*, 11 N. J. Eq. 167; *Campbell v. Gardner*, 11 N. J. Eq. 423, 69 Am. Dec. 598; *Marlatt v. Warwick*, 18 N. J. Eq. 108; *Kloeping v. Stellmacher*, 21 N. J. Eq. 328; *Wetzler v. Schaumann*, 24 N. J. Eq. 60; *Carson's Sale*, 6 Watts, 140; *Surget v. Byers*, *Hempst.* 715,

Fed. Cas. No. 13,629; *Byers v. Surget*, 19 How. 303, 15 L. ed. 670; *Andrews v. Scotton*, 2 Bland, Ch. 629; *Glenn v. Clapp*, 11 Gill & J. 1; *House v. Walker*, 4 Md. Ch. 62; *Young v. Teague*, 8 S. C. Eq. (Bail.) 13, 14; *White v. Floyd*, 17 S. C. Eq. (Speers) 351; *Hart v. Bleight*, 3 T. B. Mon. 273, 16 Am. Dec. 101; *Reed v. Carter*, 1 Blackf. 410; *Pierce v. Kneeland*, 7 Wis. 224; *Montague v. Dawes*, 14 Allen, 369; *Drinan v. Nichols*, 115 Mass. 353. From the cases here cited we may draw the general conclusion that if the inadequacy of price is so gross as to shock the conscience, or if, in addition to gross inadequacy, the purchaser has been guilty of any unfairness, or has taken any undue advantage, or if the owner of the property, or party interested in it, has been for any other reason misled or surprised, then the sale will be regarded as fraudulent and void, or the party injured will be permitted to redeem the property sold. Great inadequacy requires only slight circumstances of unfairness in the conduct of the party benefited by the sale, to raise the presumption of fraud." And in the case of *Pewabic Min. Co. v. Mason*, 145 U. S. 349, 356, 367, 36 L. ed. 732, 734, 738, 12 Sup. Ct. Rep. 887, the court said: "The question in this case is whether the master's sale shall stand. It may be stated generally that there is a measure of discretion in a court of equity, both as to the manner and conditions of such a sale, as well as to ordering or refusing a resale. The chancellor will always make such provisions for notice and other conditions as will, in his judgment, best protect the rights of all interested, and make the sale most profitable to all; and after a sale has once been made, he will, certainly before confirmation, see that no wrong has been accomplished in and by the manner in which it was conducted. Yet the purpose of the law is that the sale shall be final; and to insure reliance upon such

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sales, and induce biddings, it is essential that no sale be set aside for trifling reasons, or on account of matters which ought to have been attended to by the complaining party prior thereto. . . . The master's action was unquestionably proper, and if the party desired the intervention of the court, his duty was to apply at once, and not wait until after confirmation; for then the rights of the purchaser are vested, and something more than mere inadequacy of price must appear before the sale can be disturbed. Indeed, even before confirmation, the sale would not be set aside for mere inadequacy, unless so great as to shock the conscience."

Adopting the foregoing rule, this court has repeatedly held that mere inadequacy of price is not in itself sufficient to justify the court in refusing to ratify a sale. It must appear that such inadequacy is due to surprise, fraud, mistake, or some unfairness practised at the sale. *Hunt v. Whitehead*, 19 App. D. C. 116; *Auerbach v. Wolf*, 22 App. D. C. 538. In the *Wolf Case*, as here, an order nisi was made, and, before ratification was had, the trustees reported a much larger offer, amounting to an increase of 67 per cent, and prayed that the approved bid be rejected and a resale ordered, which was accordingly done. The court, adhering to the established rule that a sale will not be set aside or ratification refused for a mere inadequacy of price, in the absence of fraud, mistake, surprise, or unfairness, said: "In this case, there is no suggestion of fraud, mistake, or unfairness in making the sale. But the settled principle is that, in chancery sales, the contract of sale made between the court as the vendor of the property, through the agency of a trustee, and the purchaser, is never regarded as consummated until it has received the sanction and ratification of the court. *Wagner v. Cohen*, 6 Gill, 97, 46 Am. Dec. 660." The court then held that the second report of the trustee presented a question calling

for the exercise of judicial discretion, which, unless abused, will not be controlled or disturbed on appeal. But this liberal construction of the discretionary power of the lower court was qualified as follows: "We must not be understood, however, in so holding, that we intend to give any sanction to the old English practice of opening biddings in chancery sales, upon the mere offering of an advance upon the purchaser's bid. That practice has never obtained in this District, nor in the courts of Maryland. *Cohen v. Wagner*, 6 Gill, 251." Coming to the present case, had we before us only the offer of \$39,000, we would have no hesitancy in holding, in the light of the decisions above quoted, that the court below abused its discretion in reopening the sale. The increased offer was only 4 per cent above the one made by appellant, and advance less than one half of that required by the old English rule, which has been condemned "as tending to diminish confidence" in judicial sales. Furthermore, it appears from the record that, on the day the sale to appellant was ratified nisi, the court had received bids in open court from appellant and Doyle, as agent, appellant making the higher bid. Doyle then asked for an opportunity to call his client on the telephone, to ascertain if she was willing to bid any higher. This the court refused, stating that the sale would not be reopened unless an advance of \$1,500 was offered. Of course, this reservation could not enlarge the discretion vested in the court. Edelin having had an opportunity to bid, it was her duty at that time to instruct her agent to submit the highest offer she was willing to make. She should not be permitted to ascertain the limit of her opponent's bid, and then upset the sale to him by an advanced offer. "At that time each party knew that a sale was to be had, and that if it intended to buy it must make all its arrangements therefor, and in such arrangement must be

—right to
advance bid.

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included a determination of the full amount it was willing to bid for the property. It cannot be tolerated that it be in the contemplation of either to wait until the property has been struck off to the other, and then open the bidding and defer the sale by an increased offer." *Pewabic Min. Co. v. Mason*, supra.

But in this case, however, the result of the reopening of the bidding was an offer of an advance of \$8,100 —advance of 20 per cent— from one who, so far as the record opening bid. discloses, had not had an opportunity to bid before. Considering, as we must, not only the question of public policy involved, but the rights of the infant, we feel that the order ratifying the sale to Tashof should be sustained.

The decree is affirmed with costs.

Motion for rehearing denied.

NOTE.

The effect of the receipt of an advance bid before confirmation, upon

the right to confirmation of a judicial sale, is discussed in the note in 11 A.L.R. 399. That note is, in general, confined to cases in which the higher bid was received before the confirmation of the sale.

In the reported case (*EVERETT v. FORST*, ante, 789), an order nisi had been entered, to become final and absolute on a stated date unless cause to the contrary should be shown on or before that date. On the day following the last date fixed, the advance bid was received, and subsequently, upon a resale, a bid much higher than the first advance bid was received. The court says that if only the advance bid had been received, it would have no hesitancy in holding that the trial court abused its discretion in opening the sale, but in view of the later and much higher offer, the court, considering not only the question of public policy involved but the rights of the infant, felt that the order ratifying the sale at the higher price should be sustained.

AGNES PHILLIPS

v.

KERSHAW, LEESE, & COMPANY.

English Court of Appeal — June 10, 1920.

([1920] 3 K. B. 297.)

Employer and workman — compensation — death of dependent before award — "reasonable and proportionate to the injury to the dependents."

A workman died from the effects of an accident while in the employ of the respondents, and his dependents thereby became entitled to compensation under the act. He had two dependents, his widow and a daughter aged thirteen. The widow died within four weeks of her husband's death. The claim was made on the footing of partial dependency. The widow having died before the making of any award, the proceedings were continued by her executrix. The wages of the deceased workman were £3 a week, and the county court judge awarded the sum of £250, of which £20 was apportioned to the infant daughter and £230 to the executrix. The employers appealed on the grounds that the compensation was not assessed on the basis of a sum "reasonable and proportionate to the injury to the dependents," as required by Sch. I. (1) (a) (ii) of the act,

and that the county court judge ought to have taken into consideration the fact that the widow died within four weeks of her husband's death.

Held that, the widow having died before the assessment of compensation, no speculation as to the expectation of life was necessary, the facts were ascertained, the injury was ascertained, and that injury alone was what had to be considered in assessing the compensation.

[See note on this question beginning on page 821.]

APPEAL from an award of the judge of the Stockport County Court sitting as arbitrator under the Workmen's Compensation Act 1906.

The applicants were Agnes Phillips, daughter and legal personal representative of Charlotte Bailey, deceased, the widow of John Henry Bailey, a deceased workman, and Lily Bailey, his infant daughter, suing by the said Agnes Phillips, her next friend.

John Henry Bailey was injured by an accident arising out of and in the course of his employment with the respondents, and died from his injuries on March 22, 1919. At the time of his death, his wife, Charlotte Bailey, was suffering from influenza. Her illness, coupled with the shock of her husband's death, resulted in her own death on April 18, 1919. On March 28, 1919, she had made a claim for compensation on behalf of herself and her daughter Lily, who was thirteen years of age. After her death the proceedings were continued by Agnes Phillips, her daughter by a former husband, as her legal personal representative.

The county court judge found that Charlotte Bailey (since deceased), wife of John Henry Bailey, and Lily Bailey, his infant daughter, were partially dependent on his earnings at the time of his death, and that he left no other dependents.

The judge ordered that the respondents do pay the sum of £250 to the dependents, and that the said sum of £250 be apportioned between Lily Bailey and Agnes Phillips as legal personal representative of Charlotte Bailey, the widow; and he apportioned the sum of £20 to or for the benefit of Lily Bailey, and the sum of £230 to Agnes Phillips as legal personal representative of

Charlotte Bailey. Against this award the respondents appealed on the grounds,

1. That the learned county court judge was wrong in law, and misdirected himself, in not assessing the compensation on the basis provided by the act.

2. That he was wrong in law, and misdirected himself, in not assessing the compensation on the basis of a sum reasonable and proportionate to the injury to the dependents.

3. That he was wrong in law, and misdirected himself, in not taking into consideration the fact that the widow died within four weeks of the accident to and death of the workman.

Wingate Saul, K. C., and Eastham, for the appellants:

This is a case of partial dependency. In the case of total dependency the act itself fixes the amount of the compensation. In the case of partial dependency the compensation must be "reasonable and proportionate to the injury to the dependents."

Workmen's Compensation Act 1906, Sch. I. (1) (a) (ii.)

We rely upon the dictum of Lord Macnaghten in *United Collieries v. Simpson* [1909] A. C. 383, 392, 78 L. J. P. C. N. S. 129, 101 L. T. N. S. 129, 25 Times L. R. 678, 53 Sol. Jo. 630, [1909] S. C. 19, 45 Scot. L. R. 780.

[They were stopped.]

E. C. Burgis, for the respondents:

It is said that the only measure of the employer's liability in such a case as this is the expectation of life of the dependent. The appellants seek to establish that as a new basis of calculation. The dependent has a right to the reasonable compensation which accrued at the date of the accident. The injury is not only the loss of enjoyment of support from the

deceased workman—it is measured by what the workman was worth to the dependent. He would have supported the widow during his working life. The extent of the injury is to be ascertained at the date of his death. Lord Loreburn said in *United Collieries v. Simpson* [1909] A. C. 389: "As Lord Mackenzie says, It" (the amount of compensation) "is not calculated with reference to the expectation of life of the dependent. In cases of partial dependence the amount of compensation is discretionary, subject to a maximum, but is not proportioned to the expectation of life."

[Lord Sterndale, M. R.: It must be proportionate to the injury sustained.]

Here the amount of the compensation must be assessed as at the death of the workman, and that amount accrued to the widow's estate.

Lord Sterndale, M. R., delivered the opinion of the court:

I think it is clear the award cannot stand. A workman was killed, or his death resulted, from a cause which entitled the dependents to compensation under the Workmen's Compensation Act. He had two dependents, his widow and a daughter of thirteen. At the time of his death the widow was seriously ill from influenza, and, either through the influenza alone or the influenza coupled with the shock of his death, she died within somewhat less than four weeks of the death of her husband.

The case came before the learned county court judge for the assessment of compensation, and it was agreed that the deceased man's wages were a little over £3 a week. On that the learned county court judge had to assess compensation. Sch. I. (1) (i) of the Workmen's Compensation Act 1906 provides that "if the workman leaves any dependents wholly dependent upon his earnings, a sum equal to his earnings in the employment of the same employer during the three years next preceding the injury, or the sum of £150, whichever of those sums is the larger, but not exceeding in any case £300, provided that the amount of any weekly payments made under this act, and any lump sum paid in

redemption thereof, shall be deducted,"—that did not arise here. Then (ii): "If the workman does not leave any such dependents,"—that is, dependents wholly dependent,— "but leaves any dependents in part dependent upon his earnings, such sum, not exceeding in any case the amount payable under the foregoing provisions, as may be agreed upon, or, in default of agreement, may be determined, on arbitration under this act, to be reasonable and proportionate to the injury to the said dependents."

The claim was made upon the footing of partial dependency, and the evidence before the learned county court judge certainly points to partial dependency, because it was proved that a brother used to pay the widow 37s. a week, and she used to give him 7s. back, leaving a balance of 30s. for the widow. There is no evidence as to what part of that 30s. it was necessary to spend for his keep, and upon the evidence before us, as shown by the county court judge's notes, it was clearly a case of partial dependency.

The learned county court judge said: "The evidence really established a case of a total dependency (in my view) on the part of the widow of the deceased workman." As to that we do not know upon what material he made that statement, except that it is suggested, although it does not appear upon his notes at all, that he thought the whole of that 30s. was absorbed in the keep of the son; there is nothing to show one way or the other upon the notes. But he says the claim was only put forward upon the footing of partial dependency, and no application to amend was made, and therefore he treated it as a case of partial dependency, and, having done that, he awarded a sum of £250.

The claim on the part of the child was, I am told, £50. That was the outside claim made on her behalf as a dependent. The claim was a curious one,—it was for Agnes Phillips, one moiety of £250—£125; Lily

Bailey, one moiety of £250—£125; and Lily Bailey as a dependent £50. The learned county court judge, the claim of Lily Bailey as a dependent being £50, and £50 only, awarded £250, and he did not in the judgment that he gave say anything at all about the amount that he awarded to Lily Bailey as a dependent: but we are told that afterwards it was agreed between the half sisters that Lily Bailey as a dependent should have £20 and that the other £230 should be divided, and the award was drawn up to carry that out, at any rate to this extent, that £20 was apportioned to Lily Bailey and £230 to Agnes Phillips. That is the award. Supposing the outside award on behalf of Lily Bailey

Employer and workman—compensation—death of dependent before award—“reasonable and proportionate to the injury to the dependents.”

as a dependent to be £50, it is obvious that £200 of this lump sum of £250 must be awarded to the executrix. Can that be justified?

In my opinion it cannot. The dependent, the widow, to whose executrix it is awarded, died four weeks, or less than four weeks, after the death of the workman, and therefore the injury to the dependent, the widow, to whose injury the sum awarded is to be apportioned, could not exceed the amount which she lost during those four weeks. Where the dependent is alive, of course, the county court judge is obviously put in great difficulty. He has to consider a number of things, and amongst them, how long the dependent is likely to suffer the injury or the deprivation of income from which the injury arises, and he takes that into consideration although he does not, of course, make the sum exactly proportionate to the expectation of life. But where, before the compensation is assessed, the dependent has died, it is no longer in the region of speculation, for the period of time for which she was deprived of the sum that she used to get from the workman is ascertained. That is clearly stated by Lord Macnaghten in *United Col-*

leries v. Simpson [1909] A. C. 383, 392, although the decision in that case was upon another point. In discussing the question he says: “The employer is liable to make compensation in accordance with the first schedule of the act. The deceased leaves, I will suppose, a sole dependent wholly dependent on his earnings, a grandmother, it may be, on her deathbed, or a granddaughter engaged to be married to a man well able to support a wife. The grandmother dies, or the granddaughter is married before any claim for compensation is made. If the judgment under appeal stands, the married granddaughter or the personal representative of the grandmother, as the case may be, is entitled, by reason of the workman’s death, to a considerable pecuniary benefit, wholly unexpected, and, some might think, wholly undeserved.” That is dealing with the question of total dependency. “On the other hand, if this workman had left both a grandmother and a granddaughter in similar circumstances, but each only partially dependent on his earnings,”—that is this case,—“and the one married and the other died before a claim was made, or even after claim made, but before determination of the amount of compensation, it might be that neither the granddaughter nor the representative of the grandmother would be awarded one farthing.” The representative of the grandmother in that case, of course, would not, if the grandmother had died and therefore there was no injury to her; the granddaughter, who had married, would not, because she had married a man who was able to keep her and she was not therefore dependent. That seems to me to show that in *Lord Macnaghten’s* opinion, as I said, where the partial dependent has died before the assessment of compensation, there is no question of speculation, of considering the expectation of life or anything of that kind; the matter is beyond the region of speculation; the facts are ascertained

and the injury is ascertained; and that injury alone is what is to be considered in arriving at the compensation.

The learned county court judge, therefore, it seems to me, could not possibly be justified in awarding the sum of £200 to the representative of the widow. I think the only right thing to do in this case is to send it back for reconsideration for this reason: Looking at the form of this claim and at the whole case, I think that the learned judge may have been under a misunderstanding. He may have awarded the sum thinking that Lily Bailey would share in it beyond the amount apportioned to her as a dependent; and I think that, there being this misunderstanding and misapprehension about the matter, the right thing is to send the case back for reconsideration, with, of course, the direction that to award compensation to the representatives of a partial dependent upon anything approaching the sum proper as compensation to be awarded to the representative of a total dependent, is wrong, and that compensation can only be awarded in respect of the actual injury to the partial dependent.

It is suggested that it would be embarrassing to the learned county court judge to send this case back to him. In the case of new trials or retrials I am very much inclined to agree with that. It has always been my opinion that cases should not go back to the same judge; they should be retried by another judge, as is almost always done in the King's Bench Division. But this is not a case of that kind; this is not a retrial; it is only a sending back of the case for a reassessment of compensation which will have to be dealt with and administered in this learned judge's own county court. I do not think there is anything in the matter which will embarrass the learned county court judge, and I do not see any reason for not sending it back to him.

The appellant will, of course, have the costs of this appeal. The costs

of the first hearing will depend upon the result of the second.

Atkin, L. J.:

I agree. Under § 1 of the Workmen's Compensation Act the employer is liable to pay compensation in accordance with the first schedule, under which, if the workman leaves any dependents in part dependent upon his earnings, the compensation is to be such sum as may be determined on arbitration to be reasonable and proportionate to the injury to the said dependents. Resting there, I think that gives a right to the partial dependent to have determined what the compensation is, but that the compensation so determined is, as provided for under the act, to be an amount reasonable and proportionate to the injury to the said dependents. The injury to the partial dependents is the withdrawal of the support which the deceased workman was giving them; and the amount to be awarded proportionate to the injury must depend, amongst other things, upon the length of time during which that support would be forthcoming to the dependents. As to the measure of that compensation it would also be such as would be determined in the ordinary course by some estimate made by the judge, of the length of time during which the particular applicant would have been dependent upon the workman if the workman had lived; and that is a matter of estimate or calculation in the county court. In the case of the children it varies with the age of the children; in the case of the widow it depends upon the age of the widow, possibly on the question whether she may remarry, and so on, and it is a matter that the county court judge has to estimate as best he can upon the evidence before him. But it sometimes happens that in a case of that kind the facts have been ascertained, and then the learned judge is relieved from guessing or estimating on the probabilities. He knows as a fact, and if he knows at the time he comes to measure out the compensation what the period of the support of the partic-

ular applicant would have been if the workman had lived, then he takes that into account; it is unnecessary, and indeed improper, to make any further calculation; it rests on the ascertained facts; and in this case as far as that is concerned, the learned judge knows what the injury done is, and that this man would not have had to support his wife, as it happened, more than four weeks. That therefore must be the period with reference to which the learned judge must measure the extent of the injury. It seems to me impossible to award the large sum that he has granted in this case. Therefore I think the award was arrived at upon an incorrect principle in that respect.

Then there comes the question of the daughter Lily. She is a girl of thirteen, and though it is true she had been earning at the time some wages, of course the learned judge would take into account the cost of clothing, and I suppose education, and possibly other things. From that point of view it is impossible, in my opinion, that the learned judge should only award the small sum of £20, which was the amount of his ultimate award. It is quite plain to my mind that the learned judge awarded that sum upon the footing that Lily would share in the mother's estate which the daughter Agnes recovers as her legal personal representative. I do not know, but it seems to have been thought that the amount would be divided in equal shares between the two daughters. I do not know how that was; it appears really that in law Lily would only have been entitled to one third. It does not matter now, because any large sum awarded to the representative of the mother disappears. It is obvious that the matter must be reconsidered by the judge, having regard to the facts as to the mother's death, which he ought to have taken into account.

There will be liberty for the applicants to make such application as they may think fit, by way of amendment or otherwise, with a

view of putting the real case before the learned county court judge so that he may make the appropriate order upon it. I agree that the appeal should be allowed, with costs, and that the matter should be remitted to the learned county court judge.

Younger, L. J.:

I am of the same opinion. I cannot doubt that one of the main difficulties in connection with this case was occasioned by some sort of idea that the claim of the daughter Lily for compensation is in some manner affected by the fact that incidentally she happens to be one of the next of kin of her mother. If it had been made quite plain that the amount of compensation payable in respect of the widow is now receivable by her legal personal representative, and is in no way dependent upon the ultimate destination of the sum so received, then I think a good deal of the difficulty that has occurred in this case would not have arisen.

As I understand it, the claim of the legal personal representative depends as to amount entirely upon whether the widow was totally or partially dependent upon the deceased workman. Whether she was partially or totally dependent, what happens to the money, after her legal personal representative has received it, makes no difference to the assessment.

I think the appeal ought to be allowed on the grounds stated by the other members of the court.

Appeal allowed.

Solicitors for the appellants:
John Taylor & Company, Manchester.

Solicitors for the respondents:
Maude & Tunnicliffe, for Brown, Briggs, & Company, Stockport.

NOTE.

As to the right to compensation under workmen's compensation acts upon the death of the person entitled to the award, see annotation following *LAHOMA OIL CO. v. STATE INDUSTRIAL COMMISSION*, post, 821.

HEISELT CONSTRUCTION COMPANY et al., Plffs. in Certiorari,
v.

INDUSTRIAL COMMISSION OF UTAH.

Utah Supreme Court — April 11, 1921.

(— Utah, —, 197 Pac. 589.)

Workmen's compensation — effect of death before award.

1. Under a statute providing benefits for injured employees and their dependents, the death of an injured employee without dependents, prior to an award of compensation, from a cause other than the accident, terminates the right, and it will not pass to his estate.

[See note on this question beginning on page 821.]

— power of court over findings of fact. which are supported by substantial evidence.
2. The court cannot disturb findings of the Industrial Commission [See 28 R. C. L. 827, 829.]

(Gideon, J., dissents.)

CERTIORARI to review proceedings of the Industrial Commission and to have an award made by it to the estate of a certain deceased person declared null and void. *Award annulled.*

The facts are stated in the opinion of the court.

Messrs. E. L. Kearney and Gustin, Gillette, & Brayton, for plaintiffs in certiorari:

If one died simply as the result of the general working conditions at the place of employment, instead of as the result of injury received from some sudden, unusual, unexpected event described as an accident, then his death is due to industrial disease, and is not due to an accident, and no recovery can be had under the Workmen's Compensation Law.

Adams v. Acme White Lead & Color Works, 182 Mich. 157, L.R.A.1916A, 285, 148 N. W. 485, Ann. Cas. 1916D, 689, 6 N. C. C. A. 482; Alloa Coal Co. v. Drylie, 50 Scot. L. R. 250, [1913] W. C. & Ins. Rep. 213, 6 B. W. C. C. 398; Petschett v. Preis, 31 Times L. R. 156; Federal Gold Mine v. Ennor, 13 C. L. R. (Austr.) 276; Coe v. Fife Coal Co. 46 Scot. L. R. 328, [1909] S. C. 393; M'Millan v. Singer Sewing Mach. Co. 50 Scot. L. R. 220, [1913] S. C. 346, [1913] W. C. & Ins. Rep. 70, 6 B. W. C. C. 345, [1912] 2 Scot. L. T. 484; Landers v. Muskegon, 196 Mich. 750, L.R.A.1918A, 218, 163 N. W. 43; Pyper v. Manchester Liners [1916] 2 K. B. 691, 85 L. J. K. B. N. S. 1459, 115 L. T. N. S. 406, 32 Times L. R. 723, 60 Sol. Jo. 706, 9 B. W. C. C. 580; Lyons v. Woodilee Coal & Coke Co. [1916] S. C. 719, 53 Scot. L. R. 538, 9 B. W. C. C.

655; Linondale Bleach Dye & Paint Works v. Riker, 85 N. J. L. 426, 89 Atl. 929, 4 N. C. C. A. 713; Kutschmar v. Briggs Mfg. Co. 197 Mich. 146, L.R.A.1918B, 1133, 163 N. W. 933; Blair v. Omaha Ice & Cold Storage Co. 102 Neb. 16, 165 N. W. 893; Dozier v. Fidelity & C. Co. 13 L.R.A. 115, 46 Fed. 446; Roach v. Kelsey Wheel Co. 200 Mich. 299, 167 N. W. 33.

Messrs. Harvey Cluff, Attorney General, and James H Wolfe, for defendant in certiorari:

Compensation for the loss of a specific member of the body passes to the estate of the injured man when he dies from independent causes.

Rayner v. Sligh Furniture Co. L.R.A.1916A, 135, note; Darling v. Roscoe [1907] 1 K. B. 219, 76 L. J. K. B. N. S. 371, 96 L. T. N. S. 179, 23 Times L. R. 167; United Collieries v. Simpson [1909] A. C. 383, 78 L. J. C. P. N. S. 129, 101 L. T. N. S. 125, 25 Times L. R. 678, 53 Sol. Jo. 630, [1909] S. C. (H. L.) 19, 46 Scot. L. R. 780, 2 B. W. C. C. 308; State ex rel. Munding v. Industrial Commission, 92 Ohio St. 434, L.R.A.1916D, 944, 111 N. E. 299, Ann. Cas. 1917D, 1162, 13 N. C. C. A. 713; Smith v. Kaw Boiler Works Co. 104 Kan. 591, 180 Pac. 259; Wangler Boiler & Sheet Metal Works Co. v. Industrial Commission, 287 Ill. 118, 122 N. E. 367; Smith v. Southern

Surety Co. — Tex. Civ. App. —, 193 S. W. 204.

Thurman, J., delivered the opinion of the court:

This is an action to review the proceedings of the defendant, Industrial Commission of Utah (hereinafter called Commission), in the matter of an award made by said Commission to the estate of one David Murphy, deceased, and to have said award declared null and void. The decision of the Commission not only contains its findings of fact, conclusions of law, and award, but also the reasons which induced the Commission to make the award. With the view of making our opinion more intelligible we quote the decision in its entirety:

"I. The defendant employer, Heiselt Construction Company, is, and was on January 10, 1920, an employer subject to chapter 100, Compiled Laws of Utah 1917, as amended, and that defendant Aetna Life Insurance Company is the insurance carrier of said defendant employer.

"II. That defendant Aetna Life Insurance Company paid deceased \$16 per week as compensation for nine weeks, ending March 28th, 1920, and that all medical and hospital service was furnished by defendants in the following amounts: Medical, \$38; hospital, \$95.

"III. That on the 10th day of January, 1920, David Murphy, of Salt Lake City, state of Utah, was injured by accident arising out of or in the course of his employment, while engaged in the usual course of his trade, business, profession, or occupation of the defendant employer of Provo Canyon, state of Utah.

"IV. That said injury was caused from being exposed to severely cold weather while at his work on January 10, 1920, which resulted in the ends of several of his fingers becoming frozen and later requiring the amputation of right thumb at distal joint, right first finger one-half dis-

tal phalanx, right second finger one-half distal phalanx, right third finger three-fourths distal phalanx, left fourth finger three-fourths distal phalanx.

"V. That David Murphy died on the 28th day of March, 1920, from causes in no wise connected with or resulting from said injuries.

"VI. That deceased was fifty-four years of age, single, and was earning at the time of the accident \$31.50 per week, working seven days per week, and that, so far as known, he left no one dependent upon him for support.

"VII. That applicant, A. E. Harvey, is the duly appointed administrator of the estate of David Murphy, deceased.

"Conclusions.

"From the foregoing the Commission finds and concludes as follows:

"David Murphy suffered an injury arising out of or in the course of his employment while in the employ of the defendant employer, which would entitle him to the benefits of the Workmen's Compensation Act of Utah for the period of total disability of nine weeks, and in addition thereto compensation for the loss of certain members, equaling thirty-one and one-half weeks at \$16 per week, upon which was paid at the time of his death nine weeks at \$16 per week, or \$144. There remains unpaid thirty-one and one-half weeks at \$16 per week, or \$504, which amount his estate is justly entitled to recover.

"Section 3137 of the Workmen's Compensation Act provides for the compensation payments in cases of temporary disability. This section of law was complied with by defendant insurance company by their paying the injured David Murphy for that period of time total disability suffered.

"Section 3138 of the act provides, in part, 'in the case of the following injuries the compensation shall be 60 per cent of the average weekly wages, but not more than \$16, to be

(— *Utah*, —, 197 Pac. 589.)

paid weekly for the periods stated against such injuries respectively, and shall be in addition to the compensation hereinbefore provided for temporary total disability.' Then follows the schedule.

"It is under this section and schedule that the deceased was entitled to thirty-one and one-half weeks' compensation, and for which no compensation was paid.

"Section 3145 of the act gives to the Industrial Commission power to commute periodical benefits to one or more lump sum payments.

"In view of the foregoing, and the evident intent of the act to, among other things, relieve the public of the care of such cases as would otherwise become charges upon charity, the Commission finds and concludes that the estate of David Murphy, deceased, should recover in this case, thereby enabling the appointed administrator to pay certain obligations incurred by the deceased, and to defray the necessary funeral expenses.

"Therefore, it is ordered, adjudged, and decreed that the defendant Heiselt Construction Company or Aetna Life Insurance Company pay to applicant A. E. Harvey, as administrator of the estate of David Murphy, deceased, the sum of \$504, which sum represents compensation at the rate of \$16 per week for thirty-one and one-half weeks, dating from March 28, 1920, the entire amount of which is now due and payable."

Application for a rehearing was denied.

Plaintiffs contend that the evidence is insufficient to establish the fact that David Murphy's thumb and fingers were frozen while in the employment of the construction company, or that they were frozen at all. Plaintiffs also challenge the finding that the alleged freezing of the thumb and fingers constituted an injury arising from an accident as contemplated in the Industrial Act. They also challenge the conclusion that the estate of David Murphy is entitled to the benefits he would

have received had he lived during the period fixed by the award.

One of the most usual burdens imposed upon this court in this class of cases is to be compelled to declare over and over again that the court is powerless to disturb findings which are supported by substantial evidence. In the present case there is substantial evidence to support the finding that the thumb and fingers of David Murphy

Workmen's compensation—power of court over findings of fact.

were frozen while in the employment of the construction company on the 10th day of January, 1920. That question is therefore dismissed without further consideration.

Whether the thumb and fingers becoming frozen constituted an injury arising from accident, as contemplated in the Industrial Act, presents a more serious question, and one which, if controlling, should not be summarily disposed of by the court. It presents a mixed question of law and fact, under the authorities we have examined, and its determination requires a close and careful analysis of many conflicting decisions. In the opinion of the writer that question is not controlling in the instant case, and any decision we might render concerning it would, at most, merely establish a rule for the determination of future cases. For that reason, in the present case, we leave the question undetermined.

The correctness of the conclusion reached by the Commission, that the estate of David Murphy, deceased, is entitled to succeed to the benefits which he would have received had he lived, seems to be the only question left for our determination. A brief statement of the contentions of the respective parties in this regard will tend to narrow the discussion. The defendant contends that the right of David Murphy to compensation for the loss of his thumb and fingers, under Utah Comp. Laws 1917, § 3138, as amended in Sess. Laws 1919, p. 161, became a vested

right in his lifetime, and upon his death from other causes, without dependents, such right inured to his estate. Plaintiffs' contention is that the compensation to which Murphy was entitled for the loss of his thumb and fingers was intended only as compensation for the loss of any wages he might have been enabled to earn in the future if he had not been injured, and was purely a personal right which terminated upon his death.

The question presented is both novel and interesting. It is to us a case of the first impression. It is insisted by the defendant Commission that there are cases analogous in principle and persuasive in support of defendant's contention. We are referred especially to the case of *State ex rel. Munding v. Industrial Commission*, 92 Ohio St. 434, L.R.A. 1916D, 944, 111 N. E. 299, Ann. Cas. 1917D, 1162, 13 N. C. C. A. 713. That case arose under the Ohio Industrial Act which was in force when the Utah Industrial Act was enacted. It is generally conceded that the Utah act was patterned after the Ohio law. Section 35, subd. 2, of the Ohio law (103 Ohio Laws, p. 72), the construction of which was involved in the case referred to, reads as follows: "If there are wholly dependent persons at the time of the death, the payment shall be 66⅔ per cent of the average weekly wages, and to continue for the remainder of the period between the date of the death and six years after the date of the injury, and not to amount to more than a maximum of \$3,750, nor less than a minimum of \$1,500."

Section 3140, subd. 2, Utah Comp. Laws 1917, as amended in Session Laws 1919, at page 163, reads: "If there are wholly dependent persons at the time of the death, the payment shall be 60 per cent of the average weekly wages, but not to exceed a maximum of \$16 per week, and to continue for the remainder of the period between the date of the death, and six years after the date of the injury, and not to amount to

more than a maximum of \$5,000, nor less than a minimum of \$2,000."

It is admitted that as far as any question of construction is concerned there is no difference in principle between the statute of Utah and the statute of Ohio in the excerpts quoted. In the Ohio case the court held that an award of compensation from the state insurance fund to a wholly dependent person, under the law of that state, above quoted, vested in the dependent when the award was made, and in case of the dependent's death any balance remaining unpaid passed to his or her personal representative. At page 455 of 92 Ohio St., the court says: "We hold that when the award is once made to a sole dependent, the right to the compensation vests, and once vested there can be no condition attached except as to the time of payment, and it is equally immaterial whether the dependent subsequently dies or becomes independent."

A literal construction of the language used in the excerpt hardly supports the contention made by defendant in the present case. The language is: "*When the award is once made to a sole dependent the right to the compensation vests.*" (Italics ours.)

In this case no award was ever made to a person while living, nor was there a person living to whom it could have been made. It was not made until December 20, 1920, nearly nine months subsequent to Murphy's death. This distinction may not be entitled to serious consideration. The writer has no desire to advance a suggestion by way of argument that is wholly devoid of merit. The point, however, intended to be made by the distinction referred to, is, if the right does not vest until the award is made, then, in the present case, there was no vested right, because there was no one living in whom it could vest. We can hardly conceive of a right passing to an estate unless the right had vested in someone while living.

In addition to the Ohio case cited

(— *Utah*, —, 197 Pac. 589.)

in support of defendant's contention that the right of a dependent to compensation is a vested right, defendant cites *Smith v. Kaw Boiler Works Co.* 104 Kan. 591, 180 Pac. 259; *Wangler Boiler & Sheet Metal Works Co. v. Industrial Commission*, 287 Ill. 118, 122 N. E. 367; *Smith v. Southern Surety Co.* — Tex. Civ. App. —, 193 S. W. 204; L.R.A. 1916A, 135, and cases cited in the note.

It is but fair to defendant to state its position is that when Murphy lost his thumb and fingers his compensation for the loss immediately vested by virtue of § 3138, *supra*, which specifically provides compensation for the loss of a member; that such compensation does not depend for its validity upon an award by the Commission, but upon the statute, which unqualifiedly vests the compensation; that in the present case, the compensation being absolutely fixed and determined before death, it became, and was, a vested right, and, upon his death, immediately vested in his estate. There would be much force in this contention if it were justified by a fair and reasonable interpretation of the scope and meaning of the Utah Workmen's Compensation Act. The very title of the act itself seems to preclude the idea that any portion of the fund should inure to the estate of the employee or that of his dependents. The title, as far as material, reads: "Prescribing the Powers and Duties of the Industrial Commission of Utah; Establishing Rates of Compensation for Personal Injuries or Deaths Sustained by Employees in the Course of Employment; Providing Methods of Insuring the Payment of Such Compensation; Creating a State Insurance Fund for the Benefit of Injured and the Dependents of Killed Employees; Providing for the Administration of Such Fund by the Industrial Commission of Utah." (Italics ours.)

If we go further and examine the body of the act, we nowhere find a suggestion that the estate of the em-

ployee, or any of his dependents, shall succeed to the benefits covered by the act. On the contrary, as far as the dependent is concerned, we find it expressly provided: "Should any dependent of a deceased employee die or marry during the period covered by such weekly payments, the right of such dependent to compensation under this title shall cease." Utah Comp. Laws 1917, § 3141.

Neither this provision, nor any provision similar, is found in the Ohio act from which it is claimed the Utah law was adopted. The fact that the decision in the Ohio case, before referred to, was rendered prior to the enactment of the Utah law, is of deep significance. With that decision before it, interpreting the meaning of the Ohio law, the Utah legislature deliberately enacted the provision above quoted, providing that benefits awarded to sole dependents ceased upon their death. It indicates just what the title of the act above quoted implies, that the benefits of the act, in the event of the employee's death from injury, passes to his dependents, and to them alone. Upon their death the benefits cease. The unpaid balance, if any, remains in the insurance fund instead of vesting in the dependents' estate.

When we come to consider the case of the employee himself we find the same general policy expressly maintained. In the event of his death from the injury, within the act, without dependents, it is provided that the employer or insurance carrier shall, in addition to burial expenses, pay into the state treasury the sum of \$750, unless the employer is insured in the state insurance fund. Utah Comp. Laws 1917, as amended in subd. 1 of said section, Sess. Laws 1919, p. 163. Thus, it appears, both in the case of the death of a dependent and of the death of the employee himself, without dependents, the statute expressly ignores their estate and excludes them from participating in the fund.

A careful reading of the act in-

duces in our mind a strong conviction that the primary purpose of the law is: (1) To secure to an injured employee, within the act, compensation for his injury or loss, to be paid in weekly instalments, unless commuted, such payments to cease at his death; (2) to secure to the dependents of a deceased employee, within the act, the benefits provided therein, such benefits to cease upon the dependents' death; and (3) to maintain, preserve, and keep secure the insurance fund for the above purposes.

It cannot be inferred from any language found in the Utah law that the insurance fund therein provided should be drawn upon or used for any other purposes than as a personal benefit to the classes of persons named in the act, ^{—effect of death before award.} to be conferred upon them while living. Indeed, there is something almost incongruous in the idea that the insurance fund should be susceptible of being lavished upon persons possibly bearing no relation whatever to the deceased employee or the business in which he was employed.

The point we make is well stated in a Massachusetts case, wherein it was contended that, on the death of a dependent, the benefits awarded vested in her estate. The supreme judicial court of that state, in *Murphy's Case*, 224 Mass. 594, 113 N. E. 283, says: "To hold that the defendant's right to compensation is a vested right which passes to a legatee by will, and in case of intestacy goes to dependent's next of kin, would be to put upon the insurer a burden not called for by the object which the act was passed to obtain. In addition, the compensation awarded the dependent would go in that case to persons altogether outside the class contemplated by the act. So construed, the act would or might enrich strangers in place of doing justice to the family and next of kin of an employee killed in the course of, and so as an incident to, the

business in which he was employed."

If the compensation which a deceased employee would have been entitled to had he lived vests in his estate when he dies without dependents, it follows as a corollary indisputable that such compensation is not only the subject of inheritance, but of testamentary disposition as well. As stated by the Massachusetts court, the act so construed might enrich strangers in place of doing justice to the family and next of kin. Such, we believe, would be a perversion of the whole scheme of legislation on this subject, and would defeat the manifest purposes of the law. It is not entirely free from doubt that the legislature has the power to impose such a burden upon the insurance fund. It cannot be said that it is in any sense a matter of common right. No such obligation rests upon employers at common law, even in cases of the grossest negligence. Let us suppose, for instance, that the freezing of *Murphy's* thumb and fingers was caused by the inexcusable, indefensible negligence of his employer, and that, on the same day, he died from sunstroke, or other cause in no wise attributable to the injury to his thumb and fingers, what right at common law would his estate have for such injury? It would have none whatever, for the simple reason that the estate has suffered no loss.

It appears to the writer, viewing the case from every angle of which he is capable, whether from the standpoint of legislative intent, common law, or equity, that the estate of *David Murphy*, deceased, is not entitled to the sum awarded by the Commission, or any sum whatever. We have found no case in point, or even analogous, in the slightest degree sustaining such award under a statute similar to ours, nor has any such case been called to our attention.

The most plausible reason given by the Commission for the award in question is found in the last para-

(— *Utah*, —, 197 *Pac.* 589.)

graph of what are denominated its conclusions: "The Commission finds and concludes that the estate of David Murphy, deceased, should recover in this case, *thereby enabling the appointed administrator to pay certain obligations incurred by the deceased, and to defray the necessary funeral expenses.*" (Italics ours.)

The Commission found itself in an unusual and extraordinary predicament. An employee within the Industrial Act had been injured, and the Commission concluded he was entitled to compensation for the loss. The employee subsequently died from other causes. The act provides for payment of funeral expenses out of the fund only in cases where death results from the injury. The Commission by circuitous method undertook to do what it could not do directly. It sought by the award to compel the payment of the funeral expenses of deceased out of the fund, notwithstanding his death did not result from the injury. In our opinion the Commission exceeded its jurisdiction.

The award is, therefore, annulled and set aside, and the Commission is directed to dismiss the action.

Corfman, Ch. J., and Weber and Frick, JJ., concur.

Gideon, J., dissenting:

The determinative question presented by this record is concisely stated in the brief of defendant as follows: "The controlling question being whether or not compensation due deceased on account of the permanent injury suffered, namely, the loss of certain parts of his fingers, became a vested right in his estate upon his death, when death results from other causes than injury."

My learned associate Mr. Justice Thurman discusses the case on the theory that such is the decisive question. In the prevailing opinion he says: "The correctness of the conclusion reached by the Commission that the estate of David Murphy, deceased, is entitled to succeed to the benefits which he would have

received had he lived, seems to be the only question left for our determination."

The authorities, under workmen's compensation laws such as ours, are to the effect that whenever the statute has fixed a definite amount payable to a particular person the right of such person, or, in the event of his death, his legal representative, to receive the amount so fixed, cannot be defeated except by some positive provision of the statute terminating such right, or unless the manifest intent and general purpose of the act would be thwarted by enforcing payment. *State ex rel. Munding v. Industrial Commission*, 92 Ohio St. 434, L.R.A.1916D, 944, 111 N. E. 299, Ann. Cas. 1917D, 1162, 13 N. C. C. A. 713; *Smith v. Kaw Boiler Works Co.* 104 Kan. 591, 180 Pac. 259; *Wangler Boiler & Sheet Metal Works Co. v. Industrial Commission*, 287 Ill. 118, 122 N. E. 366; *Darlington v. Roscoe* [1907] 1 K. B. 219, 76 L. J. K. B. N. S. 371, 96 L. T. N. S. 179, 23 Times L. R. 167; *United Collieries v. Simpson* [1909] A. C. 383, 78 J. C. P. N. S. 129, 101 L. T. N. S. 125, 25 Times L. R. 678, 53 Sol. Jo. 630, [1909] S. C. (H. L.) 19, 46 Scot. L. R. 780, 2 B. W. C. C. 308. The last two cases are cited in notes 95 and 96, L.R.A.1916A, 135.

The Lord Chancellor, in *United Collieries v. Simpson*, supra, in discussing a similar question to the one under consideration, said: "The act does not require that the dependent himself should make the claim, and I do not see why that right to make the claim should not pass to the executor. . . . No doubt this act was intended to save dependents from the loss they might sustain by being deprived of the support they previously had from the deceased workman, and if the dependents themselves die they require it no longer. And it seems anomalous to enforce payment when no dependent is still living to require support. The act, however, provides a fixed sum, and this must be taken as the statutory provision, whether in the

event it is needed or not. Perhaps if this result had been foreseen it might have been guarded against; but that cannot affect the judgment of a court of law."

In the *Wangler Boiler & Sheet Metal Works Co. v. Industrial Commission*, 287 Ill. 118, 122 N. E. 366, the fourth headnote, which correctly reflects the opinion of the court, reads as follows: "In view of Workmen's Compensation Act, § 9, and § 19, 'g,' the right to compensation, though not a subject of bequest, and though continuing in the dependents of the beneficiary only in manner provided by the act, is a vested right, and can be affected only by the act of the legislature that gave it."

No case is cited, nor has any been found, holding contrary to the conclusions announced in the foregoing authorities.

Proceeding upon the assumption that the authorities cited support the foregoing general statement of the law, it is advisable to examine the sections of our act to determine whether there is anything except mere deductions to warrant the conclusion that the terms of the act defeat the right of the estate of the injured employee to receive the compensation fixed by the act. It will not be, and is not, contended that the amount of compensation to which the deceased would have been entitled had he lived was in any way contingent upon the question of dependency or upon any judgment of the Commission. It is a definite sum fixed by statute. No discretion is left in the Commission, save that it may commute the payments and direct the amount to be paid in a lump sum. Utah Comp. Laws 1917, § 3137, being one of the sections of the Workmen's Compensation Act, as amended by chap. 63, Utah Laws 1919, provides for compensation in cases of temporary disability, and fixes the amount to be paid. The right of the claimant in this proceeding is governed by Utah Comp. Laws 1917, § 3138, as amended by chap. 63, Utah Laws 1919. If the

award made by the Commission is not authorized, and must therefore be annulled, the reason will have to be found in this section. The section as amended reads as follows: "Where the injury causes partial disability for work, the employee shall receive, during such disability and for a period of not to exceed six years beginning on the fourth day of disability, a weekly compensation equal to 60 per cent of the difference between his average weekly wages before the accident and the weekly wages he is able to earn thereafter, but not more than \$16 a week. In no case shall the weekly payments continue after the disability ends, or death of the injured person, and in case the partial disability begins after a period of total disability the period of total disability shall be deducted from such total period of compensation. In the case of the following injuries the compensation shall be 60 per cent of the average weekly wages, but not more than \$16 to be paid weekly for the periods stated against such injuries respectively, and shall be in addition to the compensation hereinbefore provided for temporary total disability, to wit, for loss of: [Here follows schedule of amounts to be paid for loss of arm, hand, finger, etc.]."

The provision of the section claimed by counsel for plaintiff as authority to defeat the award is the sentence found in the above quotation as follows: "In no case shall the weekly payments continue after the disability ends, or the death of the injured person."

Upon the analysis of that section it is apparent that two distinct grounds or rights to compensation are included. The first relates to an injury causing "partial disability for work." (*Italics mine.*) The sentence last quoted and relied upon to defeat the award, at most, is merely a proviso or limitation upon the general terms found in the section.

"The proviso is generally introduced by the word 'provided,' but its

existence and effect are to be determined rather by its matter and substance than by its form." 36 Cyc. 1162.

The same meaning would have been conveyed if the legislature, rather than making the limitation a distinct, independent sentence, had used the word "provided" preceding "in no case," etc. Such being the evident intent of the language quoted, no good reason is found in the act why the ordinary rules of construction should not be applied to this language. The usually accepted function of proviso is to limit preceding general terms used in the statute. *Rawls v. Doe*, 23 Ala. 240, 48 Am. Dec. 289; *De Graff v. Went*, 164 Ill. 485, 45 N. E. 1075; *Re Bovier*, 52 Utah, 285, 172 Pac. 683; *Sullivan v. Bailey*, 125 Mich. 104, 83 N. W. 996; *Wolf v. Bauereis*, 72 Md. 481, 8 L.R.A. 680, 19 Atl. 1045; *United States v. Bernays*, 86 C. C. A. 52, 158 Fed. 792.

In *Rawls v. Doe*, *supra*, the court said: "As the natural and appropriate office of a proviso is to restrain or qualify some preceding matter, we think, upon sound principles of construction, it should be confined to what precedes, unless it is clear that it was intended to apply to subsequent matter."

That rule of construction received the approval of this court in *Re Bovier*, 52 Utah, 285, 172 Pac. 683.

An examination of the section quoted proves conclusively that the injuries mentioned in the latter part of that section are in no way related and are in no way kindred to the disabilities or injuries mentioned in the part of the section which precedes the proviso. The latter part of the section deals exclusively with compensation for the loss of an arm, hand, or some other portion of the body specifically mentioned in the schedule. Following that schedule, there is no intimation that the compensation provided for therein is to be defeated by the death of the injured person or after the disability ends. In fact, we are dealing with a

disability or injury that in the very nature of things can never end; nevertheless we are applying a defeasance clause that provides that an award may be defeated by the removal of a disability.

In my judgment, the decision of the Ohio supreme court in *State ex rel. Munding v. Industrial Commission*, 92 Ohio St. 434, L.R.A.1916D, 944, 111 N. E. 299, Ann. Cas. 1917D, 1162, 13 N. C. C. A. 713, ought to be decisive of the question here presented. As stated by Mr. Justice Thurman, our Workmen's Compensation Act is copied largely from the law of that state. The decision in the above case was rendered in July, 1915, some two years prior to the enactment of the law in this state. The statute in that state fixed a definite amount to be paid to the dependents, and the court held that such became a vested right and descended to the estate of the one to whom the payments should have been made had he lived. In the course of the opinion the court said: "If the deceased employee left a widow who was living with him at the time of his death, the board must find that she was wholly dependent upon her deceased husband, and must make a certain award of compensation to her. The questions of dependency and amount of award in such case are both determined absolutely by the statute. The board can act only formally, and must so act."

The amount payable to the deceased under § 3138, *supra*, is determined by the statute. There is no question of dependency involved. Neither is there any question of the loss of wages. The sole question for the Commission to determine was, Did the loss of the fingers occur in the course of or arise out of the employment? If so, the statute fixes definitely the amount of payment. The fact of the construction of the statute by the Ohio court prior to the enactment of the law in this state must be presumed to have been within the knowledge of the legislature at the date of the

enactment. Apparently with a view of defeating the application of that construction to certain portions or provisions of our act, the legislature inserted the proviso found at or near the center of § 3138.

Section 3141 of the act has to do with the apportionment and payment of benefit in cases of death. The legislature, apparently to further emphasize its intent that the limitation or defeasance of the award should apply only to certain specific provisions of the statute, and not to the act generally, provided, in the last sentence of said § 3141, as follows: "Should any dependent of a deceased employee die or marry during the period covered by such weekly payments, the right of such dependent to compensation under this title shall cease."

It will not be argued, I apprehend, that the limitation quoted affects or relates to any compensation other than that provided for in § 3141. Nothing is found in the act except in the limitations in § 3138, *supra*, and in § 3141, above quoted, that even suggests an intent on the part of the legislature to defeat a right once vested. It may well be doubted whether the limitation placed upon the award found in § 3141 was intended to defeat an award; that is, to relieve the insurer of the payment of such award. To illustrate: Suppose that a man is killed by accident while in the employ of another, and leaves a widow and minor children. The Commission, in its discretion, determines that so much of the award is payable to the widow and so much for the support of the minor children. The widow marries again. No one would seriously contend that the insurer would thereby be relieved from paying the full amount of the award to the remaining dependents, and yet such would be the logical result if the majority opinion is a correct interpretation of the intent of the legislature.

I regard the date of the award as wholly immaterial. The right was or was not in existence prior to the

death of deceased. In this case, admittedly, the deceased, in his lifetime, had the right to demand the compensation as fixed by the statute. The award does not make the right. The award is dependent upon the legal right existing before it is made. It is merely the act of the Commission recognizing a right already in existence.

It is suggested in the opinion of the court that it is hardly conceivable of the right passing to the estate unless the right had vested in someone while living. If the right was in any way dependent upon the award, that suggestion might have some weight in the reasoning of the court. The right, however, was not dependent upon the award. The right was created by statute. I have attempted to point out that there is nothing in the statute that defeats the right by reason of the death of the claimant.

My associate who writes the prevailing opinion justifies the order annulling the award, not upon a construction of the section quoted, but upon what is designated "a fair and reasonable interpretation of the scope and meaning of the Utah Workmen's Compensation Act." It is argued that the title of the act "seems to preclude the idea that any portion of the fund should inure to the estate of the employee, or that of his dependents." In my judgment, no words are found in the title of the act, as quoted in the majority opinion, to warrant the conclusion that "the very title of the act itself" precludes "the idea that any portion of the fund should inure to the estate of the" injured "employee." As set forth in the title, the insurance fund is to be administered for the benefit of injured employees and dependents of killed employees. It may reasonably be assumed that the loss of an arm, finger, etc., would be an injury to an employee. What reason, therefore, is there, from the language found in the title, to conclude that if the body of the act vests a right in an injured employee by reason of an injury, that such

(— *Utah*, —, 197 Pac. 589.)

right is defeated by the scope of the act as set forth in the title? The general purpose and scope of our Workmen's Compensation Law is not different from the general purpose and scope of such laws in other states or other countries. The authorities of this country and of England are in harmony in holding that courts have "no power to put a limitation upon the right legally given by the legislature." *Wangler Boiler & Sheet Metal Works Co. v. Industrial Commission*, 287 Ill. 118, 122 N. E. 366.

Neither, in my judgment, is the question presented by this record controlled or concluded by the contention that the underlying purpose of the act is compensation to dependents. It may be admitted that compensation in death cases is not payable except there be dependents at the time of the death. In other words, no rights vest for the simple reason that there is no one in whom such rights could vest. Granted, as it is in this case, that all the conditions had been fulfilled which vested the right and made the compensation payable, then the only question left is, What is there in the act to defeat the vested right? The error of the majority opinion, in my judgment, is that it fails to recognize the fact that a right had ever vested in the deceased. It is stated by the court that "it cannot be inferred from any language found in the Utah law that the insurance fund therein provided should be drawn upon or used for any other purpose than as a personal benefit to the class of persons named in the act, to be conferred upon them while living."

My answer to that is that the conclusion is beside the question. The question here is, Is there anything in the Utah law defeating a right once vested in the deceased? If the

right had vested, then it requires no provision of the statute to make the necessary deduction or inference. The law itself protects such vested right, unless it is defeated by some positive statute.

The eighth headnote to *Wangler Boiler & Sheet Metal Works Co. v. Industrial Commission*, *supra*, is as follows: "Courts have no power to put a limitation upon a right legally given by the legislature, unless by a fair construction of the act it can be said that such limitation was in furtherance of the legislative intent."

The general purposes sought to be accomplished by the act do not in any way, in my judgment, conflict with the general rule of law that a definite, positive right fixed by the act cannot be defeated merely by the death of the party intended to receive the benefits stipulated in such law. If the right vested and became fixed in the deceased, it follows that his legal representative is authorized to apply for and collect the amount for the benefit of the estate of such deceased.

I therefore dissent.

NOTE.

The subject of survival of the right to compensation under Workmen's Compensation Acts upon the death of the person entitled to the award is treated in the annotation following *LAHOMA OIL CO. v. STATE INDUSTRIAL COMMISSION*, post, 821. As will be observed from that annotation, the reported case (*HEISELT CONSTR. CO. v. INDUSTRIAL COMMISSION*, ante, 799) is in line with the rule in most of the states in which the question has been considered, that the death of the person having a right to an award terminates that right.

GEORGE DUFFNEY, Admr., etc., of Emma Duffney, Deceased,
v.

A. F. MORSE LUMBER COMPANY, Appt.

Rhode Island Supreme Court.—July 1, 1919.

(42 R. I. 260, 107 Atl. 225.)

Workmen's compensation — survival of compensation.

An award of compensation for a specified number of weeks to a partial dependent is not vested, and does not pass to his administrator in case of his death within the time specified, under workmen's compensation statutes providing that compensation to a widow shall be paid to minor children in case of her death, that no person shall be considered a dependent unless a member of the employee's family or next of kin wholly or partly dependent on the employee for support, and that no claims for compensation shall be assignable.

[See note on this question beginning on page 821.]

APPEAL by respondent from a decree of the Superior Court for Providence and Bristol Counties (Doran, J.) in favor of petitioner in a proceeding to compel respondent to pay to him the weekly compensation awarded his deceased wife, under the Workmen's Compensation Act, for the death of their son, on whom they were partially dependent for support. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Gardner, Pirce, & Thornley and Charles R. Haslam for appellant.

Messrs. James F. Murphy and James M. Gillrain, for appellee:

The right of Emma Duffney to weekly compensation was a vested right, which survived her death and passed to the petitioner as administrator of her estate.

Wangler Boiler & Sheet Metal Works Co. v. Industrial Commission, 287 Ill. 118, 122 N. E. 366; Monson v. Battelle, 102 Kan. 208, 170 Pac. 801; Hansen v. Brann & S. Co. 90 N. J. L. 444, 103 Atl. 696; State ex rel. Munding v. Industrial Commission, 92 Ohio St. 434, L.R.A.1916D, 944, 111 N. E. 299, Ann. Cas. 1917D, 1162, 13 N. C. C. A. 713; Roma v. Industrial Commission, 97 Ohio St. 247, 119 N. E. 461; United Collieries v. Hendry [1909] A. C. 383, 78 L. J. P. C. N. S. 129, 101 L. T. N. S. 129, 25 Times L. R. 678, 53 Sol. Jo. 630, [1909] S. C. 19, 46 Scot. L. R. 780, 2 B. W. C. C. 308; Smith v. Southern Switz Co. — Tex. Civ. App. —, 193 S. W. 204; Bradbury, Workmen's Comp. Law, 3d ed. 803; 16 Columbia L. Rev. 1916, pp. 618, 619; De La Vergne Refrigerating Mach. Co. v. Featherstone, 147 U. S.

209, 223, 37 L. ed. 138, 143, 13 Sup. Ct. Rep. 283; Lippencott v. Allander, 27 Iowa, 462, 1 Am. Rep. 299; Sacheverell v. Froggatt, 2 Wms. Saund. 367, 85 Eng. Reprint, 1155; Jones v. Pettibone, 2 Wis. 308; Goodyear Shoe Machinery Co. v. Dancel, 56 C. C. A. 300, 119 Fed. 692; Peck v. Kinney, '44 C. C. A. 270, 143 Fed. 76; Oliva v. Morgan, 10 Heisk. 322; Re Follett, 23 R. I. 409, 50 Atl. 848; Cannon v. Cannon, 114 L. T. 231, [1915] W. N. 344, 32 Times L. R. 51, 60 Sol. Jo. 43; Savory v. Dyer, 1 Ambl. 139, 27 Eng. Reprint, 41; Re Ord, L. R. 12 Ch. Div. 22, 41 L. T. N. S. 13; Agnew's Estate, 81 Pa. 190; Clarkson v. Pell, 17 R. I. 647, 24 Atl. 10; Stevenson v. Stevenson, 91 Ky. 50, 14 S. W. 955; Re Shuford, 164 N. C. 133, 80 S. E. 420; Re Whittemore, 38 N. Y. S. R. 1007, 14 N. Y. Supp. 453; Dinet v. Eigemann, 80 Ill. 274; Robinson v. Govers, 138 N. Y. 430, 34 N. E. 209.

The Rhode Island statute contemplates a vested interest in the dependent.

Batcheller-Durkee v. Batcheller, 39 R. I. 45, 61, L.R.A.1916E, 545, 97 Atl. 378; Brown v. Maryland, 12 Wheat. 438, 6 L. ed. 685; Quackenbush v.

United States, 33 Ct. Cl. 355; Black, Interpretation of Laws, 2d ed. p. 131; Jones v. Jones, 13 Sim. 568, 60 Eng. Reprint, 220, 13 L. J. Ch. N. S. 16, 7 Jur. 786; Taylor v. Jackson, — R. I. —, 25 Atl. 348; State v. Kenyon, 13 R. I. 219, 26 Atl. 199; Valcourt v. Providence, 18 R. I. 160, 26 Atl. 45; Smith v. Westerly, 19 R. I. 437, 35 Atl. 526; State ex rel. Munding v. Industrial Commission, 92 Ohio St. 442, L.R.A.1916D, 944, 111 N. E. 299, Ann. Cas. 1917D, 1162, 13 N. C. C. A. 713; Miller v. Kirkpatrick, 29 Pa. 226; Olive Cemetery Co. v. Philadelphia, 93 Pa. 129, 39 Am. Rep. 732; Newton v. Rhode Island Co. 42 R. I. 58, 105 Atl. 363; Island Sav. Bank v. Galvin, 19 R. I. 569, 36 Atl. 1125; Newport Waterworks v. Taylor, 34 R. I. 488, 83 Atl. 838; Re Newport Charter, 14 R. I. 665.

Neither the statute nor the agreement for weekly payments contemplates a revocation or termination of weekly payments during the period of 300 weeks, by the death of the dependent.

Interstate Teleph. & Teleg. Co. v. Public Service Electric Co. 86 N. J. L. 28, 90 Atl. 1062, 5 N. C. C. A. 524; Western Metal Supply Co. v. Pillsbury, 172 Cal. 407, 156 Pac. 495, Ann. Cas. 1917E, 390; Roma v. Industrial Commission, 97 Ohio St. 247, 119 N. E. 464; State v. Strauss, 49 Md. 288; Lawson v. Gibson, 18 Neb. 139, 24 N. W. 447; Smith v. Smith, 20 R. I. 556, 40 Atl. 417; State v. Mylod, 20 R. I. 632, 41 L.R.A. 428, 40 Atl. 753, 11 Am. Crim. Rep. 238; Re O'Connor, 21 R. I. 465, 79 Am. St. Rep. 814, 44 Atl. 591; Donahue v. R. A. Sherman's Sons Co. 39 R. I. 376, L.R.A.1917A, 76, 98 Atl. 109; Arkansas Valley Smelting Co. v. Belden Min. Co. 127 U. S. 379, 32 L. ed. 246, 8 Sup. Ct. Rep. 1308; King v. Batterson, 13 R. I. 117, 43 Am. Rep. 18; Tucket v. West, 31 Ark. 646; The Bay State, Abb. Adm. 235, Fed. Cas. No. 1148.

Parkhurst, Ch. J., delivered the opinion of the court:

This case comes before this court upon the respondent's appeal from a decree of the superior court. By this decree the respondent was ordered to pay to the petitioner, as administrator of the estate of Emma Duffney, his wife, weekly compensation at the rate of \$2 a week, beginning January 16, 1918, until the

expiration of the period of 300 weeks from December 11, 1916, the date of the injury of the deceased employee, Dave Duffney, which payments would have been payable to Emma Duffney, if she had lived, under the Workmen's Compensation Agreement No. 6510, filed in superior court February 1, 1917, and approved by the superior court on February 8, 1917.

By the terms of this agreement, it appears that George Duffney and Emma Duffney, his wife, were the parents of Dave Duffney, the deceased employee, were partially dependent upon his earnings for support at the time of his death, and payments of \$2 a week were agreed to be paid by the said respondent as employer to each of the said partial dependents, "to begin as of December 11, 1916, and to continue for a period not to exceed 300 weeks from December 11, 1916." Under this agreement, payments of \$2 a week were made to each of these partial dependents from December 11, 1916, to January 9, 1918, on which date Emma Duffney died. During that period of time the respondent took from each of the said dependents separate receipts for the weekly payments of compensation of \$2.

Since January 9, 1918, the employer has paid to the said petitioner under this agreement the sum of \$2 weekly, but has refused to pay to him the weekly payments of \$2 formerly made to Emma Duffney. In June, 1918, the petitioner as "a dependent" brought a petition against the respondent, claiming that he was entitled to the compensation formerly paid to his wife under the agreement, on the ground that he was the sole surviving dependent of his son, Dave Duffney, and also on the ground that the right of Emma Duffney to compensation under the agreement was a vested one and passed to him as her "surviving husband;" and, accordingly, he prayed for the enforcement of the agreement so that this weekly sum of \$2 formerly paid to Emma Duffney should be paid to him for the

balance of the compensation period. This petition was heard before Mr. Presiding Justice Tanner, who filed a rescript denying the petition on the grounds: First, that even if the right of Emma Duffney to compensation under the agreement was a vested one, yet it did not pass to the petitioner because he had not been appointed administrator; and, secondly, because the mere survivorship of the petitioner did not entitle him to all the compensation payable under the agreement to himself and wife.

Later, on January 4, 1919, the petitioner filed an amended petition substantially to the same effect as the former one, except that it was alleged that George Duffney had been appointed administrator of the personal estate of Emma Duffney, his wife, and had given a bond to pay the debts of his wife, and was therefore "entitled to demand and recover, as his own property, the remaining weekly sums of \$2 each accruing after the death of said Emma Duffney under said memorandum of agreement." This amended petition was heard before Mr. Justice Doran, who rendered a decision in which he held that the right of Emma Duffney as partial dependent under the compensation agreement was a vested one and upon her death passed to the petitioner as administrator of her estate. Thereafter a decree was entered by Mr. Justice Doran, in which it was decreed as follows:

"(1) That the said petitioner is not entitled to said compensation formerly paid to his wife, Emma Duffney, under said agreement, as surviving dependent.

"(2) That the right of the said Emma Duffney to compensation under said agreement was a vested right, which survived her death and passed to the said petitioner as administrator of her estate.

"(3) That, as administrator of the estate of Emma Duffney, the said petitioner is entitled to receive compensation at the rate of \$2 per week beginning January 16, 1918,

until the expiration of the period of 300 weeks, beginning December 11, 1916, the date of the injury to the said Dave Duffney, deceased, which said payments would have been payable under said agreement to the said Emma Duffney if she had lived."

To this decree the respondent duly filed its claim of appeal and reasons therefor, and has duly prosecuted its appeal to this court, and this appeal is now before us.

The principal question, decisive of this case, is whether or not the right of Emma Duffney (mother of the deceased employee, and a partial dependent upon him at the time of his death) to receive \$2 per week as compensation under the agreement was vested in her and passed to her administrator upon her death.

The provisions of the "Workmen's Compensation Act" of Rhode Island, being chapter 831, Pub. Laws January, 1912, pp. 424 et seq., which are important in this case, may be briefly stated as follows: By the terms of § 6 of article 2 of our Workmen's Compensation Act, it is provided that, in case the employee dies as a result of the injury, the employer shall make certain payments to his dependents. If the dependent to whom the compensation shall be payable is the widow of the employee, then it is provided that "upon her death the compensation thereafter payable under this act shall be paid to the child or children of the deceased employee, including adopted and stepchildren, under the age of eighteen years, or over said age, but physically or mentally incapacitated from earning, dependent upon the widow at the time of her death."

It is also provided that where weekly payments have been made to the injured employee before his death, then "the compensation to dependents shall begin from the date of the last of such payments, but shall not continue more than 300 weeks from the date of the injury: Provided, however, that if

the deceased leaves no dependents at the time of the injury, the employer shall not be liable to pay compensation under this act except as specifically provided in § 9 of this article."

Section 9 provides that, where an employee dies leaving no dependents at the time of his injury, then the employer shall pay the reasonable expense of his last sickness and burial, which shall not exceed \$200.

It is also provided in § 7 of article 2 that in all cases except those of a dependent wife, husband, or children, "questions of entire or partial dependency shall be determined in accordance with the fact as the fact may have been at the time of the injury;" that, "if there is more than one person wholly dependent, the compensation shall be divided equally among them, and persons partly dependent, if any, shall receive no part thereof during the period in which compensation is paid to persons wholly dependent;" and that, "if there is no one wholly dependent and more than one person partly dependent, the compensation shall be divided among them according to the relative extent of their dependency."

Another section of the act relative to the question at issue is § 8, art. 2, which provides that "no person shall be considered a dependent unless he is a member of the employee's family or next of kin, wholly or partly dependent upon the wages, earnings, or salary of the employee for support at the time of the injury."

Section 23 provides that "no claims for compensation under this act, or under any alternative scheme permitted by article 4 of this act, shall be assignable, or subject to attachment, or liable in any way for any debts."

There is no express provision of the act for the further or future payment of any sum of money awarded to a partial dependent, such as was the mother of the deceased employee in the case at bar, after her death, to any other person

(such as exists in case of the dependent widow leaving children within certain ages and conditions).

No case in this state has dealt with this question, but it has been passed upon in other jurisdictions. In *Murphy's Case*, 224 Mass. 592, 113 N. E. 283, under the Massachusetts act (Stat. 1911, chap. 751, as amended), which in essential respects is similar to ours, the sole dependent of the deceased employee was his mother, and she died while her claim for compensation was pending. After her death, her administrator intervened, and the industrial accident board made an award of compensation based on total dependency, and the superior court confirmed this award and ordered that compensation should be paid to the administrator for the period of 300 weeks under the Massachusetts Compensation Act. The supreme judicial court, in reversing this decision, held that the estate of the dependent mother was entitled to compensation from the date of the injury to the date of her death, but that her administrator had no right to further compensation, since the right of the dependent mother to compensation was not a vested right which passed to her legal representatives. The court said, at page 594 of 224 Mass.:

"To hold that the dependent's right to compensation is a vested right, which passes to a legatee by will, and in case of intestacy goes to the dependent's next of kin, would be to put upon the insurer a burden not called for by the object which the act was passed to attain. In addition, the compensation awarded the dependent would go in that case to persons altogether outside the class contemplated by the act. So construed, the act would or might enrich strangers in place of doing justice to the family and next of kin of an employee killed in the course of, and so as an incident to, the business in which he was employed."

"The opposite result has been reached in England and in Ohio. But both those decisions were

founded on provisions of the acts there in question, which were not like the provisions of our Workmen's Compensation Act. The decision in *United Collieries v. Simpson* [1909] A. C. 383, 78 L. J. P. C. N. S. 129, 101 L. T. N. S. 129, 25 Times L. R. 678, 53 Sol. Jo. 630, [1909] S. C. 19, 46 Scot L. R. 780, 2 B. W. C. C. 308, was based upon the provision of the English act that in case the employee was killed a lump sum should be paid to those dependent upon him. . . . The decision in Ohio (*State ex rel. Munding v. Industrial Commission*, 92 Ohio St. 434, 436, 437, L.R.A.1916D, 944, 111 N. E. 299, Ann. Cas. 1917D, 1162, 13 N. C. C. A. 713) was founded on a provision of the act that in the case of persons wholly dependent 'the payment shall be 66 $\frac{2}{3}$ per cent of the average weekly wages, and to continue for the remainder of the period between the date of the death, and six years after the date of injury.' This provision, construed in the light of the report of the commissioners, was held by the court to mean what, by a literal interpretation of its words, it provided.

"For these reasons, we are of opinion that, although there is no express provision to that effect in the act, the weekly payment to be made to the dependent comes to an end when the dependent dies."

In *Bartoni's Case*, 225 Mass. 349, 353, L.R.A.1917E, 765, 114 N. E. 663, the Massachusetts court, following *Murphy's Case*, supra, held that under the Workmen's Compensation Act the right to a weekly award for the death of a deceased employee is not vested absolutely in his widow, but continues only during her life, and ceases with her death. In the Massachusetts act there is no provision, as in ours, that, in the case of the death of a dependent widow, the compensation shall thereafter be paid to the children of the deceased employee, dependent upon her for support at the time of her death.

The two cases above cited were

referred to and approved by the Massachusetts court in *Bott's Case*, 230 Mass. 152, 119 N. E. 755, 16 N. C. C. A. 864, where it was held that a widow awarded compensation for the death of her husband is not barred from receiving further payments as a dependent upon her remarriage, although the remarriage renders her no longer dependent for her support upon the payments received under the act. On page 154 of 230 Mass., the court said: "It was held in *Murphy's Case*, supra, that the right to payments under the act was not vested, and ceased upon the death of the dependent. But that decision does not reach to the point here raised. Its reasoning, in brief, was that there was no provision in the act for payment to be made to anybody save to the dependents therein named, and nothing to indicate a purpose that the payments be made to the personal representative of dependents in case of their death, and that to treat the right to such payments as passing to their executors or administrators often would or might result in payments to persons in no way connected with the deceased employee, or his family or kindred, and this might deprive some of his kindred, in truth dependent upon his wages for support, of any payment under the act. The practical justice of that decision is illustrated by *Bartoni's Case*, 225 Mass. 349, 354, L.R.A.1917E, 765, 114 N. E. 663. The word 'dependents' as matter of construction did not seem rationally susceptible of including their personal representatives in case of their death, in view of the context of the act and its general purpose. That reasoning does not apply to the case at bar."

Bott's Case, supra, was cited with approval by this court in *Newton v. Rhode Island Co.* 42 R. I. 58, 63, 105 Atl. 365. This Massachusetts case clearly shows that the question decided by this court in *Newton v. Rhode Island Co.* supra, is quite different from the one involved here, and consequently that case is not an

authority in point here, as contended by the petitioner.

To the same effect, that the right to compensation awarded to an injured employee or to dependents is not a vested right and does not pass to a personal representative under Workmen's Compensation Acts of a nature substantially similar to our own, see also *Erie R. Co. v. Callaway*, 91 N. J. L. 32, 102 Atl. 6 (right of employee himself); *Ray v. Industrial Ins. Commission*, 99 Wash. 176, 178, L.R.A.1918F, 561, 168 Pac. 1121 (right of employee himself); *Lahoma Oil Co. v. State*, — Okla. —, post, 817, 175 Pac. 837 (right of employee himself); *Wozneak v. Buffalo Gas Co.* 175 App. Div. 268, 161 N. Y. Supp. 675, 679 (right of employee himself); *Matecny v. Vierling Steel Works*, 187 Ill. App. 448, 458 (dependent mother); *Corcoran v. Farrel Laundry & Mach. Co.* 1 Conn. Comp. Dec. 42, 44, ¶¶ 24, 25 (dependent mother); *Ledford v. Casper Lumber Co.* 2 Cal. Ind. Acci. Com. 679 (dependent mother).

Counsel for petitioner, in their brief, cite only a few cases under compensation acts in support of their position that the award of compensation to the dependent mother in this case was vested in her and at her death passed to her administrator. Most of them are not in point. Thus, *Wangler Boiler & Sheet Metal Works Co. v. Industrial Commission*, 287 Ill. 118, 122 N. E. 366, and *Hansen v. Brann & S. Co.* 90 N. J. L. 444, 103 Atl. 696, support the doctrine laid down by this court in *Newton v. Rhode Island Co.* supra, that a widow receiving compensation as a dependent does not forfeit the same by remarriage. *Roma v. Industrial Commission*, 97 Ohio St. 247, 119 N. E. 461, has no bearing on this case. *Smith v. Southern Surety Co.* — Tex. Civ. App. —, 193 S. W. 204, has no application; the provisions of the Texas act are radically different, the scheme and method of payment are entirely different; it is held that a temporary administra-

tor of a deceased employee cannot recover, because the plain terms of the act point out the destination of the compensation in case of the death of the injured employee. Re *Constantine Towle*, Op. Sol. Dept. Labor, p. 565, is under the Federal Compensation Act, and, so far as it goes, is against the petitioner, in that it finds that when the dependent widow of a deceased employee, having received an award, died one week thereafter, the amount accrued between the death of the employee and her death became a part of her estate. This *Towle* Case is incorrectly stated in *Bradbury*, *Workmen's Comp. Law*, 3d ed. 803, 804, also cited by petitioner, which probably accounts for the citation of this case by the petitioner. *Monson v. Battelle*, 102 Kan. 208, 170 Pac. 801, simply holds that a lump sum judgment in favor of an injured workman under the Workmen's Compensation Act does not abate by his death, but may be revived in the name of an administrator. It appeared in that case that before the death of the injured workman there had been a judgment entered in his favor, commuting all future payments of compensation to a lump sum, and pending the appeal by the employer, which was later denied, the employee died. The court said, at page 210 of 102 Kan.: "In the present case, the plaintiff had obtained an absolute personal judgment requiring the immediate payment of a fixed amount. It was the legal duty of the defendant to pay it at once, unless a stay should be procured pending an appeal. If payment had been made, the money would have been wholly at the disposal of the plaintiff. If the final result is an affirmance, it will amount to an adjudication that the rights of the parties shall remain as fixed at the time the judgment was rendered. The defendant gains no immunity from the fact of his having taken an appeal which is ultimately determined not to have been well founded."

The petitioner also cites, in sup-

port of his contention, *United Collieries v. Simpson* [1909] A. C. 383, 78 L. J. P. C. N. S. 129, 101 L. T. N. S. 129, 25 Times L. R. 678, 53 Sol. Jo. 630, [1909] S. C. 19, 46 Scot. L. R. 780, a Scotch case on appeal in the House of Lords under the English Act of 1906 (see also 2 B. W. C. C. 308), and the case of *State ex rel. Munding v. Industrial Commission*, 92 Ohio St. 434, L.R.A. 1916D, 944, 111 N. E. 299, Ann. Cas. 1917D, 1162. Both of these cases were cited by the Massachusetts court in *Murphy's Case*, 224 Mass. 592, 594, 113 N. E. 283, from which we quote, *supra*. These cases have been fully examined, and we are of the same opinion as was expressed in *Murphy's Case* with regard to the difference between the several acts under consideration. We do not find either in the English case or in the Ohio case any aid or controlling value in determining the true construction of our own act.

We find upon the petitioner's brief a large number of cases cited relating to the vesting of various kinds of incorporeal hereditaments or property rights or interests, such as rights under patents, ferry franchises, water rights and rights of flowage, annuities under wills or trusts, alimony, rights under contracts, etc., from which petitioner seems to endeavor to draw arguments by way of analogy in support of his claim that his wife had a vested interest in the compensation agreed to be paid to her in this case. A great number of these cases have been examined; but we do not find in them any support for the petitioner's contention, or any aid in the construction of the act here under consideration, and there is no occa-

sion to refer to any of them more particularly.

After due consideration of all the cases cited, we find that the weight of authority, under acts similar to our own, is against the petitioner; that the compensation agreed to be paid to the dependent mother was not vested and did not pass over to her administrator, but ceased with her death.

Workmen's
compensation—
survival of
compensation.

We therefore hold that the decree appealed from was erroneous and should be reversed.

The appeal is allowed, the decree appealed from is reversed, and the cause is remanded to the Superior Court sitting in Providence County, with direction to dismiss the petition.

A petition for reargument having been filed, the following response was handed down on July 10, 1919:

The petitioner's petition for reargument filed July 7, 1919, is denied and dismissed.

NOTE.

As to survival of right to compensation under workmen's compensation acts upon the death of the person entitled to the award, see annotation following *LAHOMA OIL CO. v. STATE INDUSTRIAL COMMISSION*, post, 821. The reported case (*DUFFNEY v. A. F. MORSE LUMBER CO.* ante, 810), in holding that the award of compensation was not vested in the dependent and did not pass to his administrator, is in line with the weight of authority on the question, as will be seen from the annotation referred to.

LAHOMA OIL COMPANY et al.
v.
STATE INDUSTRIAL COMMISSION OF OKLAHOMA et al.

Oklahoma Supreme Court—September 3, 1918.

(— Okla. —, 175 Pac. 836.)

Workmen's compensation — death between award and payment.

1. Where one entitled to compensation under the Workmen's Compensation Act (Laws 1915, chap. 246) secured a determination and award for permanent disability, and died before the lapse of the maximum number of payments had been made according to the terms of the award, the right to compensation under the award ceased with his death.

[See note on this question beginning on page 821.]

— claim for death.

2. By the provisions of § 1, art. 6, of the Compensation Act, no provision of the act applies in case of accident resulting in death and no right of action for recovery of damages for such injury is denied or affected.

Statute — construction — harmonizing with Constitution.

3. Sections of the statute must be construed to be in harmony with the Constitution, and so as to give effect to the various sections, if such construction is possible without doing violence to the spirit and language of the act.

[See 25 R. C. L. 1000.]

Headnotes by OWEN, J.

(Kane, J., dissents.)

MOTION by petitioners to dismiss an action revived by the administratrix of deceased, after his death as the result of injuries for which an award was made to him by the Industrial Commission, and from which the petitioners appealed. *Motion sustained.*

The facts are stated in the opinion of the court.

Messrs. Ross & Thurman for petitioners.

Messrs. Fulton, Shirk, & Danner, for respondent administratrix:

The award constitutes a final judgment.

Custer County v. Moon, 8 Okla. 205, 57 Pac. 161.

The award vested in claimant Downing on its rendition.

23 Cyc. 673; 15 R. C. L. 576.

Death after judgment does not abate the judgment, although the judgment was based on a cause of action that did not survive.

1 Cyc. 78; 1 R. C. L. 38.

The Compensation Act provides for compensation, not for a pension.

Adams v. Iten Biscuit Co. 63 Okla. 52, 162 Pac. 938; State ex rel. Munding v. Industrial Commission, 92 Ohio St. 434, L.R.A.1916D, 944, 111 N. E. 299, Ann. Cas. 1917D, 1162, 13 N. C. A. 713; State ex rel. Crookston 15 A.L.R.—52.

Lumber Co. v. District Ct. 131 Minn. 27, 154 N. W. 509; Crew v. Trainor, 91 N. J. L. 87, 102 Atl. 905; Russo v. Omaha & C. B. Street R. Co. 98 Neb. 436, 153 N. W. 510; Dennis v. Cafferty, 99 Kan. 810, 163 Pac. 461; Wick v. Gunn, — Okla. —, 4 A.L.R. 107, 169 Pac. 1087, 17 N. C. A. 377.

Taken as a whole, the Compensation Act clearly shows intent that the award should vest.

DeZeng Standard Co. v. Pressey, 86 N. J. L. 469, 92 Atl. 278; Carmack v. Webb Press, 1 Okla. Industrial Commission Rep. 147; State ex rel. Munding v. Industrial Commission, 92 Ohio St. 434, L.R.A.1916D, 944, 111 N. E. 299, Ann. Cas. 1917D, 1162, 13 N. C. A. 713; Monson v. Battelle, 102 Kan. 208, 170 Pac. 801; Reynolds v. E. Clemens Horst Co. 35 Cal. App. 711, 170 Pac. 1082; Young v. Duncan, 218 Mass. 346, 106 N. E. 1; Re Simmons, 117 Me. 175, 103 Atl. 68.

Messrs. Burdette Blue and H. H. Montgomery for other respondents.

Owen, J., delivered the opinion of the court:

Petitioners appeal from an award made by the Industrial Commission on November 26, 1917, to Timothy A. Downing for \$5,000, to be paid at the rate of \$10 per week for a period of 500 weeks. After the appeal was perfected to this court, Downing died as the result of the injuries for which the award was made, and the action was revived in the name of Malinda Downing, administratrix of his estate. The case is before us on motion to dismiss the action on account of the death of Downing.

In support of the motion to dismiss it is contended, first, that an award made by the Commission under the Workmen's Compensation Law (Laws 1915, chap. 246) does not confer upon the injured workman a property right or an interest which upon his death becomes a part of his estate; and, second, that the Compensation Act does not apply to accidents resulting in death.

Two rights of action exist under the law of this state for wrongful injuries resulting in the death of a person. One is the right of action which survives to the estate, or the personal representatives, to recover damages sustained by the estate, and for pain and suffering, medical expenses, etc. The other is the right of action given for the benefit of the widow and children or next of kin for the pecuniary loss sustained by them on account of the death. It was held by this court in the case of *St. Louis & S. F. R. Co. v. Goode*, 42 Okla. 784, L.R.A. 1915E, 1141, 142 Pac. 1185, that a recovery on one such cause of action does not bar recovery on the other.

The language of § 1, art. 6, of the Compensation Act, is: "It is not intended that any of the provisions of this act shall apply in cases of accidents resulting in death, and no right of action for

recovery of damages for injuries resulting in death is intended to be denied or affected."

Counsel for respondents contend that this section applies only to the right of action accruing to the next of kin for pecuniary loss sustained on account of the wrongful death of the employee, arguing that the Compensation Act supplants the right of action for pain, suffering, medical expenses, etc., and that an award made to the employee vests at his death in his representatives. We do not agree with this contention.

The compensation to be paid to the employee does not depend upon whether the injury was wrongfully caused by the negligence of the employer. It is paid when an accidental injury is sustained arising out of and in the course of the employment, without regard to the fault as a cause of such injury, except where the injury is sustained by the wilful intention of the injured employee, or where the injury results directly from the wilful failure of the injured employee to use a guard or protection furnished for his use. The act recognizes that a personal injury suffered by an employee arising out of and in the course of employment is an incident of the business in which he is employed. In consequence of that, the act provides that, as a matter of justice, the resulting burden should be borne by the business without regard to the question of fault on the part of the employer or employee.

The act makes no reference to the payment of the unpaid instalments of the award, in the event of death of the employee, to dependents or next of kin. It, in effect, provides that the employee, if accidentally injured, shall receive in lieu of his wages the amount fixed by the terms of the act. The average weekly wage of the employee is taken as a basis upon which to compute the compensation. Had there been no injury, the payment of wages would cease on the termination of the relation of master and servant. When the relation is terminated by death

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of the employee, the occasion for making compensation in lieu of wages comes to an end.

The act provides that the compensation shall be paid only to the employee, and that the claim for such compensation shall not be assigned and shall be exempt from claims of creditors. The cause of action for pain, suffering, medical expenses, etc., arising from a wrongful injury, survives under the statute (Rev. Laws 1910, § 5281) to the personal representatives when the injury results in the death of the employee, and becomes part of his estate and is subject to the claims of creditors. Section 7, art. 23, of the Constitution, provides: "The right of action to recover damages for injuries resulting in death shall never be abrogated, and the amount recoverable shall not be subject to any statutory limitation."

By the terms of the Compensation Act the amount of compensation for each injury is limited and based upon the amount of the weekly wage. The provision excepting injuries resulting in death was no doubt incorporated so as to make the act in harmony with this provision of the Constitution, under which the amount recoverable cannot be limited if death results from the injury.

So long as the employee was alive, the Industrial Commission would have jurisdiction to hear and determine his claim for compensation, and this jurisdiction would be exclusive of the courts of the state under § 2, art. 6, of the act. When his injuries resulted in death, the Compensation Act, under the terms of § 1 of article 6, above quoted, would no longer apply, and the Industrial Commission would have no further jurisdiction.

—death between
award and pay-
ment.

The cause of action, if any, arising from the death resulting from such injuries, would survive to such representatives, under § 5281 of the statute, as though the Compensation Act had never become a law. That section of the statute provides for the

survival of the action if the employee might have maintained an action had he lived. The effect of the Compensation Act was to afford to the employee a special procedure under which to maintain his action where the injuries do not result in death. After his death his representatives may maintain their action, but not under the Compensation Act.

This construction avoids any conflict between the Compensation Act, § 5281 of the statute, and § 7, art. 23, of the Constitution. The act must be construed to be in harmony with the provisions of the Constitution and the various sections of the statute law of the state, so as to give meaning and effect to all, if such construction is possible without doing violence to the spirit and language of the act. *Roma Oil Co. v. Long*, — Okla. —, 173 Pac. 957; *Matthews v. Rucker*, — Okla. —, 170 Pac. 492.

Statute—
construction—
harmonizing
with Constitu-
tion.

Our attention has not been called to any decision exactly in point on the question involved here. The compensation acts of the various states, to which our attention has been called, differ materially from the provisions of our act. The acts of some of the other states include accidents resulting in death, and provide for payment of compensation to the dependent in the event of the death of the employee, in this respect differing from the act in this state. The courts of New Jersey, Massachusetts, and New York held that payments cease at the death of the payee. The supreme court of Ohio, in the case of *State ex rel. Munding v. Industrial Commission*, 92 Ohio St. 434, L.R.A.1916D, 944, 111 N. E. 299, Ann. Cas. 1917D, 1162, 13 N. C. C. A. 713, held the award for a fixed sum payable weekly for six years to a dependent employee vested in the dependent when the award was made, and at the death of such dependent her personal representative was entitled to the balance remaining unpaid. The

award under that act has the essentials of a judgment, and appears to be made to the dependent in lieu of damages sustained by reason of the death of the employee. By virtue of our constitutional provisions the amount of recovery for a like cause of action in this state cannot be limited by statute, and the award made by the Industrial Commission under our act does not possess the essentials of a judgment. Under the continuing jurisdiction of the Commission to modify or change the award, it cannot be said to have a fixed determination or a definite amount to be paid for a fixed number of weeks. Our statute (Rev. Laws 1910, § 5123) defines a judgment to be a final determination of the rights of the parties in an action. "An action" is defined in § 4644 of this statute to be an ordinary proceeding in a court of justice by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense. Section 4645 of the statute provides that every other remedy is a special proceeding. Special proceedings are not within the scope of the usual statutory provisions providing for the survival of actions, and such proceedings, unless especially saved by a statute, abate on the death of the party. 1 C. J. p. 213.

Awards under our act lack another essential characteristic of a judgment. In the event of refusal to make payment under the award, the Industrial Commission cannot enforce the payment by execution or order. Section 16 of article 2 of the act provides that the award shall constitute a liquidated claim for damages, which may be recovered in an action instituted by the Commission.

The supreme court of New Jersey in *Erie R. Co. v. Callaway*, 91 N. J. L. 32, 102 Atl. 6, held that where one secured a determination and award for permanent disability, and died before the lapse of the maximum number of weeks for which

the statute authorized compensation, the right to compensation ceased with his death. In that case it is pointed out that the act provides for compensation during the period of disability, not, however, beyond 400 weeks, and under this provision it was held the legislature clearly contemplated that disability might not last 400 weeks. The employee there died from natural causes, and attention was called to the fact that the act contained no provision for a case where the employee died from a cause other than the accident during the period of payment for permanent injury. The conclusion was reached that the continuation of the payments after the death of the employee was not intended, and was not within the purpose of the act.

Our statute provides that in case of total disability, adjudged to be permanent, 50 per cent of the average weekly wage shall be paid to the employee "during the continuance of such disability, not exceeding 500 weeks," and, like the New Jersey act, makes no provision for payment of the award in the event of the death of the employee.

The Massachusetts act provides for payment to the dependent of an employee killed in the service. In *Murphy's Case*, 224 Mass. 592, 113 N. E. 283, the supreme court of that state held these payments came to an end at the death of the dependent to whom the award was to be paid. The award was held not to be a vested right in the dependent, passing to his personal representatives or next of kin. The act was held to apply only to the persons mentioned in the act.

In the case of *Wozneak v. Buffalo Gas Co.* 175 App. Div. 268, 161 N. Y. Supp. 675, the New York court held that the award made to the employee did not give such employee a vested interest in the payments not due, and that the right to such payments did not survive the employee's death and become a part of his estate. The purpose of that act was held to be for the protection of the

employee and the persons mentioned by the terms of the act.

By the plain and unequivocal language of § 1, art. 6, of our act, no cause of action arising from injuries resulting in death is affected by any provision of the act. Making the award prior to the death of the injured employee is not sufficient to make the various provisions of the act applicable to such injuries after death ensues. The jurisdiction of the Industrial Commission de-

pends upon the terms of the act, and, having lost jurisdiction by the death of the employee, it follows that this court loses jurisdiction of the appeal.

Therefore the motion to dismiss the action must be sustained.

All the Justices concur, except Kane, J., who dissents, and Turner, J., not participating.

Petition for rehearing withdrawn November 14, 1918.

ANNOTATION.

Survival of right to compensation under workmen's compensation acts upon the death of the person entitled to the award.

It may be observed that the annotation is not concerned with the claim of children or other dependents, in their own right, to compensation for the death of an employee as a result of an accident within the scope of the compensation acts.

The question under annotation is, of course, one as to the construction and effect of the various statutes relating to workmen's compensation, and depends upon the provisions of the particular statute. It may be said in general, however, that under the statutes of the majority of the states in which the courts have considered the question, the right to compensation not yet accrued, to which a dependent or beneficiary would become entitled, is terminated by his death, and does not pass to his personal representatives or heirs.

Colorado.—See Industrial Commission v. Colorado Fuel & I. Co. (1921) — Colo. —, 195 Pac. 114, *infra* (express statutory provision).

Illinois.—*Matecny v. Vierling Steel Works* (1914) 187 Ill. App. 448.

Massachusetts. — *Murphy's Case* (1916) 224 Mass. 592, 113 N. E. 283; *Bartoni's Case* (1916) 225 Mass. 349, L.R.A.1917E, 765, 114 N. E. 663; *Derinza's Case* (1918) 229 Mass. 435, 118 N. E. 942, 16 N. C. C. A. 210.

New Jersey.—*Erie R. Co. v. Callaway* (1917) 91 N. J. L. 32, 102 Atl. 6.

New York.—*Wozneak v. Buffalo*

Gas Co. (1916) 175 App. Div. 268, 161 N. Y. Supp. 675.

Oklahoma. — LAHOMA OIL CO. v. STATE INDUSTRIAL COMMISSION (reported herewith) ante, 817.

Rhode Island.—*DUFFNEY v. A. F. MORSE LUMBER CO.* (reported herewith) ante, 810.

Texas.—*United States Fidelity & G. Co. v. Salser* (1920) — Tex. Civ. App. —, 224 S. W. 557.

Utah.—*HEISELT CONSTR. CO. v. INDUSTRIAL COMMISSION* (reported herewith) ante, 799.

Washington.—*Ray v. Industrial Ins. Commission* (1917) 99 Wash. 176, L.R.A.1918F, 561, 168 Pac. 1121.

It was held in LAHOMA OIL CO. v. INDUSTRIAL COMMISSION (reported herewith) ante, 817, that where one entitled to compensation under the Oklahoma Workmen's Compensation Act secured a determination and award for permanent disability, and died before the lapse of the maximum number of payments had been made according to the terms of the award, the right to compensation under the award ceased with his death.

So, it was held in *DUFFNEY v. MORSE LUMBER CO.* (reported herewith) ante, 810, that, under the Rhode Island statute, an award of compensation for a specified number of weeks to a partial dependent was not vested, and did not pass to his administrator, in case of his death within the time specified.

The same conclusion has been reached under the Massachusetts statute. Thus, it was held in *Murphy's Case* (1916) 224 Mass. 592, 113 N. E. 283, that the weekly payments to be made to the dependent under the Massachusetts Workmen's Compensation Act ceased when the dependent died. In this case the dependent died while the case was pending on appeal from an award of the arbitration committee. The court said that the question was as to the character of the right to compensation given to a dependent of an employee, and that there was no provision in the act dealing expressly with this question; that whether the sum which a dependent was entitled to receive upon the death of an employee was a vested interest, or ceased upon the dependent's death, was a question which must be decided by the general provisions of the act, interpreted in the light of the object which it was passed to effect. It was said further: "To hold that the dependent's right to compensation is a vested right, which passes to a legatee by will, and in case of intestacy goes to the dependent's next of kin, would be to put upon the insurer a burden not called for by the object which the act was passed to attain. In addition, the compensation awarded the dependent would go in that case to persons altogether outside the class contemplated by the act. So construed, the act would or might enrich strangers in place of doing justice to the family and next of kin of an employee killed in the course of, and so as an incident to, the business in which he was employed. The opposite result has been reached in England and in Ohio. But both those decisions were founded on provisions of the acts there in question, which were not like the provisions of our Workmen's Compensation Act. . . . For these reasons we are of opinion that, although there is no express provision to that effect in the act, the weekly payment to be made to the dependent comes to an end when the dependent dies."

And, following the above case, the court in *Bartoni's Case* (1916) 225

Mass. 349, L.R.A.1917E, 765, 114 N. E. 663, held that the right to the weekly award was not vested absolutely in the widow of the employee, but continued only during her life; and that the right to compensation on her account ceased with her death.

The fact, however, that the widow died before any payment had been made to her, was held in *Bartoni's Case* (Mass.) supra, not to prevent recovery by her administrator of the weekly payment provided by the statute from the date of the injury until the time of the widow's death, which occurred pending negotiations as to settlement for a lump sum in lieu of a weekly allowance.

It may be observed that the further question considered in *Murphy's Case* and *Bartoni's Case* (Mass.) supra, as to whether, on the death of the dependent, there should be a review of the order for compensation,—in other words, whether a new award should be made in view of the change of circumstances,—is beyond the scope of the annotation.

Citing the above Massachusetts cases, the court in *Derinza's Case* (1918) 229 Mass. 435, 118 N. E. 942, 16 N. C. C. A. 210, said that it was therein held that weekly payments to a dependent under the compensation statute ceased when the dependent died. And the court accordingly held, in the case before it, that the decree should contain a clause to the effect that payments were to cease upon the death of the dependent before the expiration of the period of payment.

The additional compensation allowed under the Massachusetts statute for the total or partial loss or incapacity of certain members of the body was held in *Burns's Case* (1914) 218 Mass. 8, 105 N. E. 601, Ann. Cas. 1916A, 787, 5 N. C. C. A. 635, to cease with the death of the person injured. The court said that this was a right peculiar to the employee himself, and not created for the benefit of his dependents; that this provision, and others in the same connection providing for special compensation for a period of total or partial incapacity for work, were for the personal relief

of the injured employee, his dependents being provided for by the compensation to be made for his death. The court, however, said that the question was not raised or decided as to whether, if, during his lifetime and upon his own petition, specific compensation had been ordered to be made to the employee for a stated number of weeks, and his death had occurred before the expiration of that period, the right thus adjudicated would cease at his death, or whether the payments must be continued until the end of the prescribed time, for the benefit of his dependents.

In *Bott's Case* (1918) 230 Mass. 152, 119 N. E. 755, 16 N. C. C. A. 864, the court stated with reference to the earlier decisions in that state, that the word "dependents," as matter of construction, did not seem rationally susceptible of including their personal representatives in case of their death. The question in the latter case, however, was as to the effect of the widow's marriage, which it was held did not preclude the continuance of payments to her as a dependent. Of course, this question is not within the scope of the annotation.

And it may be observed that the question whether the right to compensation is a vested one arises in some cases of the class of the one last cited, which are beyond the scope of the annotation, as in *Wangler Boiler & Sheet Metal Works Co. v. Industrial Commission* (1919) 287 Ill. 118, 122 N. E. 366, where the court discusses this question in passing on the effect of dependent's remarriage.

The supreme court of Utah held in *HEISELT CONSTR. CO. v. INDUSTRIAL COMMISSION* (reported herewith) ante, 799, that, under the statute in that state providing benefits for injured employees and their dependents, the death of an injured employee without dependents, prior to an award of compensation, from a cause other than the accident, terminates the right, and it will not pass to his estate.

And it was held in *Erie R. Co. v. Callaway* (1917) 91 N. J. L. 32, 102 Atl. 6, that where one entitled to compensation under the New Jersey Work-

men's Compensation Act of 1911, secured a determination and award for permanent disability, and died from causes not connected with the accident, before the lapse of the maximum number of weeks for which the statute authorized compensation, the right to compensation ceased with his death. The court said: "The Act of 1911, which was the act in force at the time of the award, contained no provision for the case where the employee died from a cause other than the accident, during the period of payment for permanent injury. By the amendment of 1913 the legislature enacted that the remaining payments should be paid to his or her dependents. The effort now is to give this amendment retroactive force and alter the terms of the contract between the employer and employee. We think no such intent should be imputed to the legislature."

It was held also under the New York statute, in *Wozneak v. Buffalo Gas Co.* (1916) 175 App. Div. 268, 161 N. Y. Supp. 675, that an award of compensation, to be paid periodically for a specified time to an injured employee, is not a vested interest which will pass to his personal representative upon his death from causes entirely unconnected with the accident, before termination of the payment period. The court said that not only was there no provision for continuing the award made for compensation for the injury in case of death, but that the letter and spirit of the act were opposed to such a construction; that the act was one for a workman's compensation, with an insurance provision for those dependent upon him in the event of an accident resulting in death; that as the workman would have no earning capacity after death due to natural causes he could have no just claim for compensation beyond his life span; and that it was only when his death resulted from the injuries received in the industry that there was any equitable reason why the industry should be called upon to pay benefits to those dependent upon him. The court called attention, also, to the fact that the statute re-

ferred to the computation, under certain circumstances, of the present value of future payments "with due regard for life contingencies," it being said that this language indicated that the legislature not only did not understand that the award became vested so as to be due at the time of the death of the claimant, or at the date of the award, but that the award was of a certain sum per week during the lifetime of the claimant if he died before the expiration of the time fixed by the statute for the compensation to continue. The court called attention also to the provision of the statute that "compensation and benefits shall be paid only to employees or their dependents." It was further said: "That the award made to the claimant in this proceeding could not have been vested absolutely in the claimant is evident from the provisions of § 22 of the law, which provides that the commission, on its own motion or upon application by any interested party, may, on the ground of a change in conditions, 'review any award, and, on such review, may make an award ending, diminishing, or increasing the compensation previously awarded, subject to the maximum or minimum provided in this chapter, and shall state its conclusions of facts and rulings of law,' etc. He had a right during his lifetime, and while the award remained unchanged, to receive the compensation fixed for the period limited by the statute, but with his death from natural causes he ceased to have any right to compensation, just as his contract of employment for a definite period would have been terminated by the same event if no accident had befallen him. The right to compensation was personal to himself as much under the statute as it was under his contract of employment; the former grew out of the latter. We are clearly of the opinion that the right to compensation ceased upon the death of Michael Wozneak."

Compensation for an injury to an employee awarded him by the industrial accident board under the provisions of the Texas Workmen's Compensation Act, for a certain number

of weeks at a specified sum per week, it was held in *United States Fidelity & G. Co. v. Salser* (1920) — *Tex. Civ. App.* —, 224 S. W. 557, did not, upon his death before the expiration of the period of the payment from a cause not connected with the accident, pass to his heirs, but was terminated, and the heirs were not entitled to recover the unpaid balance of the compensation. The court said: "The clearly expressed intention of the legislature in the passage of our Workmen's Compensation Act was to provide compensation to employees for injuries received by them in the course of their employment, and to dependents of employees who should die as the result of injuries so received. There is nothing in the act which preserves in an heir of an employee the right to compensation due the employee for injuries received by him, and the beneficiaries named in the act are only given the right to compensation when the employee dies as a result of his injuries. The only right given by the act to heirs or beneficiaries of an injured employee is given by § 8, which reads as follows: 'If death should result from the injury, the association hereinafter created shall pay the legal beneficiaries of the deceased employee a weekly payment equal to 60 per cent of his average weekly wages,' etc. . . . The compensation provided for the injured employee is for his benefit and protection, and if the employee dies before receiving any of such compensation, his death not being caused by the injury, no right thereto survives to his heirs. . . . In our opinion it would do violence to the purpose of our act, and place a burden upon the insurer not intended by the act, to hold that the right to the compensation therein provided for the benefit of the injured employee, upon the death of the employee, passes to heirs, regardless of whether his death was caused by his injury, and regardless of whether the heirs are dependents of the deceased."

In *United States Fidelity & G. Co. v. Salser* (Tex.) *supra*, the award was under an agreement made between the

insurer of the employer and the employee for payment of a certain sum per week for 100 weeks, this agreement being filed with and approved by the state industrial accident board; and it appears that the employee died about four months after the weekly payments were begun. The court held that this agreement did not change the nature of the right to the compensation, so as to make the heirs' claim one founded upon a vested contract right of their decedent; but that their cause of action was dependent upon whether the statute providing compensation for an injured employee gave to the employee a vested right which would pass by will or inheritance; and that the statute should not be so construed.

And under the Illinois Statute of 1911, providing that "any right to receive compensation hereunder shall be extinguished by the death of the person or persons entitled thereto," it was held in *Matecny v. Vierling Steel Works* (1914) 187 Ill. App. 448, that the right of a dependent to weekly payments under the act, or to a lump-sum judgment, did not become a vested right upon the death of the employee, so as to pass to the dependent's estate; that the right to payments would not survive the death of the sole dependent, but would be extinguished thereby. The question arose in connection with the contention that the court, in this instance, had abused its discretion in ordering payment of compensation in a lump sum, for the reason that the mother was the sole beneficiary under the act, and that her age and physical condition made it probable that she would die prior to the expiration of the eight years' payment period fixed in the statute.

The Illinois statute does not, however, extinguish the right to receive payments for the period from the date of the injured employee's death until the beneficiary's death, although that occurs before any award is made. *East St. Louis Bd. of Edu. v. Industrial Commission* (1921) 298 Ill. 61, 131 N. E. 123. In this case the widow of the employee died about a year

after her husband. The statute provided that any right to receive compensation thereunder should be extinguished by the death of the person entitled thereto, but that, upon the death of a beneficiary leaving a dependent parent, sister, or brother of the deceased employee, who was receiving from such beneficiary a contribution for support, a proportionate part of the compensation of the beneficiary should be paid such dependent, and it was held that while the right to receive compensation was extinguished by the death of the widow of the employee before any award was made, yet her administrator was properly allowed the amount of the weekly payments from the death of her husband to her own death. The court said: "While the right to receive compensation is extinguished by the death of the beneficiary entitled thereto, this, in our judgment, does not mean that, if the widow had received instalments under the award, the amount she had received to the day of her death must be refunded because the right had been extinguished by her death. There is no provision to that effect. The right to receive compensation was fixed as of the time of the employee's death; and we think a fair reading of § 21, including the proviso, justifies the conclusion that the death of the beneficiary stops any further right to payments, but is not retroactive so as to extinguish the right to receive payments for the period from the date of the injured employee's death until the beneficiary's death. The fact that there may or may not have been an award at the time of her death is an incident which does not decide whether she was entitled to compensation."

In *Bowman v. Industrial Commission* (1919) 289 Ill. 126, 124 N. E. 373, the court said, referring to the act as amended in 1917, that it was obvious that it was intended that if the proceedings for compensation were instituted by the injured person, and he died pending such proceedings, they could be thereafter carried on by his personal representa-

tive or beneficiary. In this case the widow of the employee, as administratrix, filed with the commission a claim for compensation on her behalf and on behalf of her minor children. Pending the hearing before the commission, the widow died, and another person was substituted as administrator of the employee's estate. But the question under annotation was not discussed, the case turning on the inquiry as to whether the claim was filed within the required time.

Under the statutes of several of the states, however, the right to compensation is held to be a vested one.

Thus, an award of compensation from the state insurance funds, under the Ohio Workmen's Compensation Act, to a wholly dependent person, was held in *State ex rel. Munding v. Industrial Commission* (1915) 92 Ohio St. 434, L.R.A.1916D, 944, 111 N. E. 299, Ann. Cas. 1917D, 1162, 13 N. C. C. A. 713, to vest in the dependent when the award was made; so that, in case of the death of such dependent, his or her personal representative was entitled to the balance, if any, remaining unpaid. The statute, with respect to injuries causing death, provided that if there were wholly dependent persons at the time of the death, the payments should be two thirds of the average weekly wages, to continue for the remainder of the period between the date of the death and six years after the time of the injury, subject to a certain maximum and minimum. The court said: "This paragraph of § 35 is practically conclusive of the case, as it has every element necessary to confer a vested right. A fixed amount is awarded to a definite person as a matter of right, with no language suggesting in any way an abatement of the award on the death of the person to whom it is made prior to the payment of the same in full, and we must hold that it speaks for itself, unless some other section or sections of the act condition or limit the right to this compensation. . . . The right to be compensated for an injury has no element of bounty or charity about it. . . . As we have before stated, the

theory is that when an employee is injured or killed in course of his employment, a sum fixed by law is set off from the fund to compensate him for his injuries, or his dependents for his death, to compensate for taking away the man's right to earn a livelihood, which, but for the accident, he would have earned. A fixed sum goes out from the fund to compensate for the loss which has occurred. . . . Thus, the payments being fixed in amount, ordered paid from a certain fund, and awarded to a definite person, every element of a vested right is present, and no element or suggestion of a pension that is to cease at the death of the pensioner. The report of the investigating commission, as well as all of our compensation laws and reports, shows that the provision for periodical payments is solely for the benefit of the injured employee or dependents, for the reason that experience teaches that in a very great many cases a lump sum, if allowed, is dissipated, while small payments, on the other hand, are carefully husbanded. . . . The intent, apparent and expressed throughout the act, that compensation is to be paid only to dependents, was not for the purpose of securing an abatement of unpaid compensation upon the death of a dependent. . . . We hold that when the award is once made to a sole dependent, the right to the compensation vests, and once vested there can be no condition attached except as to the time of payment, and it is equally immaterial whether the dependent subsequently dies or becomes independent."

And a judgment for a lump sum in favor of an injured workman under the Kansas statute, it was held in *Monson v. Battelle* (1918) 102 Kan. 208, 170 Pac. 801, did not abate by his death, but might be revived in the name of the administrator; and it was held that this was true although the statute forbade its assignment. The court, after citing the *Wozneak Case* (1916) 175 App. Div. 268, 161 N. Y. Supp. 675, *supra*, as holding that a judgment under the New York Compensation Act for periodical payments

to an injured workman, although subject to commutation, did not survive the plaintiff's death, said: "That decision, however, if accepted as sound, would not control here. In the present case the plaintiff had obtained an absolute personal judgment requiring the immediate payment of a fixed amount. It was the legal duty of the defendant to pay it at once, unless a stay should be procured pending an appeal. If payment had been made, the money would have been wholly at the disposal of the plaintiff. If the final result is an affirmance it will amount to an adjudication that the rights of the parties shall remain as fixed at the time the judgment was rendered. The defendant gains no immunity from the fact of his having taken an appeal which is ultimately determined not to have been well founded."

And under the provision of the Kansas Statute of 1911 that the amount of compensation in case of death from injury, if the workman leaves any dependents wholly dependent upon his earnings, should be an amount equal to three times his earnings for the preceding year, with specified maximum and minimum, the court in *Smith v. Kaw Boiler Works Co.* (1919) 104 Kan. 591, 180 Pac. 259, said that there could be no doubt that the amount of compensation was a single sum, definitely ascertained by a prescribed method, the right to which became fully vested in the widow on the death of her husband; that the Statute of 1913 discontinued payment of compensation in two instances only, viz., the marriage of the dependent and arrival at the age of independency; that death of the dependent after death of the workman was not added as a third disability, and consequently was not a bar to the recovery of the full sum specified in the statute.

Although somewhat beyond the scope of the annotation, attention is called to the ruling in *Smith v. Kaw Boiler Works Co.* (Kan.) supra, that where a wholly dependent widow of a workman, who was killed, died before compensation was made, the administrator of the workmen's estate could

sue for compensation, under the provision of the statute that, when death results from injury, the action shall be prosecuted by the dependent or dependents entitled to compensation, or by the legal representative of the deceased for the benefit of dependents. It was unsuccessfully contended in this case that the primary right of action was given to dependents, and that the action should have been prosecuted by the administrator of the deceased dependent.

Regarding the contention that because the judgment was, by the statute, not assignable, it did not survive the plaintiff's death, the court in *Monson v. Battelle* (Kan.) supra, said: "It is true that as a rule causes of action which are not assignable do not survive. . . . But a judgment based on a nonsurviving cause of action ordinarily does survive, . . . and does so in this state, notwithstanding the pendency of an appeal. . . . Moreover, while as a rule causes of action which are not assignable do not survive, this is because of qualities that inhere in the nature of the right. Where the statute, for some special purpose, as the protection of a claimant against improvidence, forbids assignment, non-survivability does not necessarily result therefrom. The new government war savings certificates are expressly made not transferable, but it will hardly be doubted that the title would pass to the heirs or personal representatives of the owner upon his death. We hold that if the assignment was invalid the revivor was properly made in the name of the administratrix."

But the question whether the right to compensation survived to the personal representative was held in *Ray v. Industrial Ins. Commission* (1917) 99 Wash. 176, L.R.A.1918F, 561, 168 Pac. 1121, to be dependent on whether the claim was assignable; and consequently, in view of a statutory provision that the money payable as compensation could not be assigned or passed to any person by operation of law prior to the issuance and delivery of the warrant therefor, it was held

that the right to compensation did not pass to the personal representative, where the employee, who had received an injury entitling him to compensation, was accidentally killed from a cause in no way connected with his employment, before a warrant in payment of compensation had been issued and delivered to him. It was said that the court, in keeping with the universal rule, had held that the test of survivorship of a cause of action is its assignability, and, conversely, that the test of assignability is survivorship; in other words, that assignability and survivability were convertible terms; and that since the assignment of the claim was expressly prohibited under the facts of this case, and since the statute further provided that the claim should not pass to any other person by operation of law, the conclusion seemed irresistible that the cause of action did not survive to the personal representative of the deceased, but was a right limited to the injured workman, or his dependents, as defined by the statute.

The Colorado statute expressly provides that "when a right to death benefits shall have become fixed, it shall cease upon the happening" of certain contingencies, among which are the death of any dependent. *Industrial Commission v. Colorado Fuel & I. Co.* (1921) — Colo. —, 195 Pac. 114. This case involves the question of the amount which should be awarded to dependents who are non-residents of the United States, on the lapse of an award to a resident dependent. The statute provides that death benefits thereunder to dependents who are nonresidents of the United States shall be one third of the amount which a dependent who is a resident of the United States might receive, but that in no event should death benefits to dependents who are nonresidents exceed the aggregate sum of \$1,000. It was held that this limitation as to the amount which non-residents could receive applied not only to the original award, but to a subsequent award made upon the lapsing of an award on the death of

a dependent. And in this case, where the award was made on the basis of \$2,500, the dependents consisting of a minor son, who was a resident of the state, and a widow and minor daughter, who were residents of Mexico, and the son died leaving a large portion of the award to him remaining unpaid, and the widow's share lapsed upon her marriage, it was held that the daughter was entitled to receive from the unpaid award the sum of \$1,000 less the amount previously awarded to herself and the widow. The contention, the court held, was erroneous that the amount must be limited to one third of the sum remaining unpaid under the award to the son at the time of his death.

English decisions.

Under the English act it has been held that, upon the death of the sole dependent, his representative is entitled to claim all that the dependent might have claimed. This was held true in *Darlington v. Roscoe* [1907] 1 K. B. 219, 76 L. J. K. B. N. S. 371, 96 L. T. N. S. 179, 23 Times L. R. 167, 9 W. C. C. 1, where, before the death of the dependent, a claim had been made by her for compensation. The court distinguished the Irish case of *O'Donovan v. Cameron* (1901) 2 Ir. R. 633, 34 Ir. L. Times, 169, in which the opposite conclusion was reached, on the ground that in that case no claim had been made for compensation before the dependent's death.

The English doctrine, however, is not, it seems, limited to cases in which a claim for compensation was made before the dependent's death, it being held in *United Collieries v. Simpson* [1909] A. C. 383, 78 L. J. P. C. N. S. 129, 101 L. T. N. S. 129, 25 Times L. R. 678, 53 Sol. Jo. 630, [1909] S. C. 19, 46 Scot. L. R. 780, 2 B. W. C. C. 308, that where the mother of an employee, who was wholly dependent upon him, and was the sole dependent, died before making a claim for compensation, her right to make a claim or to take proceedings under the statute passed to her executrix. The *Darlington Case*, supra, was approved, and the decision of the Irish court in the

O'Donovan Case (Ir.) *supra*, was disapproved.

In holding that the maxim "*actio personalis moritur cum persona*" did not apply, Collins, M. R., in *Darlington v. Roscoe*, *supra*, said: "There is no *actio* here within the meaning of the maxim which is relied upon. No actionable wrong has been committed by the employers. The statute gives the dependent a statutory right to a certain measured sum of money which is to be paid by the employers. The amount of that sum is fixed by the statute, with the object of saving the expense and trouble of calculations of damages according to the expectations of life and other such considerations. This appears to me to be an answer to the argument which has been urged upon us on behalf of the employers,—that it would be a great hardship upon them to have to pay the full amount of compensation when the dependent, the widow of the workman, only survived him a very short time. Under the express provisions of this act the sum payable as compensation is fixed without any question arising as to expectation of life. The widow in this case had acquired a statutory right to be paid the fixed sum payable as compensation under the act."

In *PHILLIPS v. KERSHAW L. & Co.* (reported herewith) ante, 793, the court construed that provision of the English statute by which the employer is liable to pay compensation, in cases of partial dependency, in such sum as may be determined on arbitration "to be reasonable and proportionate to the injury of the said dependents;" it being held that where a partially dependent widow died within four weeks of the death of her husband, a workman for whose death his employer was liable to pay compensation, the widow's death before the assessment of compensation^o removed the necessity for speculation as to the expectation of

life, and her personal representative could recover only for the ascertained loss; in other words, the award must be only for the period during which she survived her husband.

In the earlier case of *Harvey v. Northeastern Marine Engineering Co.* (1902) 5 W. C. C. 30, 113 L. T. Jo. 499, which is apparently overruled by the later cases, it was held that under the rule that, in the absence of statutory provisions to the contrary, a personal action for a tort dies with the person by or against whom it is brought, where a wholly dependent widow of an employee filed an application for compensation under the statute, and died before an award was made, there was no vested right, but the widow's right of action died with her, and did not survive to her administrator, so as to enable the latter successfully to make a claim in respect of any amount which might have been awarded to the widow.

In *Ivey v. Ivey* (1912) 2 K. B. 118, 5 B. W. C. C. 279, 81 L. J. K. B. N. S. 819, [1912] W. C. Rep. 293, 106 L. T. N. S. 485, where the dependents consisted of a widow and four children of the deceased employee, and they were awarded a specific sum as compensation, the same to be apportioned in varying amounts to each of them, and to be retained by trustees for payment of the respective shares by instalments, it was held that the death of the widow before her full share had been paid to her created a "variation of the circumstances of the various dependents," within the meaning of a provision in the statute authorizing the court in that event to make an order for the variation of the former award as in the circumstances of the case it might consider just; and that the administrator of the widow was not entitled to the unpaid portion of her share. R. E. H.

PETERSON BROTHERS & COMPANY

v.

MAE GUNNARSON, Appt.

Nebraska Supreme Court—April 11, 1921.

(— Neb. —, 182 N. W. 505.)

Husband and wife — desertion — wife's liability on contracts.

Where a husband deserts his wife and departs from the state, leaving her without maintenance or support, and remains absent therefrom continuously, with an intent to renounce the marital relation, and leaves her to act as a feme sole, and she so acts, she is liable to be sued on her contract the same as though she were unmarried.

[See note on this question beginning on page 833.]

Headnote by DEAN, J.

APPEAL by defendant from a judgment of the District Court for Hamilton County (Corcoran, J.) in favor of plaintiff in an action brought to recover the purchase price of certain goods furnished by it to defendant. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Hainer, Craft, & Edgerton and J. J. Reinhardt, for appellant:

In Nebraska, the common-law disabilities of married women still exist, and they cannot bind themselves by contracts and purchases, except where the law is expressly changed by statute.

Grand Island Bkg. Co. v. Wright, 53 Neb. 574, 74 N. W. 82; Union State Bank v. McKelvie, 91 Neb. 728, 136 N. W. 1021; Citizens State Bank v. Smout, 62 Neb. 223, 86 N. W. 1068; T. G. Northwall Co. v. Osgood, 80 Neb. 764, 115 N. W. 308.

Under Nebraska statutes, a married woman's property is not subject to debts contracted for necessities furnished herself or family until after execution against the husband for such indebtedness has been returned unsatisfied.

Union State Bank v. McKelvie, 91 Neb. 728, 136 N. W. 1021; Scott v. House, 93 Neb. 325, 140 N. W. 631; Noreen v. Hansen, 64 Neb. 858, 90 N. W. 937; George v. Edney, 36 Neb. 604, 54 N. W. 986; Small v. Sandall, 48 Neb. 318, 67 N. W. 156.

A married man, and not his wife, is under a legal obligation to furnish necessities for support and maintenance of his wife, and if he fails otherwise to provide same, she may pledge his credit for them.

Aultman v. Obermeyer, 6 Neb. 260; 21 Cyc. 1152; Cany v. Patton, 2 Ashm. 140; Speckmann v. Foote, 138 N. Y. Supp. 380; Smith v. Allen, 1 Lans. 101; Salmon v. McEnany, 23 Hun, 87; Howe v. North, 69 Mich. 272, 37 N. E. 213; Gayle v. Marshall, 70 Ala. 522; Gleason v. Warner, 78 Minn. 405, 81 N. W. 206; Oltman v. Yost, 62 Minn. 261, 64 N. W. 564.

Her right to pledge his credit for necessities not otherwise provided exists as fully when he has deserted her without just cause, as when they are living together.

Yeiser v. Lowe, 50 Neb. 310, 69 N. W. 847; Litson v. Brown, 26 Ind. 489; Kirk v. Chinstrand, 85 Minn. 108, 56 L.R.A. 333, 88 N. W. 422; Calkins v. Long, 22 Barb. 97; Schnuckle v. Bierman, 89 Ill. 454; Belknap v. Stewart, 38 Neb. 304, 41 Am. St. Rep. 729, 56 N. W. 881; Oltman v. Yost, 62 Minn. 261, 64 N. W. 564.

A married woman is not rendered liable on contracts not made with reference to her separate estate or business, or for her husband's debts, by the fact that several months after the obligation arose she recovered against him a judgment for separate maintenance.

Minck v. Martin, 22 Jones & S. 136; Johnston v. Allen, 6 Abb. Pr. N. S. 306, 39 How. Pr. 506; Cunningham v.

Irwin, 7 Serg. & R. 247, 10 Am. Dec. 458; Keegan v. Smyth, 8 Dowl. & R. 118, 5 Barn. & C. 375, 108 Eng. Reprint, 140, 4 L. J. K. B. 189, 29 Revised Rep. 273.

Nor is she rendered liable for such obligations by the fact that the decree for separate maintenance or alimony is dated back, and especially when such judgment or decree is never paid.

Mitchell v. Treanor, 11 Ga. 324, 56 Am. Dec. 421; Minck v. Martin, supra.

Mr. C. C. Flansburg, for appellee:

At common law the disability of coverture was removed from a married woman, when her husband was banished for his crimes, or voluntarily abandoned her and left the state. When that status arose, the married woman was restored to all the rights, and was under all the duties and obligations of a feme sole.

Rhea v. Rhenner, 1 Pet. 105, 7 L. ed. 72; McAnally v. Alabama Insane Hospital, 109 Ala. 109, 34 L.R.A. 223, 55 Am. St. Rep. 923, 109 So. 492; Gregory v. Pierce, 4 Met. 478; Wolf v. Bauereis, 72 Md. 481, 8 L.R.A. 680, 19 Atl. 1045; Phelps v. Walther, 78 Mo. 320, 47 Am. Rep. 112; Robinson v. Reynolds, 1 Aik. 174, 15 Am. Dec. 673; Krebs v. O'Grady, 23 Ala. 726, 58 Am. Dec. 312; Love v. Moynahan, 16 Ill. 277, 63 Am. Dec. 306; Starrett v. Wynn, 17 Serg. & R. 130, 17 Am. Dec. 654.

By the terms of the marriage settlement in which the property rights of defendant and her former spouse were adjusted, he was specifically released from the payment of the obligation to support and maintain appellant, and would not be liable therefor.

Wise Memorial Hospital Asso. v. Peyton, 99 Neb. 48, 154 N. W. 838.

Messrs. Smith & Hare also for appellee.

Dean, J., delivered the opinion of the court:

The plaintiff corporation is engaged in the retail general merchandise business at York. On May 13, 1919, it sued to recover the purchase price of groceries, dry goods, and household necessities generally that were bought by defendant. A jury was waived. From a judgment for \$108.58 against defendant she appealed.

The facts in brief are these: On June 12, 1910, Harry A. Peterson and defendant were married. They

lived together until October 15, 1917, when Peterson abandoned his wife and went to California to live, and has resided there ever since. They never again lived together, nor did Peterson thereafter, so long as the marriage relation continued, furnish his wife with any support or funds for her maintenance, except for a brief period when he was required by a court decree to furnish "separate maintenance" for her. This feature of the case will be presently noted. They had no children. On November 21, 1918, defendant obtained a decree of divorce from her husband that is now absolute, and her maiden name of Gunnarson was restored. Subsequent to and while she was living in a state of abandonment, in the interval between November 1, 1917, and July 1, 1918, defendant purchased from plaintiff, as need arose, the goods in suit and for which she refused to pay. She denies liability on three alleged grounds: First, that they were necessities of life, and were therefore chargeable solely to Peterson, she being his wife when the goods were bought; second, that the goods were not bought with respect to, nor upon the faith and credit of, her separate estate; and, third, that no judgment was first obtained against her husband and execution thereon returned unsatisfied prior to the commencement of this action. The first and second assignments only need be discussed.

When the divorce was obtained, a property settlement was effected between Peterson and his wife, and, pursuant to the settlement, the parties jointly executed an instrument that is called in the record a "deed of separation and settlement." This instrument was introduced in evidence by plaintiff. By its terms it is provided generally that Peterson shall pay to defendant \$2,500, and convey to her the title to certain town lots in Aurora, and deliver to her all of his furniture and household goods, with the exception of two articles of trifling value

which he reserved. The defendant in consideration of the foregoing acknowledged "full and complete payment and satisfaction of all claims" against her husband and his present or after-acquired property or estate, "including all claims for support, maintenance, alimony, homestead, inheritance, or otherwise, all of which claims . . . are hereby and by the said Mae Peterson fully satisfied, released, extinguished, and barred." The instrument further provides that Mae Peterson will not hereafter claim from Harry A. Peterson, or his estate, "any support, maintenance, or interest in his property, as his wife, widow, heir, or otherwise, . . . all of which, as above stated, have been fully paid, satisfied, and released." There is nothing on the face of the foregoing instrument to show that defendant's husband was obligated to pay for the goods in suit, nor has it any relation to the matters involved herein; so that it need not be further noticed.

On the merits the general manager of plaintiff's store testified that, before defendant bought any of the goods in suit, he notified her personally that she could not make any purchases from plaintiff on her husband's account, and if she made any more purchases they would be charged to her. He said they were sold to and charged solely to defendant. The manager's evidence is corroborated by the original slips upon which are charged the several items of goods. There are thirty or thirty-five of these slips, and all of them indicate, by the recitals thereon, that the goods described therein were charged to "Mrs. Harry A. Peterson," or to "Mrs. Harry Peterson," or to "Mae Peterson."

Defendant testified that she was thirty-one; that plaintiff never notified her that it would not sell goods to her on her husband's account; that prior to November 1, 1917, goods bought by her from plaintiff were charged to her husband, for which no bill was presented; that she never told plaintiff to

charge the goods to her; that she never agreed to pay for them; and that she bought only on Peterson's credit. She further testified that the clerks in the store told her that they could not charge any goods to her husband, but that she was not so informed by them until after all of the goods involved in this case were purchased.

It is true the verbal evidence conflicts on the question as to whether defendant purchased the goods on the faith and credit of her own estate. But the learned trial court who heard the witnesses testify—and there were only two witnesses—resolved that conflict, in view of all the evidence, in plaintiff's favor. Whether defendant contracted to purchase and pay for the goods was a question of fact that was decided by the trial court adversely to her contention, and we do not find any reason to hold that the court erred in this respect. We conclude that the record fairly shows the debt is properly chargeable to defendant. In *Grand Island Bkg. Co. v. Wright*, 53 Neb. 574, 74 N. W. 82, with respect to the right of a married woman to contract, it is said: "She may make contracts only in reference to her separate property, trade, or business, or upon the faith and credit thereof, and with the intent on her part to thereby charge her separate estate. Whether a contract of a married woman was so made is a question of fact."

That Peterson's separation from an abandonment of his wife were voluntary, and with an intent to renounce the marital relation and leave her to act as a feme sole, is clearly established. The rule is well stated by Shaw, Ch. J., in *Gregory v. Pierce*, 4 Met. 478: "The desertion of a wife by her husband, which will enable her to sue, and render her liable to be sued, as a feme sole, must be an absolute and complete desertion, by his continued absence from the commonwealth, and a voluntary separation from and abandonment of his wife, with

an intent to renounce, de facto, the marital relation, and leave her to act as a feme sole."

In *Rhea v. Rhenner*, 1 Pet. 105, 107, 7 L. ed. 72, 73, it is said: "The law seems to be settled that, when the wife is left without maintenance or support by the husband, has traded as a feme sole, and has obtained credit as such, she ought to be liable for her debts. And the law is the same, whether the husband is banished for his crimes, or has voluntarily abandoned the wife. It is for the benefit of the feme covert that she should be answerable for her debts, and liable to an action in such a case; otherwise, she could not obtain credit, and would have no means of gaining a livelihood."

The rule is that where a husband deserts his wife and departs from the state, leaving her without maintenance or support, and remains absent therefrom continuously, with an intent to renounce the marital relation, and leaves her to act as a feme

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sole, and she so acts, she is liable to be sued on her contract the same as though she were unmarried.

Respecting the decree of separate maintenance hereinbefore referred to: It appears that, on September 24, 1918, defendant obtained a decree against her husband, pursuant to an action theretofore commenced by her, in the district court for Hamilton county, wherein she was awarded separate maintenance in the sum of \$60 a month, from October 15, 1917, and thereafter, and her right to possession of the homestead was quieted in her. She was also awarded suit money and attorneys' fees and costs. The decree by its terms seems fairly to cover the period of time in which the goods involved herein were purchased. *Wise Memorial Hospital Asso. v. Peyton*, 99 Neb. 48, 154 N. W. 838.

The record does not present reversible error. The judgment is affirmed.

Rose and Flansburg, JJ., not sitting.

ANNOTATION.

Liability of married woman for necessities.

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II. Liability at common law:

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I. Introduction.

The question of the liability of married women in this country, for necessities, depends entirely upon statutes and their interpretation. But to understand the interpretation which the courts have put upon them, it is necessary to know the state of the law at the time the statutes were enacted. Furthermore, the question of liability of married women upon

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contracts for necessities is but a branch of the wider question of the power to contract and to be sued generally. In order fully to understand the question, therefore, it will be necessary to notice a few of the leading cases which have formed the basis of the law upon the subject, even though they may not deal directly with contracts for necessities. The cases, however, which

are outside the scope of this annotation, will be noticed only as far as necessary to show how the law of contracts for necessities is controlled by them.

II. Liability at common law.

a. In general.

At common law the individuality of a woman was completely merged in that of her husband, so that she had no power to make separate contracts which would bind her, nor could an action be brought against her separately. Various reasons have been given for this, but the one which most frequently appears in the discussion of the proposition by the courts seems to be based upon the laws which permit imprisonment for debt. If the wife could be sued on a contract, and had no property out of which the execution could be satisfied, her body might be taken and she be cast into prison, and the courts have said that this would seriously interfere with the right of her husband to her society, and therefore they have refused to permit the bringing of suits which might terminate in such a result. All of the cases gathered in this annotation proceed upon the theory that at common law a married woman was not liable on her contracts, even for necessities, and that no action could be maintained against her upon such a contract. The following cases, however, either by way of dicta or discussion, contain an explicit statement of that rule, and are cited here for the convenience of anyone wishing such a judicial statement:

Alabama.—*McAnally v. Alabama Insane Hospital* (1896) 109 Ala. 109, 34 L.R.A. 223, 55 Am. St. Rep. 923, 19 So. 492.

Iowa.—*Rodemeyer v. Rodman* (1857) 5 Iowa, 426.

Massachusetts.—*Shaw v. Thompson* (1834) 16 Pick. 198, 26 Am. Dec. 655.

Ohio.—*Wagg v. Gibbons* (1855) 5 Ohio St. 580.

Tennessee.—*Warren v. Freeman* (1885) 85 Tenn. 513, 3 S. W. 513.

Vermont.—*Brown v. Summer* (1859) 31 Vt. 671.

Wisconsin.—*Chickering-Chase Bros.*

Co. v. White (1906) 127 Wis. 83, 106 N. W. 797.

England.—*Neve v. Hollands* (1852) 18 Q. B. 262, 118 Eng. Reprint, 97; *Murray v. Barlee* (1834) 3 Myl. & K. 209, 40 Eng. Reprint, 80, 3 L. J. Ch. N. S. 184.

In *Murray v. Barlee* (Eng.) supra, the court said, That at law a feme covert cannot in any way be sued, even for necessities, is certain. The court says, whether living with her husband and not allowed necessities, or apart from him, with an insufficient or unpaid allowance, she herself is free from suit.

A feme covert is not liable on her express promise for her support. This rule necessarily results from the principle that the husband and wife are one person, and her ability to bind herself by express contract is necessarily suspended. *Shaw v. Thompson* (Mass.) supra, the court says that even if the husband was insane it would make no difference, because it would not relieve the disability of the wife, or confer on her any new power to bind herself by contract.

A married woman cannot bind herself at law for her board, while she is living with her husband. *Chickering-Chase Bros. Co. v. White* (Wis.) supra.

In *Wagg v. Gibbons* (Ohio) supra, the court said the common law disables a married woman from contracting, not from any want of capacity on her part, but because the enforcement of her contracts might interfere with the legal rights of her husband.

At common law contracts of a married woman, as such, are absolutely void and of no binding effect. No personal liability can be adjudged against her. Only her separate estate, which rests upon equitable principles, can, under such principles, be taken to meet her engagements. *Warren v. Freeman* (Tenn.) supra.

In *Brown v. Summer* (Vt.) supra, which was an attempt to enforce a note given by a married woman for necessities, against her estate in the probate court, the court said the note was absolutely void at law, and that

if it could be enforced at all it must be in a court of equity, and that the probate court had no authority to allow the claim.

Where a married woman contracted for the care of her insane husband, the court said that at common law the wife was generally incapable of entering into any valid contract to bind either her person or her property, and could not be sued at law in an action *ex contractu*. And, except as modified by statute, this disability continues to exist. And where the statutes permit her to contract with the consent of her husband, expressed in writing, her contract without such consent is void, even where he is insane and cannot give his consent. The court says what the wife may do in case of the insanity of her husband, in respect to contracting and taking care of herself, is carefully provided for in the statutes, and it would seem a common principle of interpretation that she is excluded from doing anything more in this respect than is authorized by statute.

b. Woman separated from husband.

If a woman has been abandoned by her husband, or is living apart from him, there is much to be said in favor of upholding her contracts for necessities, and there has been from time to time a marked tendency on the part of the courts to look favorably upon such contracts; but, with certain well-marked and very limited exceptions, the rule against her contracting power finally prevailed, so that until the passage of the statutes she could not, apart from the exceptional cases, contract even for necessities.

Blackstone states (1 Com. 443) that there is one case where a wife may be sued as a *feme sole*, viz., where the husband has abandoned the realm, or been banished, for then he is dead in law.

As illustrations of this:

In *Belknap's Case* (1399) 1 Hen. IV. (Eng.) 1a, a writ of guardianship was upheld against a *feme covert* whose husband had been banished, notwithstanding the claim that he might re-

ceive grace from the King, and returned.

In *Maltravers' Case* (1335) 10 Edw. III. (Eng.) 53, pl. 37, a writ of *quare impedit* was brought against a *feme covert*, and, she having pleaded her coverture, it was alleged that her husband was not exiled, and therefore the writ would lie against her.

Where the husband is transported, the wife may be sued alone. *Sparrow v. Carruthers*, cited in (1745) 2 W. Bl. 1198, 96 Eng. Reprint, 705.

In the latter part of the eighteenth century there was a strong attack made upon the idea that a woman deserted by her husband could not contract for necessities and be sued alone upon the contract. In *DeGaillon v. L'Aigle* (1798) 1 Bos. & Pl. 357, 126 Eng. Reprint, 950, in which the wife was held liable for debts contracted as a sole trader while her husband resided abroad, the court said that, in case of banishment of the husband, the rights known to exist between husband and wife were not interfered with by allowing the wife to be taken in execution.

In *Corbett v. Poelnitz* (1785) 1 T. R. 6, 99 Eng. Reprint, 941, which involved an action upon a bond for money loaned, Lord Mansfield said that at law a married woman's contracts are entirely and universally void, for her contracts, even for necessities, are the contracts of her husband, and she cannot be sued or taken in execution, but as the times alter, new customs and new laws arise which occasion exceptions, and justice and convenience require different applications of exceptions within the principle of the general rule. Where a husband is exiled, or has abjured the realm, and credit had been given the wife alone, justice says she must pay, for the husband cannot be sued. So in the case of transportation, though the case is not exactly the same, for there the absence is only temporary, because the husband may come over and be sued afterwards. This is established because the wife acts as a single woman, gains credit as such, receives the benefit, and should be liable for the loss, and where she has an estate.

to her separate use, in justice she ought to be liable to the extent of it. In that case, the cases of *Ringstead v. Lanesborough* (1782) 23 Geo. III., B. R. (Eng.) and *Barwell v. Brooks* (1783) 24 Geo. III., B. R. (Eng.) were cited, in which an action for goods sold and delivered was maintained against a married woman living apart from her husband and having a separate estate; and the exception in favor of women living apart from their husbands was also recognized in *Compton v. Collinson* (1826) 2 Bro. Ch. 385, 29 Eng. Reprint, 212, 1 H. Bl. 334, 126 Eng. Reprint 197, 2 Revised Rep. 786.

But the question finally came squarely before the King's bench, and, after two arguments and much consideration, in *Marshall v. Rutton* (1800) 8 T. R. 545, 101 Eng. Reprint, 1538, which was an action against a married woman, *inter alia*, for goods sold and delivered when she was living separate and apart from her husband, with a separate allowance, Lord Kenyon said, the only question which arises on this record is whether, by any agreement between a man and his wife, she may be made legally responsible for the contracts she may enter into, and be liable to the action of those who may have trusted to her engagements as if she was sole and unmarried. The court held that the action cannot be maintained. The first difficulty was that husband and wife were incapable of contracting with each other. Next, if they could contract, this contract would contravene the general policy of the law. The court says: "A wife living apart from her husband, and who has property secured to her own separate use, must apply that property to her support, as her occasions may call for it; and if those who know her condition, instead of requiring immediate payment, give credit to her, they have no greater reason to complain of not being able to sue her, than others who have nothing to confide in but the honor of those they trust." And since that decision the law has been regarded as settled that the contract is invalid or enforceable.

In *Kay v. De Pienne* (1811) 3 Campb.

(Eng.) 123, it was held that an alien coming into the country with her husband, who afterwards enters the employment of a foreign government and departs the realm, is not liable to suit on a promissory note. The consideration of the note does not appear in the case, but the ground of the ruling is that he might return and be subject to suit.

But in *Walford v. De Pienne* (1797) 2 Esp. (Eng.) 554, which was against the same defendant, the debt was for necessities and the action was upheld under the old principle holding her liable when the husband had abjured the realm. The court says if she should not be held liable under such circumstances, she might have starved. And the same ruling was made in *Franks v. De la Pienne* (1797) 2 Esp. (Eng.) 587.

In *Lean v. Schutz* (1778) 2 W. Bl. 1195, 96 Eng. Reprint, 704, which was an action for necessities against a married woman living apart from her husband, the court says there is no instance in the books of an action being sustained against the wife, the husband being alive, at home, and no disability.

The wife of an alien who has been in the Kingdom, and departed, leaving the wife, is not liable to action for rent and occupation. *Stretton v. Busnach* (1834) 1 Bing. N. C. 139, 131 Eng. Reprint, 1071.

The wife of a man in government employment who, after termination of his employment, remains in the foreign country to look after his own affairs, sending his wife home, is not liable to action for necessities purchased by her. *Marsh v. Hutchinson* (1800) 2 Bos. & P. 226, 126 Eng. Reprint, 1249.

In this country the liability in case of a wife living separate from her husband has been more or less influenced by statute, but the rule is much more favorable to her contracting power than is the rule in England.

In *Rhea v. Rhenner* (1828) 1 Pet. (U. S.) 105, 7 L. ed. 72, where a woman deserted by her husband contracted debts by carrying on business as *feme sole trader*, she was held liable upon her contract, the court

saying that when a wife is left without maintenance or support by the husband, and has obtained credit as a feme sole trader, she is liable for her debts, and it is immaterial whether the husband was banished from the Kingdom, or had voluntarily abandoned her.

In *Robinson v. Reynolds* (1826) 1 Aik. (Vt.) 174, 15 Am. Dec. 673, the action was against a wife on a book account for goods sold to her after her husband had departed from the state, and gone to Canada, where he had resided for three or four years, without contributing anything to her support. It does not definitely appear that the goods were necessities, and she had contracted another marriage, which fact appears to have had no weight in the discussion. The court held that, being a feme covert when the goods were bought, the contract was not binding on her, and no action would lie against her to enforce it. The court said that the mere absence of the husband for three years, or for any length of time, will not deprive him of his legal rights, and in the discussion the court says: "In contemplation of law, by marriage, the existence of the wife is merged in that of the husband. And it is a general principle that she can, during coverture, make no contracts by which she is bound, or sue, or be sued, alone. To this rule of law that a married woman is incapable of suing, or being sued, without her husband, there are excepted cases, and, so far as the principles which have controlled the decisions in such cases extend, the court feels bound to recognize them as the law here. Where the husband is accounted in law *civilter mortuus*, the wife may sue or be sued alone, as where the husband is exiled, banished for life, or has abjured the realm. So, too, where the husband is an alien, having never resided in the government, she is capable of suing and being sued alone. But we believe there is no principle of law that will authorize her to sue, or subject her to a suit, as a feme sole, where the husband is a citizen or subject of the

government, on account of her having a separate maintenance, or of his temporary absence."

Where, by statute, a woman becomes in legal contemplation a feme sole when she is abandoned by her husband, she may thereafter charge her separate estate for necessities, so that the account will be enforceable at law. *Craft v. Rolland* (1871) 37 Conn. 491.

A woman living apart from her husband may charge necessities furnished for her support upon her separate estate, held in trust for her, if the intent so to do can be established. *Jackson v. West* (1864) 22 Md. 71.

In *Gregory v. Pierce* (1842) 4 Met. (Mass.) 478, which was an action on a note given for necessities by a woman who had been abandoned by her husband, the court said: "The principle is now to be considered as established in this state . . . that where the husband was never within the commonwealth, or has gone beyond its jurisdiction, has wholly renounced his marital rights and duties, and deserted his wife, she may make and take contracts . . . and be sued in her own name as a feme sole. . . . But to accomplish this change . . . the desertion by the husband must be absolute and complete."

Where a woman, having been deserted by her husband, comes into the state to reside, she may contract for necessities as a feme sole. *Wagg v. Gibbons* (1855) 5 Ohio St. 580.

In considering the question of the right of a woman who had been abandoned by her husband, to sue in her own name, to protect her property, the court in *Love v. Moynihan* (1855) 16 Ill. 277, 63 Am. Dec. 306, asks why should a woman under such circumstances, without means of living, not be permitted to provide for the necessities of herself and family by industry and economy? And if she could provide for them, she, of course, could contract for them.

In *McAnally v. Alabama Insane Hospital* (1896) 109 Ala. 109, 34 L.R. A. 225, 55 Am. St. Rep. 928, 19 So. 492, the court said of the exceptions to the power of a married woman to

contract that she could do so if her husband had abandoned her and departed into another country, without the intention of returning, or when he was civilly dead, banished, or imprisoned for life; but that insanity was not civil death, and therefore his mere insanity would not confer upon her the ability to contract.

It will be noted that the reported case (*PETERSON BROS. & CO. v. GUNNARSON*, ante, 830) makes the woman liable as though unmarried, when her husband has deserted her and departed from the state, leaving her without support.

III. Liability in equity.

While the law did not recognize the validity of a married woman's contract, equity would, if she had a separate estate, compel payment of her contract debts for necessities out of such estate. There has been some conflict of opinion as to what form the contract must take to charge the separate estate, which continued into cases dealing with the estate preserved to her by the Married Woman's Acts. The rule provided that she might charge necessities upon her separate estate, if there was an express contract to do so, and the rule gradually provided, although not without strong opposition, that the contract need not be by specialty, or even in writing, and some cases held that it need not be express if the circumstances were such as to raise a sufficiently strong implication of intention to bind the property.

United States.—*Dodge v. Knowles* (1884) 114 U. S. 480, 29 L. ed. 144, 5 Sup. Ct. Rep. 1108, 1197.

Alabama.—*Collins v. Lavenberg* (1851) 19 Ala. 682; *Collins v. Rudolph* (1851) 19 Ala. 616.

California.—*Miller v. Newton* (1863) 23 Cal. 554.

District of Columbia.—*Knowles v. Dodge* (1881) 1 Mackey, 66.

Kentucky.—*Burch v. Breckinridge* (1855) 16 B. Mon. 484, 63 Am. Dec. 553.

New York.—*Jaques v. Methodist Episcopal Church* (1820) 17 Johns. 580, 8 Am. Dec. 447; *Yale v. Dederer*

(1853) 18 N. Y. 274, 72 Am. Dec. 503.
South Carolina.—*Hall v. Faust* (1855) 30 S. C. Eq. (9 Rich.) 301.

Tennessee.—*Kirby v. Miller* (1867) 4 Coldw. 3; *Porter v. Baldwin* (1846) 7 Humph. 177; *Litton v. Baldwin* (1847) 8 Humph. 210, 47 Am. Dec. 605; *Cherry v. Clements* (1850) 10 Humph. 552; *Warren v. Freeman* (1886) 85 Tenn. 513, 3 S. W. 518.

Vermont.—*Priest v. Cone* (1879) 51 Vt. 495, 31 Am. Rep. 695.

England.—*Kenge v. Delavall* (1685) 1 Vern. 326, 23 Eng. Reprint, 499; *Norton v. Turvill* (1723) 2 P. Wms. 144, 24 Eng. Reprint, 674; *Peacock v. Monk* (1750) 2 Ves. Sr. 190, 28 Eng. Reprint, 123; *Hulme v. Tenant* (1778) 1 Bro. Ch. 16, 28 Eng. Reprint, 958; *Heatley v. Thomas* (1809) 15 Ves. Jr. 596, 33 Eng. Reprint, 380; *Bullpin v. Clarke* (1810) 17 Ves. Jr. 365, 34 Eng. Reprint, 141; *Anonymous* (1811) 18 Ves. Jr. 258, 34 Eng. Reprint, 315, 11 Revised Rep. 194; *Greatley v. Noble* (1818) 3 Madd. Ch. 79, 56 Eng. Reprint, 439; *Stuart v. Kirkwall* (1818) 3 Madd. Ch. 287, 56 Eng. Reprint, 547; *Murray v. Balree* (1834) 3 Myl. & K. 209, 40 Eng. Reprint, 80, 3 L. J. Ch. N. S. 184; *Owens v. Dickenson* (1840) 1 Craig. & Ph. 48, 4 Jur. 1151.

The earliest rule seems to have been that the separate income of the married woman might be made liable in equity to answer for her debts for necessities, but that the corpus of the estate could not be.

In *Kenge v. Delavall* (Eng.) supra, it is held that debts contracted by a wife living apart from her husband might in equity be charged on her separate maintenance, but not on her jointure.

In *Peacock v. Monk* (1750) 2 Ves. Sr. 190, 28 Eng. Reprint, 123, there is a dictum by Lord Chancellor Hardwicke that if a wife, having an estate to her separate use, borrows money which she gives a bond to pay, underhand, this would give a foundation to demand the money against her, out of her separate estate, she being considered as a feme sole as to that.

Also, the early cases seem to have been limited to specialty contracts, or, at least, contracts in writing. The

question also arose whether or not there must be an express charge on the separate estate, or whether a general engagement was sufficient.

In *Norton v. Turvill* (1723) 2 P. Wms. 144, 24 Eng. Reprint, 674, a bond given for borrowed money was enforced out of the separate estate.

In *Owens v. Dickenson* (Eng.) supra, a married woman having a separate estate and power of appointment, and owing a duebill for borrowed money, with nothing to show whether the money was used for necessities or not, made a will by which she directed her debts to be paid. The court held that equity might charge her estate for the debts, and adopted the view in *Hulme v. Tenant* (1778) 1 Bro. Ch. 16, 28 Eng. Reprint, 958, that the separate property of a married woman, being the creature of equity, if she has a power to deal with it, she has power of contracting debts to be paid out of it, and equity takes upon itself to give effect to her agreements, not as personal obligations, but by laying hold of the separate property as the only means by which they can be satisfied.

The *Hulme Case* involved a bond of husband and wife given for borrowed money. The question involved was whether or not a general engagement, such as the bond, was sufficient, or a special charge on the estate was necessary. The *Hulme Case* was followed in *Heatley v. Thomas* (1809) 15 Ves. Jr. 596, 33 Eng. Reprint, 880, in sustaining liability as surety upon a bond, but it did not meet with universal approval. Several cases thought that it went too far in permitting a general charge to be made out of the separate estate. *Nantes v. Corrock* (1803) 9 Ves. Jr. 182, 32 Eng. Reprint, 572, 7 Revised Rep. 156; *Jones v. Harris* (1804) 9 Ves. Jr. 497, 32 Eng. Reprint, 695; *Sperling v. Rochfort* (1798) 8 Ves. Jr. 175, 32 Eng. Reprint, 320; *Parkes v. White* (1804) 11 Ves. Jr. 221, 32 Eng. Reprint, 1072; *Whistler v. Newman* (1798) 4 Ves. Jr. 129, 31 Eng. Reprint, 67, where Lord Chancellor Loughborough said: "I cannot help making one remark that if the rule laid down in them [i. e.,

cases cited, including the *Hulme Case*] is to be pushed to its full extent, a married woman having trustees, and her property under the administration of this court, is infinitely worse off and much more unprotected than she would be if left to her legal rights."

Murray v. Barlee (1834) 3 Myl. & K. 209, 40 Eng. Reprint, 80, was a bill filed to charge the separate estate of a married woman living apart from her husband, with solicitors' fees for services rendered in opposing a commission of lunacy against her, in securing her release from confinement, and defending against attempts to charge her separate estate for debts. There was no written obligation, and no contract especially to charge the separate estate, and the question was whether or not an implied promise to pay for the services rendered, or an express statement of intention to pay, was sufficient to render the wife liable to suit. Lord Chancellor Brougham, after a careful review of the cases, held that the estate was liable, saying: "I take the foundation of the doctrine to be this—the wife has a separate estate subject to her own control, and exempt from all other interference or authority. If she cannot affect it, no one can; and the very object of the settlement which vests it in her exclusively is to enable her to deal with it as if she were discoverer. The power to affect it being unquestionable, the only doubt that can arise is whether or not she has validly encumbered it. At first, the court seems to have supposed that nothing could touch it but some real charge, as a mortgage, or an instrument amounting to an execution of a power, where that view was supported by the nature of the settlement. But afterwards her intention was more regarded, and the court only required to be satisfied that she intended to deal with her separate property. When she appeared to have done so, the court held her to have charged it, and made the trustees answer the demand thus created against it."

And with respect to the distinction between a general engagement, and

the execution of a written instrument to charge the estate, the Lord Chancellor says: "I own I can perceive no reason for drawing such a distinction. If, in respect of her separate estate, the wife is in equity taken as a feme sole, and can charge it by instruments absolutely void at law, can there be any reason for holding that her liability, or, more properly, her power of affecting the separate estate, shall only be exercised by a written instrument? Are we entitled to invent a rule, to add a new chapter of the Statute of Frauds, and to require writing where that act requires none? Is there any equity reaching written dealings with the property, which extends not also to dealing in other ways, as by sale and delivery of goods? Shall necessary supplies for her maintenance not touch the estate, and yet money furnished to squander away at play be a charge on it, if fortified by a scrap of writing? No such distinction can be taken upon any conceivable principle."

The circumstance of a debt contracted by a married woman being secured by bond does not give the creditor any preference over simple contract debts. *Anonymous* (1811) 18 Ves. Jr. 258, 34 Eng. Reprint, 315, 11 Revised Rep. 194.

In *Greatley v. Noble* (1888) 3 Madd. Ch. 79, 56 Eng. Reprint, 439, which involved liability for misappropriating property by the procurement of a fraudulent will, it is said: "I think it would be difficult to find either principle or authority for reaching the separate property of a feme covert, as if she were a feme sole, without any charge on her property, either express or implied."

In *Stuart v. Kirkwall* (1818) 3 Madd. Ch. 387, 56 Eng. Reprint, 547, which was an attempt to charge the separate maintenance of a married woman living apart from her husband, and allowed such maintenance by him, upon an acceptance which she had given for a millinery bill, the vice chancellor said: "I . . . am of opinion that, a feme covert being incapable of contract, the court cannot subject her separate property to general demands. But that, as in-

cident to the power of enjoyment of separate property, she has a power to appoint it, and that this court will consider a security executed by her as an appointment pro tanto of her separate estate."

Bullpin v. Clarke (1810) 17 Ves. Jr. 365, 34 Eng. Reprint, 141, was an action to enforce a promissory note given for money lent for the separate use of a married woman, which she agreed to pay out of her separate property. The decree directed the note to be paid out of the rents and profits of the separate estate.

The same doubt as to just what was necessary to charge the property of a married woman in equity appears in the decisions of this country.

In *Priest v. Cone* (1879) 51 Vt. 495, 31 Am. Rep. 695, it is said: "From the conflicting decisions of the American and English courts touching the power of married women, and persons dealing with them, to subject their separate estates to liability upon their contracts, one safe and practicable rule is deducible. Contracts entered into by a married woman to obtain necessities for herself and family, or for her separate estate, and upon the credit of such estate, will be enforced in equity against it. What are necessities will be determined by the court as each case arises. . . . The separate estate of a married woman, against which rights exist and may be enforced by her creditors, is wholly a creature of courts of equity, and their remedies can exist and be enforced in those courts alone. In that forum, the common-law disabilities of the wife in respect to the ownership of property and the right to contract upon its credit are disregarded, and, to the extent above stated, she contracts as freely as if she were unmarried. It would seem to follow that the corpus of her separate estate, to the extent of her title, may be charged with the payment of such debts as she may lawfully contract upon its credit. The right to contract a debt is of no practical benefit to the wife, unless her creditors be clothed with ample remedy to secure their debts upon her property. Courts of

equity must, therefore, give execution against the property, and will not limit creditors to its rents, issues, and profits."

Jaques v. Methodist Episcopal Church (1820) 17 Johns (N. Y.) 580, 8 Am. Dec. 447, although not involving directly a claim against the wife for family expenses, was a bill by a beneficiary under the terms of a marriage settlement to compel the husband, after the decease of the wife, to account for the funds, and he defended upon the ground that the wife had authorized him to use them for the payment of family expenses. Chancellor Kent held that the authorization was ineffectual, on the ground that she was restrained in the disposition of the estate to the modes mentioned in the deed of settlement, and that her husband could not set up any other or less solemn alienation against her. (1817) 3 Johns. Ch. 77. But that ruling was reversed by the court of errors, Chief Justice Spencer saying he was entirely satisfied that the established rule in equity is that when a feme covert having separate property enters into an agreement, and sufficiently indicates her intention to affect by it her separate estate, a court of equity will apply it to the satisfaction of such an agreement. It necessarily results that Mrs. Jaques might give her property away without any formal act, in the same manner as though she had been sole, and her agreement that the family expenses were to be borne out of her estate was a valid act.

This principle is made clear in *Gardner v. Gardner* (1839) 22 Wend. (N. Y.) 526, 34 Am. Dec. 340, which involved an attempt to charge an estate of a married woman for money borrowed from her husband, where the court said that, although she is still incapable of charging herself at law, and equally incapable of charging herself personally with debts in equity, yet the better opinion is that separate debts contracted by her expressly on her own account shall in all cases be considered an appointment or appropriation, for the benefit of the

creditor, of so much of her separate estate as is sufficient to pay it.

A promissory note given by a married woman for necessities is a charge on her separate estate. *Collins v. Lavenberg* (1851) 19 Ala. 682.

The acknowledgment of a married woman over her signature that an account for medical services for the family is just and correct is tantamount to an express promise in writing to pay, and is therefore an enforceable charge in equity against her separate estate. *Ibid.* The court says that in that state they had adopted the English rule that a married woman is to be considered as a feme sole as respects her separate estate, and may dispose of it as she pleases, unless the instrument through which she claims imposes limitations or restrictions upon her power of disposition.

Equity will not create a lien on the separate estate of a married woman for household supplies furnished the family, although her husband had no property, the merchant testifies that he furnished the goods on her credit, and took notes from the husband as trustee for her as security for the account, and the husband testifies that the goods were secured on her credit, where there is no evidence of an express agreement on her part that there should be a charge on her separate estate. *Dodge v. Knowles* (1884) 114 U. S. 430, 29 L. ed. 144, 5 Sup. Ct. Rep. 1108, 1197.

In equity the separate estate of a married woman will be held liable for all the debts, charges, encumbrances, or other engagements which she expressly or by implication charges upon it. And therefore, where her husband has left the country, and she has purchased the supplies necessary for the support of herself and her family under a special agreement to pay for them out of her separate estate, equity will enforce the agreement. Her direct expression of an intention to charge her separate estate is deemed sufficient to create such a charge, and the mere fact that the debt has been contracted by her for herself will generally be held as *prima facie* evi-

dence sufficient to charge her separate estate, without any proof of a positive agreement to do so. The simple point to ascertain is whether it was her intention to make her separate estate liable for the debt, and the intention may be ascertained either from her direct agreement to that effect, or from the circumstances of the case by which it may be fairly inferred that such was her intention. The court said of the case before it that it was an example of the necessity of maintaining the power of equity over the subject. The husband had left the state, and with abundance of property she could not directly dispose of it, even for the necessities of life, and unless equity affords her relief, she may suffer from want in the midst of abundance. The dissenting judge, however, insisted that the statute controlled the matter, and that she could not charge her separate estate, except as provided by it. He said the statute was as obligatory in equity as at law, and the fact that in some cases its operation may be attended with hardship is no reason for disregarding it. *Miller v. Newton* (1863) 23 Cal. 554.

The attitude of equity toward the debts of a married woman, contracted for necessities, while the common-law disabilities still existed, is thus tersely expressed in *Hall v. Faust* (1855) 30 S. C. Eq. (9 Rich.) 301: "Deserted by her husband, as the defendant has been, for more than fifteen years, divorced from him by the laws of a sister state, she is still regarded as his wife by the law of South Carolina. Although the owner of a competent estate, with which her husband has no authority (nor, according to his answer, any inclination) to interfere, she has no legal power to bind that estate. Without the ordinary recommendation to credit which attaches to proprietorship, she might thus frequently be subjected to many of the inconveniences of destitution. Under such circumstances it is the peculiar province of this court to interfere, as well for the benefit of the married woman as for the protection of those who have supplied her with ne-

cessities. But we are of opinion that, the plaintiffs asking the aid of this court, their recovery may properly be restricted to such articles as were necessary and proper for the defendant, in the condition in society which she occupied."

Where a married woman, with separate life estate and power of appointment, secured family necessities on her own credit, her husband being insolvent, and executed the power without executing any formal instrument to charge the necessities upon her estate, equity will postpone the claims of the appointees to those of the creditors. *Knowles v. Dodge* (1881) 1 Mackey (D. C.) 66. The court says: "If the credit was given to the married woman and she assented to it, if the purchases were made and the goods supplied to her, good faith required that her estate shall answer for it. It would be a fraud on her part to allow her to repudiate a debt which she herself had contracted in this way for the maintenance of her otherwise helpless family and herself."

Where an estate is vested in a married woman for her separate maintenance without restriction, equity may enforce its liability for necessities contracted for, on the faith of it. *Porter v. Baldwin* (1846) 7 Humph. (Tenn.) 177.

The Tennessee chancellors have been inclined to be more conservative, and to follow more strictly the early English rule, than have the judges in other states.

A separate estate created under an instrument conferring on a married woman power in writing under her hand to alienate, sell, or dispose of property does not confer power to execute a promissory note for necessary furniture, which contains no reference either to the power or the subject-matter thereof, and indicates no agreement or intention to create a charge on the separate estate. Courts of equity hold that married women cannot, by general personal contracts or agreements, bind their separate estates. And the court held that an intention to charge the separate estate

could not be implied, because it would apply to all the pecuniary engagements of married women, and would confer upon them the power of making personal contracts generally, in opposition to the uniform principle that a married woman cannot, by contract, bind either her person or property generally. *Litton v. Baldwin* (1847) 8 Humph. (Tenn.) 210, 47 Am. Dec. 605.

In *Burch v. Breckinridge* (1855) 16 B. Mon. (Ky.) 484, 68 Am. Dec. 553, which was an attempt to subject the separate estate of a married woman to debts for family expenses, the court said that no charge could be created by her upon her real estate, without a writing, since the charge was an alienation *pro tanto*. But with respect to the personality, a verbal agreement that it shall be appropriated to the payment of the debt will be enforced. But it will not be bound for agreements made without reference to the separate estate, unless the circumstances are sufficient to prove that in fact the understanding between her and the person with whom she contracted was that it would be liable.

A mere note for necessities, which contains no express agreement that it shall be a charge upon the separate estate of the wife, is not sufficient to render it liable. *Cherry v. Clements* (1850) 10 Humph. (Tenn.) 552.

In *Kirby v. Miller* (1867) 4 Coldw. (Tenn.) 3, which was an action upon a contract for hire of a slave, the court says that in order to render a married woman liable it is necessary that she have a separate estate, that the power to contract with reference to the same shall have been expressly conferred upon her, that the contract be made with reference to the power, and the intention to bind her separate estate must be clearly manifested by express words, and not left to implication.

Equity will enforce against a separate estate held without restriction liability for necessities furnished the wife, for which she expressly binds her separate estate. *Warren v. Freeman* (1886) 85 Tenn. 513, 3 S. W. 513.

IV. *Liability under Married Woman's Acts.*

a. *In general.*

While the provisions of what are known as Married Woman's Acts are as varied as the states in which they were enacted, for the most part they merely preserve to women their individual property, free from the control of the husband, and give them power to contract with respect to such property. For many years this represented the general type of acts known by that name, and many of the cases involving liability of women on contracts for necessities arose under such statutes. Statutes of this description did little more than create what might be called a legal estate out of what formerly was an equitable estate under special settlements.

The courts quite generally applied to such estates the rules which formerly controlled courts of equity in dealing with the separate estates of married women. At about the time that the Married Woman's Acts were passed, many of the states abolished the formal distinction between courts of law and courts of equity, and provided one civil action by which to afford all relief. This, together with the abolition of imprisonment for debt, permitted judgments at law to go against married women on their contracts, to be satisfied by execution against their separate estate. The result has been that under the acts reserving to married women their separate estates, if they possessed such estates, they might contract for necessities, and the contract would be enforced against them largely as other contracts are enforced, although, where the distinction between law and equity is still preserved, resort must be had to equity to reach the separate estate.

Under the statutes reserving to married women their separate estates, and permitting them to contract with respect to them, a wife may bind her separate estate by contract for necessities.

Connecticut. — *Craft v. Rolland* (1871) 37 Conn. 491.

Georgia.—*Goodson v. Powell* (1911) 9 Ga. App. 497, 71 S. E. 765; *Smith v. Brown & Co.* (1915) 16 Ga. App. 608, 85 S. E. 950; *Reynolds v. Starks* (1915) 16 Ga. App. 607, 85 S. E. 950; *Bell v. Rossignol* (1915) 143 Ga. 150, L.R.A. 1915D, 1184, 84 S. E. 542, Ann. Cas. 1917C, 576.

Kentucky.—*Hayden v. Bohlson* (1886) 7 Ky. L. Rep. 749; *Dearing v. Moran* (1904) 25 Ky. L. Rep. 1545, 78 S. W. 217.

Massachusetts.—*Labaree v. Colby* (1868) 99 Mass. 559.

Michigan.—*Campbell v. White* (1871) 22 Mich. 178; *Buck v. Haynes* (1899) 75 Mich. 397, 42 N. W. 949; *Fafeyta v. McGoldrick* (1890) 79 Mich. 360, 44 N. W. 617; *Meads v. Martin* (1890) 84 Mich. 306, 47 N. W. 583; *Hirshfield v. Waldron* (1890) 83 Mich. 116, 47 N. W. 239; *H. Leonard & Sons v. Stowe* (1911) 166 Mich. 681, 132 N. W. 454.

Missouri.—*Miller v. Brown* (1871) 47 Mo. 504, 4 Am. Rep. 345.

New Hampshire.—*Hammond v. Corbett* (1870) 51 N. H. 315; *McConnell v. McConnell* (1909) 75 N. H. 385, 74 Atl. 875.

New York.—*Yale v. Dederer* (1858) 18 N. Y. 274, 72 Am. Dec. 503; *Maxon v. Scott* (1873) 55 N. Y. 251; *Tiemeyer v. Turnquist* (1881) 85 N. Y. 516, 39 Am. Rep. 674; *Eisenlord v. Snyder* (1877) 71 N. Y. 45.

Yale v. Dederer (N. Y.) *supra*, was an action to charge the separate estate of a married woman upon a note given for the purchase price of cows, which might not be regarded as strictly necessities, but there was evidence tending to show that some of them went to stock the farm of the wife. The court said that the settled doctrine now is that a married woman may dispose of or charge her equitable separate estate in any manner, and for any purpose, not conflicting with the instrument under which she acquired it, and that in the disposition of such estate she acts as a feme sole; but that with respect to the legal separate estates she could only dispose of them, as the common law or some enabling statute allowed her. The court held that, since the estate in the case proved to

be a legal estate, she could not charge it for payment of such a note. The court further held that the Statute of 1849, permitting a married woman to take, hold, and convey real and personal property in the same manner and with like effect as if she were unmarried, did not remove her incapacity to contract debts, but that estates acquired under it could be charged in equity to the same extent as her equitable estate could be, prior to the passage of the statute. *Comstock, J.*, delivering the opinion of the court, stated that his conclusion was that, although the legal disability to contract remains, a married woman may, as incidental to the perfect right of property and power of disposition which she takes under this statute, charge her estate for the purpose and to the extent which the rule in equity has heretofore sanctioned in reference to separate estates. But the court held that, although contracts entered into on her own account would be satisfied out of her separate estate, she could not charge such estate by a contract, merely as surety for her husband, and therefore the judgment was reversed. As showing the necessity of equitable intervention in such cases, there is a statement by *Harris, J.*, that her contracts are only valid so far as they operate upon her separate estate.

Where a wife orders wearing apparel for her personal use, and directs it to be charged to her, saying she will pay for it out of her separate estate, she may be held liable in an action at law, where the statute provides that she may convey her separate estate, enter into any contracts in reference to it, and be sued in all matters having relation to it, the same as if she were sole. *Labaree v. Colby* (1868) 99 Mass. 559.

The benefit paid to a soldier's wife while he was in the Army was separate property, within the meaning of a statute providing that she may be sued in her own name in matters pertaining to such property, and therefore, if she purchases supplies and makes individual promises that she will pay for them out of such funds, she may be sued for the price. *Ham-*

mond v. Corbett (1870) 51 N. H. 315. The court says that a contract for necessities must be held to pertain to the separate property of the wife. It further says: "If it is not so, she might be worth thousands in her own right, and, if she chanced to have a husband too poor to obtain credit and too feeble to labor, she might starve, or perish with cold for want of fuel, or clothes, or shelter, if the money was invested so that she could not at all times command a supply of ready cash. The law which was intended to benefit the married woman by enabling her to hold her property to her sole and separate use, so that it might not be taken from her upon her improvident husband's debts, really did her a great wrong if it did not enable her to contract upon her own credit for the absolute necessities of life, and create a personal liability based upon her own private individual funds, when both parties designed and intended to contract in that way."

In *Campbell v. White* (1871) 22 Mich. 178, an action of assumpsit was maintained under the Michigan statute against a married woman, on a contract made by her for household necessities. The court says the liability of the wife was consequent upon her obtaining of the goods on her sole credit and individual promise to pay for them. The court relied upon the ruling of *Cooiey, J.*, in *Tillman v. Shackleton* (1867) 15 Mich. 447, 93 Am. Dec. 198, which involved a purchase of property for a boarding house, which, some of the court were of opinion, involved the wife's separate property, but *Cooiey* and *Campbell, J.J.*, stated that the statutes on the subject established a new system, and are to be construed with a view to give them the effect designed by the legislature, rather than to retain as much as possible of the old system which they are meant to replace. The rule which the courts established is one of general capacity to own property and to make valid contracts binding at law and in equity in relation to it.

Where a married woman personally applies to a tradesman for the pur-

chase of groceries, stating that she wishes to open an account in her own name, and directs the plaintiff to charge the goods to her, and where, in pursuance of this arrangement, the goods are delivered at her home and charged to her, she will be personally liable therefor, notwithstanding the legal obligation of the husband to support his wife; the groceries being such as would be a proper support to be provided by the husband for the family. . . . The court says there can be no doubt that a married woman on her own credit may, by express contract, bind herself for the purchase of necessities for herself and family. It is true that the husband is bound to support his wife and family, but this legal obligation does not prevent the wife from buying, on her own responsibility, groceries for the support of the family, and personally agreeing to pay for them. *Bell v. Rossignol* (1915) 143 Ga. 150, L.R.A.1915D, 1184, 84 S. E. 542, Ann. Cas. 1917C, 576.

If the credit for the necessities is extended to the wife in her individual capacity, she will be liable therefor. *Smith v. Brown & Co.* (1915) 16 Ga. App. 608, 85 S. E. 950.

Where a married woman orders necessities for her household and directs them to be charged to her, intending to pledge her credit and separate estate in payment, the bill may be charged against her separate estate in equity. *Craft v. Rolland* (1871) 37 Conn. 491.

A married woman does not, by executing a note jointly with her husband for family supplies, become a surety for him, but she undertakes to pay a debt of her own, the consideration of which she shares, and is therefore bound by it. *Reynolds v. Starks* (1915) 16 Ga. App. 607, 85 S. E. 950.

In *Dearing v. Moran* (1904) 25 Ky. L. Rep. 1545, 78 S. W. 217, it is said that the wife might contract for necessities for herself, and thus secure herself such comforts as she needed.

A married woman may be personally liable for a suit of clothes purchased by her for her minor son, and charged by her direction to her personal ac-

count. *Fafeyta v. McGoldrick* (1890) 79 Mich. 360, 44 N. W. 617; *Meads v. Martin* (1890) 84 Mich. 306, 47 N. W. 583; *Hirshfield v. Waldron* (1890) 83 Mich. 116, 47 N. W. 239.

In *McConnell v. McConnell* (1909) 75 N. H. 385, 74 Atl. 875, where a married woman and her child were furnished board by her husband's parents, the court held that since the husband did not promise to pay for her, her promise to do so was not an undertaking on his behalf, within the meaning of the statute providing for contracts of that character. And under the statute the wife might contract for necessities for herself and family, although the duty to furnish them might rest upon the husband, and the fact that she had a husband did not establish her incapacity as a matter of law to be bound by an implied promise to pay for her board, and therefore she was held liable.

In *Maxon v. Scott* (1873) 55 N. Y. 251, which was an action upon the woman's contract for board furnished herself and her husband, the court held that she, in the contract, charged her separate estate with the payment of the board. This made her estate liable therefor, under the rule laid down in *Yale v. Dederer* (1858) 18 N. Y. 274, 72 Am. Dec. 503, *supra*, and a writing was not necessary, since there was no attempt to charge specific property. The court says that a careful examination of the opinion in *Yale v. Dederer* shows that separate estates were held liable in equity for the payment of debts and obligations made on account thereof, in the absence of any provision in the contract creating such charge, on the ground that the intention so to do was proved by the subject-matter of the contract. But it seems that the doctrine went no further than applicability to equitable separate estates.

And in *Crisfield v. Banks* (1881) 24 Hun (N. Y.) 159, it was held that when a married woman purchases necessities, and promises to pay for them herself, she is liable therefor, although she has no separate property. The court said: "If that which was acquired by purchase was the only

separate property she had, she would still be liable to pay for it. By the purchase she created a separate estate, so far as the purchased property made one, and no principle of justice will permit her to escape liability for the payment of the purchase price."

Where a married woman has statutory authority to acquire real and personal property, she may purchase on credit, and out of the right to purchase flows the liability to pay the price. It matters not what character of property she purchases, and the rule applies in case of purchase of necessities for the family. *Tiemeyer v. Turnquist* (1881) 85 N. Y. 516, 39 Am. Rep. 674.

To hold a married woman liable under her contract for household assistance, it must be established, not only that she agreed to pay therefor, but that such services were for the benefit of her separate estate, or that it was part of the alleged contract that the compensation should be a charge on such separate estate. *Eisenlord v. Snyder* (1877) 71 N. Y. 45.

In *Hayden v. Bohlsen* (1886) 7 Ky. L. Rep. 749, it is said that the wife is not authorized by statute to bind herself for necessities; the only authority is to bind her real estate. Therefore it is improper to render a personal judgment against her on her contract for necessities. The mode of coercing satisfaction of the debt is by a proceeding against her property. A memorandum addition to the case states that the decision was reversed by the supreme court, but no such reversal has been found.

Where a married woman contracts for necessities in her own name, equity will charge her separate estate for the debt. *Miller v. Brown* (1871) 47 Mo. 504, 4 Am. Rep. 345. The court says, as against her property, if it clearly appears that the credit was solicited by her for herself and given to her, her husband being unknown in the transaction, it does not matter whether he ought to have furnished the goods, or whether she could have availed herself of his credit, if he had any. And where the wife is trading as a feme sole with respect to her

separate property, she may bind the estate by any oral contract.

In *H. Leonard & Sons v. Stowe* (1911) 166 Mich. 681, 132 N. W. 454, where an attempt was made to hold the husband upon a contract for furnishings sold on credit of the wife, the court held him not liable, because she had authority to make the contract, and having made it on her own behalf, it did not bind the husband.

In *Goodson v. Powell* (1911) 9 Ga. App. 497, 71 S. E. 765, it is stated that the husband is not bound where it affirmatively appears that the tradesman contracted with the wife individually, and extended the credit to her in her individual capacity, and that both parties to the contract so understood.

Liability denied.

A contract by a married woman without separate estate, for the support of her child, is entirely void at law and in equity. *Valentine v. Bell* (1894) 66 Vt. 280, 29 Atl. 251.

In *Hubbard v. Bugbee* (1885) 53 Vt. 172, 2 Atl. 594, which was a suit upon notes given in part for necessities, the court said: "Since the wife had no separate estate she had no capacity, either legal or equitable, to make contracts chargeable upon it."

And a contract by a wife to pay for medical services to herself and husband does not relate to her separate property, and such property is in no way benefited by it, and she is therefore not bound by the contract. *Buck v. Haynes* (1889) 75 Mich. 397, 42 N. W. 949. The court says it was a debt of her husband, and she could not become bound by a promise to become surety for its payment.

So, under a statute permitting married women to contract so far as necessary or convenient to the beneficial enjoyment of their separate property, they cannot bind themselves for the services of a physician for themselves and their children. *Stack v. Padden* (1901) 111 Wis. 42, 86 N. W. 568.

A married woman is not liable in an action at law for necessities purchased by her for the benefit for herself and children, under a statute

giving her the control of her separate property and the right to contract and be contracted with as to such property in the same manner as if unmarried. *Brown v. Thomson* (1887) 27 S. C. 500, 4 S. E. 845.

In *Howe v. North* (1888) 69 Mich. 272, 87 N. W. 213, which was an action upon an alleged contract for board for defendant, her husband, and imbecile son, the court said the contract could not be enforced against defendant. The ground of the decision was that defendant was a married woman, and had no power to make contracts. The court says it is true that under our statute a married woman residing with her husband is held liable for merchandise purchased by herself on her individual credit and sole agreement to pay, even when the merchandise so purchased belongs to the class of family necessities and is actually used by the husband's family and in his house. This is, however, where there has been an actual purchase of property, the title of which passed to the wife and became a part of her separate estate. But the contract in the case before the court was not a contract for purchase of property. It in no manner related to her sole property. The husband was bound to provide for his wife and family. The defendant was a married woman, and she had no power to make an executory contract not directly connected with her property or estate. The court further said that the statute provided that a married woman might be sued in relation to her sole property as if she were unmarried, but in all other respects she was a *feme covert*.

Statutes merely reserving to married women their separate estates do not enable them to contract upon their personal account for necessities, such as medical services to themselves, but such contracts bind only their husbands. *Thomas v. Passage* (1876) 54 Ind. 106. In that case, the woman was greatly in need of the services of a physician, which she could not obtain on the credit of her husband. To induce the physician to attend her, she promised to pay him out of her separate estate. The court

says if there ever was a case in which it would be justified in making a little law in order to uphold and enforce an invalid and void contract, in the interest of good conscience and fair dealing, this was the case. But the court says: "We are not legislators."

b. Necessity of express undertaking to pay.

Where the statute merely preserves to the wife her separate estate and permits her to contract with reference to it, she must enter into an express undertaking to bind such estate, or the articles purchased must have been beneficial to it, to establish her liability.

Alabama.—*Gunn v. Samuel* (1858) 33 Ala. 201; *Gayle v. Marshall* (1881) 70 Ala. 522.

Georgia.—*Oliver v. Webb* (1912) 12 Ga. App. 216, 76 S. E. 1081; *Georgia Grocery Co. v. Brunson* (1919) 24 Ga. App. 484, 101 S. E. 130; *Freeman v. Holmes* (1879) 62 Ga. 556; *Rushing v. Clancy* (1893) 92 Ga. 769, 19 S. E. 711.

Idaho.—*Holt v. Gridley* (1900) 7 Idaho, 418, 63 Pac. 188; *Edminston v. Smith* (1907) 13 Idaho, 645, 14 L.R.A. (N.S.) 871, 121 Am. St. Rep. 294, 92 Pac. 842.

Kentucky.—*Gatewood v. Bryan* (1870) 7 Bush, 509; *Quisenberry v. Thompson* (1897) 19 Ky. L. Rep. 1554, 42 S. W. 723.

Maryland.—*Koontz v. Nabb* (1860) 16 Md. 554.

Michigan.—*Powers v. Russell* (1872) 26 Mich. 179; *Paul v. Roberts* (1883) 50 Mich. 611, 16 N. W. 164.

Minnesota.—*Flynn v. Messenger* (1881) 28 Minn. 208, 41 Am. Rep. 279, 9 N. W. 759.

Mississippi.—*Cook v. Ligon* (1876) 54 Miss. 868.

Missouri.—*Baldwin v. Fowler* (1920) — Mo. App. —, 217 S. W. 637.

Nebraska.—*Fulton v. Ryan* (1920) 60 Neb. 9, 82 N. W. 105.

New Jersey.—*Feiner v. Boynton* (1905) 73 N. J. L. 136, 62 Atl. 420; *Mooney v. McMahon* (1912) 83 N. J. L. 120, 83 Atl. 504.

New York.—*Smith v. Allen* (1869) 1 Lans. 101; *Weir v. Groat* (1875) 4 Hun, 198; *Winkler v. Schlager* (1892)

64 Hun, 83, 19 N. Y. Supp. 110; *Lindholm v. Kane* (1895) 92 Hun, 369, 36 N. Y. Supp. 665; *Lugar v. Swayze* (1892) 1 Misc. 209, 20 N. Y. Supp. 885, affirmed in (1893) 2 Misc. 411, 21 N. Y. Supp. 1101; *Hazard v. Potts* (1903) 40 Misc. 365, 82 N. Y. Supp. 246; *Speckman v. Foote* (1912) 138 N. Y. Supp. 380; *Bradt v. Shull* (1899) 46 App. Div. 347, 61 N. Y. Supp. 484; *Grandy v. Hadcock* (1903) 85 App. Div. 173, 83 N. Y. Supp. 90; *Ruhl v. Heintze* (1904) 97 App. Div. 442, 89 N. Y. Supp. 1031; *Valois v. Gardner* (1907) 122 App. Div. 245, 106 N. Y. Supp. 808; *Re Totten* (1910) 137 App. Div. 273, 121 N. Y. Supp. 942.

Washington.—*Butterworth v. Brede-meyer* (1913) 74 Wash. 524, 133 Pac. 1061.

Wisconsin.—*Israel v. Silsbee* (1883) 57 Wis. 222, 15 N. W. 144; *Clark v. Tenneson* (1911) 146 Wis. 65, 33 L.R.A. (N.S.) 426, 130 N. W. 895, Ann. Cas. 1912C, 141.

In order to charge a married woman under the statute, for necessities purchased by her, there must have been an express promise on her part to pay for them. *Powers v. Russell* (Mich.) supra.

Since the passage of the acts giving married women power to contract, it is necessary, in order to render a wife liable for services of a seamstress, that she expressly agree to be so responsible. *Flynn v. Messenger* (Minn.) supra. Treating services of a seamstress as in the nature of necessities, the court held that a married woman could not be held liable therefor, in the absence of circumstances to take the hiring of the plaintiff out of the ordinary presumption that the employment was in behalf of the husband, although the wife made the arrangement and agreed upon the amount of the wages. Nothing was said as to who would pay the seamstress, but while she was at work the wife told her she had property of her own, and when she sold some land she would pay her. This was held to be a mere voluntary promise, and was not sufficient to shift the obligation of payment from the husband to his wife.

A statute subjecting the real estate of a married woman to debts "contracted after marriage, on account of necessities for herself or any member of her family, her husband included, as shall be evinced by writing signed by her and her husband," requires that the contract for such necessities be made by the wife, and the credit therefor given to her. *Gatewood v. Bryan* (Ky.) *supra*.

Statutes enlarging the capacity of married women to take and hold property do not enlarge their capacity to contract, but operate to disable the husband as to those rights which, at common law, devolved on him, in and to the property of his wife. The common-law duty of the husband to maintain the wife continues, therefore, and purchases by the wife of necessities are presumed to be on his credit, by his assent or authority, so that her property is not liable therefor, unless the necessities are obtained on her own credit, and to the express exclusion of the credit of the husband. *Gayle v. Marshall* (Ala.) *supra*.

Equity will not charge the separate estate of the wife for medical services rendered to her and the family, where they are ordered by the husband and there is no evidence of a contract on her part to pay for them, although she directed members of her family to do so. *Gunn v. Samuel* (1858) 33 Ala. 201.

In *Koontz v. Nabb* (1861) 16 Md. 554, where the note in suit was given for the purchase price of a horse, the court held that a married woman having a separate estate cannot affect the estate, unless the obligation sought to be enforced presents upon its face some evidence of the intent to charge the estate, or there is evidence aliunde to prove such intent.

In *Holt v. Gridley* (1900) 7 Idaho, 418, 63 Pac. 188, which was an action against husband and wife for goods, wares, and merchandise sold to them, the court says, where it is sought to make the separate property of a married woman liable for a debt, it must be alleged and proved that the debt is her own, or made in behalf of her separate estate. The wife is not

personally liable for the debts of her husband, and neither is her separate property. This decision was under a statute permitting the wife to become a sole trader, and providing that the separate property of the wife shall not be liable for the debts of the husband, but shall be liable for the debts of the wife.

In *Edminston v. Smith* (1907) 13 Idaho, 645, 14 L.R.A. (N.S.) 871, 121 Am. St. Rep. 294, 92 Pac. 842, which was an action to recover for board for the wife, and under the statute setting apart a separate estate to the wife and giving her power to contract with respect to it, the court held that the wife was not liable unless the debt was contracted for the use and benefit of her separate property, or was contracted by her for her own use and benefit, and then says: The wife is entitled to those necessities at the husband's expense, but if he neglects to furnish them and she cannot secure them on his credit, and can do so on the faith of her own promise to pay the bill, she is certainly entitled to procure them in that manner. If the creditor parts with his goods on the faith of the wife's promise to pay, he is entitled to recover against her if the debt is not paid. The court further says, if she cannot be held for a debt of this kind, a woman who has an improvident, impecunious, and worthless husband might be compelled frequently to live on the charity of neighbors, for want of credit at the market and provision stores. The law fully authorizes, and the interest of the wife equally demands, that she bind herself personally for such necessities as she finds that she must bind herself for, in order to obtain them.

The wife is not liable unless she expressly contracts or signifies that she intends that she herself, and not her husband, will assume the obligation. *Oliver v. Webb* (1913) 12 Ga. App. 216, 76 S. E. 1081.

Where a man accompanied his wife and child to a dentist to have work done for both, and the dentist did not know that she had a separate estate, but evidently gave credit to the husband, the court held she was not liable

therefor; that in the absence of an express contract on her part to pay the debt, it could not be collected from her separate estate. *Freeman v. Holmes* (1879) 62 Ga. 556.

In *Rushing v. Clancy* (1893) 92 Ga. 769, 19 S. E. 711, a married woman was held not liable on a contract for board for herself and child. The court said it is true that under our law a married woman who has no separate estate may, by express contract, bind herself for the board of herself and children, although she may have a husband living; but the contract must be such a one as would indicate that she intended to bind herself individually, and not her husband. Although a woman has a separate estate, her husband is bound to support her and the children, and if the wife, while in company with her husband, makes a contract for board for them, and it is not expressly stipulated that she is to be bound therefor, the debt is her husband's, and not hers; and this is true although the other party may have intended to credit her, and not the husband.

The separate estate of a married woman cannot, under the statutes, be made liable for necessities unless such is the agreement at the time of the contract, or it is evidenced by writing showing that such was the contract executed by her. *Quisenberry v. Thompson* (1897) 19 Ky. L. Rep. 1554, 42 S. W. 723.

As to the question of extending credit to a married woman upon her implied contract, the court said in *Cook v. Ligon* (1877) 54 Miss. 368: "With reference to family supplies, clothing, tuition, and the like, we think that, where the husband has property or an income of his own, the legal presumption would be that the credit was given to him; and, in order to hold the wife liable, she must have either expressly assented, or failed to object to the purchases after being advised that her separate property was looked to. Where, on the other hand, as in the case at bar, the wife knows that the husband has no property which the law can reach, and he is engaged in no business save attending to her estate

and devoting his time to the production of profits, all of which must inure to her benefit, the presumption would be that she was aware that the credit was being extended to herself, rather than to him; and if, under such circumstances, she bought goods herself, or suffered him to buy goods which she consumed, her consent that her estate should be bound therefor would be implied. We do not mean to say that this would be a necessary and inflexible conclusion of law, but rather that, upon the question of fact as to whether or not she had consented that her estate should be bound, these circumstances would fully warrant an affirmative response."

In an action to hold the estate of a married woman for services rendered in housekeeping and nursing, the court held that there was an implied promise to pay for the services rendered to the wife herself, but that an express promise must be shown to hold her liable for those furnished to other members of the family. *Baldwin v. Fowler* (1920) — Mo. App. —, 217 S. W. 637.

The wife's estate cannot be taken, in the absence of her express agreement that it shall be bound, until the return of execution, unsatisfied, against her husband. *Fulton v. Ryan* (1900) 60 Neb. 9, 82 N. W. 105.

To render a stepmother liable for services rendered in the family by the stepdaughter, there must be either an express contract to pay for them out of her own estate, or circumstances clearly showing an assumption on her part exclusive of that of her husband. *Mooney v. McMahon* (1912) 83 N. J. L. 120, 83 Atl. 504.

A promissory note of a married woman, given for goods which had been purchased by her upon credit for family use while her husband was residing and cohabiting with her and supporting his family, is absolutely void, and has no foundation either in law, equity, conscience, or good rules, unless there is some special agreement by which the goods are sold to the wife for her exclusive use upon the credit of her separate estate, and not upon the credit of the husband. This

ruling is put upon the ground that the title to the goods vests in the husband, and that he is the one to pay for them. *Smith v. Allen* (1869) 1 Lans. (N. Y.) 101.

There must be an express intent to charge the separate estate, and a simple promise to pay is not sufficient. *Weir v. Groat* (1875) 4 Hun (N. Y.) 193; *Baken v. Harder* (1875) 4 Hun (N. Y.) 272.

The court says in *Weir v. Groat* (N. Y.) *supra*, that the wife may, if she pleases, charge her property with any debt, but it is only when it benefits her estate that the intent to charge it thereby becomes unnecessary. In that case the wife was held not liable, because there was no express contract to charge her estate, although the evidence showed that the merchant of whom the goods were bought refused to trust the woman's husband, and so told her in a conversation in which she said she would be responsible for everything. In the statement of the case, as reported, in addition to her assertion that she would be responsible, it is said that she promised to pay the debt after it was made. The court said in the course of the opinion: "In order to charge her estate, therefore, she must express such intention in her contract. This she has not done. The respondent labors under the false idea that such intention may be inferred from her simple promise to pay. That would destroy the only distinction now remaining between the contracts of a married and unmarried female. No case goes to that extent."

If the wife, in hiring household help, acts as agent for the husband, she is not personally liable on the contract. *Winkler v. Schlager* (1892) 64 Hun, 83, 19 N. Y. Supp. 110.

To charge the wife for necessities, it must appear that she undertook to become liable and that the goods were sold on her credit. *Lindholm v. Kane* (1895) 92 Hun, 369, 36 N. Y. Supp. 665.

In *Lugan v. Swayze* (1892) 1 Misc. 209, 20 N. Y. Supp. 885, where the contract was for decorating the flat where the family lived, the court said

the wife is not liable where she contracts as a married woman, and not individually. And, in affirming the judgment, the court in (1893) 2 Misc. 411, 21 N. Y. Supp. 1101, says: "As far as we are able to see from the return, there is nothing to distinguish this case from any other where the wife, as part of her family duties, superintends and looks after the family home, seeing that it is kept in order and suitable for a family residence. If the defendant could be held personally liable in this action, there is nothing to hinder any tradesman from holding the wife liable for everything pertaining to the household which she directs to be done, and she would be liable for the hire of the household servants, who are always under her direction and selection."

The wife is not liable for medical services furnished the family unless in the first instance she pledged her personal credit to pay for them. *Hazard v. Potts* (1903) 40 Misc. 365, 82 N. Y. Supp. 246.

The mere fact that the wife orders the supplies, and that the bills are sent to her, is not enough to charge her personally. *Speckman v. Foote* (1912) 138 N. Y. Supp. 380. In that case it was ruled that, while a wife may by agreement charge herself personally for necessities purchased by her for the family while living with her husband, the presumption is that such purchases were made by her as agent of the husband, and that he alone is liable; so, where the proof goes only to the extent of the showing that the wife came to plaintiff's store and ordered groceries, that they were delivered to her home and the bills sent to her, and that, when plaintiff asked the husband for payment, he replied that his wife said she had no money yet, and the plaintiff would have to wait—it was held that the wife was not liable personally for the debt, and, the husband being primarily liable, an oral promise to pay made by the wife after the debt was incurred would be merely a promise to pay the debt of another, and not binding upon her.

The wife is not liable for rent unless she expressly agrees to become liable

for it. *Grandy v. Hadcock* (1903) 85 App. Div. 173, 83 N. Y. Supp. 90.

Nor for room and board furnished herself and family, unless she expressly agrees to pay for them. *Ruhl v. Heintze* (1904) 97 App. Div. 442, 89 N. Y. Supp. 1031.

The mere fact that the wife tells the merchant that she has property is not sufficient to charge her personally for the necessities purchased by her. *Valois v. Gardner* (1907) 122 App. Div. 245, 106 N. Y. Supp. 808.

An agreement by a married woman to pay for board and medical services for herself need not be shown by direct evidence, but may be gathered from the surrounding circumstances, and it is sufficient that, upon presentation of the bill to the wife, she makes payment upon it. *Re Totten* (1910) 137 App. Div. 273, 121 N. Y. Supp. 942.

In *Butterworth v. Bredemeyer* (1913) 74 Wash. 524, 133 Pac. 1061, the court said it is not denied that an express promise of a wife to pay for expenses of her husband would create a primary liability against her, but that nothing less than an express promise will do so.

A married woman is not liable for board of herself and children unless she expressly makes the claim chargeable upon her separate estate. *Israel v. Silsbee* (1883) 57 Wis. 222, 15 N. W. 144.

A married woman is not personally liable for artificial teeth purchased by her for her own use, although she has always attended to the dental affairs of herself and her children, and paid the bills, and the dentist who made the teeth never had any dealing with her husband, where there is nothing to show that she made the payments out of her separate estate. The ruling is placed upon the ground that artificial teeth are necessities which it was the husband's duty to furnish to the wife, and that it was established that the defendant was acting under the authority of the husband, and therefore no independent contract on her part to pay for them was shown. *Clark v. Tenneson* (1911) 146 Wis. 65, 33 L.R.A.(N.S.) 426, 130 W. 895, Ann. Cas. 1912C, 141.

If the necessities are expressly sold on credit to the wife, and she agreed to pay for them, she is liable on her contract. *Paul v. Roberts* (1883) 50 Mich. 611, 16 N. W. 164.

Where the goods were charged to the husband at the time of purchase, and the wife did not agree to become personally responsible for the price, she is not liable. *Bradt v. Shull* (1899) 46 App. Div. 347, 61 N. Y. Supp. 484.

Under the New York law, a wife is not liable for necessities unless by express agreement she charges herself personally, or exceeds her authority as agent of her husband. *Mettler v. Snow* (1916) 90 Conn. 690, 98 Atl. 322, Ann. Cas. 1917C, 578.

Funeral expenses.

There are a few cases dealing with funeral expenses, which seem to be an exception to the rule requiring an express promise to bind the separate estate. These cases are noticed here, not for the purpose of giving an exhaustive collection of the cases dealing with the liability of a married woman for funeral expenses, but simply to call attention to the fact that in such cases such an exception has been made.

In *Carpenter v. Hazelrigg* (1898) 103 Ky. 538, 45 S. W. 666, it is stated that, if the husband fails to pay the doctors' bills and funeral expenses of his wife, her estate is liable therefor. The ground of this liability is not stated, but possibly is based upon special statute.

And a similar situation appears in *Brand v. Brand* (1901) 109 Ky. 721, 60 S. W. 704, and *Ketterer v. Nelson* (1911) 146 Ky. 7, 37 L.R.A.(N.S.) 754, 141 S. W. 409.

In *Towery v. McGaw* (1900) 22 Ky. L. Rep. 155, 56 S. W. 727, 982, it appeared that the statute made the wife's estate liable for the debts and liabilities contracted by her, and the court, after remarking that the statute seems to contemplate that the funeral expenses shall be chargeable against her estate, said the ultimate responsibility for such expenses rests there.

In *Fogg v. Holbrook* (1895) 88 Me. 169, 33 L.R.A. 660, 33 Atl. 792, the

court says the law implies a promise, from the pecuniary necessities of the situation, that the funeral expenses shall be paid out of the estate.

So, in *Gould v. Moulahan* (1895) 53 N. J. Eq. 341, 33 Atl. 483; *Re Smith* (1896) 18 Misc. 141, 41 N. Y. Supp. 1093.

But in *Bowen v. Daugherty* (1915) 168 N. C. 242, 84 S. E. 265, Ann. Cas. 1917B, 1161, which involved the question of liability for the wife's funeral expenses, the court said, notwithstanding the statute, in the absence of express promise and of any evidence tending to show that credit was given to her, or of any facts or circumstances to make her exclusively and primarily liable under the general equitable principles of *indebitatus assumpsit*, there is no reason for imputing the debt of the husband to the wife.

V. Liability under statutes permitting contracts as if sole.

The New Jersey Statute of 1875 provided that a married woman shall have the right to bind herself by contract in the same manner and to the same extent as though she was unmarried, and under this statute the court held that, while she may assume the responsibility of debts for necessities, to fasten upon her such a liability it must appear affirmatively that she made the purchase upon her individual credit. There must be either a special contract on her part to pay out of her separate estate, or the circumstances must be such as to show clearly that she assumed individual responsibility for payment, exclusive of the liability of her husband.

Under the Massachusetts statute, if a married woman purchases personal property on her own credit, though the goods may be delivered to the matrimonial residence, she binds herself personally to pay for them. And it is sufficient to charge her for furniture purchased that she directed the merchant to charge it to her account. *Caldwell v. Blanchard* (1906) 191 Mass. 489, 77 N. E. 1036.

Under a statute providing that all

legal disabilities of married women to make contracts are hereby abolished, a married woman may contract for necessary wearing apparel for herself and children, and bind her estate and her separate property thereby. *Arnold v. Engleman* (1885) 103 Ind. 512, 3 N. E. 238.

Under the Indiana statute, a woman may contract for the necessities which her husband is bound to furnish her, and if she promises to pay for the same, and they are furnished upon her credit, she is liable therefor. *Nelson v. Spaulding* (1894) 11 Ind. App. 453, 89 N. E. 168.

A statute conferring upon a married woman power to contract in her own name in all matters having relation to her sole and separate property, in the same manner as if she were unmarried, does not confer upon her power to contract verbally for necessities so as to bind her separate estate, in case her husband is insolvent. As a reason why the woman cannot bind herself under such statute, the court says, if she can, the tradesman can never sue the husband nor recover a cent from him on account of the claim, and if she should lose her property, and he become wealthy, he would go scot-free. There could be nothing devised more likely to promote idleness and vice than a statute thus offering a premium to worthless husbands to refrain from all effort to gain support for their families, and to appropriate what they might casually pick up to their own private indulgences. *Schneider v. Garland* (1882) 1 Mackey (D. C.) 350.

In *Dobbins v. Thomas* (1905) 26 App. D. C. 157, which was an action against a married woman for the price of some furniture and supplies delivered to her in exchange for property, the court said in argument, concerning the statute providing that the husband's liability for necessities contracted for her should continue as at common law, that she could not relieve herself of liability by showing that the articles were in fact necessities. That the statute did not undertake to provide that she should not render herself liable for necessities

when contracted for by her independently of her husband, and with reference to her separate estate, but merely that in such cases the husband should be relieved of liability therefor.

New York Laws 1896, chap. 272, § 21, provides that a married woman has all the rights in respect to property, real or personal, and the acquisition, use, enjoyment, and disposition thereof, and to make contracts in respect thereto, and be liable on such contracts, as if she were unmarried. Under this statute the wife was held liable for the material and services used in constructing a dress for herself, although the court says that the jury might properly have found that she was directly liable under her contract. It is intimated that an express promise by a married woman to pay for necessities bought by her is not necessary to charge her separate property, the court saying: "It appears that the defendant is a married woman living with her husband, and the principal point urged by the defendant upon this appeal is that, the dress ordered by the defendant being in the nature of a necessity, the husband was presumptively liable for the materials furnished and the services rendered in making, and that the defendant could not be charged therewith, except by an express promise on her part to pay therefor. This contention is not well founded. While an action may be maintained against a husband, under certain circumstances, for goods sold or services rendered to the wife, an action of that character may be brought directly against a married woman. *Mayer v. Lithauer* (1899) 28 Misc. 171, 58 N. Y. Supp. 1064.

Under the Act of 1896, a married woman is not liable for medical services rendered herself and her children upon her request, where there is no express contract making her so liable. *Richards v. Young* (1903) 84 N. Y. Supp. 265.

Where the goods are bought under an express promise to pay for them, and an assurance of the possession of separate property, it is not necessary

that they shall be expressly charged upon the separate estate. *Von Mallen v. Fuhrmann* (1890) 56 Hun, 402, 9 N. Y. Supp. 878. The court says, when a married woman buys property, she benefits her estate by the addition of the amount of purchase, and she is obliged to pay for the purchase for that reason.

A married woman may render herself liable for medical services by express agreement. *Re Smith* (1896) 18 Misc. 140, 41 N. Y. Supp. 1093.

Where the statute permits the wife to contract as freely as if she were unmarried, she is liable for necessities if she purchases the articles in her own name and on her own credit. *Lipinsky v. Revell* (1914) 167 N. C. 508, 83 S. E. 820.

Where a wife may make contracts and sue and be sued as a single woman, she may charge her estate with liability upon a contract for board and nursing. *Hardiman v. Crick* (1909) 131 Ky. 358, 133 Am. St. Rep. 248, 115 S. W. 236.

Under a statute providing that every married woman shall have the same rights and remedies, and shall be subject to the same liabilities in relation to property held by her in her own right, as if she were unmarried, and may make contracts and sue and be sued as if she were unmarried, a contract made by her for medical services for her husband is enforceable. *Parsons v. McLane* (1887) 64 N. H. 478, 13 Atl. 588.

In *Byrnes v. Rayner* (1895) 84 Hun, 199, 32 N. Y. Supp. 542, which was an action to hold the husband liable, the court said that under the Act of 1884, giving a married woman the power to contract as if sole, when she avails herself of the privilege of making an express contract in her own name for board for herself and husband, she will no longer be deemed as acting for her husband in procuring such support, and will bind only herself.

A married woman is liable for jewelry purchased for her own use, if she directs it to be charged to her. *Dickinson v. Ensign* (1890) 120 N. Y. 650, 25 N. E. 5.

Upholding the validity of a married woman's contract for medical services rendered her after being abandoned by her husband, the court said, in *Carstens v. Hanselman* (1886) 61 Mich. 426, 1 Am. St. Rep. 606, 28 N. W. 159: "Our statutes, before we had any law enlarging the business rights of married women, contained liberal provisions to enable women who were deserted to act for themselves. Since their rights have been put under their own control, they have had general power to contract concerning their own property, and have been authorized to sue singly for all causes of action, and to be sued separately for all their torts. Their power to make any kind of purchases on their own credit has been fully recognized.

. . . And while they have not a general power to make agreements of all kinds, we think they must necessarily be able to make contracts concerning what it is essential for their safety and security for them to procure.

. . . Where a husband utterly deserts his wife, it would be a cruel rule for her if she cannot, in his absence at least, or in his presence if he does not himself provide for her, make a binding agreement for any necessary, whether articles to be purchased or professional help, without becoming a public charge."

In *Wilder v. Brokaw* (1910) 141 App. Div. 811, 126 N. Y. Supp. 932, it is held that a wife living apart from her husband may bind herself by a contract for necessities, the question being merely as to whether credit was extended to her, or to her husband, and where the evidence is conflicting on that question, it should be submitted to a jury.

VI. Statutes authorizing contracts for necessities.

Under the New York Act of 1860, the estate of the married woman is liable for all necessities purchased by her for the benefit of herself and children. *Covert v. Hughes* (1876) 8 Hun (N. Y.) 305.

Where a woman living apart from her husband has property of her own, an agreement specifically to charge her separate estate for services of a seam-

stress is not necessary to render her liable in an action at law for work and labor, if the surrounding circumstances are such as to lead to the inevitable conclusion that such was her intention. *Conlin v. Cantrell* (1876) 64 N. Y. 217. In the lower court, however, it was ruled that the case came directly within the terms of a statute which makes the separate property of the married woman liable for such debts of her husband as may be contracted by her as his agent, for the support of herself and children. (1875) 51 How. Pr. 812.

But the wife is not personally liable under the Act of 1860 for necessities bought by her as agent for the husband. *Strong v. Moul* (1889) 51 Hun, 644, 22 N. Y. S. R. 762, 4 N. Y. Supp. 299.

The statute providing that the separate estate of a married woman will not be liable for her husband's debts, except such debts as may have been contracted for the support of herself or children, by her as his agent, was not intended to make the wife liable for all necessities purchased by her as agent for the husband. *Demott v. McMullen* (1869) 8 Abb. Pr. N. S. 335. The court says: "If it can be held liable for the purchases proved to have been made in this instance, the separate estate of every married woman may be held liable for every item of family expense which the husband should direct or allow the wife to supply on his credit. In this manner the whole burden of family support could be shifted from the husband to the wife, and a designing husband would thus not only be enabled to impose upon the wife burdens from which the policy of the law has at all times protected her, but to destroy her separate estate, in case it is not too large to be overcome in that way. This is so contrary to the policy pursued by the law-making power of this state during the last twenty years that I cannot believe the legislature of 1860 intended to effect any such result." The court suggested that the intention was to make her liable for the necessities purchased by the husband as her agent.

If the sale is made to the wife, and not to the husband, she is not liable under the Act of 1860, and the mere fact that she promises to pay, without expressly charging the debt on her separate estate, is not sufficient to render her liable. *Salmon v. McEnany* (1880) 23 Hun (N. Y.) 87.

The mere fact that the wife has the account opened in her name is not sufficient to hold her liable. *Kegney v. Ovens* (1888) 18 N. Y. S. R. 482, 2 N. Y. Supp. 319.

VII. Statutes charging necessities on estates of both husband and wife.

An early statute in Iowa made household expenses a charge upon the property of both husband and wife. Under this statute it has been held that the wife is liable for the price of an organ purchased for family use. *Frost v. Parker* (1884) 65 Iowa, 178, 21 N. W. 507.

Also for a piano. *Smedley v. Felt* (1875) 41 Iowa, 588. Also for kitchen furnishings (*Finn v. Rose* (1861) 12 Iowa, 565) and sewing machines (*Farrar v. Emery* (1879) 52 Iowa, 725, 3 N. W. 50). For stoves and fuel. *McDaniels v. McClure* (1909) 142 Iowa, 370, 134 Am. St. Rep. 424, 120 N. W. 1031.

She may be liable for jewelry. *Neasham v. McNair* (1897) 103 Iowa, 695, 38 L.R.A. 847, 64 Am. St. Rep. 202, 72 N. W. 773. But see *Hyman v. Harding* (1896) 162 Ill. 357, 44 N. E. 754, to the contrary. She may be liable for rent. *Houghteling v. Walker* (1900) 100 Fed. 253; *Straight v. McKay* (1900) 15 Colo. App. 60, 60 Pac. 1106. And for medical services. *Murdy v. Sykles* (1897) 101 Iowa, 549, 63 Am. St. Rep. 411, 70 N. W. 714; *Mueller v. Kuhn* (1895) 59 Ill. App. 353; *May v. Smith* (1872) 48 Ala. 485.

But the liability does not include money advanced to the husband to pay family expenses. *Sherman v. King* (1879) 51 Iowa, 182, 1 N. W. 441; *Davis v. Ritchey* (1881) 55 Iowa, 719, 8 N. W. 669.

The wife continues liable, notwithstanding the husband's discharge in bankruptcy. *Jones v. Glass* (1878) 48 Iowa, 345.

The statute making family expenses a charge against the wife does not render her liable for her husband's board. *Vose v. Myott* (1909) 141 Iowa, 506, 21 L.R.A. (N.S.) 277, 120 N. W. 58. The court says, through all the cases, there is traceable an effort to confine the term "family expenses" to obligations incurred for something which is intended, nominally at least, for the use and comfort of the collection or personality which we speak of as a family, or for the use of some member of the family, as distinguished from individual or personal expenses not contributing to family convenience, enjoyment, or comfort.

Since this annotation is confined to the liability of the wife for necessities, the general question of what are or are not necessities is not within its scope. One phase of that question, viz., as to articles or services for husband personally, is considered in the annotation in 13 A.L.R. 1396.

The Iowa statute has been adopted in several other states, and in *Kosanke v. Kosanke* (1917) 137 Minn. 115, 162 N. W. 1060, it was held that the statute making husband and wife jointly and severally liable for all necessary household articles and supplies furnished to and used by the family does not change the primary liability of the husband.

To charge the wife, her contract to pay must be express. *Chester v. Pierce* (1885) 33 Minn. 370, 23 N. W. 539.

Under the Washington statute containing a similar provision, the wife is liable for the hospital charges and medical expenses of the husband during his last illness, although he resided in another state at the time, if the family relation had not been severed. *Russell v. Graumann* (1905) 40 Wash. 667, 82 Pac. 998, 5 Ann. Cas. 830.

Under the Colorado statute to similar effect, the wife is liable for employment of domestic service. *Perkins v. Morgan* (1906) 36 Colo. 360, 85 Pac. 640.

And for wearing apparel purchased by the husband for his own use, if they are living together as a family.

Gilman v. Matthews (1904) 20 Colo. App. 170, 77 Pac. 366.

But in O'Brien v. Galley-Stockton Shoe Co. (1917) 65 Colo. 70, 173 Pac. 544, it was held that, if supplies for children were purchased by the wife after she had left the husband, he was not liable under the statute, thereby implying that the sole liability rested upon her.

The statute applies only to family expenses. Straight v. McKay (1900) 15 Colo. App. 60, 60 Pac. 1106.

And is not retroactive. Kelly v. Canon (1895) 6 Colo. App. 465, 41 Pac. 833.

In Hyman v. Harding (1896) 162 Ill. 357, 44 N. E. 754, where the action was against the husband for a ring purchased by the wife, the court held that the term "expenses of the family" is not synonymous with necessities, which may be personal and individual as well as for the family. The statute does not include private or individual expenses which do not affect the collective body of persons, under one head, constituting a household or family.

The wife is not liable for the care of a drunken husband with whom she is not living. Featherstone v. Chapin (1901) 93 Ill. App. 223. The court says, to warrant a recovery, it must appear there was a family in fact at the time the services were rendered.

The statute imposes personal liability. Hayden v. Rogers (1887) 22 Ill. App. 557.

In Mandel Bros. v. Ringstrom (1914) 189 Ill. App. 564, which was an action against the husband, the court says a statute relating to family expenses enlarges the liability of husband and wife, either jointly or severally, and such liability is not dependent upon an authorization of the person sought to be held.

In Mandel Bros. v. Simpson (1910) 67 Misc. 386, 122 N. Y. Supp. 397, the court says that, although the Illinois statute made both husband and wife liable for family necessities, the New York court would not hold the wife liable unless it appeared that she expressly contracted that she should be so, since the Illinois statutes were not enforceable in New York.

Under the Oregon statute, which is similar to that in Iowa, the wife is not liable for an account stated against her husband for the family expenses, if she had not consented to it. The reason for this rule is that the creditor is not likely to enforce the wife's liability under the statute, but her husband's contract, to which she was not party. Holmes v. Page (1890) 19 Or. 232, 23 Pac. 961.

Although the statute makes family expenses chargeable upon both the husband and wife, the wife's liability for goods bought by the husband is limited to the original account, and does not extend to a note given by him for the amount due. Dale v. Marvin (1915) 76 Or. 528, 148 Pac. 1116, 1151, Ann. Cas. 1917C, 657.

Under the Utah statute, both husband and wife are liable for indebtedness for family expenses incurred by either. Berow v. Shields (1916) 48 Utah, 270, 159 Pac. 538.

VIII. *Special statutory provisions.*

The Nebraska statute provides that all property of a married woman, not exempt by law from sale and execution or attachment, shall be liable for the payment of all debts contracted for necessities furnished the family, after execution against her husband for such indebtedness has been returned unsatisfied. Under this statute it is held that she is a surety, and must have her day in court before judgment can go against her property, and the court said that she might show in defense that the goods were sold on the exclusive credit of the husband. George v. Edney (1893) 36 Neb. 604, 54 N. W. 986; Small v. Sandall (1896) 48 Neb. 318, 67 N. W. 156.

The statute is not unconstitutional. Noreen v. Hansen (1902) 64 Neb. 858, 90 N. W. 937.

If the judgment fails to show that it was rendered for necessities, the shield of the statute may be raised at any time before sale of the wife's property. Scott v. House (1913) 93 Neb. 325, 140 N. W. 631.

The Missouri statute provides that the wife's property shall be subject to execution for any debt or liability of her husband created for necessities

for the wife or family. *Bedsworth v. Bowman* (1890) 104 Mo. 44, 15 S. W. 990; *Gabriel v. Mullen* (1888) 30 Mo. App. 464.

The California statute provides that the separate property of the wife is liable for her own debts, but not for her husband's debts, provided that it is liable for the payment of debts contracted by the husband for necessities of life furnished to them, or either of them, while they are living together, with the exception that the statute shall not apply to separate property held by the wife at the time of marriage, or that acquired by her by devise or succession after marriage. And it was held that the statute applied to medical services rendered to the children of the marriage, at the request of the husband. *Evans v. Noonan* (1912) 20 Cal. App. 288, 128 Pac. 794.

In Connecticut, a statute imputes to a married woman liability arising out of the beneficial use of goods in fact used for support of the family. *Mettler v. Snow* (1916) 90 Conn. 690, 98 Atl. 322, Ann. Cas. 1917C, 578.

The Kentucky statute provides that the real estate of the married woman shall be liable for such debts contracted after marriage on account of necessities for herself or any number of the family as shall be evidenced by writing signed by her. In *Singer Mfg. Co. v. Harned* (1881) 79 Ky. 279, it was held that the general estate of the wife, acquired after the creation of the debt, would be subject to payment for a sewing machine purchased for family use. The court says the object was clearly to enable the wife to supply the family with necessities, and, as a means to the end, she was empowered to use her real estate by utilizing it as a basis for credit.

Where the husband contracts for medical services for his wife, she cannot, after they have been rendered, bind herself for them by the execution of her note for the amount, under a statute providing that no part of her estate shall be subject to payment of her husband's debt unless such estate shall be set apart for that purpose by deed, mortgage, or other convey-

ance. *Underhill v. Mayer* (1917) 174 Ky. 229, 192 S. W. 14.

Lumber furnished for repair of the dwelling house is a necessity, within the statute making the real estate of the married woman liable for her debts on account of necessities. *Marsh v. Alford* (1869) 5 Bush (Ky.) 392.

Under such statute, the contract must be made by the wife, and the credit must be given to her. But under that statute the separate estate of the wife is not liable, and cannot be subjected to debts for necessities, where the statute forbids her to alienate her separate estate. *Gatewood v. Bryan* (1870) 7 Bush (Ky.) 509.

In *Underhill v. Mayer* (Ky.) *supra*, there is a dictum to the effect that under the Kentucky statutes, if the necessities be furnished at the instance of the wife, on her request or contract, she is liable for the debt. If the credit is extended to her, and the debt charged against her, she is liable.

The execution by a married woman and her husband of a note in payment of a debt contracted by her for necessities subjects the general estate of the wife to the payment thereof, as specifically provided by statute; and the fact that the intent of the wife was to charge her separate estate, such separate estate not being subject to the debt according to the statute, did not relieve her general property, no express intention on her part to charge her general estate being necessary. *Marshall v. Miller* (1860) 3 Met. (Ky.) 333.

The Mississippi Code of 1857 provided that all contracts made by the wife, or by the husband with her consent, for family supplies or necessities, shall be binding on her. *Pendleton v. Galbreath* (1871) 45 Miss. 53.

Under the Mississippi statute, supplies purchased by or with consent of the wife are chargeable upon a separate estate held in trust for her. *Porter v. Caspar* (1877) 54 Miss. 359.

The Texas statute provides that the wife may contract debts for neces-

saries furnished herself or children. When abandoned by her husband, her contracts are treated as those of a feme sole. *Palmer v. Coghlan* (1900) — *Tex. Civ. App.* —, 55 S. W. 1122.

Under that statute, a wife who purchases necessities for her own use on credit is personally liable therefor. *Trammell v. Neiman-Marcus Co.* (1915) — *Tex. Civ. App.* —, 179 S. W. 271.

Under a statute providing that, in all cases where debts may be contracted for necessities for the support of the family of a married woman, it shall be lawful for the creditor to institute suit against the husband and wife, provided that the judgment shall not be rendered against the wife unless it shall appear that the debt was contracted by her, or incurred for articles necessary for the support of the family of said husband and wife, the word "or" should be construed "and," so that she cannot be held liable for debts contracted by him. *Murray v. Keyes* (1860) 35 Pa. 384.

Under the Pennsylvania statute, all that is necessary to hold a married woman liable for necessities is that they are contracted for by her, or in her name by someone authorized to do so, and that her husband is insolvent. *Bear's Estate* (1869) 60 Pa. 430.

To render the wife liable for medical services rendered to her child, she must contract in her own behalf; a mere request to attend the child, in which she is acting for her husband, is not sufficient. *Berger v. Clark* (1875) 79 Pa. 340.

The wife is liable for funeral expenses of a member of her family, when the contract was made by her and her husband was insolvent. *Bair v. Robinson* (1885) 108 Pa. 247, 56 Am. Rep. 198. And that ruling was approved on second appeal in *Robinson v. Bair* (1886) 2 Sadler (Pa.) 223, 18 W. N. C. 120, 3 Atl. 669.

The mere fact that the wife orders medical services for herself, and that they are charged against her by the physician, does not show that she entered into the contract by undertaking to pay for them. *Moore v. Copley* (1895) 165 Pa. 294, 44 Am. St. Rep. 664, 30 Atl. 829.

The wife is liable for board and education of her children, if her husband is insolvent, and she personally contracts to pay for them. *Reed's Estate* (1861) 4 Phila. (Pa.) 375.

The mere fact of coverture will not defeat liability under the Act of 1848. *Darlington v. Ervin* (1878) 13 Phila. (Pa.) 127.

Under the Pennsylvania statute, insolvency of the husband need not be proved before recovery can be had against husband and wife. It is only after recovery that the question of the husband's ability arises. The execution must first go against the husband's property, and a return made unsatisfied, before execution can go against the wife. *Davidson v. McCandlish* (1871) 69 Pa. 169.

It was said in *Sawtelle's Appeal* (1877) 84 Pa. 306: "The act enables the wife to bind her separate estate for necessities obtained for herself and family, but the very essence of the liability is that they are furnished at her request and on her credit. If not so furnished, her separate estate is not liable."

In *Jones v. Neall* (1887) 19 W. N. C. (Pa.) 256, it appeared that the Statute of 1898 allowed a recovery against a married woman for necessities furnished her, only where her husband had been absent a year or more.

A former statute of Alabama (1867); now repealed, provided that for all contracts for articles of comfort and support for the household, suitable to the degree and condition in life of the family, and for which the husband would be responsible at common law, the separate estate of the wife is liable, to be enforced by action at law against the husband alone, or against husband and wife jointly. The statute was held constitutional. *Pippin v. Jones* (1875) 52 Ala. 161; *Bender v. Meyer* (1876) 55 Ala. 576.

It was held that an action could not be maintained against the wife alone, after the death of the husband. *Carter v. Wann* (1871) 45 Ala. 343, overruling, on this point, *Cunningham v. Fontaine* (1854) 25 Ala. 644.

There could be no suit against the

representatives of the deceased wife in the first instance, for supplies secured in her lifetime. *Rodger v. Brazeale* (1859) 34 Ala. 512.

In some early cases it was held that the judgment against the wife must be against her statutory separate estate. *Raviesies v. Stoddart* (1858) 32 Ala. 599; *Cannon v. Turner* (1858) 32 Ala. 483.

But in *Jordan v. Smith* (1887) 83 Ala. 299, 3 So. 703, it was held that the statute applied to equitable as well as legal estates.

The right to recover against the

wife's property was not affected by the ability of the husband to pay. *Sharp v. Burns* (1860) 35 Ala. 653.

Nor by the fact that the suit gave no notice of the fact that the claim might be charged against the wife's estate. *McMillan v. Hurt* (1860) 35 Ala. 665.

The articles must be family supplies, and not merely for the personal use of the husband. *Durden v. McWilliams* (1858) 31 Ala. 438.

The repealing statute was not retroactive. *Jordan v. Smith* (1887) 83 Ala. 299, 3 So. 703. H. P. F.

HELEN HOFF

v.

PUBLIC SERVICE RAILWAY COMPANY, Appt.

New Jersey Court of Errors and Appeals — March 4, 1918.

(91 N. J. L. 641, 103 Atl. 209.)

Carrier — duty to guard passenger from assault.

1. A carrier owes its passengers the duty to guard them from assault and insult from their fellow passengers and strangers, when, by a high degree of care, the same might have been prevented.

[See note on this question beginning on page 868.]

— failure to protect passenger from assault — liability.

2. The plaintiff sued for damages consequent upon an assault and battery committed upon her by a passenger on defendant's trolley car. The testimony, upon which there was no material dispute, showed that, when she entered the car about 11:20 o'clock at night, she was addressed by a passenger, who had been drinking, with the remark, "Ah! look who's here!" or words equivalent thereto. When she was leaving the car, she left her seat near the front exit, when she might have left by the front exit, and purposely passed the stranger, who again addressed her with, "Hey, chicken; take us along!" She turned back and said: "You have insulted me since I got on this car. If you insult me again, I will smack your face." He rose and struck her on the face and breast, when he was taken into cus-

tody by two policemen, in uniform, who had entered the car shortly after her entrance, and were seated opposite to her. After their entrance no offensive language was used on the car. She made no appeal for protection to the officers or to the conductor, and the assault upon her at the door was perpetrated in a moment, and before the conductor or police could intervene. Held, that there was no testimony in the case from which an inference could be drawn that the defendant had failed to use due care for the protection of the plaintiff, and that in the absence of such proof the defendant was entitled to a direction in its favor.

[See 4 R. C. L. 1181.]

Negligence — basis of action — duty.
3. The existence of legal duty is necessary to sustain an action for negligence.

[See 20 R. C. L. 10.]

Headnote 2 by MINTURN, J.

— doctrine of contributory negligence.

4. The reason for the doctrine of contributory negligence denies recov-

ery to one who in any proximate degree has consciously made himself the instrumentality of his own injury. [See 20 R. C. L. 136.]

(Walker, Ch., and Garrison, Parker, and White, JJ., dissent.)

APPEAL by defendant from a judgment of the Supreme Court affirming a judgment of the Circuit Court for Hudson County (Campbell, J.) in favor of plaintiff in an action brought to recover damages for an alleged assault committed on plaintiff by a passenger on defendant's street car. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Lefferts S. Hoffman, Leonard J. Tynan, and George H. Blake for appellant.

Mr. Alexander Simpson for appellee.

Minturn, J., delivered the opinion of the court:

The complaint alleges that, while the plaintiff was a passenger upon defendant's street car, in Bayonne, she was assaulted by a passenger because of the failure of the defendant to use reasonable care to protect her, and while she was exercising due care upon her part. The testimony disclosed that she was a married woman; that she boarded a car at 11:20 o'clock at night, upon which were several men passengers and the conductor; that one of the men, who was seated about 2 feet away from the conductor, remarked to her as she passed, "Ah! look who's coming!" or, "Ah! look who's here!" This remark apparently disconcerted her, so that she forgot to place her fare in the box at the door, until she saw the conductor look and smile at her, when she arose and, walking back, paid her fare. While so doing she heard some unintelligible remark from the man who addressed her upon her entrance. She seated herself about 3 feet from the front of the car; the men were near the rear door. Shortly afterwards two policemen, in uniform, entered the car and seated themselves about opposite her. The exact time of their entrance the plaintiff was not clear about, but she admitted it was not very long after she boarded the car. After their entrance the plain-

tiff heard no further remarks from any of the men. In her own language, prior to the policemen's entrance, these men "were saying to themselves and hollering up to me." After the entrance of the policemen no further remarks were passed by anyone until the car reached Sixteenth street, which was the plaintiff's destination.

In attempting to pass the men on her way out by the rear door, one of them, known in the testimony as Mr. Whitman, said to her, "Hey, chicken; take us along!" She had then passed the author of this remark, but upon hearing the utterance she turned around and said to him: "You have insulted me, since I got on this car. If you insult me again, I will smack your face." And he said, "Will you?" and he got up and punched her once on her face and again on her breast, which blows eventuated in the damage which presents the basis for this suit. The jury found in her favor, and the supreme court affirmed the judgment, from which determination this appeal is taken.

Her testimony is that, when Whitman struck her, every man in the car rose to her assistance, including the policemen, who took him into custody, and removed him from the car to the police station. During the entire situation after the entrance of the police, she made no complaint or protest to the conductor, and made none to the police officers, and they were called upon to intervene only when she was about to leave the car, and then not be-

cause she invoked their aid, or protection, but because a breach of the peace had taken place in their presence. Her explanation for not appealing to the conductor was that, if she did so, "they would have made a row, and then the conductor would have a fight;" and, when asked why she did not appeal to the police officers, said she "didn't want to make any trouble."

When asked why she did not leave the car by the front door, near which she sat, instead of walking down the length of the car and passing the objectionable passengers to reach the rear door, she said: "I couldn't help it. He said so much to me I had to do something." The two police officers testified that, when the blow was struck, the plaintiff stood with one foot on the floor of the rear vestibule, and the other on the floor of the car proper, and the conductor stood on the platform behind her; that after they entered they heard no loud talk from anyone on the car; that they had no reason to anticipate a breach of the peace; and that the affair, in the language of one of them, "happened in a moment."

Excepting the medical testimony this narration of facts presented the plaintiff's case. The defendant's witnesses presented no material variant facts, so that essentially the plaintiff's right of recovery was predicated upon the accepted truth of her own testimony and that of her witnesses. A motion for nonsuit and a motion to direct a verdict for the defendant, upon the ground that no negligence upon the part of the defendant had been shown, both of which motions were refused, present the basis of this appeal.

The rule is fundamental that the mere happening of an accident affords no legal ground for a claim for damages, unless the claim can be predicated upon that class of accidents, governed by the rule of *res ipsa loquitur*, which per se raises a presumption of negligence. *Bahr v. Lombard*, 53 N. J. L. 233, 21 Atl. 190, 23 Atl. 167, 16 Am. Neg. Cas. 689.

To invoke the rule of liability for negligence, which is predicated upon the omission to perform, or the performance negligently of some legal duty by the defendant, it must appear that the legal duty

Negligence—basis of action—duty.

existed as *sine qua non* to the defendant's liability. *Kingsley v. Delaware, L. & W. R. Co.* 81 N. J. L. 540, 35 L.R.A. (N.S.) 338, 80 Atl. 327. Such a duty cannot be presumed, but must be proved. *Addison, Torts*, 36. In the circumstances of the case sub judice, this general duty of the defendant has been defined by this court to be to guard its passengers "from assaults and insults

Carrier—duty to guard passenger from assault.

from their fellow passengers and strangers, when by a high degree of care the same might have been prevented." *Exton v. Central R. Co.* 62 N. J. L. 14, 56 L.R.A. 508, 42 Atl. 486, 5 Am. Neg. Rep. 675, affirmed in 63 N. J. L. 356, 56 L.R.A. 508, 46 Atl. 1099. The duty thus generically formulated is more specifically stated in the case cited as a duty "to provide reasonable precautions to protect the passengers from assaults from any quarter at which they might reasonably be expected to occur, under the circumstances of the case and the condition of the parties."

Manifestly the ratio decidendi underlying the rule thus declared is reasonable expectation of likelihood of harm. For obviously, were the rule otherwise, the doctrine of reasonable care in such an exigency would be transmuted into individual insurance of the passenger's safety from injury against all hazards and in anticipation of all possible dangers. Where, as in the case at bar, no diversity of fact exists regarding the salient features of the situation, liability must be predicated, if at all, in the application of the rule, upon a basis consonant with reason and abstract justice, and the practical possibilities inherent in the situation. "Cessante ratione legis, cessat ipsa lex." In the situation

presented, the plaintiff found herself not in an isolated position, or in a dangerous environment, to escape from which she had to look to the conductor as her only protector and safeguard. Seated opposite to her were two police officers, in uniform, and in this fortuitous environment it must have been apparent to her that she possessed every reasonable assurance for her safety and protection. From the time the officers entered the car until she was in the act of leaving it, the situation was quiescent, and nothing took place to indicate to anyone that the plaintiff was in danger.

It may be assumed, therefore, that the plaintiff herself could not have anticipated what subsequently happened, or as a careful and prudent woman she would have made her exit from the front of the car, in order to avoid possible danger; and it is within the range of probabilities to assume that, if she had foreseen the occurrence, an immediate appeal would have been made by her to those in authority on the car for protection. Such an appeal, if unheeded by the conductor, would indubitably place the defendant company in the category of a tortfeasor; but none was made, and the inference is that danger was neither imminent nor anticipated by her. If this be the logical and reasonable deduction from the situation, it is difficult to perceive upon what theory of prescience or foresight the defendant can be chargeable with the performance of

Carrier—failure to protect passenger from assault—liability.

a duty, based upon the exercise of foresight and care, which duty the facts

and circumstances could not call into being, or cause to be invoked, for the purpose of obviating an existing danger.

The absence of any appearance of danger to the plaintiff and to the officers must be conceded to have been equally obvious to the conductor. It is also a conspicuous fact that if the plaintiff had sought exit by the front door, which was near

and convenient to her, the danger complained of would have been obviated; and while no positive duty was incumbent upon her in that regard, so far as the case shows, we cannot be unmindful of the fact that the possible danger inherent in the situation existed at the rear exit, and that the plaintiff was conscious of that fact. So far conscious of it was she, and so determined to meet it, that she testified as her excuse for this choice of exit: "He said so much to me, I had to do something." In such a situation the inquiry results, and its answer presents the gravamen of the case and the rational solution of the inquiry: What, under such circumstances, could the conductor have done, not only to anticipate or foresee the conduct of the man who insulted her, but also to anticipate her own conduct, which in a measure, at least, provoked the assault which caused her injury? The legal obligation to exercise due care in any case involves a reasonable answer to such an inquiry, and the present case offers no solution which could in practical execution have anticipated the injury and prevented it.

The application of the doctrine of contributory negligence is not without its practical importance, in such a situation; for the fundamental reason for the existence of the rule inheres in the maxim, "volenti non fit injuria," and denies a recovery to one who in any proximate degree

Negligence—doctrine of contributory negligence.

has consciously made himself the instrumentality of his own injury. *Hott v. Wilkes*, 3 Barn. & Ald. 304, 106 Eng. Reprint, 674, 22 Revised Rep. 400, 25 Eng. Rul. Cas. 85. The application of the rule in the case sub judice must obviously militate against the plaintiff's right of recovery; for manifestly, had she continued upon her course and alighted from the car, instead of returning to threaten her insulter with physical violence, the sequel consequent upon her act would not have occurred. That she

invited trouble of some character is obvious from her state of mind, indicated by her testimony, to which reference has been made. The rationale of the instructions imparted to the jury by the learned trial court, as well as that contained in the opinion of the supreme court, is based upon the assumption that, because her insulter was drunk, some indefinable duty of protection was cast upon the conductor. We find no warrant in the case for the assumption that the man was drunk; but, if he was, that fact was as obvious to the plaintiff as it was to the conductor, and it therefore required from her the exercise of at least some degree of prudence and foresight, looking to her safe exit from the car. That he was not boisterously intoxicated, or drunk to such a degree of offensiveness, as to make a nuisance of himself to his fellow passengers, is evidenced by the testimony of the police officers; and such, in effect, we have decided must be his physical and mental condition before the defendant would be warranted in ejecting him. *Parks v. Delaware, L. & W. R. Co.* 85 N. J. L. 577, 89 Atl. 983, affirmed in this court in 86 N. J. L. 696, 92 Atl. 1087.

The contrary situation is manifest from the testimony, which, evinces, without contradiction, that from the time when the policeman entered the car until the time plaintiff attempted to leave it, nothing of an objectionable nature occurred to attract their attention; and with the presence of the officers confronting

the insulter, it is not too much to assume that if the plaintiff had proceeded to alight, instead of returning to threaten the man, his offensive remark would have spent itself in harmless vacuity. Equally patent is it that any mediation or interference by the conductor at that time, based upon a recognition of the duty of foresight and due care, must have proved ineffectual to prevent the occurrence of the assault upon the plaintiff; for, in the language of her witness, it was perpetrated in a moment. In such circumstances, indicating no failure of performance of any obvious or definable duty by the defendant, its act of tort-feasance must be proved, and cannot be assumed, or left to conjecture by a jury, upon a hypothesis of duty which has nothing to support it but the mere happening of the injury.

The judgment of the Supreme Court will be therefore reversed, to the end that a venire de novo may issue.

Walker, Ch., and Garrison, Parker, and White, JJ., dissent.

NOTE.

Liability of a carrier to a passenger for assault by a third person is the subject of the annotation following *BEASLEY v. HINES*, post, 868. More specifically, as to assault by fellow passenger, see subd. I. a, of that annotation.

H. W. BEASLEY, Appt.,

v.

WALKER D. HINES, Director General of Railroads.

Arkansas Supreme Court — March 15, 1920.

(143 Ark. 54, 219 S. W. 757.)

Carrier — liability for robbery of passenger.

1. A carrier is not liable for assault upon and robbery of a passenger riding in a freight car to care for his stock, by one who, without knowl-

edge of the train crew, enters the car under false pretenses while it is standing in a freight yard.

[See note on this question beginning on page 868.]

—stock caretaker as passenger.

2. A shipper riding in a stock car with his stock to care for it is entitled to the rights and protection of a passenger.

[See 4 R. C. L. 1008-1010.]

—measure of protection required.

3. A passenger riding in a stock car with his stock cannot expect the care from the railroad company that he would be entitled to were he in a passenger car or in the caboose of a freight train.

[See 4 R. C. L. 1008, 1160.]

Evidence—contributory negligence of passenger.

4. Evidence that a passenger in a

stock car who admitted a robber to the car acted upon the latter's statement that he was a brakeman desiring to see if the stock had room to lie down is admissible upon the question of his contributory negligence.

Carrier—duty to guard train from tramps.

5. Knowledge on the part of a train crew that it has been found impossible to prevent tramps from boarding trains does not impose upon it the continuous duty of so patrolling the cars as to make it impossible for tramps to enter them without being discovered.

APPEAL by plaintiff from a judgment of the Circuit Court for Saline County (Evans, J.) in favor of defendant in an action brought to recover damages for assault upon and robbery of plaintiff while riding in a stock car as a passenger on defendant's train. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Emerson, Donham, & Shepherd, for appellant:

A caretaker in charge of a shipment of live stock and riding free is a passenger.

St. Louis, I. M. & S. R. Co. v. Loyd, 105 Ark. 340, 150 S. W. 864; St. Louis & S. F. R. Co. v. Coy, 113 Ark. 265, 168 S. W. 1106.

This being true, defendant was bound under the law to exercise the same high degree of care to protect plaintiff from injury as if he had been on a passenger train; defendant's duty being modified only by the nature of the train and the necessary difference in the mode of operation.

St. Louis, I. M. & S. R. Co. v. Brabbzson, 87 Ark. 109, 112 S. W. 222; Pasley v. St. Louis, I. M. & S. R. Co. 83 Ark. 22, 102 S. W. 387, 13 Ann. Cas. 121; Rodgers v. Choctaw, O. & G. R. Co. 76 Ark. 520, 1 L.R.A.(N.S.) 1145, 113 Am. St. Rep. 102, 89 S. W. 468.

Carriers are required to exercise for the safety of their passengers the highest degree of care and diligence which human prudence and foresight will suggest in view of the character and mode of conveyance employed.

Hutchinson, Carr. 3d ed. p. 995, § 895; Mayfield v. St. Louis, I. M. & S. R. Co. 97 Ark. 24, 32 L.R.A.(N.S.) 525, 133 S. W. 168; 4 R. C. L. p. 1181, § 15 A.L.R.—55.

606; White, Personal Injuries on Railroads, p. 1149, § 761; 2 Thomp. Neg. p. 544, § 3085; Wright v. Chicago, B. & Q. R. Co. 4 Colo. App. 102, 35 Pac. 196, 8 Am. Neg. Cas. 89; Connell v. Chesapeake & O. R. Co. 93 Va. 44, 32 L.R.A. 792, 57 Am. St. Rep. 786, 24 S. E. 467; Southwestern Teleg. & Teleph. Co. v. Bruce, 89 Ark. 581, 117 S. W. 564.

Messrs. E. B. Kinsworthy and B. S. Kinsworthy, for appellee:

There was not sufficient evidence for this case to be given to the jury.

Chicago, R. I. & P. R. Co. v. Brown, 111 Ark. 288, 163 S. W. 525; Ball v. Chesapeake & O. R. Co. 93 Va. 44, 32 L.R.A. 792, 57 Am. St. Rep. 786, 24 S. E. 467.

It was impossible for the railroad company to have anticipated the injury alleged by plaintiff.

St. Louis & S. F. R. Co. v. Dyer, 115 Ark. 262, 170 S. W. 1018; Arkansas Midland R. Co. v. Canman, 52 Ark. 517, 13 S. W. 280; Little Rock Traction & Electric Co. v. Kimbro, 75 Ark. 211, 87 S. W. 121, 644.

Plaintiff is barred by the terms of his contract.

Leslie v. Atchison, T. & S. F. R. Co. 82 Kan. 152, 27 L.R.A.(N.S.) 646, 107 Pac. 765; Illinois C. R. Co. v. Jennings, 217 Ill. 140, 75 N. E. 457.

Smith, J., delivered the opinion of the court:

In support of his cause of action appellant testified as follows: He entered into a contract with the railroad company for the shipment of a carload of live stock and one of household furniture and farm implements from Bowling Green, Missouri, to Donaldson, Arkansas. He left Bowling Green Friday night, and, with the knowledge and consent of the various train crews, rode in the car containing his stock. The train of which his cars were a part left Little Rock about 10 o'clock Monday night, and he fell asleep soon afterwards, and slept until he was awakened by someone pounding on the door of the car. The train had then stopped. He asked what was wanted, but received no reply. The man at the door, who later proved to be a robber, walked around to the other side of the train. The door on that side was open for about 6 or 8 inches, and he lit a lantern and hung it on the beam across the car, right in front of the door. He looked out and saw that it was still dark, but noticed several tracks, and knew that they were in some switch yard. These tracks were made visible by an electric light, which may have been the headlight of another engine. He saw the man, and asked him what he wanted, and the man replied that he was a brakeman, and wanted to see if the stock in his car had room to lie down. During his journey the trainmen had frequently come into his car to see about the cattle. He asked where they were, and was told that they were in Benton. He undid the door, and the man climbed into the car, and sat down on some boards he had nailed across the door, and commenced to talk about the horses. The man remained seated for a few minutes, when it began sleeting, and the man said, "I think I will stay here for a while," and about that time the train started. After going some distance the train took a sidetrack to allow a passenger train to pass. In his own language the narrative is continued as follows:

"I thought it was queer of him being in there, and I told him that I didn't believe he was a brakeman, because he had on too good clothes, and he said, 'I'll be honest with you, partner; I knew one of the brakemen on the train, and he told me what to do, and he told me the car was going to Donaldson, and I could ride that far.' I began to feel uneasy about his presence in the car, and I listened and watched for a brakeman to pass through to the side of the car, or on top of it; but I am positive that none passed the side or over the top, because I had a light in the car and the door was open about 2 feet. Just as soon as the train pulled out of there, this man, who had been sitting with his face toward me, turned around with his back toward me for a few minutes and faced the door. Suddenly he turned around with a revolver in his right hand, a flashlight in his left hand, and demanded that I put my hands up. I said, 'You don't mean that; you are joking partner;' and he said, 'God damn you, put them up, or I will blow your damn head off.' I grabbed the gun with my left hand, and reached in my hip pocket with my right, and threw my pocketbook, which contained about \$180, in the straw at the horses' feet; but he jerked the gun out of my hand and jumped back out of my reach. I saw that he was going to shoot when he pulled the gun out of my hand, and I turned my left shoulder toward him, and he shot me. He then told me to turn around, and he felt in my hip pocket, but found nothing in there. He then searched my other pockets, and obtained about \$15 from them. He then came over and found the pocketbook that I had thrown in the straw, and took it also. He remained in the car for about five or ten minutes after he shot me, and as we were going up a long hill he jumped off the train and escaped. . . . The car in which I was riding was the third car from the engine. There were two box cars between me and the engine. I continued to ride on the

train until we got to Donaldson, where I was treated by a physician."

No one requested appellant to ride in the caboose at any time, but he knew he had the right to do so if he wished. No other testimony was offered, and the court directed the jury to find for the defendant, and this appeal comes from the judgment pronounced on the verdict thus returned.

This appeal is prosecuted upon the theory that appellant was a passenger, and that the railroad company, in the exercise of the care which should have been bestowed upon him as such, should have anticipated the probable presence of the robber in the car, and should have taken the necessary precautions to protect appellant from the injury inflicted upon him.

Appellant was a passenger, and the company did owe him the degree of care due a passenger; but, in measuring that care, we must take into account the circumstances of the case. It is obvious, of course, that the company could not afford appellant the protection which could and should be given on passenger trains; nor, for that matter, could it give appellant the protection he might have expected, and would, no doubt, have had, had he traveled in the caboose, as he had the right to do. *St. Louis & S. F. R. Co. v. Coy*, 113 Ark. 265, 168 S. W. 1106.

Here the robber entered the car with appellant's consent. It is true the robber first said the purpose of his visit was to see if the stock had room to lie down, and later that the brakeman had given him permission to ride in the car. This testimony was competent to show that appellant was not guilty of contributory negligence in admitting the robber into the car; but it has no probative value to charge the company with liability for the robber's conduct. Appellant's suspicions were aroused before his train took the sidetrack

to allow the passenger train to pass; yet during the interval they waited on that account he did nothing to apprise the train crew of the man's presence or his suspicions concerning him. The robber made no assault until the train was in motion, and he left the train before it stopped. The shot was fired inside the car, and at a time when the train was under full headway. The night was cold, and it is highly improbable that any member of the train crew could have heard this shot, or could have told whence it came, had they heard; but it would have availed nothing, had they heard it, as the passenger was then injured.

We think no issue for the jury was made as to the negligence of the company in permitting the robber to board the train. It is a matter of common knowledge that in the practical operation of trains it has been found impossible to prevent tramps from boarding them, and the train crew must be presumed to have had that knowledge.

But that knowledge did not impose upon the train crew the continuous duty of so patrolling appellee's cars as to make it impossible for tramps to enter them without being discovered. We think what was said in the case of *Chicago, R. I. & P. R. Co. v. Brown*, 111 Ark. 288, 168 S. W. 525, is applicable here: "When this evidence has been analyzed, we think a recovery can be had only upon the theory that a passenger was injured, and that by some possibility something might have been done which was not done; but the evidence does not show what that was. We think the only reasonable view of this evidence is that there was nothing which the members of this train crew could have done which would have prevented this unfortunate occurrence, and, as carriers are not absolute insurers of the safety of their passengers, the case must be reversed and the cause dismissed."

The judgment of the court below must therefore be affirmed.

Carrier—stock caretaker as passenger.

—measure of protection required.

Evidence—contributory negligence of passenger.

Carrier—duty to guard train from tramps.

—liability for robbery of passenger.

ANNOTATION.

Liability of carrier to passenger for assault by third person.

I. Assault by fellow passenger:

- a. Rules stated, 868.
- b. Application of rules generally, 872.
- c. Effect of permitting intoxicated passenger on vehicle, 879.
- d. Effect of failure to separate white and colored passengers, 884.

I. Assault by fellow passenger.

a. Rules stated.

Although a carrier is not an insurer of the safety of a passenger, it is liable for an assault by one passenger on another if it fails to exercise the highest degree of care which is practicable under the circumstances of the particular case to prevent the assault.

United States.—*King v. Ohio & M. R. Co.* (1884) 22 Fed. 413; *Meyer v. St. Louis, I. M. & S. R. Co.* (1893) 4 C. C. A. 221, 10 U. S. App. 677, 54 Fed. 116.

Alabama.—*Montgomery Traction Co. v. Whatley* (1907) 152 Ala. 101, 126 Am. St. Rep. 17, 44 So. 538; *Culberson v. Empire Coal Co.* (1908) 156 Ala. 416, 47 So. 237; *Seaboard Air Line R. Co. v. Mobley* (1916) 194 Ala. 211, 69 So. 615; *Birmingham R. Light & P. Co. v. Lipscomb* (1916) 198 Ala. 653, 73 So. 962.

Arkansas.—*St. Louis Southwestern R. Co. v. Bradley* (1911) 99 Ark. 346, 138 S. W. 478; *Memphis, D. & G. R. Co. v. Trussell* (1916) 122 Ark. 516, 183 S. W. 981; *Hines v. Meador* (1920) 145 Ark. 356, 224 S. W. 742.

Connecticut.—*Flint v. Norwich & N. Y. Transp. Co.* (1868) 34 Conn. 554, Fed. Cas. No. 4,873, affirmed in (1872) 13 Wall. (U. S.) 3, 20 L. ed. 565.

District of Columbia.—*Flannery v. Baltimore & O. R. Co.* (1885) 4 Mackey, 111; *Washington R. & Electric Co. v. Perry* (1917) 47 App. D. C. 90.

Georgia.—*Holly v. Atlanta Street R. Co.* (1878) 61 Ga. 215, 34 Am. Rep. 97; *Hillman v. Georgia R. & Bkg. Co.* (1906) 126 Ga. 814, 56 S. E. 68, 8 Ann. Cas. 222; *Grimsley v. Atlantic Coast Line R. Co.* (1907) 1 Ga. App. 557, 57 S. E. 943.

II. Assault by policeman or other officer of law, 885.

III. Assault by stranger:

- a. Rules stated, 887.
- b. Stranger throwing missile into car, 888.
- c. Intruder in car, 889.
- d. Intruder in station house or grounds, 891.

Illinois.—*Chicago & A. R. Co. v. Pillsbury* (1887) 123 Ill. 9, 5 Am. St. Rep. 483, 14 N. E. 22.

Indiana.—*Evansville & I. R. Co. v. Darting* (1892) 6 Ind. App. 375, 33 N. E. 636, 8 Am. Neg. Cas. 198; *Indianapolis Street R. Co. v. Dawson* (1903) 31 Ind. App. 605, 68 N. E. 909; *Pittsburgh, C. C. & St. L. R. Co. v. Richardson* (1907) 40 Ind. App. 503, 82 N. E. 536; *Chicago, T. H. & S. E. R. Co. v. Fisher* (1915) 61 Ind. App. 10, 110 N. E. 240.

Iowa.—*Starr v. Chicago, R. & Q. R. Co.* (1912) 156 Iowa, 311, 136 N. W. 524.

Kansas.—*Spangler v. St. Joseph & G. I. R. Co.* (1903) 68 Kan. 46, 63 L.R.A. 634, 104 Am. St. Rep. 391, 74 Pac. 607, 15 Am. Neg. Rep. 299.

Kentucky.—*Kinney v. Louisville & N. R. Co.* (1896) 99 Ky. 59, 34 S. W. 1066; *Louisville R. Co. v. Wellington* (1910) 137 Ky. 719, 126 S. W. 128, 128 S. W. 1077; *Louisville & N. R. Co. v. Finn* (1894) 16 Ky. L. Rep. 57; *Cincinnati, N. O. & T. P. R. Co. v. Taylor* (1905) 27 Ky. L. Rep. 351, 85 S. W. 168.

Maryland.—*United R. & Electric Co. v. State* (1901) 93 Md. 619, 54 L.R.A. 942, 86 Am. St. Rep. 453, 49 Atl. 923, 10 Am. Neg. Rep. 71.

Massachusetts.—*Nute v. Boston & M. R. Co.* (1913) 214 Mass. 184, 100 N. E. 1099; *Isenberg v. New York, N. H. & H. R. Co.* (1915) 221 Mass. 182, 108 N. E. 1046.

Michigan.—*McWilliams v. Lake Shore & M. S. R. Co.* (1906) 146 Mich. 216, 109 N. W. 272.

Minnesota.—*Mullan v. Wisconsin C. Co.* (1891) 46 Minn. 474, 49 N. W. 249; *Lucy v. Chicago G. W. R. Co.* (1896)

64 Minn. 7, 31 L.R.A. 551, 65 N. W. 944; *Jansen v. Minneapolis & St. L. R. Co.* (1910) 112 Minn. 496, 32 L.R.A. (N.S.) 1206, 128 N. W. 826.

Mississippi.—*New Orleans, St. L. & C. R. Co. v. Burke* (1876) 53 Miss. 200, 24 Am. Rep. 689; *Royston v. Illinois C. R. Co.* (1889) 67 Miss. 376, 7 So. 320, 8 Am. Neg. Cas. 453.

Missouri.—*Spohn v. Missouri P. R. Co.* (1885) 87 Mo. 74, 4 Am. Neg. Cas. 564, later appeal in (1890) 101 Mo. 417, 4 Am. Neg. Cas. 629; *Abernathy v. Missouri P. R. Co.* (1920) — Mo. App. —, 217 S. W. 568. Compare *Utterback v. St. Louis & S. F. R. Co.* (1916) — Mo. —, 189 S. W. 1171; *Liljegren v. United R. Co.* (1921) — Mo. —, 227 S. W. 929.

New Jersey.—*Partridge v. Woodland S. B. Co.* (1901) 66 N. J. L. 290, 49 Atl. 726, 10 Am. Neg. Rep. 627.

New York. — *Koch v. Brooklyn Heights R. Co.* (1902) 75 App. Div. 282, 78 N. Y. Supp. 99; *McMahon v. Interborough Rapid Transit Co.* (1908) 59 Misc. 242, 110 N. Y. Supp. 876; *Wachser v. Interborough Rapid Transit Co.* (1910) 69 Misc. 346, 125 N. Y. Supp. 767.

North Carolina.—*Britton v. Atlanta & C. Air Line R. Co.* (1883) 88 N. C. 536; *Penny v. Atlantic Coast Line R. Co.* (1903) 133 N. C. 221, 63 L.R.A. 497, 45 S. E. 563; *Bedsole v. Atlantic Coast Line R. Co.* (1909) 151 N. C. 152, 65 S. E. 925. See also *Stanley v. Southern R. Co.* (1912) 160 N. C. 323, 76 S. E. 221.

Pennsylvania.—*Pittsburgh, Ft. W. & C. R. Co. v. Hinds* (1866) 53 Pa. 512, 91 Am. Dec. 224, 8 Am. Neg. Cas. 602; *Pittsburg & C. R. Co. v. Pillow* (1874) 76 Pa. 510, 18 Am. Rep. 424, 8 Am. Neg. Cas. 608.

South Carolina. — *Franklin v. Atlanta & C. Air Line R. Co.* (1906) 74 S. C. 332, 54 S. E. 578; *Anderson v. South Carolina & G. R. Co.* (1907) 77 S. C. 434, 122 Am. St. Rep. 591, 58 S. E. 149, later appeal in (1908) 81 S. C. 1, 61 S. E. 1096; *Spires v. Atlantic Coast Line R. Co.* (1912) 92 S. C. 564, 75 S. E. 950.

Tennessee.—*Ferry Cos. v. White* (1897) 99 Tenn. 256, 38 L.R.A. 427, 41 S. W. 583, 3 Am. Neg. Rep. 279; *Nash-*

ville, C. & St. L. R. Co. v. Flake (1905) 114 Tenn. 671, 108 Am. St. Rep. 925, 88 S. W. 326; *St. Louis, I. M. & S. R. Co. v. Hatch* (1906) 116 Tenn. 580, 94 S. W. 671.

Texas.—*Missouri, K. & T. R. Co. v. Gerren* (1909) 57 Tex. Civ. App. 34, 121 S. W. 905; *Twichell v. Pecos & N. T. R. Co.* (1910) 62 Tex. Civ. App. 175, 181 S. W. 243; *Galveston, H. & S. A. R. Co. v. Bell* (1914) — Tex. Civ. App. —, 165 S. W. 1, 5 N. C. C. A. 621, affirmed in (1919) 110 Tex. 104, 216 S. W. 390.

Virginia.—*Norfolk & W. R. Co. v. Birchfield* (1906) 105 Va. 809, 54 S. E. 879.

Washington.—*Kelly v. Navy Yard Route* (1913) 77 Wash. 148, 137 Pac. 444.

Wisconsin. — *Kline v. Milwaukee Electric R. & Light Co.* (1911) 146 Wis. 134, 131 N. W. 427, Ann. Cas. 1912C, 267.

England. — Compare *Pounder v. North Eastern R. Co.* [1892] 1 Q. B. 385, criticized in *Cobb v. Great Western R. Co.* [1894] A. C. 419, 63 L. J. Q. B. N. S. 629, 6 Reports, 203, 71 L. T. N. S. 161, 58 J. P. 636, and *Canadian P. R. Co. v. Blain* (Can.) *infra*.

Canada.—*Canadian P. R. Co. v. Blain* (1903) 34 Can. S. C. 74, affirming (1903) 5 Ont. L. Rep. 334, appeal to Privy Council refused in [1904] A. C. (Eng.) 453, 73 L. J. P. C. N. S. 109.

In *Kelly v. Navy Yard Route* (Wash.) *supra*, the court said: "A carrier is bound to exercise the highest degree of care demanded by the surrounding circumstances in protecting its passengers, and is answerable for the unlawful conduct of a fellow passenger if, upon consideration of all the facts and circumstances, it could, or might, by the exercise of such diligence as the occasion demanded, have prevented an assault or injury at the hands of a fellow passenger. A passenger, from the time he enters his vehicle, has the right to claim the protection of the carrier from the insults and violence of others, and it is a duty the carrier owes to the passengers, when the circumstances known to it are such as to create a reasonable apprehension of disorderly conduct, to

be vigilant and prompt to suppress it when it occurs, and to prevent its repetition."

The rule was expressed as follows in *Chicago, T. H. & S. E. R. Co. v. Fisher* (1915) 61 Ind. App. 10, 110 N. E. 240: "It may be stated generally that, although common carriers are not insurers of the safety of their passengers, they are in duty bound to protect them from the unprovoked assault or misconduct of a fellow passenger, where the servants of the carrier have knowledge of the existing conditions for a sufficient intervening time between the acquisition of knowledge and the injury to protect their passengers; and this is true where the carrier's servants have reason to anticipate from the existing conditions that the safety of the passengers is imperiled by the misconduct of a fellow passenger."

So, in *Washington R. & Electric Co. v. Perry* (1917) 47 App. D. C. 90, the court said: "It is the duty of the employees of a carrier of passengers to exercise great care and vigilance in preserving order, that one passenger may not be subjected to violence or insult from other passengers; and the carrier is liable for injuries sustained by a passenger at the hands of fellow passengers where, through its agents or employees, it knows or has opportunity to know of the threatened injury, or might reasonably anticipate the happening of such an injury, and fails or neglects to take proper precautions or to use proper means to prevent it."

In *Louisville R. Co. v. Wellington* (1910) 137 Ky. 719, 126 S. W. 370, wherein it appeared that the plaintiff was assaulted by disorderly negro passengers on the defendant's car, the court approved of the following instruction: "If the jury believe from the evidence that the conduct of the negroes, by whom plaintiff claims to have been insulted and assaulted on the occasion in the evidence referred to, was such on defendant's car, and prior to the happening of the alleged assault, as would induce a reasonably vigilant and prudent conductor to have anticipated that such assault

might be made, then it became the duty of such defendant's conductor, in the exercise of the utmost vigilance, to use all reasonable means to protect the plaintiff from indignity and assault from said negroes, and if you shall believe from the evidence that the defendant's conductor, under such circumstances, failed to use all reasonable means to prevent such indignity to or assault upon the plaintiff, and that by reason of such failure on the part of defendant's conductor the plaintiff sustained insult, assault, or injury from said negroes on the occasion in the evidence referred to, the law is for the plaintiff, and the jury should so find." The court entered an order reversing a judgment for the plaintiff on the ground that the damages awarded were excessive, but, on a rehearing, affirmed the judgment. 137 Ky. 726, 128 S. W. 1077.

A fortiori, the connivance of a conductor or brakeman in an assault on a passenger by a fellow passenger renders the carrier liable for the injury. *Richmond & D. R. Co. v. Jefferson* (1892) 89 Ga. 554, 17 L.R.A. 571, 32 Am. St. Rep. 87, 16 S. E. 69; *Evansville & I. R. Co. v. Darting* (1892) 6 Ind. App. 375, 33 N. E. 636, 8 Am. Neg. Cas. 198. See also *Seawell v. Carolina C. R. Co.* (1903) 132 N. C. 856, 44 S. E. 610, 14 Am. Neg. Rep. 445, rehearing denied (1903) 133 N. C. 515, 45 S. E. 850.

Thus, a carrier has been held to be liable for an assault on a colored minister by two drunken white men, who, with the connivance of the conductor, compelled their victim, by threats of violence, to dance and sing religious songs. *Richmond & D. R. Co. v. Jefferson* (Ga.) supra.

Where passengers have committed boisterous and disorderly acts in the coach of a carrier for a long period of time, the carrier becomes liable for a subsequent assault on an innocent passenger; and it cannot avoid responsibility on the ground that its servants did not know of such misconduct, since in the proper exercise of their duties they should have known of it. *Abernathy v. Missouri P. R. Co.* (1920) — Mo. App. —, 217 S. W. 568.

The carrier's liability does not depend on his having reason to believe that an assault will be made by a disorderly passenger on any particular individual. After notice that a passenger is a menace to the safety of other passengers, the carrier is bound to exercise care to prevent an injury to any of them. *St. Louis Southwestern R. Co. v. Bradley* (1911) 99 Ark. 346, 138 S. W. 478; *Spangler v. St. Joseph & G. I. R. Co.* (1903) 68 Kan. 46, 63 L.R.A. 634, 104 Am. St. Rep. 391, 74 Pac. 607, 15 Am. Neg. Rep. 299; *United R. & Electric Co. v. State* (1901) 93 Md. 619, 54 L.R.A. 942, 86 Am. St. Rep. 453, 49 Atl. 923, 10 Am. Neg. Rep. 71; *Liljegren v. United R. Co.* (1921) — Mo. App. —, 227 S. W. 925; *Galveston, H. & S. A. R. Co. v. Bell* (1914) — Tex. Civ. App. —, 165 S. W. 1, 5 N. C. C. A. 621, affirmed in (1919) 110 Tex. 104, 216 S. W. 390. Nor need the particular manner of the injury be apparent to the carrier. *Baltimore & O. R. Co. v. Rudy* (1912) 118 Md. 42, 84 Atl. 241.

In *Liljegren v. United R. Co.* (1921) — Mo. App. —, 227 S. W. 925, the court while recognizing that a carrier is not bound to anticipate an assault by a fellow passenger merely because he is intoxicated, in the absence of anything in his conduct to warn trainmen that he is likely to become insulting or violent, held that the evidence was sufficient to warrant a finding of breach of duty on the part of the carrier toward a woman passenger who was kissed by an intoxicated fellow passenger, it appearing that he had previously, to the knowledge of the trainmen, engaged in boisterous and offensive conduct, and had assaulted other passengers, and that another passenger prior to the assault in question had unavailingly appealed to the conductor to protect the passengers.

A railroad company owning a railroad under a charter obtained from the state is not relieved from its legal responsibility with respect to an assault on a passenger by a fellow passenger merely because another corporation was operating the road at the time of the injury. *Franklin v. Atlanta & C. Air Line R. Co.* (1906) 74 S. C. 332, 54 S. E. 578.

Moreover, where the lines of two or more carriers are conducted as a single system, an initial carrier is not relieved of liability for an assault by a third person, by reason of the fact that the assault is committed on a line belonging to another carrier, but forming a part of the system. *Pugh v. Washington R. & Electric Co.* (1919) 134 Md. 196, 106 Atl. 522.

On the other hand, a carrier will not be held liable for an assault on a passenger by a fellow passenger, committed under such circumstances that it could not reasonably have been anticipated by the employees of the carrier in time to prevent it.

United States.—*McGuinn v. Forbes* (1889) 37 Fed. 639; *Brown v. Chicago, R. I. & P. R. Co.* (1905) 2 L.R.A. (N.S.) 105, 72 C. C. A. 20, 139 Fed. 972, 2 Ann. Cas. 251, 19 Am. Neg. Rep. 646.

Alabama. — *Culberson v. Empire Coal Co.* (1908) 156 Ala. 416, 47 So. 237; *Gooch v. Birmingham R. Light & P. Co.* (1912) 177 Ala. 293, 58 So. 196, 6 N. C. C. A. 818; *Ex parte Alabama G. S. R. Co.* (1920) 204 Ala. 504, 86 So. 100.

Colorado. — *Snyder v. Colorado Springs & C. C. D. R. Co.* (1906) 36 Colo. 288, 8 L.R.A. (N.S.) 781, 118 Am. St. Rep. 110, 85 Pac. 686, 20 Am. Neg. Rep. 23.

Indiana.—*Lake Erie & W. R. Co. v. Arnold* (1901) 26 Ind. App. 190, 59 N. E. 394.

Iowa.—*Felton v. Chicago, R. I. & P. R. Co.* (1886) 69 Iowa, 577, 29 N. W. 618.

Kentucky.—*Illinois C. R. Co. v. Gunterman* (1909) 135 Ky. 438, 121 S. W. 514; *Louisville & N. R. Co. v. Renfro* (1911) 142 Ky. 590, 33 L.R.A. (N.S.) 133, 135 S. W. 266; *Hale v. Chesapeake & O. R. Co.* (1911) 142 Ky. 835, 135 S. W. 398; *Bailey v. Louisville & N. R. Co.* (1898) 19 Ky. L. Rep. 1617, 44 S. W. 105.

Maryland.—*Tall v. Baltimore Steam Packet Co.* (1899) 90 Md. 248, 47 L.R.A. 120, 44 Atl. 1007; *Baltimore & O. R. Co. v. Rudy* (1912) 118 Md. 42, 84 Atl. 241; *Pugh v. Washington R. & Electric Co.* (1921) — Md. —, 113 Atl. 731.

Minnesota.—*Mullan v. Wisconsin C. Co.* (1891) 46 Minn. 474, 49 N. W. 249.

Mississippi.—*Illinois C. R. Co. v. Minor* (1892) 69 Miss. 710, 16 L.R.A. 627, 11 So. 101; *Spinks v. New Orleans, M. & C. R. Co.* (1913) 106 Miss. 53, 63 So. 190.

Missouri.—*Sira v. Wabash R. Co.* (1893) 115 Mo. 127, 37 Am. St. Rep. 386, 21 S. W. 905; *Abernathy v. Missouri P. R. Co.* (1920) — Mo. App. —, 217 S. W. 568; *Lige v. Chicago, B. & Q. R. Co.* (1918) 275 Mo. 249, L.R.A. 1918F, 548, 204 S. W. 508.

New Jersey.—*Hoff v. PUBLIC SERVICE R. Co.* (reported herewith) ante, 860, reversing (1917) 90 N. J. L. 386, 101 Atl. 404.

New York.—*Putnam v. Broadway & S. Ave. R. Co.* (1873) 55 N. Y. 108, 14 Am. Rep. 190; *Victorson v. Interborough Rapid Transit Co.* (1912) 137 N. Y. Supp. 860; *Stutsky v. Brooklyn Heights R. Co.* (1904) 88 N. Y. Supp. 358.

North Carolina.—*Pruett v. Southern R. Co.* (1913) 164 N. C. 3, 49 L.R.A. (N.S.) 810, 80 S. E. 65, Ann. Cas. 1915D, 54; *Mills v. Atlantic Coast Line R. Co.* (1916) 172 N. C. 266, 90 S. E. 221; *Chaney v. Norfolk & W. R. Co.* (1917) 174 N. C. 351, L.R.A. 1918A, 1072, 93 S. E. 834, Ann. Cas. 1918E, 580.

Pennsylvania.—*Brehony v. Pottsville Union Traction Co.* (1907) 213 Pa. 123, 66 Atl. 1006; *Barlick v. Baltimore & O. R. Co.* (1909) 41 Pa. Super. Ct. 87; *Hillebrecht v. Pittsburg R. Co.* (1913) 55 Pa. Super. Ct. 204. See also *Widener v. Philadelphia Rapid Transit Co.* (1909) 224 Pa. 171, 73 Atl. 209.

South Carolina.—*Franklin v. Atlanta & C. Air Line R. Co.* (1906) 74 S. C. 332, 54 S. E. 578.

Texas.—*Ft. Worth & R. G. R. Co. v. Stewart* (1916) 107 Tex. 594, 182 S. W. 893, reversing (1912) — Tex. Civ. App. —, 146 S. W. 355; *Texas & P. R. Co. v. Baker* (1919) — Tex. —, 215 S. W. 556, reversing (1915) — Tex. Civ. App. —, 184 S. W. 664; *Missouri K. & T. R. Co. v. Gerren*, 57 Tex. Civ. App. 34, 121 S. W. 905; *Walker v. International & G. W. R. Co.* 54 Tex. Civ. App. 406, 117 S. W. 1020.

England.—*Cobb v. Great Western*

R. Co. [1894] A. C. 419, 63 L. J. Q. B. N. S. 629, 6 Reports, 203, 71 L. T. N. S. 161, 58 J. P. 636, affirming [1893] 1 Q. B. 459, 62 L. J. Q. B. N. S. 335, 4 Reports, 283, 63 L. T. N. S. 483, 41 Week. Rep. 275, 57 J. P. 437.

Ireland.—*Adderley v. Great Northern R. Co.* [1905] 2 Ir. R. 378, 4 B. R. C. 293.

There is no presumption of negligence on the part of the carrier from the mere fact that a passenger has been assaulted by another passenger while riding on the carrier's train. *Anderson v. South Carolina & G. R. Co.* (1907) 77 S. C. 434, 122 Am. St. Rep. 591, 58 S. E. 149, s. c. on subsequent appeal (1908) 81 S. C. 1, 61 S. E. 1096.

And a carrier is clearly not liable for an assault made by one passenger on another merely in self-defense. *Culberson v. Empire Coal Co.* (1908) 156 Ala. 416, 47 So. 237. See to the same effect, *Missouri, K. & T. R. Co. v. Gerren* (1909) 57 Tex. Civ. App. 34, 121 S. W. 905. However, the plaintiff need not allege, in stating his cause of action, that the assault was not made in self-defense, or that it was unlawfully made; since the fact that an assault was committed in self-defense is a matter of defense. *Culberson v. Empire Coal Co.* (Ala.) *supra*.

b. Application of rules generally.

Sudden assault.

In *Hillebrecht v. Pittsburg R. Co.* (1913) 55 Pa. Super. Ct. 204, an action against a carrier for damages for an assault by a fellow passenger, the court stated the facts and its conclusion as follows: "There was in the present case but one blow struck, and that blow was struck suddenly and without warning by a passenger who, up to that moment, had been quiet and orderly. The thing was so quickly done that neither the conductor nor the friends of the plaintiff who were standing in the aisle of the car could have prevented it. The conduct of those in charge of the car must be judged in the light of the facts established by the evidence. The evidence failed to establish facts from which

a jury should have been permitted to find that the employees of the defendant company were guilty of negligence, and the point submitted by the defendant company, requesting a binding instruction, should have been affirmed."

A carrier has been held not to be liable for an injury to a passenger struck by another who was in the act of jumping over a closed gate of a car, unless it was shown that the act of the offending passenger could have been foreseen and prevented by the guard. *Victorson v. Interborough Rapid Transit Co.* (1912) 137 N. Y. Supp. 860.

So, in *Widener v. Philadelphia Rapid Transit Co.* (1909) 224 Pa. 171, 73 Atl. 209, the plaintiff was not permitted to recover for an injury received by him in being rudely pushed and assaulted by a fellow passenger on the step or platform of a street car. The court stated that a conductor was required to police his car, and, when able to do so, prevent injury to passengers from the wanton assaults of unruly fellow passengers, but that in order to measure the conductor's responsibility the circumstances of the case had to be considered for the purpose of arriving at a conclusion as to what he could have done to prevent the injury.

In *Pugh v. Washington R. & Electric Co.* (1921) — Md. —, 113 Atl. 732, a directed verdict for defendant was sustained notwithstanding that the plaintiff, a woman passenger, had made an outcry when a fellow passenger reached under the seat and felt of her leg, but apparently accepted his explanation that he was trying to warm his hands at the heater under the seat, and he shortly afterwards repeated the act, when he was seized by an employee of the carrier and after a struggle made to release his grasp, it appearing that her first outcry and the circumstances attending were not such as to attract the attention of her friends who were seated near her.

Employee of carrier having opportunity to interfere.

In *Norfolk & W. R. Co. v. Birchfield* (1906) 105 Va. 809, 54 S. E. 879, it was

held that it was the duty of the conductor of a train, on hearing an altercation between two passengers, to interfere to prevent further difficulty, and that for an assault on one of the passengers by the other, thereafter occurring, the carrier was liable, especially in a jurisdiction where a statute made conductors conservators of the peace. It was also held to be the duty of the conductor to prevent an assault even though he believed that the assaulting passenger was a special officer of the railroad company.

So, it has been held to be a conductor's duty to interfere in an altercation between passengers, to protect one of them from injury, even though the latter is the aggressor in the altercation. *Birmingham R. Light & P. Co. v. Lipscomb* (1916) 198 Ala. 653, 73 So. 962.

In *Pittsburgh, C. C. & St. L. R. Co. v. Richardson* (1907) 40 Ind. App. 503, 82 N. E. 536, the court made the following statement in holding that a carrier was liable for a gunshot wound inflicted on a passenger by a fellow passenger, in the presence of a brakeman who made no effort to prevent the assault: "It is the duty of a common carrier to protect a passenger from the unprovoked assault of a fellow passenger, if there is reason to believe that it is threatened and can be prevented. This duty springs from a condition created by a third party, coupled with a knowledge by the carrier's servants that the condition exists, and with time enough intervening between the acquisition of the knowledge and the infliction of the injury to enable the servant of the carrier to protect the passenger from the third party's misconduct."

In *McMahon v. Interborough Rapid Transit Co.* (1908) 59 Misc. 242, 110 N. Y. Supp. 876, supra, it was held that a carrier was liable for an injury to a passenger inflicted by boisterous fellow passengers, where it appeared that the guard's attention was called to their acts of rowdiness and he failed to interfere.

In *Spires v. Atlantic Coast Line R. Co.* (1912) 92 S. C. 564, 75 S. E. 950, it appeared that prior to the assaults in litigation disorder and violence had

developed on the train to the point of rioting. Recoveries for injuries by assaults from fellow passengers were upheld, although the trainmen had good reason to believe that any effort by them to enforce order would increase the danger to innocent passengers. The decision was based on the ground that the carrier should have provided an adequate force to police the train, and that the crew should have run the train back to a station near the scene of the disorder, or should have demanded the assistance of officers at stations passed on the trip.

In *Stanley v. Southern R. Co.* (1912) 160 N. C. 323, 76 S. E. 221, it appeared that negroes on an excursion train were drinking liquor and shooting firearms when the plaintiff entered the negro coach to rescue another white man, and was himself assaulted. A judgment of nonsuit was reversed on the ground that the jury might have found the company to be negligent in not having sufficient officers on the train to preserve order and prevent the assault on the plaintiff.

In *Utterback v. St. Louis & S. F. R. Co.* (1916) — Mo. —, 189 S. W. 1171, the court held that even though the conductor knew or should have known, by the exercise of ordinary care, that other passengers were threatening and assaulting the plaintiff, the carrier was not bound absolutely to prevent them from approaching him, but only to exercise the highest degree of care that a prudent person engaged in a similar business would have exercised to prevent the assault.

In *Lake Erie & W. R. Co. v. Arnold* (1901) 26 Ind. App. 190, 59 N. E. 394, the plaintiff alleged that he was ejected from a train by fellow passengers, and, within full view of the train crew, was forcibly prevented from again boarding the train. The court admitted that a carrier is bound to exercise a high degree of care to prevent an injury to a passenger from third persons, but held that the plaintiff failed to state a cause of action because he did not allege that the servants of the carrier could have prevented any of the assaults on him, and,

although his complaint sounded in tort, he did not make a general averment that he was free from fault.

Knowledge of conditions apt to cause assault.

A conductor who knows that there are strikers and strikebreakers on the same train is under an obligation to take steps to prevent an outbreak of violence between them, and, for his failure to exercise care and precaution under such circumstances, an innocent passenger injured by the fighting of the strikers and strikebreakers may recover from the carrier. *Nute v. Boston & M. R. Co.* (1913) 214 Mass. 184, 100 N. E. 1099.

So, in *Chicago & A. R. Co. v. Pillsbury* (1887) 123 Ill. 9, 5 Am. St. Rep. 483, 14 N. E. 22, it appeared that the plaintiff was wounded by a pistol shot fired in a fight between strikers and strikebreakers, while the latter were being carried in the same coach with the plaintiff without notice to him of any danger, although a previous attack had been made on the strikebreakers while they were being carried on a train of the defendant company. In holding that the defendant was liable, the court said: "It is the duty of carriers by rail to preserve order in their carriages, and to protect passengers from all dangers, from whatever source, arising on their trains, whether from the dangerous and violent conduct of other passengers or otherwise. To this end all conductors in this state, while on duty on their respective trains, are invested by statute with police power. With regard to danger and hazard to travel arising otherwise than on the train, and not incidents of such travel, the degree of care to be observed to discover and prevent all danger to and consequent injuries to passengers must depend in a large measure on the attendant circumstances. No doubt in many cases, if the carrier observes ordinary care and diligence to discover and prevent injury to passengers, such as any prudent person would do for his own personal safety, it will be exonerated from liability. In other cases and under other circumstances

it will, no doubt, be the duty of the carrier to exercise the utmost care, skill, and diligence to protect the passengers from danger and injury, so far as the same, by the exercise of such care and skill and diligence, could have been reasonably and practicably foreseen and anticipated in time to prevent injury. In no case must the carrier expose the passenger to extrahazardous dangers that might readily be discovered or anticipated by all reasonable, practicable care and diligence."

In *Penny v. Atlantic Coast Line R. Co.* (1903) 133 N. C. 221, 63 L.R.A. 497, 45 S. E. 563, it appeared that the plaintiff had alighted from a train and was crossing the station platform when he was shot by a negro passenger engaged in a fight with members of the train crew who were pursuing him. It also appeared that no warning was given to the plaintiff, though a conductor and brakeman knew of the man hunt. The court said: "This was not a direct assault by Calloway upon the plaintiff, who was a passenger on the defendant's train when he was shot by Calloway, but we think that in law the carrier's duty would be as clear to warn and give notice to an alighting passenger who was in danger of being injured by violence at the hands of outside parties, as it would be to protect them against assaults at the hands of others. It seems to us that the same rule would apply in both cases. The defendant was charged with the plaintiff's safe exit under the rule laid down. The imminence and suddenness of the danger, as well as the strength and numbers of those offering violence to passengers, would be matters to be considered by the jury in connection with the carrier's duty."

A carrier is liable for an assault on a passenger by an insane fellow passenger, if it knows, or is chargeable with knowledge at the time it admits the insane passenger, that he is not accompanied by anyone to restrain him. And if a carrier learns after a passenger has boarded the train that he is violently insane, it becomes its duty to place him under a guard, and

on its failure to do so it will be held liable for an assault by him on a fellow passenger. *Meyer v. St. Louis, I. M. & S. R. Co.* (1893) 4 C. C. A. 221, 10 U. S. App. 677, 54 Fed. 116.

Knowledge of previous altercation or disorder.

In *Twichell v. Pecos & N. T. R. Co.* (1910) 62 Tex. Civ. App. 175, 131 S. W. 243, it appeared that members of a train crew were warned that one Childress had made an assault on the plaintiff, and that it was feared he was taking passage on the train to renew the offense. Thereafter Childress conducted himself properly until he made a sudden assault on the plaintiff when the members of the crew were not present. It also appeared that Childress had a reputation as a dangerous man, which fact was known to the conductor. Under these circumstances it was held to be proper to refuse a peremptory instruction for the defendant carrier, the court saying: "We think it was for the jury to say whether appellee's servants and employees had such knowledge of the character of Childress, and such information of threatened assault, as would create in the mind of a person of a very high degree of prudence and care a reasonable anticipation of an assault and injury upon appellant, and, if so, whether, notwithstanding the ordinary demeanor of Childress just prior to the assault, such servants and employees, under the circumstances, exercised that high degree of care to prevent the assault that the law imposes."

In *Isenberg v. New York, N. H. & H. R. Co.* (1915) 221 Mass. 182, 108 N. E. 1046, it was held that it was for the jury to determine whether a carrier complied with its obligation to use the highest degree of care to prevent injury to its passengers consistent with its undertaking, where it appeared that the plaintiff had complained to the conductor and another trainman that he was being annoyed and threatened by another passenger, and that nothing was done by them to prevent a further assault except to ask the offender to let the plaintiff alone.

In *Kelly v. Navy Yard Route* (1913) 77 Wash. 148, 137 Pac. 444, it was held to be a question for the jury to determine whether the carrier exercised the required degree of diligence and care, and whether it should have taken effective means to guard against the occurrence of a second assault, where the evidence showed the following facts: A fellow passenger of the plaintiff, with a reputation as a dangerous man, and under the influence of liquor, had made a prior assault on the plaintiff, without provocation or excuse, and had been induced by the steward to go into another room. The steward, believing that the assailant had been quieted, had gone about his work when a second assault was committed on the plaintiff by the same offender.

In *Koch v. Brooklyn Heights R. Co.* (1902) 75 App. Div. 282, 78 N. Y. Supp. 99, the court decided that there was sufficient evidence for the submission of the case to the jury where witnesses for the plaintiff testified that repeated assaults on the plaintiff had been committed by fellow passengers, that a request had been made to the conductor to stop such misconduct, and that he had failed to make any effectual or determined effort to put an end to the disturbance.

But even where an altercation has taken place between two passengers, and an employee of the carrier has interfered, if the attitude of the aggressor thereafter has been such as reasonably to induce the employee to believe that no further difficulty will occur, the carrier is not liable for a subsequent sudden assault by the offender. *Putnam v. Broadway & S. Ave. R. Co.* (1873) 55 N. Y. 108, 14 Am. Rep. 190.

In *HOFF v. PUBLIC SERVICE R. Co.* (reported herewith) ante, 860, reversing (1917) 90 N. J. L. 386, 101 Atl. 404, it appeared that the plaintiff, a female passenger, as she entered a street car, was insulted by a male passenger. She was agitated by the occurrence, and passed into the car without paying her fare. On again passing the offender to pay her fare, further insulting remarks were made to her. Two police officers thereafter

entered the car and sat down near her. On reaching the point at which she wished to leave the car, she used the rear door, though she could have avoided her annoyer by going out through the front door. When a further insulting remark was made to her by the offensive passenger as she was near the exit, she threatened to "smack" him, and was struck by him, sustaining serious injuries. It appeared that all of the remarks addressed to her were within the hearing of the conductor. It also appeared from her testimony that she passed out through the rear door in order to resent the insults offered to her. The court of errors and appeals held that there was insufficient evidence for the submission of the case to the jury, since there was no proof that the conductor could have apprehended the assault in time to prevent it. The judgment of the supreme court affirming a verdict for the plaintiff was reversed, four judges dissenting.

Effect of overcrowding of car.

In *Chancey v. Norfolk & W. R. Co.* (1917) 174 N. C. 351, L.R.A.1918A, 1072, 93 S. E. 834, Ann. Cas. 1918E, 580, the court decided that the overcrowding of a car and the failure to light it were not the proximate causes of an assault and robbery committed therein. It was therefore held that the carrier was not liable for the assault and robbery, where no other negligence was proved.

Similarly, in *Cobb v. Great Western R. Co.* [1894] A. C. (Eng.) 419, 63 L. J. Q. B. N. S. 629, 71 L. T. N. S. 161, 58 J. P. 636, affirming [1893] 1 Q. B. 459, 62 L. J. Q. B. N. S. 335, 4 Reports, 283, 68 L. T. N. S. 483, 41 Week. Rep. 275, 57 J. P. 437, it was held that legal responsibility for the robbery of a passenger could not be imposed on a carrier because it permitted the carriage to be overcrowded, where the plaintiff did not show any causal connection between the overcrowding and the robbery.

In *Snyder v. Colorado Springs & C. C. D. R. Co.* (1906) 36 Colo. 288, 8 L.R.A.(N.S.) 781, 118 Am. St. Rep. 110, 85 Pac. 686, 20 Am. Neg. Rep. 23,

it appeared that the conductor was forcing his way through a crowded car when he pressed a passenger against a fellow passenger, who arose and "surged" against the plaintiff so that the latter was thrown from the car and injured. In affirming a verdict which was directed for the defendant, the court stated that although it was possible that some extremely nervous or irritable person would become angry because of the inconvenience attendant on the crowded condition of the car, it was not in accordance with the usual and ordinary course of events that a seated passenger would so far lose control of himself, on account of having a standing passenger crowded against him, that he would forcibly eject the standing passenger from the car. It was therefore held that the proximate cause of the injury to the plaintiff was the action of the irritable passenger, and that this cause could not be anticipated by the defendant's employees.

Likewise, in *Anderson v. South Carolina & G. R. Co.* (1908) 81 S. C. 1, 61 S. E. 1096, the South Carolina supreme court, in affirming a judgment for the plaintiff, approved of an instruction to the effect that if the carrier knew or had reasonable grounds for suspecting that danger would arise in handling a large number of passengers, it was bound to exercise the highest degree of care to provide a sufficient force of employees to control the crowd and prevent assaults on innocent passengers, even though such requirement would necessitate the employment of an additional force of servants; and that the carrier was liable in damages for a failure to perform that duty, if it resulted in an injury to a passenger without fault on his part. It appeared in that case that the plaintiff was shot in the leg by a fellow passenger while the latter was engaged in a riot.

In *Pounder v. Northeastern R. Co.* [1892] 1 Q. B. (Eng.) 385, the plaintiff sought to recover for an assault committed on him in a crowded railway carriage by several pitmen whose

enmity he had incurred by reason of his being employed to evict them from their houses, following disputes between them and their employers. It appeared that the carrier had no notice of the plaintiff's need for special protection at the time he purchased his ticket for transportation, but that its servants knew of the danger to him at the time he entered the carriage, but nevertheless permitted the carriage to be overcrowded by pitmen. It was held that, although the servants of the carrier improperly permitted the carriage to be overcrowded, the consequence was one which it assumed no obligation to prevent at the time it entered into the contract of carriage. The court said: "The obligation which the defendants undertook when they contracted with the plaintiff was that, if they omitted to supply him with reasonable accommodation, they would be liable for the consequences usually arising therefrom to one of the traveling public,—not for consequences which might result to a man who required, whilst traveling, special protection for his safety, and which fact was unknown to the company when they contracted to carry him. To an ordinary passenger the consequence of not supplying reasonable accommodation, which is the breach of duty now set up, is certainly not his being assaulted by an independent tort-feasor, which is the sole injury or loss complained of in the present case." The correctness of this decision was questioned by two judges in *Cobb v. Great Western R. Co.* [1894] A. C. (Eng.) 419, 63 L. J. Q. B. N. S. 629, 6 Reports, 203, 71 L. T. N. S. 161, 58 J. P. 636, affirming [1893] 1 Q. B. 459, 62 L. J. Q. B. N. S. 335, 4 Reports, 283, 68 L. T. N. S. 483, 41 Week. Rep. 275, 57 J. P. 437, and its doctrine was repudiated in *Canadian P. R. Co. v. Blain* (1903) 34 Can. S. C. 74, affirming (1903) 5 Ont. L. Rep. 334, appeal to Privy Council refused in [1904] A. C. (Eng.) 453, 73 L. J. P. C. N. S. 109.

Effect of permitting card playing.

In *Tall v. Baltimore Steam Packet Co.* (1899) 90 Md. 248, 47 L.R.A. 120, 44 Atl. 1007, the court held that a car-

rier which permitted passengers to play cards in a smoking room on a steamboat, in violation of its rules, was not, for that reason, liable for an injury to another passenger who was shot during a quarrel over the game, since it could not reasonably have been foreseen that such shooting would occur.

Throwing of bottle from window.

In *Barlick v. Baltimore & O. R. Co.* (1909) 41 Pa. Super. Ct. 87, it appeared that a passenger sitting in front of the plaintiff tossed an empty beer bottle out of an open window, and the bottle, striking a car on another track, was broken and a piece of the glass passed back into the car through another open window and injured the plaintiff. In reversing a judgment for the plaintiff the court stated: "The carrier is . . . liable for injuries to a passenger resulting from the negligent or unlawful acts of a fellow passenger if, prior to the accident, the conduct of the offending party has been such as to indicate a disposition to indulge in physically violent conduct and give rise to a reasonable apprehension of injury to other parties. This is not upon the ground that the company is liable to answer for the acts of all those whom it undertakes to carry, but it is because of the failure of the duty to afford reasonable and proper protection to other passengers. The carrier is not bound to provide against contingencies which it had no reasonable grounds to apprehend, nor is it bound to protect its passengers from rudeness or bad manners on the part of strangers or other passengers, unless such conduct amounts to a breach of the peace." See to the same effect, *Pruett v. Southern R. Co.* (1913) 164 N. C. 3, 49 L.R.A.(N.S.) 810, 80 S. E. 65, Ann. Cas. 1915D, 54.

Where, however, bottle throwing has continued for some time to the knowledge of the carrier's servants, it becomes liable for an injury from broken glass rebounding through the window from some outside object. *Baltimore & O. R. Co. v. Rudy* (1912) 118 Md. 42, 84 Atl. 241, wherein the

court said: "It would not be rational to require knowledge or means of knowledge of the particular act by which injury might be inflicted. All that can be required is knowledge or means of knowledge of such disorderly or reckless conduct as is likely to result in injury in some manner to others, if permitted to continue. The fact that the bottle which caused this injury struck a passing train, instead of striking some part of the window frame through which it was thrown, does not at all affect the question. The danger of striking something, and scattering broken glass, was inherent in the reckless throwing of bottles through the window, and the probability of striking the car window was far greater than that of striking a passing train."

Street railway company.

In *Holly v. Atlanta Street R. Co.* (1878) 61 Ga. 215, 84 Am. Rep. 97, the defendant street railway company urged that a distinction should be made between steam railroad cars and street cars, with respect to the care required for the prevention of assaults by fellow passengers. On this point the court said: "It is true that, as argued for defendant in error, there may be a difference between railroads on which cars are propelled by steam across the country, and these street railroads in cities; but both are carriers of passengers, and liable for slight neglect, or the absence of extraordinary diligence. And their duty to their passengers, in caring for their safe and comfortable conveyance from point to point, is the same." The decision was based on the following section of the Georgia Code: "A carrier of passengers is bound to extraordinary diligence, on behalf of himself and his agents, to protect the lives and persons of his passengers. But he is not liable for injuries to the person after having used such diligence."

Moreover, a street railway company has been held to be liable for an assault on a colored person in a park owned and operated by the company,

where its employees, with knowledge that assaults on colored persons were frequent in the park, carried him as a passenger to the park without warning him of danger. *Indianapolis Street R. Co. v. Dawson* (1903) 31 Ind. App. 605, 68 N. E. 909.

Sleeping car company.

In *St. Louis, I. M. & S. R. Co. v. Hatch* (1906) 116 Tenn. 580, 94 S. W. 671, both the railroad company and a Pullman company were held liable for an assault on a woman in a Pullman car by two men who were presumably fellow passengers, where none of the employees of either company appeared in the car for several hours, though bells were rung to call them.

e. Effect of permitting intoxicated passenger on vehicle.

Ordinarily the mere fact that a carrier admits an intoxicated passenger to one of its cars, with knowledge that he is intoxicated, or fails to eject him after acquiring such knowledge, is insufficient to render the carrier liable for an assault by him on another passenger.

United States.—See *Brown v. Chicago, R. I. & P. R. Co.* (1905) 2 L.R.A. (N.S.) 105, 72 C. C. A. 20, 139 Fed. 972, 3 Ann. Cas. 251, 19 Am. Neg. Rep. 646.

Mississippi.—*Spinks v. New Orleans, M. & C. R. Co.* (1913) 106 Miss. 53, 63 So. 190.

Missouri.—*Lige v. Chicago, B. & Q. R. Co.* (1918) 275 Mo. 249, L.R.A. 1918F, 548, 204 S. W. 508; *Abernathy v. Missouri P. R. Co.* (1920) — Mo. App. —, 217 S. W. 568; *Liljegren v. United R. Co.* (1921) — Mo. App. —, 227 S. W. 925.

New York.—*Putnam v. Broadway & S. Ave. R. Co.* (1873) 55 N. Y. 108, 14 Am. Rep. 190. See also *Wachser v. Interborough Rapid Transit Co.* (1910) 69 Misc. 346, 125 N. Y. Supp. 767. Compare *Hendricks v. Sixth Ave. R. Co.* (1878) 12 Jones & S. 8.

North Carolina.—*Mills v. Atlantic Coast Line R. Co.* (1916) 172 N. C. 266, 90 S. E. 221.

Pennsylvania.—*Brehony v. Pottsville Union Traction Co.* (1907) 218 Pa. 123, 66 Atl. 1006.

Texas.—*Ft. Worth & R. G. R. Co. v. Stewart* (1916) 107 Tex. 594, 182 S. W. 893, reversing (1912) — Tex. Civ. App. —, 146 S. W. 355.

Ireland.—*Adderley v. Great Northern R. Co.* [1905] 2 Ir. R. 378, 4 B. R. C. 293.

As was said in *Putnam v. Broadway & S. Ave. R. Co.* (N. Y.) supra: "The fact that an individual may have drank to excess will not, in every case, justify his expulsion from a public conveyance. It is rather the degree of intoxication, and its effect upon the individual, and the fact that, by reason of the intoxication, he is dangerous or annoying to the other passengers, that gives the right and imposes the duty of expulsion."

So, in *Abernathy v. Missouri P. R. Co.* (Mo.) supra, the court said: "Where there is nothing in the conduct or known disposition of the passenger, other than mere intoxication, to warn the trainmen that he is likely to become insulting or violent towards another passenger, then the carrier is not liable for sudden acts of such character."

In *Adderley v. Great Northern R. Co.* (Ir.) supra, it was held to be error to assume, in submitting the case to the jury, that the failure of a carrier's servants to notice the drunken condition of a man, and their admission of him as a passenger, rendered the carrier liable for his misconduct in swinging out his arm while being led along the station platform, and breaking the glass in a car window, thereby injuring the plaintiff's eye.

In *Ft. Worth & R. G. R. Co. v. Stewart* (Tex.) supra, it appeared that certain intoxicated passengers had been engaged in an altercation with the conductor and the plaintiff, but had returned to their seats apparently pacified. Thereafter they assaulted the plaintiff. It was held that the carrier was not, as a matter of law, bound to eject them from the train for the plaintiff's protection. A judgment for the plaintiff was reversed because of the refusal of the trial court to give an instruction that if the attack on the plaintiff was so sudden and of such a character that the conductor, if pres-

ent, could not reasonably have prevented it, the jury could not find a verdict for the plaintiff on account of the fact that the conductor was not present and personally looking after the plaintiff's protection.

In *Spinks v. New Orleans, M. & C. R. Co.* (Miss.) supra, it was held that a carrier was not liable for an assault on the plaintiff by an intoxicated passenger, where it appeared that the conductor placed the offender in a baggage car and requested the plaintiff and another passenger to help care for him, and there had been nothing in the previous conduct of the assailant to indicate that he was dangerous to anyone but himself.

Brown v. Chicago, R. I. & P. R. Co. (Fed.) supra, it appeared that a drunken man, on being expelled from a train, threw a heavy missile at the conductor. The missile struck a passenger, severely injuring him. In holding that the carrier was not liable, the court said: "In the light of authority, and in the very reason of things, the liability or nonliability of the carrier of passengers, in cases of this nature, must be held to depend upon the presence or absence of evidence tending to show the employees of the defendant carrier either knew, or by the exercise of due care should have known, from the circumstances of the particular case, injury to the passenger was threatened or impending, which injury, by the exercise of that high degree of care which the law requires of a carrier of passengers for the safety and protection of the passenger, might not only have been foreseen, but guarded against, thus averting the injury. . . . Applying this principle to the facts in the case at bar, as stated, the nonliability of the defendant follows, and follows for the reason that the act of violence resulting in injury to the plaintiff was suddenly entered upon and committed, entirely unapprehended and unforeseen by anyone, and was, in its nature and manner of execution of such character, in the light of attending circumstances, as to be clearly unexpected."

However, where a passenger ap-

pears to be intoxicated and disorderly, and the servants of the carrier know, or ought to know, that he will be a menace to the safety of his fellow passengers, his admission by the carrier, or its failure to eject or to guard him carefully, is a sufficient ground of liability to support an action by a passenger who is thereafter assaulted by him.

United States.—*King v. Ohio & M. R. Co.* (1884) 22 Fed. 413.

Alabama.—*Seaboard Air Line R. Co. v. Mobley* (1915) 194 Ala. 211, 69 So. 615. See also *Montgomery Traction Co. v. Whatley* (1907) 152 Ala. 101, 126 Am. St. Rep. 17, 44 So. 538.

Arkansas.—*St. Louis Southwestern R. Co. v. Bradley* (1911) 99 Ark. 346, 188 S. W. 478; *Memphis, D. & G. R. Co. v. Trussell* (1916) 122 Ark. 516, 183 S. W. 981.

Connecticut.—*Flint v. Norwich & N. Y. Transp. Co.* (1868) 34 Conn. 554, Fed. Cas. No. 4,873, affirmed in (1872) 13 Wall. (U. S.) 3, 20 L. ed. 556.

Georgia.—*Hillman v. Georgia R. & Bkg. Co.* (1906) 126 Ga. 814, 56 S. E. 68, 8 Ann. Cas. 222. See also *Grimsley v. Atlantic Coast Line R. Co.* (1907) 1 Ga. App. 557, 57 S. E. 943.

Iowa.—*Starr v. Chicago, B. & Q. R. Co.* (1912) 156 Iowa, 311, 136 N. W. 524.

Kansas.—See *Spangler v. St. Joseph & G. I. R. Co.* (1903) 68 Kan. 46, 63 L.R.A. 634, 104 Am. St. Rep. 391, 74 Pac. 607, 15 Am. Neg. Rep. 299.

Kentucky.—*Louisville & N. R. Co. v. Finn* (1894) 16 Ky. L. Rep. 57. See also *Cincinnati, N. O. & T. P. R. Co. v. Taylor* (1905) 27 Ky. L. Rep. 351, 85 S. W. 168.

Maryland.—*United R. & E. Co. v. State* (1901) 93 Md. 619, 54 L.R.A. 942, 86 Am. St. Rep. 453, 49 Atl. 923, 10 Am. Neg. Rep. 71.

Minnesota.—*Lucy v. Chicago G. W. R. Co.* (1896) 64 Minn. 7, 31 L.R.A. 551, 65 N. W. 944; *Jansen v. Minneapolis & St. L. R. Co.* (1910) 112 Minn. 496, 82 L.R.A. (N.S.) 1206, 128 N. W. 826.

Missouri.—*Liljegren v. United R. Co.* (1921) — Mo. App. —, 227 S. W. 925.

New Jersey. — See *Partridge v.*

Woodland S. B. Co. (1901) 66 N. J. L. 290, 49 Atl. 726, 10 Am. Neg. Rep. 627.

New York.—Hendricks v. Sixth Ave. R. Co. (1878) 12 Jones & S. 8; Wachser v. Interborough Rapid Transit Co. (1910) 125 N. Y. Supp. 767.

Pennsylvania.—Pittsburgh, Ft. W. & C. R. Co. v. Hinds (1866) 53 Pa. 512, 91 Am. Dec. 224, 8 Am. Neg. Cas. 602; Pittsburg & C. R. Co. v. Pillow (1874) 76 Pa. 510, 18 Am. Rep. 424, 8 Am. Neg. Cas. 608.

Tennessee.—Ferry Cos. v. White (1897) 99 Tenn. 256, 38 L.R.A. 427, 41 S. W. 583, 3 Am. Neg. Rep. 279.

Texas.—Galveston, H. & S. A. R. Co. v. Bell (1914) — Tex. Civ. App. —, 165 S. W. 1.

Washington.—Kelly v. Navy Yard Route (1913) 77 Wash. 148, 137 Pac. 444.

Wisconsin. — Kline v. Milwaukee Electric R. & Light Co. (1911) 146 Wis. 134, 131 N. W. 427, Ann. Cas. 1912C, 267.

Canada.—Canadian P. R. Co. v. Blain (1903) 34 Can. S. C. 74, affirming (1903) 5 Ont. L. Rep. 334, appeal to Privy Council refused in [1904] A. C. (Eng.) 453, 73 L. J. C. P. N. S. 109.

In a leading case, Pittsburgh, Ft. W. & C. R. Co. v. Hinds (1866) 53 Pa. 512, 91 Am. Dec. 224, 8 Am. Neg. Cas. 602, it appeared that a large crowd of drunken men rushed into a car reserved for ladies, and, in a fight between them, a passenger rightfully in the car was injured. It was held that the company was not liable for the failure of the conductor to keep the crowd of drunken men out of the car, since he was clearly unable to exclude them, but that it was proper to submit to the jury the question whether the conductor could not have stopped the fighting in time to avoid the injury. That case was cited with approval in Pittsburg & C. R. Co. v. Pillow (1874) 76 Pa. 510, 18 Am. Rep. 424, 8 Am. Neg. Cas. 608, wherein a carrier was held to be liable for an injury to a passenger caused by an altercation between two drunken men who were improperly permitted on the train.

In Memphis, D. & G. R. Co. v. Trus-
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sell (1916) 122 Ark. 516, 183 S. W. 981, a carrier was held to be liable for the repetition of an assault on a female passenger by an intoxicated passenger, who was not evicted from the car or properly guarded after he had once assaulted her.

In Kline v. Milwaukee Electric R. & Light Co. (Wis.) supra, an action by a passenger against a carrier to recover damages because of a knife wound inflicted by a drunken fellow passenger, evidence was introduced to show that the conductor had been requested to eject the drunken man, who had been cursing and fighting. In affirming a judgment for the plaintiff, the court held that it was for the jury to determine whether the conductor had the knowledge or the opportunity to know that an injury to passengers was threatened or probable, and whether he kept a vigilant watch over the disorderly man in order to protect the passengers.

In Montgomery Traction Co. v. Whatley (1907) 152 Ala. 101, 126 Am. St. Rep. 17, 44 So. 538, it appeared that the plaintiff was injured by a drunken and disorderly passenger, who fell against her, and that he had been walking about the car and had fallen before, to the knowledge of the conductor. It was held to be a question for the jury to determine whether the conductor ought to have foreseen that he might do injury to some passenger.

In Cincinnati, N. O. & T. P. R. Co. v. Taylor (1905) 27 Ky. L. Rep. 351, 85 S. W. 168, it appeared that a female passenger, while passing from one coach of a train to another, was seized by the arm and frightened by a drunken man. The court held that it was a question for the determination of the jury whether the railroad company used proper care for her protection.

In Seaboard Air Line R. Co. v. Mobley (1915) 194 Ala. 211, 69 So. 615, the court stated the facts and its conclusion as follows: "The evidence shows without conflict that the assault, insult, and nervous shock sustained by Mrs. Mobley as a passenger of the defendant were caused by two drunken passengers going into the ladies' toilet of the car in which she

was riding, cursing her, and throwing her violently to the floor, and that, even after she had complained to the conductor and porter, the insult and shock were prolonged and continued by the act of the defendant's servants in confining the men in the closet, instead of promptly removing them from the car. The duty of defendant was to apprehend the injurious misconduct complained of, if it could not have been foreseen in time to prevent its occurrence, or, if not, to prevent its continuation or its repetition, on its discovery."

A carrier is under an obligation to remove or guard a drunken passenger who, to the knowledge of the conductor, is armed and a menace to other passengers. A failure of the train crew to remove him or adequately to warn a relieving train crew of the danger will make the carrier liable for a resulting murderous assault by him on a passenger. *King v. Ohio & M. R. Co.* (1884) 22 Fed. 413.

In *Starr v. Chicago, B. & Q. R. Co.* (1912) 156 Iowa, 311, 136 N. W. 524, it was held that where the previous conduct of a drunken passenger was such that the train crew should have anticipated an assault on the plaintiff, the carrier was liable to the latter for the injury to him resulting from its failure to exercise its authority to enforce peace and order.

In *Flint v. Norwich & N. Y. Transp. Co.* (1868) 34 Conn. 554, Fed. Cas. No. 4,873, affirmed in (1872) 13 Wall. (U. S.) 3, 20 L. ed. 556, a recovery was sought for an injury to a passenger on a boat, caused by the discharge of a gun dropped by a soldier. There was conflicting evidence as to whether the discharge of the gun was due to an effort of soldiers on guard to enforce discipline, or to a brawl among intoxicated soldiers who were permitted by the officers of the transportation company to remain on a part of the vessel where they were a menace to the safety of other passengers. The court said: "The defendants were bound to exercise the utmost vigilance and care in maintaining order and guarding the passengers against violence, from whatever source arising, which might

reasonably be anticipated or naturally be expected to occur, in view of all the circumstances and of the number and character of the persons on board." See to the same effect, *Ferry Cos. v. White* (1897) 99 Tenn. 256, 38 L.R.A. 427, 41 S. W. 583, 3 Am. Neg. Rep. 279.

In *Partridge v. Woodland S. B. Co.* (1901) 66 N. J. L. 290, 49 Atl. 726, 10 Am. Neg. Rep. 627, it appeared that the plaintiff was a passenger on a steamboat of the defendant carrier, and was assaulted by drunken fellow passengers who were engaged in a fight. The court stated that a carrier was bound to exercise the utmost diligence in guarding its passengers from violence arising from any source, but it reversed a judgment for the plaintiff on the ground that the trial court had submitted to the jury a question as to the defendant's negligence which was not raised by the pleadings.

In *Lucy v. Chicago G. W. R. Co.* (1896) 64 Minn. 7, 31 L.R.A. 551, 65 N. W. 944, a carrier was held to be liable to a passenger for its failure to prevent a drunken fellow passenger from calling her vile names, after the attention of the conductor was directed to his misconduct.

See to the same effect, *Jansen v. Minneapolis & St. L. R. Co.* (1910) 112 Minn. 496, 32 L.R.A. (N.S.) 1206, 128 N. W. 826, wherein a conductor, on being informed of the assault on the plaintiff, declined to interfere, saying: "What can you do when the party has the whisky in him?"

In *Galveston, H. & S. A. R. Co. v. Bell* (1914) — Tex. Civ. App. —, 165 S. W. 1, 5 N. C. C. A. 621, affirmed in (1919) 110 Tex. 104, 216 S. W. 390, it appeared that an intoxicated and disorderly passenger became engaged in an altercation with another passenger, and that, on request, the conductor made some slight effort to remove him from the car, but when he refused to go farther than a place in the aisle near the person with whom he had quarreled, the conductor left him standing there and walked out of the car. Almost immediately he renewed his attack on the other passenger, and the latter, in self-defense, fired three

shots at his assailant, one of which struck the plaintiff, an innocent passenger, and injured her. The court, in affirming a judgment for the plaintiff, said: "It was not necessary that appellant should or could have foreseen the occurrence as it really happened. 'If a drunken and disorderly man is on the carrier's vehicle, it will not do to say, after a passenger has been subjected to insult or injury, that the carrier's servants did not know or could not have foreseen that the particular individual who was insulted or injured was in danger of such insult or injury, if they were apprised, or with proper care could have known, of circumstances which indicated that someone would be injured unless the disorderly passenger or stranger were ejected or controlled.'"

A street railway company has been held to be liable for an assault on a passenger by a drunken and disorderly passenger, who was a short time before ejected from the car for an assault on another passenger, and was permitted to board the car again. *United R. & Electric Co. v. State* (1901) 93 Md. 619, 54 L.R.A. 942, 86 Am. St. Rep. 453, 49 Atl. 923, 10 Am. Neg. Rep. 71.

In *Spangler v. St. Joseph & G. I. R. Co.* (1903) 63 Kan. 46, 63 L.R.A. 634, 104 Am. St. Rep. 391, 74 Pac. 607, 15 Am. Neg. Rep. 299, it appeared that certain drunken passengers had insulted and mistreated generally the other passengers, and had threatened, as soon as they reached their station, to take revenge on those who had interfered with their disorderly conduct. It further appeared that the employees of the defendant carrier knew of their intoxication and threats. Under these circumstances it was held that the carrier was bound to take precautions to prevent an attack on the car after the drunken passengers had gotten off, and that it was liable for an injury to a passenger who was struck in the eye by a heavy burr thrown through the car window by one of them.

In *Grimsley v. Atlantic Coast Line R. Co.* (1907) 1 Ga. App. 557, 57 S. E. 943, it appeared that an intoxicated

passenger had discharged a revolver several times without being restrained or ejected. He alighted at a station and discharged the revolver into one of the coaches of the train, wounding a passenger. The supreme court held that it could not be said as a matter of law that the carrier was not under an obligation to anticipate that a disorderly intoxicated passenger, who had already discharged a pistol in disregard of the safety of fellow passengers, would injure them by further acts of violence.

It has been held that the evidence did not warrant the submission of the case to the jury where it appeared that a drunken passenger refused to pay his fare, and, in resisting ejection from the car, violently struck at the conductor with his foot, and, missing him, hit the plaintiff, a fellow passenger. *Brehony v. Pottsville Union Traction Co.* (1907) 218 Pa. 123, 66 Atl. 1006. In that case the only negligence charged to the defendant carrier was the admission of the drunken passenger who inflicted the injury. In reversing a judgment for the plaintiff, the court said: "It is the duty of a conductor to exercise a watchful care for the safety of his passengers; and this duty may require him under certain conditions to refuse to admit into his car a person applying. . . . If one applying for admission bears upon his person signs convincing to the ordinary mind that he is afflicted with a dangerous and contagious malady, it is manifestly the duty of the conductor to exclude him. . . . But such danger cannot be affirmed of admitting a person who is simply intoxicated. Intoxication is not infectious; nor does it so ordinarily express itself in violence that disturbance of the peace of the car is to be reasonably apprehended when an intoxicated person is admitted. There may be, and doubtless are, exceptional cases where the intoxication is so gross, the condition resulting therefrom so offensive, the conduct of the individual so unbecoming and violent, as to justify, and indeed require, his exclusion."

See to the same effect, *Virginia R.*

& Power Co. v. McDemmick (1915) 117 Va. 862, 86 S. E. 744.

It is ordinarily a question for the jury whether a conductor, in the exercise of that degree of care required of him by law, ought to have foreseen, from the circumstances of the case, that an intoxicated passenger would probably injure a passenger. *Montgomery Traction Co. v. Whatley* (1907) 152 Ala. 101, 126 Am. St. Rep. 17, 44 So. 538; *Grimsley v. Atlantic Coast Line R. Co.* (1907) 1 Ga. App. 557, 57 S. E. 943; *Cincinnati, N. O. & T. P. R. Co. v. Taylor* (1905) 27 Ky. L. Rep. 351, 85 S. W. 168; *McWilliams v. Lake Shore & M. S. R. Co.* (1891) 146 Mich. 216, 109 N. W. 272; *Jansen v. Minneapolis & St. L. R. Co.* (1910) 112 Minn. 496, 32 L.R.A. (N.S.) 1206, 128 N. W. 826; *Kelly v. Navy Yard Route* (1913) 77 Wash. 148, 137 Pac. 444; *Kline v. Milwaukee Electric R. & Light Co.* (1911) 146 Wis. 134, 131 N. W. 427, Ann. Cas. 1912C, 267. Compare *Brehony v. Pottsville Union Traction Co. (Pa.) supra*.

d. Effect of failure to separate white and colored passengers.

A failure to comply with a statute requiring the separation of white and colored passengers ordinarily renders a carrier liable for an assault on one passenger by another, growing out of the carrier's failure to enforce the separation, if the employee charged with the duty of enforcing the statute knows of the violation. *Hines v. Meador* (1920) 145 Ark. 356, 224 S. W. 742; *Hillman v. Georgia R. & Bkg. Co.* (1906) 126 Ga. 814, 56 S. E. 68, 8 Ann. Cas. 222. Compare *Royston v. Illinois C. R. Co.* (1889) 67 Miss. 376, 7 So. 320, 8 Am. Neg. Cas. 453.

In *Hines v. Meador* (Ark.) *supra*, a carrier was held to be liable for an assault on a white passenger growing out of an altercation with a colored passenger illegally permitted by employees of the carrier to occupy a coach reserved for white people. The court said: "When a carrier permits a passenger to occupy a coach set apart to passengers of another race, it will not be heard to say that it had no reason to anticipate injury to another passenger; for a violation of the law

itself is tantamount to warning that injury may result, and makes the carrier liable for any injury resulting to another passenger, not as a cause of action based upon the statute, but from the duty of the carrier to its passengers to protect them from harm and inconvenience."

In *Hillman v. Georgia R. & Bkg. Co.* (1906) 126 Ga. 814, 56 S. E. 68, 8 Ann. Cas. 222, it was held to be error for the trial court, in its charge to the jury, not to refer to the fact that the assailant was in a coach reserved for members of another race.

In *Britton v. Atlanta & C. Air Line R. Co.* (1883) 88 N. C. 531, it appeared that a colored passenger was assaulted by a white passenger while riding on an excursion train, in a coach for white persons, where she was permitted to remain by the conductor, though she was advised to go into a coach reserved for colored people. It further appeared that the conductor was informed that an altercation was about to take place, but did not interfere to prevent the injury. In holding that the carrier was liable, the court said: "The carrier owes to the passenger the duty of protecting him from the violence and assaults of his fellow passengers, or intruders, and will be held responsible for his own or his servant's neglect in this particular, when, by the exercise of proper care, the acts of violence might have been foreseen and prevented; and while not required to furnish a police force sufficient to overcome all force, when unexpectedly and suddenly offered, it is his duty to provide ready help sufficient to protect the passenger against assaults from every quarter, which might reasonably be expected to occur under the circumstances of the case and the condition of the parties."

See to the same effect, *Murphy v. Western & A. R. Co.* (1885) 23 Fed. 637.

However, in *Royston v. Illinois C. R. Co.* (1889) 67 Miss. 376, 7 So. 320, 8 Am. Neg. Cas. 453, it was held that where an intoxicated negro passenger becomes involved in an altercation with the conductor, and is assaulted

by a fellow passenger because of his boisterous conduct, the failure of the carrier to provide separate coaches for white and colored passengers cannot be deemed the proximate cause of the negro's injuries, and that the carrier is not liable therefor.

The carrier will not be held liable for an assault due to the presence of a passenger in a coach reserved for the other race, if the servants of the carrier do not know of his presence there. *Louisville & N. R. Co. v. Renfro* (1911) 142 Ky. 590, 83 L.R.A. (N.S.) 133, 135 S. W. 266; *Bailey v. Louisville & N. R. Co.* (1898) 19 Ky. L. Rep. 1617, 44 S. W. 105; *Walker v. International & G. N. R. Co.* (1909) 54 Tex. Civ. App. 406, 117 S. W. 1020.

In *Hale v. Chesapeake & O. R. Co.* (1911) 142 Ky. 835, 135 S. W. 398, it appeared that a conductor requested an intoxicated white passenger to leave a coach reserved for colored persons, and that he went out quietly. It was held that the carrier was not liable for an assault by him after he returned to the car without the conductor's knowledge.

And a violation of a statute providing for a separation of the races does not make the carrier guilty of negligence per se, and therefore liable for an assault due to the violation of the statute, unless knowledge of the violation is known to the officer on whom the statute places the duty of enforcing the separation. *Texas & P. R. Co. v. Baker* (1919) — Tex. Com. App. —, 215 S. W. 556, reversing (1916) — Tex. Civ. App. —, 184 S. W. 664.

II. Assault by policeman or other officer of law.

A conductor is not bound to make an investigation to ascertain if persons whom he knows to be officers of the law have a warrant for the arrest of a passenger, or to find out whether the charge on which they are proceeding is one for which an arrest can be legally made. Therefore, a carrier is not liable for an assault by an officer of the law in making an illegal arrest, unless its conductor knows of the illegality.

Alabama.—*Nashville, C. & St. L. R.*

Co. v. Crosby (1913) 183 Ala. 237, 62 So. 889.

Arkansas.—*Mayfield v. St. Louis, I. M. & S. R. Co.* (1910) 97 Ark. 24, 32 L.R.A. (N.S.) 525, 133 S. W. 168.

Georgia.—*Brunswick & W. R. Co. v. Ponder* (1902) 117 Ga. 63, 60 L.R.A. 713, 97 Am. St. Rep. 152, 43 S. E. 430, 13 Am. Neg. Rep. 254.

Kentucky.—*Louisville & N. R. Co. v. Byrley* (1913) 152 Ky. 35, 153 S. W. 36, Ann. Cas. 1915B, 240; *Louisville & N. R. Co. v. White* (1913) 152 Ky. 463, 153 S. W. 1199; *Chesapeake & O. R. Co. v. Pack* (1921) — Ky. —, 232 S. W. 36.

Michigan.—See *Foster v. Grand Rapids R. Co.* (1905) 140 Mich. 689, 104 N. W. 380, 18 Am. Neg. Rep. 479.

North Carolina.—*Owens v. Wilmington & W. R. Co.* (1900) 126 N. C. 139, 78 Am. St. Rep. 642, 35 S. E. 259.

Pennsylvania.—*Duggan v. Baltimore & O. R. Co.* (1893) 159 Pa. 248, 39 Am. St. Rep. 672, 28 Atl. 182, 186.

Texas.—*Texas Midland R. Co. v. Dean* (1905) 98 Tex. 517, 70 L.R.A. 943, 85 S. W. 1135, reversing (1904) — Tex. Civ. App. —, 82 S. W. 524; *Missouri, K. & T. R. Co. v. Brown* (1913) — Tex. Civ. App. —, 158 S. W. 259.

West Virginia.—*Clark v. Norfolk & W. R. Co.* (1919) 84 W. Va. 526, 7 A.L.R. 117, 100 S. E. 480.

As was said in *Louisville & N. R. Co. v. Byrley* (Ky.) supra: "When the arrest is by officers of the law, and is apparently regular, and there is nothing to put the company on notice that the arrest is illegal, the company cannot be held liable for a failure to interfere with the officers and prevent the arrest. It would be going too far to hold that the conductor of a railroad company should interfere with officers of the law, and prevent an arrest, merely because he did not know whether or not they were acting within their power and authority. We think the correct rule is that a railroad company is not liable for a failure of the conductor to protect a passenger from unlawful arrest, unless the conductor knows, or the facts and circumstances known to him are such as to apprise a person of ordinary prudence that the arrest is unlawful."

It is never the duty of a conductor in the protection of his passengers from arrest by a known officer of the law, to assert his authority against such officer acting within the apparent scope of his authority, unless he knows such facts as beyond question make the action of the officer unlawful. It must be a plain, unmistakable case where the facts are fully known to the conductor and where they do not require him to pass upon a technical question which will authorize him to interfere. *Chesapeake & O. R. Co. v. Pack* (1921) — Ky. —, 232 S. W. 36. Applying the principles thus laid down it was held that the carrier was not liable because of the conductor's failure to interfere with an arrest by a known officer of the law, although he had information that the officer had no warrant. This was apparently upon the assumption that the arrest without a warrant was in fact unlawful, but was not so clearly so as to require the conductor to interfere.

In *Mayfield v. St. Louis, I. M. & S. R. Co.* (1910) 97 Ark. 24, 32 L.R.A. (N.S.) 525, 133 S. W. 168, the court said: "No obligation rests upon the railroad company, or upon its servants in charge of the train, to prevent the arrest of one who happens to be upon its train, by an officer duly empowered to make such arrest. The law does not impose the duty on the conductor to resist or interfere with the authority of an officer acting under color of his office."

And in *Clark v. Norfolk & W. R. Co.* (1919) 84 W. Va. 526, 7 A.L.R. 117, 100 S. E. 480, it was said: "It is a fact, proven and not disputed, that the conductor and brakemen in charge of the train all knew that the men who forced plaintiff to alight were officers, and in such case the law imposes no duty upon the carrier or its servants or agents to inquire into the officer's authority, or substitute their opinions for his, or to protest against his arresting a passenger. A passenger train is not intended as a place of refuge for criminals, and unless a passenger is arrested for an offense of which the carrier's agent knew, or by

proper diligence ought to have known, he is not guilty, he is not obliged to interfere or protest against the arrest. The rule, however, is different where the carrier's servants know, or by the exercise of proper diligence ought to know, that the arrest of the passenger is unlawful."

A carrier is under no obligation to intervene between a passenger and a known officer of the law, until its servant is informed or has good reason to believe that the officer is not acting officially, or is wrongfully acting *colore officii*, and the burden is on the assaulted passenger to show such knowledge. *Nashville, C. & St. L. R. Co. v. Crosby* (1913) 183 Ala. 237, 62 So. 889.

And it has been held that where a special deputy sheriff, employed by the carrier to police its park and its cars when disorderly persons are on board, makes an unjustifiable assault on an intoxicated passenger, the latter cannot recover from the carrier for the injury if the assailant is at the time acting in his official capacity. *Foster v. Grand Rapids R. Co.* (1905) 140 Mich. 689, 104 N. W. 380, 18 Am. Neg. Rep. 479. In that case, however, it was held on the facts that the officer was acting as an employee to compel the payment of fare, and the carrier was held to be liable.

A carrier does not become liable for an assault by a town marshal on a colored passenger in a coach reserved for the colored race, because the conductor permits the officer to enter the car to investigate a disturbance which has taken place therein. *Missouri, K. & T. R. Co. v. Brown* (1913) — Tex. Civ. App. —, 158 S. W. 259.

Where, however, a conductor knows that the arrest of a passenger on his train by an officer of the law is wholly without justification, and makes no effort to prevent it, the carrier is liable for his failure to intervene. *Anania v. Norfolk & W. R. Co.* (1915) 77 W. Va. 105, L.R.A.1916C, 439, 87 S. E. 167, 11 N. C. C. A. 1025. In that case it appeared that a justice of the peace interfered in a dispute between a conductor and two Italian passengers in regard to their tickets, and arrested and ejected not only the passengers

engaged in the dispute, but also another passenger who had taken no part in the altercation, but had arisen from his seat during the altercation. The conductor, with full knowledge of these facts, tacitly permitted his ejection from the train. The court said: "Here the officer unlawfully and unnecessarily interfered. There was nothing to justify his course, unless it was the vulgarity of Mrs. Near. No violence was attempted or committed until he interfered, and, but for his intrusion, none may have occurred. Without the slightest protest by the conductor, and in his presence, the justice, as soon as he reached the seat occupied by the Nears, began to inflict violent blows on Charles Near, injured his hand while administering the 'strong arm,' beat and wounded the passenger assailed, and with the assistance of a member of the train crew expelled him from the car, threw him on the ground, disabled and stunned by such vigorous and inexcusable treatment. Then returning, he ejected plaintiff also, though with less manifestation of physical violence. The conductor knew, or, if reasonably diligent, ought to have known, that whatever may have been the conduct of the Nears, Anania had done no act and said no word indicative of an intent to disobey any lawful demand made upon him, or any rule or regulation of the company, or to project himself into the quarrel or combat between the trainmen and justice, on the one hand, and his companions, on the other. The testimony presents him as free from default as any other passengers save those actively participating in the assault. Though thus innocent and free from the appearance of unlawfulness and from conduct justifying the treatment received, he was deprived of a carriage for which he had made due compensation in advance, and of that protection which the law requires of a carrier, without any attempt to prevent the indignity unlawfully imposed upon him."

A fortiori, a carrier is liable for the arrest of an innocent passenger erroneously and negligently pointed out by the conductor to a public officer as the

man who had committed an assault on him. *Gillingham v. Ohio River R. Co.* (1891) 35 W. Va. 588, 14 L.R.A. 798, 29 Am. St. Rep. 827, 14 S. E. 243.

III. Assault by stranger.

a. Rules stated.

For an assault by a stranger on a passenger, the carrier is not liable if it could not have anticipated and prevented the assault by the exercise of ordinary care and prudence.

Alabama.—*Irwin v. Louisville & N. R. Co.* (1909) 161 Ala. 489, 135 Am. St. Rep. 153, 50 So. 62, 18 Ann. Cas. 772; *Alabama City G. & A. R. Co. v. Sampley* (1910) 169 Ala. 372, 53 So. 142; *Nashville, C. & St. L. R. Co. v. Crosby* (1913) 183 Ala. 237, 62 So. 889; *Southern R. Co. v. Hanby* (1913) 183 Ala. 255, 62 So. 871.

Arkansas.—See *BEASLEY v. HINES* (reported herewith) ante, 864.

Georgia.—*Savannah, F. & W. R. Co. v. Boyle* (1902) 115 Ga. 836, 59 L.R.A. 104, 42 S. E. 242.

Kentucky.—*Illinois C. R. Co. v. La-loge* (1902) 113 Ky. 896, 62 L.R.A. 405, 69 S. W. 795, 12 Am. Neg. Rep. 288; *Louisville & N. R. Co. v. Dott* (1914) 161 Ky. 759, L.R.A.1915C, 681, 171 S. W. 438.

Minnesota.—*Fewings v. Mendenhall* (1903) 88 Minn. 336, 60 L.R.A. 601, 97 Am. St. Rep. 519, 93 N. W. 127, 13 Am. Neg. Rep. 346.

Missouri.—*Woas v. St. Louis Transit Co.* (1906) 198 Mo. 664, 7 L.R.A. (N.S.) 231, 91 S. W. 1017, 8 Ann. Cas. 584.

New York.—See *Weeks v. New York, N. H. & H. R. Co.* (1878) 72 N. Y. 50, 28 Am. Rep. 104.

Rhode Island.—*Bosworth v. Union R. Co.* (1904) 26 R. I. 309, 58 Atl. 982, 3 Ann. Cas. 1080, 17 Am. Neg. Rep. 375, on demurrer, (1903) 25 R. I. 202, 55 Atl. 490, 14 Am. Neg. Rep. 465.

Texas.—*Thweatt v. Houston, E. & W. T. R. Co.* (1903) 31 Tex. Civ. App. 227, 71 S. W. 976, 13 Am. Neg. Rep. 452; *Prokop v. Gulf, C. & S. F. R. Co.* (1904) 84 Tex. Civ. App. 522, 79 S. W. 101.

Virginia.—*Connell v. Chesapeake & O. R. Co.* (1896) 93 Va. 44, 32 L.R.A. 792, 57 Am. St. Rep. 786, 24 S. E. 467.

But a carrier is liable for an assault on a passenger by a stranger, if it could have been anticipated and prevented by the exercise of reasonable care and diligence.

United States.—*Hill v. Pullman Co.* (1911) 188 Fed. 497.

Alabama. — *Southern R. Co. v. Haynes* (1914) 186 Ala. 60, 65 So. 339.

Colorado.—*Wright v. Chicago, B. & Q. R. Co.* (1893) 4 Colo. App. 102, 35 Pac. 196, 8 Am. Neg. Cas. 89.

Illinois.—*Chicago & A. R. Co. v. Pillsbury* (1887) 123 Ill. 9, 5 Am. St. Rep. 483, 14 N. E. 22.

Indiana.—*Repp v. Indianapolis, C. & S. Traction Co.* (1915) — Ind. App. —, 109 N. E. 441, 9 N. C. C. A. 730.

Kentucky.—See *Tate v. Illinois C. R. Co.* (1904) 26 Ky. L. Rep. 309, 81 S. W. 256.

Minnesota.—See *Dean v. St. Paul Union Depot Co.* (1889) 41 Minn. 360, 5 L.R.A. 442, 16 Am. St. Rep. 703, 43 N. W. 54, 8 Am. Neg. Cas. 441.

New Jersey.—*Exton v. Central R. Co.* (1898) 62 N. J. L. 7, 56 L.R.A. 508, 42 Atl. 486, 5 Am. Neg. Rep. 675, affirmed in (1899) 63 N. J. L. 356, 56 L.R.A. 512, 46 Atl. 1099.

North Carolina.—*Seawell v. Carolina C. R. Co.* (1903) 132 N. C. 856, 44 S. E. 610, 14 Am. Neg. Rep. 445, rehearing denied (1903) 133 N. C. 515, 45 S. E. 850; *Garrett v. Southern R. Co.* (1916) 172 N. C. 737, L.R.A. 1917F, 885, 90 S. E. 903.

Pennsylvania.—*Kennedy v. Pennsylvania R. Co.* (1907) 32 Pa. Super. Ct. 623.

South Carolina.—*Calder v. Southern R. Co.* (1911) 89 S. C. 287, 51 S. E. 847, Ann. Cas. 1913A, 894.

Texas.—*Houston & T. C. R. Co. v. Phillio* (1902) 96 Tex. 18, 59 L.R.A. 392, 97 Am. St. Rep. 868, 69 S. W. 994, 12 Am. Neg. Rep. 637; *Texas & P. R. Co. v. Dick* (1901) 26 Tex. Civ. App. 256, 63 S. W. 895, 10 Am. Neg. Rep. 196; *McCardell v. Gulf, C. & S. F. R. Co.* (1907) — Tex. Civ. App. —, 102 S. W. 941; *Missouri, K. & T. R. Co. v. Silber* (1919) — Tex. Civ. App. —, 209 S. W. 188.

Vermont.—*Dufur v. Boston & M. R. Co.* (1903) 75 Vt. 165, 53 Atl. 1068, 18 Am. Neg. Rep. 461.

b. Stranger throwing missile into car.

There are several decisions to the effect that a carrier is not liable for an injury to a passenger by a missile thrown by a stranger from outside the car, where the injury could not reasonably have been anticipated or prevented. *Irwin v. Louisville & N. R. Co.* (1909) 161 Ala. 489, 130 Am. St. Rep. 153, 50 So. 62, 18 Ann. Cas. 772; *Fewings v. Mendenhall* (1903) 88 Minn. 336, 60 L.R.A. 601, 97 Am. St. Rep. 519, 93 N. W. 127, 13 Am. Neg. Rep. 346; *Woas v. St. Louis Transit Co.* (1906) 198 Mo. 664, 7 L.R.A. (N.S.) 231, 91 S. W. 1017, 8 Ann. Cas. 584; *Bosworth v. Union R. Co.* (1904) 26 R. I. 309, 58 Atl. 982, 3 Ann. Cas. 1080, 17 Am. Neg. Rep. 375, on demurrer (1903) 25 R. I. 202, 55 Atl. 490, 14 Am. Neg. Rep. 465. Compare *Dufur v. Boston & M. R. Co.* (Vt.) supra.

Thus it has been held that where a passenger on a street car is struck by a stone thrown by a strike sympathizer while standing outside the car, the street car company is not liable for its failure to protect the passengers by pulling down all the blinds or stretching a heavy canvas over the windows. *Fewings v. Mendenhall* (1903) 88 Minn. 336, 60 L.R.A. 601, 97 Am. St. Rep. 519, 93 N. W. 127, 13 Am. Neg. Rep. 346, supra. It was also held in that case that the street car company was not liable to the injured passenger for its failure to warn him of danger, since the strike and the turbulence accompanying it were matters of general knowledge in the city where the injury occurred.

In *Irwin v. Louisville & N. R. Co.* (1909) 161 Ala. 489, 135 Am. St. Rep. 153, 50 So. 62, 18 Ann. Cas. 772, it was held that a carrier was not liable for an injury to a passenger by a stone thrown by some unknown person through a window of the car in which the plaintiff was riding. The decision was based on the ground that the cause of the injury was not one which the defendant could reasonably have anticipated, and that, therefore, it was not bound to provide against it.

In *Woas v. St. Louis Transit Co.* (1906) 198 Mo. 664, 7 L.R.A. (N.S.) 231, 96 S. W. 1017, 8 Ann. Cas. 584, it

appeared that a passenger was struck by a stone thrown through a car window, and that immediately preceding the injury a man was seen standing in the middle of the street, holding something in his hand and making violent motions toward the car. A directed verdict for the defendant was upheld on the ground that there was nothing in the evidence which would have justified the trial court in submitting the question to the jury whether the defendant could reasonably have anticipated that this stranger would hurl the rock or missile into the car, or violate the law by throwing a deadly missile at the motorman.

It is not ordinarily actionable negligence for a street car company to operate its cars during a strike, and a passenger injured by a rock thrown by a strike sympathizer is not entitled to recover from the street car company on that ground. *Fewings v. Mendenhall* (1901) 83 Minn. 237, 55 L.R.A. 713, 86 N. W. 96, wherein the court stated: "Those who are charged with the public duty of operating street cars, in consideration of valuable franchises, cannot be permitted to omit the duty for any cause save the most pressing, such as the practical impossibility of discharging the duty, consistent with the further duty to exercise the utmost vigilance and care in guarding their passengers against violence, from whatever source arising, which may be reasonably anticipated or naturally be expected to occur, in view of all the circumstances of each particular case. It then necessarily follows that a street railway company is not guilty of negligence, as to its passengers, in attempting to operate its cars during a strike of its employees, unless the conditions are such that it ought to know, or reasonably to anticipate, that it cannot do so and at the same time guard from violence, by the exercise of the utmost care on its part, those who accept its implied invitation to become passengers." See to the same effect, *Bosworth v. Union R. Co.* (1904) 26 R. I. 309, 58 Atl. 982, 3 Ann. Cas. 1080, 17 Am. Neg. Rep. 375, on demurrer (1903) 25 R. I. 202, 55 Atl. 490, 14 Am. Neg. Rep. 465.

In *Dufur v. Boston & M. R. Co.* (1903) 75 Vt. 165, 53 Atl. 1068, 13 Am. Neg. Rep. 461, the plaintiff alleged in his declaration that the defendant neglected its duty towards him by running a street car in which he was a passenger on a sidetrack, and allowing it to remain there a long time, and by requiring the plaintiff to remain in the car, though it knew and permitted one Allen to keep a target for rifle practice in such a situation that a bullet from the rifle might and would pass into the car. He further alleged that Allen was engaged in firing at the target directly towards the car, and that the plaintiff, without negligence on his part, was struck by a bullet from Allen's rifle. In overruling a demurrer to the declaration, the court held that if Allen was accustomed to use this space for target practice, and was so using it on this occasion, it was a question of fact whether the defendant's employees, in the exercise of the high degree of care required of carriers of passengers, ought not to have known of it and guarded their passengers from such injury as was inflicted on the plaintiff.

c. Intruder in car.

No liability is incurred by a carrier for an assault on a passenger by an intruder in one of its cars, if it does not appear that the carrier's servants have been negligent in failing to anticipate or prevent his act of violence. *Savannah, F. & W. R. Co. v. Boyle* (1902) 115 Ga. 836, 59 L.R.A. 104, 42 S. E. 242; *Louisville R. Co. v. Dott* (1914) 161 Ky. 759, L.R.A. 1915C, 681, 171 S. W. 438; *Thweatt v. Houston, E. & W. T. R. Co.* (1903) 31 Tex. Civ. App. 227, 71 S. W. 976, 13 Am. Neg. Rep. 452. See also *Weeks v. New York, N. H. & H. R. Co.* (1878) 72 N. Y. 50, 28 Am. Rep. 104. And see *BEASLEY v. HINES* (reported herewith) ante, 864.

The plaintiff in *Savannah, F. & W. R. Co. v. Boyle* (Ga.) supra, was an express messenger, but the court said that, with respect to an injury inflicted on him by a tramp, the carrier owed to him the same duty that it owed to a passenger. It was held, however, that the carrier was not lia-

ble for the act of a tramp confined in a baggage car in firing at him. The court said: "While it may be that even an ordinarily prudent person would have reason to apprehend that negro tramps under arrest for a misdemeanor or would escape if afforded a reasonable opportunity, still an extremely careful person could not reasonably apprehend that in making such an attempt they would, in order to effectuate it, make a murderous assault with a deadly weapon either upon one who made an effort to thwart this attempt, or upon another who was taking no part in such effort. . . . There is nothing in the allegations of the petition from which it appears that the employees in charge of the train, in the exercise of that high degree of care which the railway company owed to the plaintiff to protect him from injury at the hands of those who might be upon its train with its consent or with its knowledge, could and should have foreseen that the two negro tramps would, after having been arrested and brought into the train, attempt to escape, and, in so doing, commit a murderous assault upon those endeavoring to prevent his escape, or upon others who were taking no part in such efforts."

Likewise, in *BEASLEY v. HINES* (reported herewith) ante, 864, it is held that a carrier is not liable for an assault on a passenger by an intruder on its train, in the absence of negligence by the carrier's employees.

On the other hand, if the presence of an intruder in a car could have been detected, and his act of violence prevented by the exercise of reasonable vigilance and care, the carrier is legally responsible for an assault by him on a passenger. *Hill v. Pullman Co.* (1911) 188 Fed. 497; *Wright v. Chicago, B. & Q. R. Co.* (1893) 4 Colo. App. 102, 35 Pac. 196, 8 Am. Neg. Cas. 89; *Repp v. Indianapolis, C. & S. Traction Co.* (1915) — Ind. App. —, 109 N. E. 441, 9 N. C. C. A. 730. Compare *Connell v. Chesapeake & O. R. Co.* (*Ball v. Chesapeake & O. R. Co.*) (1896) 93 Va. 44, 32 L.R.A. 792, 57 Am. St. Rep. 786, 24 S. E. 467.

In *Repp v. Indianapolis, C. & S.*

Traction Co. (1915). — Ind. App. —, 109 N. E. 441, 9 N. C. C. A. 730, a passenger was allowed to recover from a carrier for a robbery committed in a railway coach in view of the conductor thereof, who made no attempt to aid the passenger. The court said: "We hold that in cases where the servants of the carrier, in charge of its cars and responsible for their management and the care and protection of passengers, are apprised of a passenger's imminent peril to theft, robbery, or any loss or damage to his property, money, and baggage in his own possession, and the carrier, by and through such servants, has it in its power, and is able, to prevent such damage to or loss of property, and negligently or wilfully fails so to do after being so apprised, a new duty arises, independent of the implied contract between carrier and passenger, and, for such failure to prevent loss of or damage to such property, the carrier is liable to such passenger for any loss or damage so sustained, which is the proximate result of such failure to render such assistance as might reasonably have been rendered under the circumstances."

So, in a case similar in its facts to that last cited, the court said: "Although the doctrine is of comparatively recent growth, it is now firmly established that a carrier of passengers must exercise the same degree of care to protect them from violence from their fellow passengers, or from intruders, that is required for the prevention of casualties in the management and operation of its trains. While carriers are not insurers of the safety of passengers, as they are of freight committed to them for shipment, still they are held to the utmost care, vigilance, and precaution to guard against accident, consistent with the mode of conveyance and with its practical operation; and no distinction is made between casualties resulting from the negligent equipment or operation of their trains and those arising from the misconduct of passengers upon them. . . . In all the cases coming under our observation in which this question has been

the subject of adjudication, the agents and servants of the carrier either knew of the actual existence of a disturbance, and made no attempt to quell it, or had knowledge of the presence on board of disorderly or dangerous persons, from whose language or actions there was reasonable ground to apprehend danger, and failed to take any precaution to avert it." *Wright v. Chicago, B. & Q. R. Co.* (1893) 4 Colo. App. 102, 35 Pac. 196, 8 Am. Neg. Cas. 89.

The absence of the crew from a train for a brief time while it is stopping at a station is not such negligence as will render a railway company liable for an unprovoked assault on a passenger by an intruder, where there are no circumstances reasonably calculated to give the trainmen warning of danger. *Thweatt v. Houston, E. & W. T. R. Co.* (1903) 31 Tex. Civ. App. 227, 71 S. W. 976, 13 Am. Neg. Rep. 452; *Sezal v. St. Louis Southwestern R. Co.* (1904) 35 Tex. Civ. App. 517, 80 S. W. 233.

In *Weeks v. New York, N. H. & H. R. Co.* (1878) 72 N. Y. 50, 28 Am. Rep. 104, it appeared that, on the arrival of a passenger train of the defendant company at New York, the cars were disconnected and the one in which the plaintiff was riding was left standing alone, with no employees of the company in charge of it. Three strangers entered the car and robbed the plaintiff of a package of bonds valued at \$16,000. It was held to be error to submit any question to the jury, since the injury was too remote from any act or failure to act by the defendant to charge it with damages. It is to be noted, however, as pointed out by the court, that the plaintiff's pleadings did not raise the question of liability for violence to the person of the plaintiff, but only for his pecuniary loss.

In case of a conflict of duties by a carrier it is bound only to exercise a reasonable discretion. Ordinarily it is under no obligation to pursue a course of action which would tend to prevent an assault on one passenger by an intruder, but would endanger the safety of other passengers as well as of trespassers. *Louisville R. Co. v.*

Dott (1914) 161 Ky. 759, L.R.A.1915C, 681, 171 S. W. 438.

A Pullman company which neglects to keep a sufficient watch to protect passengers in a sleeping car from robbery is liable for an assault on a passenger by a thief who attempts to rob him. *Hill v. Pullman Co.* (1911) 188 Fed. 497; *Calder v. Southern R. Co.* (1911) 89 S. C. 287, 71 S. E. 841, Ann. Cas. 1913A, 894.

But in *Connell v. Chesapeake & O. R. Co.* (Ball v. Chesapeake & O. R. Co.) (1896) 93 Va. 44, 32 L.R.A. 792, 57 Am. St. Rep. 786, 24 S. E. 467, it was held that a sleeping car company was not liable for the murder of one of its passengers by an intruder who entered the car in the nighttime while the train was passing through a section of the country where violence could not reasonably be anticipated.

d. Intruder in station house or grounds.

A carrier will not be held liable for an assault committed on a passenger by an intruder in its station house or grounds, if it is not negligent in failing to use reasonable care and diligence for the passenger's safety. *Nashville, C. & St. L. R. Co. v. Crosby* (1913) 183 Ala. 237, 62 So. 889; *Southern R. Co. v. Hanby* (1913) 183 Ala. 255, 62 So. 871; *Illinois C. R. Co. v. Laloge* (1902) 113 Ky. 896, 62 L.R.A. 405, 69 S. W. 795, 12 Am. Neg. Rep. 288; *Prokop v. Gulf, C. & S. F. R. Co.* (1904) 34 Tex. Civ. App. 522, 79 S. W. 101.

As was said in *Nashville, C. & St. L. R. Co. v. Crosby* (Ala.) *supra*: "It is the duty of common carriers to protect their passengers against violence or improper conduct, whether on the part of its own servants or of other passengers or strangers; but the carrier's liability for failure to protect from the misconduct of others than its own servants arises only when the wrong is actually foreseen, or is of such a character and perpetrated under such circumstances as that it might reasonably have been anticipated or naturally expected to occur. . . . It is, of course, a corollary to this rule of liability that the injurious misconduct complained of could have

been foreseen in time to permit of its effective prevention." The decision on a second appeal of the case is to the same effect. (1913) 194 Ala. 338, 70 So. 7.

And with respect to an assault on a passenger in a station house the court said, in *Southern R. Co. v. Hanby* (1913) 183 Ala. 255, 62 So. 871: "If a passenger is suddenly assaulted by a stranger while in the station of a railroad company, it at once becomes the duty of the station agent, if he sees or becomes aware of the difficulty, to take all reasonable steps necessary to put an end to such difficulty, and if he negligently fails to do so, then the company is liable to the person so assaulted or beaten for any injuries which such passenger thereby unlawfully received at the hands of such stranger."

In *Prokop v. Gulf, C. & S. F. R. Co.* (1904) 34 Tex. Civ. App. 522, 79 S. W. 101, it was held that the failure of station-house employees to light the building, and their absence therefrom, did not render a carrier liable for an unprovoked assault by an intruder, committed at night on a passenger waiting for a train.

One who comes into a station waiting room an unreasonable length of time before the departure of his train is not entitled to recover from the carrier for an assault which does not come within the observation or knowledge of the station agent or other employees of the carrier. Where a statute requires stations to be open one-half hour before the time for the leaving of trains, the statute, in the absence of an express or implied contract, fixes the period of time which is to be deemed reasonable for an intending passenger to use the station while waiting for a train. *Illinois C. R. Co. v. Laloge* (1902) 113 Ky. 896, 62 L.R.A. 405, 69 S. W. 795, 12 Am. Neg. Rep. 288.

A failure to use the care and diligence ordinarily employed by persons engaged in the same or a similar business will render a carrier liable for an assault on a passenger committed at its station house or grounds by a stranger, if the assault could have

been prevented by the exercise of that degree of care and diligence.

Alabama. — *Southern R. Co. v. Haynes* (1914) 186 Ala. 60, 65 So. 339. Compare *Southern R. Co. v. Hanby*, *supra*.

Kentucky. — *Tate v. Illinois C. R. Co.* (1904) 26 Ky. L. Rep. 309, 81 S. W. 256.

Minnesota. — See *Dean v. St. Paul Union Depot Co.* (1889) 41 Minn. 360, 5 L.R.A. 442, 16 Am. St. Rep. 703, 43 N. W. 54, 8 Am. Neg. Cas. 441.

New Jersey. — *Exton v. Central R. Co.* (1898) 62 N. J. L. 7, 56 L.R.A. 503, 42 Atl. 436, 5 Am. Neg. Rep. 675, affirmed in (1899) 63 N. J. L. 356, 56 L.R.A. 512, 46 Atl. 1099.

North Carolina. — *Seawell v. Carolina C. R. Co.* (1902) 132 N. C. 856, 44 S. E. 610, 14 Am. Neg. Rep. 445, rehearing denied in (1903) 133 N. C. 515, 45 S. E. 850; *Garrett v. Southern R. Co.* (1916) 172 N. C. 737, L.R.A. 1917F, 885, 90 S. E. 903.

Pennsylvania. — *Kennedy v. Pennsylvania R. Co.* (1907) 32 Pa. Super. Ct. 623.

Texas. — *Houston & T. C. R. Co. v. Phillio* (1902) 96 Tex. 18, 59 L.R.A. 392, 97 Am. St. Rep. 868, 69 S. W. 994, 12 Am. Neg. Rep. 637; *Texas & P. R. Co. v. Dick* (1901) 26 Tex. Civ. App. 256, 63 S. W. 895, 10 Am. Neg. Rep. 196; *McCardell v. Gulf, C. & S. F. R. Co.* (1907) — Tex. Civ. App. —, 102 S. W. 941; *Missouri, K. & T. R. Co. v. Silber* (1919) — Tex. Civ. App. —, 209 S. W. 188.

Actionable negligence on the part of a carrier may be based on the failure of its station agent to interfere to prevent an assault and robbery committed in his presence, in the waiting room of the carrier, on a person who has purchased a ticket and is waiting for a train. *Southern R. Co. v. Haynes* (Ala.) and *Missouri, K. & T. R. Co. v. Silber* (Tex.) *supra*.

In *Southern R. Co. v. Haynes* (Ala.) *supra*, a recovery was sought for an assault on the plaintiff by a stranger while the plaintiff was awaiting a train in a waiting room at a station of the defendant. The plaintiff alleged that an agent of the defendant carrier was informed of the impending

ing assault, or had knowledge that it was necessary to intervene in order to protect the plaintiff, but failed or refused to discharge this duty. It was held that the allegations of the plaintiff were sufficient to charge the defendant with negligence. The court distinguished *Southern R. Co. v. Hanby* (1913) 183 Ala. 255, 62 So. 871, wherein the right of the plaintiff to recover under somewhat similar circumstances was denied on the ground that there was no averment that the station agent knew, or had the opportunity to know, that an injury was threatened.

In *McCardell v. Gulf, C. & S. F. R. Co.* (1907) — Tex. Civ. App. —, 102 S. W. 941, it appeared that the plaintiff, a negro, had purchased a ticket and was in the waiting room of the defendant's station when he was assaulted by a number of white men, in the presence of the defendant's agents, and driven from the room. It was held to be error not to submit the question of the defendant's negligence to the jury.

Similarly, in *Seawell v. Carolina C. R. Co.* (1902) 132 N. C. 856, 44 S. E. 610, 14 Am. Neg. Rep. 445, rehearing denied in (1903) 133 N. C. 515, 45 S. E. 850, a judgment for the plaintiff was sustained, it appearing that he was assaulted at the defendants' station on account of his political tenets, by a crowd, who pelted him with eggs, and that the defendants' servants not only failed to protect him, but participated in the assault. The court said: "A careful examination of all the authorities shows no case, and the appellants cite none, in which, under similar circumstances, the railroad company has not been held liable unless it exerted what power it could to protect the passenger from the mob. Here, if the agent had taken the passenger into his private office, or offered to do so, had expostulated with the mob, and on the arrival of the train, in company with the conductor and his own employees, escorted him to the train, the eggs would hardly have been thrown, and at any rate the defendants would not have incurred liability for this breach of duty. Or there might have

been other attempts to protect the passenger while on its premises, and which the jury might have held sufficient. But here there was none whatever. It was the assaulting mob, not the passenger, whom the agent admitted to his office, and he issued therefrom with the mob at his heels, who immediately began spattering the plaintiff with eggs and abuse. Such attempted intimidation for political opinion's sake cannot be safely permitted, especially by great public corporations holding their franchises in trust, impartially, for all the public."

In *Texas & P. R. Co. v. Dick* (1901) 26 Tex. Civ. App. 256, 63 S. W. 895, 10 Am. Neg. Rep. 196, the plaintiff brought an action to recover for an assault on him, made while he was leaving the defendant's premises after alighting from a train. The court held that the defendant company was liable for the assault, since it appeared that its agent knew that an assault would probably be made on the plaintiff, if he did not, in fact, instigate it, and he took no measures whatever to prevent it or protect the plaintiff after it was begun.

In *Garrett v. Southern R. Co.* (1916) 172 N. C. 737, L.R.A.1917F, 885, 90 S. E. 903, it appeared from the testimony of one of the plaintiffs that she was assaulted and robbed by an unknown negro while being helped to board a Pullman car by its conductor, who made no effort to interfere. The court said: "An investigation of the authorities discloses that they all hold that it is the duty of a Pullman company, although not technically a common carrier, to exercise reasonable care in the protection of passengers holding tickets upon the car. It must be conceded that if the testimony offered by the plaintiffs is true, the defendant's conductor entirely failed to protect them from the assault and robbery committed at the very steps of the car while the conductor was helping them into it."

In *Kennedy v. Pennsylvania R. Co.* (1907) 32 Pa. Super. Ct. 623, it appeared that, while the plaintiff was walking toward her train at the defendant's station, she was knocked

down and injured by an unruly body of students, who had been there for some time acting in a boisterous and disorderly manner. The defendant carrier was held to be liable for the injury, on the ground that it was its duty to restrain the acts of rowdiness.

Likewise, in *Tate v. Illinois C. R. Co.* (1904) 26 Ky. L. Rep. 309, 81 S. W. 256, it was held that there was sufficient evidence of actionable negligence for the submission of the case to the jury, where it appeared that a section boss, acting wholly outside the scope of his duties, engaged in a long noisy quarrel with a passenger in the carrier's waiting room, and ultimately assaulted him, and the station agent was in an adjoining room with an open window between him and the scene of the difficulty.

In *Exton v. Central R. Co.* (1898) 62 N. J. L. 7, 56 L.R.A. 508, 42 Atl. 486, 5 Am. Neg. Rep. 675, affirmed in (1899) 63 N. J. L. 356, 56 L.R.A. 512, 46 Atl. 1099, it appeared that the plaintiff was knocked down and injured by some boisterous cabmen while on her way from the station platform to the baggage room of the defendant company for the purpose of checking her baggage. The cabmen were not in the employ of the defendant. In sustaining the ruling of the trial judge denying a motion for nonsuit at the close of the plaintiff's evidence, the supreme court said: "Carriers of passengers are bound to

exercise the utmost care in maintaining order and guarding those they transport against violence from whatever source arising, which might be reasonably anticipated or naturally expected to occur. . . . The carrier must exercise the care required to protect the passenger from violence even by a stranger. . . . The general rule is clear that from whatever source the danger may arise, if it be known or should have been known, care must be exercised to protect the passenger from that danger."

In *Houston & T. C. R. Co. v. Phillio* (1902) 96 Tex. 18, 59 L.R.A. 392, 97 Am. St. Rep. 868, 69 S. W. 994, 12 Am. Neg. Rep. 637, wherein it appeared that the plaintiff and his wife were assaulted in a railroad station, it was held that when the plaintiff's wife entered the station and purchased a ticket she became a passenger of the defendant, and the duty devolved on the company's agent to protect her against assault on the part of intruders, provided he knew of such misconduct or had reasonable grounds to anticipate it; but that no such duty existed toward the plaintiff, who merely accompanied his wife to the station without intending to become a passenger. The court stated that the only duty toward him was to use ordinary care to see that the premises were kept in a reasonably safe condition. W. S. R.

PHILADELPHIA & READING RAILWAY COMPANY, a Corporation
of the State of Pennsylvania, Plff. in Err.,

v.

SAUNDERS C. DILLON.

PHILADELPHIA & READING RAILWAY COMPANY, a Corporation
of the State of Delaware, Plff. in Err.,

v.

CLARENCE M. BEADENKOPF.

Delaware Supreme Court — March 24, 1921.

(— Del. —, 114 Atl. 62.)

Highway — blocking — freedom from negligence — liability for injury.

1. A railroad company which is not negligent toward travelers on a

highway in blocking the crossing at night with a train is not liable for injuries to either an automobile driver or his guest by collision with the train, notwithstanding they may also have been free from negligence.

[See note on this question beginning on page 901.]

Evidence — ability to stop automobile — effect on particular car.

2. Testimony that one driving an automobile at the time of an accident could stop a car going 18 miles an hour in 50 feet does not show that he could stop the car which he was driving within that distance.

Highway — reliance on absence of obstruction.

3. A traveler on a highway may expect that it will not be obstructed unlawfully, or in such manner as to cause him injury, while he himself is in the exercise of due and reasonable care.

[See 13 R. C. L. 472.]

— right of one obstructing.

4. One lawfully obstructing a highway may rightfully expect that travelers will use due and reasonable care to avoid any danger because of the obstruction.

[See 13 R. C. L. 473.]

— negligence in driving without lights.

5. It is negligence to drive an automobile on a highway on a dark night without lights.

[See 2 R. C. L. 1192.]

Appeal — refusal to direct verdict — consideration of evidence.

6. In passing upon refusal to direct

a verdict for defendant, plaintiff's evidence must be considered in the light most favorable to him.

Evidence — sufficiency — negligence in blocking highway.

7. Absence of light or warning signals when a train is blocking a highway at night does not establish negligence as to a particular traveler injured by collision with the train.

Highway — collision with standing train — negligence.

8. An automobile driver who fails to stop his machine after discovering that his way is blocked by a standing train, when it was possible to do so before collision with the train, is negligent.

— negligence in obstructing crossing — absence of warning.

9. A railroad company blocking a highway with a standing train at night has a right to assume that one driving an automobile along the highway will adopt such lights and rate of speed that he can bring his machine to a standstill within the distance that he can plainly see the obstruction, and therefore is not negligent in failing to give warning of the presence of the train.

ERROR to the Superior Court for New Castle County to review a judgment in favor of plaintiffs in consolidated actions brought to recover damages for injuries sustained by a collision alleged to have been caused by defendant's negligence. Reversed.

The facts sufficiently appear in the opinion of the court.

Mr. John W. Huxley for plaintiff in error.

Messrs. Robert H. Richard, Aaron Finger, and James I. Boyce, for defendants in error:

Although it is for the court to say whether there is any evidence from which negligence on the part of the defendant, or contributory negligence on the part of the plaintiff, can be reasonably and legitimately inferred, nevertheless it is for the jury to say whether, from the evidence adduced, when submitted to them, any negligence, and whose, ought to be inferred.

Creswell v. Wilmington & N. R. Co. 2 Penn. (Del.) 210, 43 Atl. 629; Queen Anne's R. Co. v. Reed, 5 Penn. (Del.) 228, 119 Am. St. Rep. 301, 59 Atl. 860; Wilmington City R. Co. v. White, 6 Penn. (Del.) 368, 66 Atl. 1009; Metropolitan R. Co. v. Jackson, L. R. 3 App. Cas. 193, 47 L. J. C. P. N. S. 303, 37 L. T. N. S. 679, 26 Week. Rep. 175, 18 Eng. Rul. Cas. 677.

The railway company owed to the plaintiffs below the duty to inform them of the unusual and unexpected obstruction of the public thoroughfare. Whether the defendant below

had performed its duty was a question for the jury.

Harris v. Uebelhoer, 75 N. Y. 169; *Brusso v. Buffalo*, 90 N. Y. 679; *Corcoran v. New York*, 188 N. Y. 131, 80 N. E. 660; *Pittsburgh, C. & St. L. R. Co. v. Sponier*, 85 Ind. 165; *Edwards v. Carolina & N. W. R. Co.* 140 N. C. 49, 52 S. E. 234; *McCoy v. Philadelphia, W. & B. R. Co.* 5 Houst. (Del.) 599; *Hubbard v. Boston & A. R. Co.* 162 Mass. 132, 38 N. E. 366; *Bolinger v. St. P. & D. R. Co.* 36 Minn. 418, 1 Am. St. Rep. 680, 31 N. W. 856; *Chesapeake & O. R. Co. v. Gunter*, 108 Ky. 362, 56 S. W. 527; *Southern P. Co. v. Walker*, — Tex. Civ. App. —, 171 S. W. 264; *Cincinnati, N. O. & T. P. R. Co. v. Champ*, 31 Ky. L. Rep. 1054, 104 S. W. 988; *Grand Trunk R. Co. v. Ives*, 144 U. S. 408, 36 L. ed. 485, 12 Sup. Ct. Rep. 679, 12 Am. Neg. Cas. 659; *Paine v. Grand Trunk R. Co.* 63 N. H. 623, 3 Atl. 634.

A plaintiff will not be held guilty of contributory negligence who, when placed in sudden peril, through the negligence of the defendant, fails to act as quickly as he might under normal circumstances.

Simeone v. Lindsay, 6 Penn. (Del.) 224, 65 Atl. 778; *Nailor v. Maryland, D. & V. R. Co.* 6 Boyce (Del.) 145, 97 Atl. 418.

The owner of an automobile has the same right as the owner of other vehicles to use the highways or streets of a city, and, like them, he must exercise reasonable care and caution for the safety of others.

Hannigan v. Wright, 5 Penn. (Del.) 537, 63 Atl. 234; *Simeone v. Lindsay*, supra; *House v. Cramer*, 134 Iowa, 374, 10 L.R.A. (N.S.) 655, 112 N. W. 3, 13 Ann. Cas. 461.

The driver of an automobile and any other user of the highways, aside from special provision changing the rule, have equal rights in the use of the same, and each is required to exercise reasonable care not to injure the other.

Walls v. Windsor, 5 Boyce (Del.) 265, 92 Atl. 989; *Travers v. Hartman*, 5 Boyce (Del.) 302, 92 Atl. 855; *Grier v. Samuel*, 4 Boyce (Del.) 106, 86 Atl. 209; *Campbell v. Walker*, 2 Boyce (Del.) 41, 78 Atl. 601.

Whether defendant was guilty of contributory negligence was a question for the jury.

Corcoran v. New York, 188 N. Y. 181, 80 N. E. 660; *Nesbit v. Crosby*, 74 Conn. 554, 51 Atl. 550; *Sweet v. Salt*

Lake City, 43 Utah, 306, 134 Pac. 1167, 8 N. C. C. A. 922; *Keevil v. Ponsford*, — Tex. Civ. App. —, 173 S. W. 518; *Record v. Pennsylvania R. Co.* 75 N. J. L. 311, 67 Atl. 1040; *Thomp. Neg.* 2d ed. § 7389; *Britt v. Omaha Concrete Stone Co.* 99 Neb. 300, 156 N. W. 497; *Latimer v. Anderson County*, 95 S. C. 187, 78 S. E. 879; *Abbott v. Wyandotte County*, 94 Kan. 553, 146 Pac. 998; *Farrell v. Waterbury Horse R. Co.* 60 Conn. 239, 21 Atl. 675, 22 Atl. 544; *Detroit & M. R. Co. v. Van Steinburg*, 17 Mich. 99.

The primary duty of care for the safety of the vehicle and its passengers rests upon the driver, and a mere gratuitous passenger should not be found guilty of contributory negligence as a matter of law unless he, in some way, actively participates in the negligence of the driver, or is aware either that the driver is incompetent, or careless, or unmindful of some danger known to, or apparent to, the passenger.

Carnegie v. Great Northern R. Co. 128 Minn. 14, 150 N. W. 164.

Curtis, Ch., delivered the opinion of the court:

The case is brought to this court on a writ of error to the superior court for New Castle county by the defendant below. There were two suits with different plaintiffs against the same defendant, and the cases were tried together. The defendant was charged in each case with negligently permitting freight cars to remain at night on its tracks directly across the highway without lights thereon, or other signal or warning being given of their presence, by reason whereof the automobile in which the plaintiffs were riding at night, and which was being driven with due care, ran into one of the freight cars, whereupon the plaintiffs were injured and the automobile damaged.

The plaintiffs, Beadenkopf and Dillon, were riding about 1 o'clock A. M. on a straight street in Chester, Pennsylvania, 50 feet wide, in an automobile owned and then operated by Beadenkopf, with Dillon as his guest, each being seated on one of the front seats of the machine, and the automobile was

driven into the side of one of the freight cars of a train standing on the tracks of the defendant company motionless, directly across the whole width of the highway. The freight car was a box car about 12 feet high above the rail. The automobile was a new Franklin sedan, equipped with lights on the front, and was being driven with dimmers on the lighted lights. When the machine was about 40 or 50 feet distant, the train was discovered by each of the plaintiffs about the same time, and the brakes immediately applied. The lights of the machine were such that the driver could see ahead possibly 50 feet, the brakes on the machine were working properly, and the driver was expert and familiar with the machine he was driving. Dillon testified that he could stop in 50 feet a car going 18 miles per hour. Each of the plaintiffs testified that there were no lights on the train and no flagman or warning given of the presence of the train. Both of the plaintiffs were familiar with the road and the railroad crossing.

There was conflicting evidence as to whether the night, though dark, was clear or cloudy, and whether the moon was shining, but it was not shown to be foggy, misty, or rainy. There was also a conflict as to whether an arc light hung about 20 feet above the street on a pole located on the opposite side of the freight train was lighted at the time of the accident. There was testimony that if the arc light was lit, the train would have cast a shadow about 32 feet in width. Also there was a conflict of testimony as to whether the trainman exhibited warning lights swung across the track as the automobile approached the train, and visible to those in it. The speed of the automobile was disputed, the plaintiffs saying it was 18 or 20 miles per hour, and other witnesses fixing a much higher rate. There was a conflict of testimony as to whether either of the plaintiffs was intoxicated at the time of the accident.

15 A.L.R.—57.

One other question discussed was whether it was shown that the automobile could have been stopped before reaching the train after it became visible. According to the plaintiffs' testimony the rate of speed was from 15 to 20 miles an hour, and both of the plaintiffs saw the train when from 40 to 50 feet away from it, but the distance within which this particular automobile could have been stopped at a given rate of speed was not shown, and the only evidence bearing upon it was the testimony of Dillon that, going 18 miles an hour, he could stop in 50 feet a car, but he did not say he could so stop the car in which the plaintiffs were then riding. The known variation in machinery, size, and weight of various kinds of automobiles makes it clear that it was not shown that, after the plaintiffs saw the train, this machine could have been stopped in time to avoid running into the train.

Evidence—
ability to stop
automobile—
effect on par-
ticular car.

A traveler on a highway by day or night may expect that it will not be obstructed unlawfully or in such manner as to cause him injury while he himself is in the exercise of due and reasonable care, and what is such care depends on the circumstances of each case. All who lawfully ob-
struct a highway may rightly expect that travelers on it will use due and reasonable care to avoid any danger because of an obstruction. In every case of a collision between a vehicle on a highway and an obstruction therein, the conduct of the traveler affects the corresponding duty of the one who causes the obstruction. This problem is more complex where the vehicle is an automobile than when it is horse drawn, because of the size, weight, mechanism, and motive power of the machine, some of them capable of being driven at high speed, and all requiring and

Highway—
reliance on
absence of
obstruction.

—right of one
obstructing.

dependent upon the control of the operator. Animals have an instinct to sense danger, while in a highway, and their instinct of self-preservation is a protection and guard to those in the vehicle. Indeed, it is common knowledge that horses will discover the presence of danger while on a highway sooner than a man will, and will protect themselves from injury by stopping short of, or evading, or avoiding the point of danger; while a machine moves on until the motive power be exhausted or shut off, or its direction is controlled by an independent human intelligence. Therefore,

—negligence in driving without lights.

while it may be true, as has been decided, that it is not negligent for one to drive horses on a highway on a dark night without lights, this should not be extended to automobiles, for the reason stated in *Lauson v. Fond du Lac* (1909) 141 Wis. 57, 25 L.R.A. (N.S.) 40, 135 Am. St. Rep. 30, 123 N. W. 629, viz.: "A team of horses, if permitted to do so, will ordinarily follow the traveled track, even where it is so dark that their driver may be wholly unable to distinguish it. Under such circumstances an automobile could hardly be run a rod without running into a ditch, except by sheer good luck. A horse will ordinarily stop when a barrier is reached. The machine tries conclusions with it, and brushes it aside if not strong enough to resist the momentum hurled against it. Driving an automobile over a country road on a dark, rainy night without light would indicate a well-defined intent on the part of the driver to commit suicide, rather than the exercise of ordinary care."

One of the assignments of error is that the court below refused to grant a prayer for an instruction to the jury to render a verdict for the

Appeal—refusal to direct verdict—consideration of evidence.

defendant. In deciding this question the evidence must be considered in the light most favorable to the plaintiffs. So viewing the evidence, was

it shown that the defendant was guilty of negligence?

The train was lawfully across the highway. The absence of lights on the train, or shown by the trainmen, or other signals to travelers of the presence of the train there, is the negligence charged. It is not in itself negligence for a railroad company to allow a train of cars to remain a reasonable or lawful length of time across a highway. This is so stated in

the brief of the plaintiff. The absence of such lights or warning signals

Evidence—sufficiency—negligence in blocking highway.

does not of itself prove that the company was negligent as to the plaintiffs. *Gage v. Boston & M. R. Co.* 77 N. H. 289, 295, L.R.A.1915A, 363, 90 Atl. 855. There was no statute or ordinance which required such lights or warning, or regulating the speed of or lights on the automobile. The trainmen and the driver of the automobile each had a right to presume that the other would act as a reasonable person, under all the conditions and surroundings of the crossing, until the contrary should appear. This was said in a case in the superior court, where the plaintiff was struck by a moving train at a crossing. *Welch v. Baltimore & O. R. Co.* 7 Penn. (Del.) 140, 143, 76 Atl. 50.

Here, then, the railroad company had a right to assume that the plaintiffs would act in a reasonable way to avoid running into the train of box cars while it was lawfully standing across the highway. If the defendant's trainmen had a right to assume that a reasonably careful man, driving an automobile on a highway at night, would use such lights and adopt such a rate of speed as that he could bring his machine to a standstill within the distance that he could plainly see by the lights on his machine a railroad box car 12 feet high, standing across the highway, motionless on a railroad track, and completely obstructing his passage along a straight, unobstructed highway,

then the defendant did not then omit to perform any duty by not showing lights, or giving other warning of the presence of the train. This point has not been determined in this state with respect to automobiles, but has been elsewhere.

Plainly, if, under a state of facts such as stated immediately above, the driver of an automobile does not stop it before striking such a large object as a train of cars on a railroad track, when it is shown that, considering his rate of speed, the illumination made by his lights, and the mechanism of the car, he could, after seeing the obstruction, have

Highway—
collision with
standing train—
negligence.

stopped the automobile before striking the obstruction, then he was clearly guilty of contributory negligence such as would bar his right to recover for damages. The case of *Gage v. Boston & M. R. Co. supra*, is an illustration. There an automobile, driven at such speed that it could have been stopped within 26 feet, crashed into the side of a train of cars at night, though they were seen by the driver by the lights of the motor car when it was 35 feet away from the train. The court decided that the railroad company was not negligent in not giving warning of the presence of its train to the driver of an automobile, who, after seeing the train in time to have stopped his machine before reaching the obstruction, failed to do so.

In *Allison v. Chicago, M. & St. P. R. Co.* (1915) 83 Wash. 591, 145 Pac. 608, where the lights of the machine shone 100 feet ahead, and it could have been stopped within 15 feet at the rate it was going, the court said it was one of those cases where the facts speak the law, and that the accident was plainly due to the negligence of the driver. But there is, in the pending case, no evidence that, after the driver saw the train across the highway, the automobile could have been stopped before striking the train.

In a later case in Massachusetts, *Trask v. Boston & M. R. Co.* 219 Mass. 410, 106 N. E. 1022, the same principle was, on authority of *Gage v. Boston & M. R. Co.*, cited above, applied to facts similar to the case at bar, but where it was not shown that the automobile could have been stopped after the driver thereof saw the train standing across the highway and before striking it. In the *Trask Case* the speed of the machine was from 20 to 25 miles per hour; it could have been stopped within 40 or 50 feet; the headlights shone 100 feet ahead; and the train was not seen by the driver until he was within 40 feet of the train. It was held by the court that the railroad company was not negligent in not giving warning by lights, or otherwise, of the presence of the train across the highway, and said: "In order to charge the defendant with negligence it must be found that its employees, in the exercise of reasonable care, would have known that, on account of the darkness, the cars upon the crossing were such an obstruction that people traveling along the highway, in an automobile, at a reasonable rate of speed, properly equipped with lights, and carefully operated, would be liable to come in collision with them. We are of opinion that, upon the evidence, the conditions shown were not such as to warrant a finding that the defendant was negligent in failing to provide lights or a flagman, or to give other warning. The defendant or its servants, in the exercise of reasonable care, were justified in believing that travelers in automobiles, properly lighted, and driven at reasonable speed, would observe the cars upon the crossing in time to avoid coming in collision with them."

In *Gage v. Boston & M. R. Co. supra*, the following language was used, which is applicable to the facts here and to the case of *Trask v. Boston & M. R. Co. supra*, viz.: "The defendant's cars were rightfully occupying the crossing, and

the trainmen were exercising due care so far as the management of the train in approaching and passing over the crossing is concerned. The plaintiffs were not injured by being run into by the defendant's locomotive, but by running into the defendant's freight car as it was slowly passing over the crossing. They were not injured by any mismanagement of the train. If it is conceded that the trainmen were chargeable with knowledge that automobiles were frequently driven over the crossing in the evening, were they also chargeable with knowledge that they were liable to be driven at such a rate of speed that they could not be stopped before reaching the crossing after the cars upon it became visible? Suppose, instead of the place being the intersection of a highway and the railroad, it had been the crossing of two highways, and the plaintiffs had run into the side of a load of logs which were being transported over the crossing; the driver of the logging team would have the same duty to exercise care for the benefit of the plaintiffs that the trainmen had, and the care he would be bound to exercise would be commensurate with the apparent danger to travelers on the other highway caused by his occupation of the crossing with a heavily loaded team. If the driver of the approaching automobile could see the obstruction in time to avoid colliding with it, reasonable men could not find that it was the duty of the driver of the team to have a lighted lantern on the side of his load toward the automobile, as a warning that the crossing was occupied, or to use some other extraordinary precaution to convey that information. In deciding what, if anything, he ought to do, he would be justified in assuming that the approaching traveler would not unnecessarily run into his load of logs."

As argued by counsel for the plaintiff in error, other cases elsewhere have gone further than this.

In 1909 the Wisconsin supreme court, in *Lauson v. Fond du Lac*, 141 Wis. 57, 25 L.R.A. (N.S.) 40, 135 Am. St. Rep. 30, 123 N. W. 629, adopted a rule further defining the duties of drivers of automobiles. There it was held that the driver of an automobile traveling on a dark and rainy night over a straight stretch of strange country road was not exercising ordinary care when he drove his machine at such a rate of speed that he was unable to stop it within a distance that is within the clear range of his vision; or, stated in another way, he was not using ordinary care if he could see objects but 10 feet ahead, and his speed was such that he could not stop within that distance. The words of the court are these: "It seems to us, and we decide, that the driver of an automobile, circumstanced as was the driver of the car in which the plaintiff was riding, and operating it under such conditions as he operated his machine on the night of the accident, is not exercising ordinary care if he is driving the car at such a rate of speed that he cannot bring it to a standstill within the distance that he can plainly see objects or obstructions ahead of him. If his light be such that he can see objects for only a distance of 10 feet, then he should so regulate his speed as to be able to stop his machine within that distance, and if he fails to do so, and an accident results from such failure, no recovery can be had. This, it seems to us, is the minimum degree of care that should be required. Circumstances might arise where it would be reckless to drive at such a rate of speed, or even at a rate approximating it. We do not ground this rule on the fact that we have a statute requiring automobiles to carry reasonably bright lights while being operated during the hours of darkness. Independent of any statute, and considering the character of these machines, we hold it would be negligent operation to run them without sufficient lights to enable

the driver to see objects ahead of him in time to avoid them."

This case was approved and followed in *West Constr. Co. v. White* (1914) 130 Tenn. 520, 172 S. W. 301; *Knoxville R. & Light Co. v. Vangilder* (1915) 132 Tenn. 487, L.R.A.1916A, 1111, 178 S. W. 1117, 10 N. C. C. A. 820; *Pietsch v. McCarthy*, 159 Wis. 251, 150 N. W. 483; *Raymond v. Sauk County*, 167 Wis. 125, L.R.A.1918F, 425, 166 N. W. 29; *Fisher v. O'Brien* (1917) 99 Kan. 621, L.R.A.1917F, 610, 162 Pac. 317, 15 N. C. C. A. 350; *Solomon v. Duncan*, 194 Mo. App. 517, in Missouri court of appeals (1916) 185 S. W. 1141. But in Iowa the court in *Kendall v. Des Moines*, 183 Iowa, 866, 167 N. W. 684, refused to follow the decisions in Wisconsin and Tennessee. So, also, the decision in *Corcoran v. New York*, 188 N. Y. 131, 80 N. E. 660, may not be in accord with the Wisconsin and Tennessee cases, but the facts in this last-mentioned case are peculiar, and the case does not throw much light on the question before this court.

But in order to rightly decide the pending case, it is not necessary to adopt as broad a rule as that laid down in the case of *Lauson v. Fond du Lac*, supra, for there is in this case no evidence showing negligence on the part of the defendant. The trainmen of the defendant had a right to assume that a reasonably careful person driving an automom-

bile on that highway at that time would adopt such lights and rate of speed as that he could and would bring his automobile to a standstill within the distance that he could plainly see the train of the defendant, and so avoid running his machine into it, and therefore these employees of the defendant company were not negligent in failing to give warning by lights, or otherwise, of the presence of the train as an obstruction to the highway.

It, therefore, follows that if the defendant was not negligent, it cannot be held liable for the injuries to either the driver or his guest in his private machine, whether the driver was careful or negligent. *Gage v. Boston & M. R. Co.* 77 N. H. 289, L.R.A.1915A, 363, 90 Atl. 855.

Inasmuch as the court below should have instructed the jury to render a verdict for the defendant below, for the reasons here stated, it is unnecessary to consider the other assignments of error.

An order will be made reversing the judgment in the court below, and directing that a judgment be entered for the defendant below, plaintiff in error, with costs in both courts.

—negligence in obstructing crossing—absence of warning.

Highway—blocking—freedom from negligence—liability for injury.

ANNOTATION.

Liability of railroad for injury due to road vehicle running into train or car standing on highway crossing.

I. Ground of liability, 901.

II. What amounts to negligence:

a. Generally, 902.

b. Duty to warn of presence of cars, 902.

I. Ground of liability.

The liability of a railroad company for injury resulting from the collision of a road vehicle with a car or train

II.—continued.

c. Violation of statute or ordinance, 903.

III. Contributory negligence, 903.

a. Violation of statute or ordinance, 904.

standing on a highway crossing is generally predicated upon negligence. *PHILADELPHIA & R. R. Co. v. DILLON* (reported herewith) ante, 894; *Farmer*

v. New York, N. H. & H. R. Co. (1914) 217 Mass. 158, 104 N. E. 492; Trask v. Boston & M. R. Co. (1914) 219 Mass. 410, 106 N. E. 1022; McGlauffin v. Boston & M. R. Co. (1918) 230 Mass. 431, L.R.A.1918E, 790, 119 N. E. 955; Prescott v. Hines (1920) 114 S. C. 262, 103 S. E. 543; Gilman v. Central Vermont R. Co. (1919) 93 Vt. 340, — A.L.R. —, 107 Atl. 122; Allison v. Chicago, M. & St. P. R. Co. (1915) 83 Wash. 591, 145 Pac. 608; Depow v. Chicago & N. W. R. Co. (1912) 151 Wis. 109, 138 N. W. 42.

In *Trask v. Boston & M. R. Co.* (1914) 219 Mass. 410, 106 N. E. 1022, one of the counts of the petition charged the defendant with creating a nuisance, but this was predicated upon "negligently" permitting its cars to remain in the highway. The court said that this count added nothing to the count which alleged that defendant negligently permitted one of its cars to remain upon the highway. There was another count in the *Trask Case* which charged that the defendant negligently permitted one of its cars to remain on the highway, thus rendering it unsafe and defective; but the court said that there could be no recovery on that count under *Rev. Laws*, chap. 51, § 18, if for no other reason, because there was no allegation or proof that the required statutory notice was given. The court stated that it did not mean to intimate that the railroad company would be liable as for a defect in the highway, had such notice been proved.

II. What amounts to negligence.

a. Generally.

It is not in itself negligence for a railroad company to allow a train of cars to remain a reasonable or lawful length of time across a highway. *PHILADELPHIA & R. R. Co. v. DILLON* (reported herewith) ante, 894.

And a railroad company is not liable for damages to an automobile from running into a train on a highway crossing the railroad at the bottom of a steep hill, where the driver was unable to prevent his car from striking the train because of the greasy condition of the road, for which the railroad

company was not responsible, and of which its trainmen had neither actual nor constructive notice, since the accident happened through no fault of the defendant, but was the result of an unusual condition, unknown to its servants, which intervened and changed the plaintiff's situation from one of safety to one of danger. *Gilman v. Central Vermont R. Co.* (1919) 93 Vt. 340, — A.L.R. —, 107 Atl. 122.

In *Depow v. Chicago & N. W. R. Co.* (1912) 151 Wis. 109, 138 N. W. 42, where a judgment in favor of one who, at night, and at a time when the electric lights were out by unavoidable accident, drove his horses against the side of a train of flat cars standing on a railroad crossing, was regarded as excessive, the appellate court, instead of following the usual practice of naming a sum which the plaintiff might accept and terminate the litigation, remanded the cause for a new trial on the merits, because of the uncertainty and insufficiency of the evidence tending to establish the defendant's negligence.

A case analogous to the question annotated is that of *Pittsburgh, C. & St. L. R. Co. v. Sponier* (1882) 85 Ind. 165, which affirms a judgment in favor of one injured when the wagon in which she was riding after dark collided with a hand car negligently left by the defendant railway company's employees on a bridge over a ditch within the limits of the railroad right of way, which bridge was a part of a public highway crossing the railroad.

b. Duty to warn of presence of cars.

The failure of a railroad company to warn travelers approaching upon the highway, of the presence of cars standing upon the crossing, either by lights or other warning signals, does not of itself prove negligence on the part of the company as to one injured by running into the standing cars. *PHILADELPHIA & R. R. Co. v. DILLON* (reported herewith) ante, 894.

And a railroad company is not negligent in failing to station a man with a lantern at a highway crossing to give warning that it is obstructed by a standing train, where the situation

is such that the trainmen are amply justified in acting upon the belief that travelers in automobiles properly lighted, and driving at reasonable speed, would observe the cars upon the crossing in time to avoid a collision. *Gilman v. Central Vermont R. Co.* (1919) 93 Vt. 340, — A.L.R. —, 107 Atl. 122. In this case it was held that a verdict should have been directed for the defendant.

Trainmen have the right to assume that a reasonably careful man driving at night an automobile on a highway crossed by a railroad will use such lights and adopt such a rate of speed as that he can bring his machine to a standstill within the distance that he can plainly see by the lights on his car a railroad box car 12 feet high standing on the crossing, and completely obstructing his passage along a straight, unobstructed highway, and therefore they are not negligent in failing to give warning by lights, or otherwise, of the presence of the train as an obstruction to the highway. *PHILADELPHIA & R. R. Co. v. DILLON* (reported herewith) ante, 894.

Negligence was held, in *Trask v. Boston & M. R. Co.* (1914) 219 Mass. 410, 106 N. E. 1022, not attributable to a railroad company which failed to warn travelers, either by bell, whistle, signals, or through the presence of a brakeman or flagman, of the presence upon a crossing of freight cars, with which the automobile in which such travelers were riding collided, where the cars were standing upon a spur track infrequently used, at a crossing 160 feet from an arc light upon a highway which, at that point, runs in a straight line for several hundred feet, and the accident occurred at 1 o'clock in the morning, when it could not reasonably have been anticipated that there would be a great amount of travel upon the highway.

A railroad company is not liable for injury to the occupants of an automobile which collides with a train standing on a blind crossing, because a gong installed to announce the approach of trains to the crossing was not ringing. *McGlauffin v. Boston & M. R. Co.* (1918) 230 Mass. 431, L.R.A. 1918E, 790, 119 N. E. 955.

But it was held in *Prescott v. Hines* (1920) 114 S. C. 262, 103 S. E. 543, that actionable negligence on the part of the defendant could reasonably be inferred by the jury, where there was evidence that the train was standing still, blocking one of the most traveled streets of the city, that the cars had no light of any kind upon them or near them, or any guard or watchman to give warning, and that, on the night of the accident, there was a fog or smoke that made the place where the cars were standing dark, and obscured them.

c. Violation of statute or ordinance.

In *Gilman v. Central Vermont R. Co.* (1919) 93 Vt. 340, — A.L.R. —, 107 Atl. 122, where the damage to the plaintiff's automobile was claimed to have been occasioned by the train starting just as the automobile struck it, it was held that since concededly the train was moving, or on the point of moving, at the time the automobile ran into it, the violation by the railroad company of a statute prohibiting the occupation of a crossing by a train for more than five minutes was not, under such circumstances, evidence of negligence, for it was only a condition, and not the proximate cause, of the accident.

And in *McGlauffin v. Boston & M. R. Co.* (Mass.) supra, where the only negligence on the part of the defendant relied on was the failure to ring of the electric gong which had been voluntarily installed by the railroad company at the crossing, the court said: "Even if this appliance were maintained by the defendant because required to do so under the authority of the statute, its purpose was to protect travelers on the highway from the danger of approaching trains, and not to warn the public against cars and engines which were standing still. A plaintiff cannot recover for the violation of a statute, unless there is a causal connection between his injury and the condition to which the statute applies."

III. Contributory negligence.

Where the driver of an automobile does not stop it before running into

a train of cars standing on a crossing, at night, when it is shown that, considering his rate of speed, the illumination made by his lights, and the mechanism of the car, he could, after seeing the obstruction, have stopped the automobile before striking the train, he is guilty of such contributory negligence as will bar his right to recover for damages. *PHILADELPHIA & R. R. Co. v. DILLON* (reported herewith) ante, 894.

One who drives his automobile at night against a box car in the highway which he does not see until almost the instant of the impact is guilty of contributory negligence, as matter of law, where the automobile, with headlights enabling the driver to see objects within a radius of 100 feet, was traveling 15 miles an hour, a rate of speed which permitted it being stopped within 15 feet, and the box car was being pushed across the highway at a speed of about 4 miles an hour, and was practically at a standstill when the automobile struck it, approximately 8 feet from the front end thereof. *Allison v. Chicago, M. & St. P. R. Co.* (1915) 83 Wash. 591, 145 Pac. 608.

And one who, on a stormy night, drives his automobile with the side

curtains down and the windshield up, upon a railroad grade crossing with which he is familiar, without slackening speed or taking any notice of the path before him, fails to exercise reasonable care, and is therefore precluded from recovering for damage to his automobile, due to a collision with a flat freight car standing partially within the roadway. *Farmer v. New York, N. H. & H. R. Co.* (1914) 217 Mass. 158, 104 N. E. 492. And it was stated in this case that the fact that he did not hear the crossing gong ring did not relieve him from taking ordinary precautions for his own safety.

a. Violation of statute or ordinance.

The statutory prohibition, under penalty of a fine, of the operation of an unregistered automobile upon a public highway, does not preclude one driving such an automobile from recovering damages for an injury to himself or his automobile from a collision with a freight train standing on a crossing, where his illegal act in no way contributed to the accident. *Gilman v. Central Vermont R. Co.* (1919) 93 Vt. 340, — A.L.R. —, 107 Atl. 122.

G. V. I.

STATE OF IOWA

v.

EARLE PRENTICE, Appt.

Iowa Supreme Court — June 21, 1921.

(— Iowa, —, 183 N. W. 411.)

Witness — impeachment — drug habit.

1. Evidence that a witness was addicted to a drug habit is admissible upon the question of the reliability of the testimony given by him.

[See note on this question beginning on page 912.]

Evidence — circumstantial — absence of consent to larceny.

2. Absence of the owner's consent to a taking, alleged to have been larceny, may be shown by circumstantial evidence.

[See 17 R. C. L. 64.]

Appeal — rejection of evidence — nonprejudicial error.

3. Rejection of evidence in a prose-

cution for larceny of a car, after accused had testified as to his transactions with a certain person and been recalled in rebuttal, as to conversations with such person, and under whose direction he visited his house, the purpose of which evidence is not shown, is not prejudicial error.

APPEAL by defendant from a judgment of the District Court for Lucas County (Vermillion, J.) convicting him of larceny of an automobile and overruling his motion for a new trial. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. O. A. Stafford, M. L. Temple, and W. W. Bulman, for appellant:

Defendant is not bound to prove the truth of his explanation; the presumption arising from recent possession is removed if the explanation leaves the matter in doubt.

State v. Bartlett, 128 Iowa, 518, 105 N. W. 59; *State v. Miner*, 107 Iowa, 656, 78 N. W. 679; *State v. Manley*, 74 Iowa, 561, 38 N. W. 415; *State v. Kirpatrick*, 72 Iowa, 500, 34 N. W. 301, 7 Am. Crim. Rep. 334; *State v. Peterson*, 67 Iowa, 564, 25 N. W. 780; *State v. Hopkins*, 65 Iowa, 240, 21 N. W. 585; *State v. Richart*, 57 Iowa, 245, 10 N. W. 657; *State v. Emerson*, 48 Iowa, 172; 25 Cyc. 137.

Where the evidence establishes similarity merely, and there is no other evidence of identification, a conviction cannot be supported.

Bishop v. People, 194 Ill. 365, 62 N. E. 785, 14 Am. Crim. Rep. 548.

The verdict cannot stand, because the evidence was insufficient to establish the corpus delicti.

State v. Osborne, 28 Iowa, 9; 25 Cyc. 120, 132; 12 Am. & Eng. Enc. Law, 838; *Clayton v. State*, 15 Tex. App. 348; *Love v. State*, 15 Tex. App. 563; *Schultz v. State*, 20 Tex. App. 308; 1 McClain, Crim. Law, § 616; *State v. Taylor*, 25 Iowa, 273; *State v. Osborne*, 45 Iowa, 425; *Jones v. State*, 30 Miss. 653, 64 Am. Dec. 175; *State v. Keeler*, 28 Iowa, 551; *State v. Westcott*, 130 Iowa, 1, 104 N. W. 341; 16 C. J. 771.

The mere fact that a witness has taken morphine is immaterial as affecting his credibility, and his denial of the fact does not present a ground for impeachment.

Botkin v. Cassady, 106 Iowa, 334, 76 N. W. 722; *Livingston v. Heck*, 122 Iowa, 74, 94 N. W. 1098; *State v. Roscum*, 119 Iowa, 330, 93 N. W. 295; 40 Cyc. 2569, 2570.

Messrs. Benjamin J. Gibson, Attorney General, and B. J. Flick, Assistant Attorney General, for the State:

The corpus delicti may be proved by circumstantial evidence. The question is for the jury on the whole record, the only requirement being that the jury must be satisfied that a crime has been committed beyond a reasonable doubt.

State v. House, 108 Iowa, 68, 78 N.

W. 859; *State v. Millmeier*, 102 Iowa, 692, 72 N. W. 275; *State v. Keeler*, 28 Iowa, 551; *State v. Westcott*, 130 Iowa, 1, 104 N. W. 341.

There will be no interference with the verdict of the jury on the ground of insufficient evidence, unless the verdict is clearly and manifestly against the evidence and the supreme court is well satisfied of the insufficiency of the evidence to convince the judgment, reason, and conscience of the jurors.

State v. Walters, 178 Iowa, 1108, 160 N. W. 821; *State v. Quinn*, 47 Iowa, 368; *State v. Hall*, 168 Iowa, 221, 150 N. W. 97.

Recent possession of stolen property is presumptive evidence of guilt, and, unless satisfactorily explained, justifies a verdict of guilty.

State v. Brady, 121 Iowa, 561, 12 L.R.A. (N.S.) 199, 97 N. W. 62; *State v. Bricker*, 178 Iowa, 297, 159 N. W. 873; *State v. Kimes*, 145 Iowa, 346, 124 N. W. 164; *State v. Rebbeke*, — Iowa, —, 178 N. W. 364.

Evidence tending to show that a witness at a given time was under the influence of morphine is admissible as bearing upon the credibility of such witness.

State v. Dillman, 183 Iowa, 1147, 168 N. W. 206; *Potter v. Browne*, 197 N. Y. 288, 90 N. E. 812; *People v. Webster*, 139 N. Y. 73, 34 N. E. 730; *State v. Fong Loon*, 29 Idaho, 248, L.R.A. 1916F, 1198, 158 Pac. 233; 40 Cyc. 2579, note 49.

The supreme court will not ordinarily reverse a case for error relative to the testimony of any particular witness, where the facts sought to be proven or established are fully shown by the testimony of other witnesses.

State v. Woodson, 41 Iowa, 425; *Hoadley v. Hammond*, 63 Iowa, 599, 19 N. W. 794; *State v. Pratt*, 40 Iowa, 631; *State v. McPherson*, 114 Iowa, 501, 87 N. W. 421.

A case will not be reversed because of the improper admission of evidence, where the result could not have been different if such evidence had been excluded. The error, if any, was without prejudice, and cannot be made a ground for reversal.

State v. McPherson, 114 Iowa, 492,

87 N. W. 421; Re Wiltsey, 135 Iowa, 485, 109 N. W. 776.

Mr. C. F. Wennerstrum also for the State.

Preston, J., delivered the opinion of the court:

The trial in the district court was at the October, 1919, term. The errors relied upon for a reversal are that the evidence is not sufficient to sustain the verdict of the jury, and particularly it is claimed that the corpus delicti has not been established, in that nonconsent of the owner is not shown; ruling out evidence offered by defendant; and admitting evidence as to the use of drugs by one of defendant's witnesses.

1. If the evidence of the defendant is true, and a verity, and the evidence offered by the state in contradiction is ignored, then the verdict should have been for the defendant. The case is argued as though this was the situation, and as though this court was the jury, and the triers of fact questions. The defendant is corroborated at different points by his wife, mother, stepfather, whose name is Dr. Brittell, and others. They are contradicted by evidence for the state, and by the circumstances. The car taken was a Buick model D-55, and was the property of Tom Hooper, of Chariton, Iowa. It was taken from the streets of Chariton in the evening of September 8, 1919, and, according to the testimony of the state, it must have been taken between the hours of about 8:50 and 10 or 10:30 o'clock. If it was taken by the defendant, then, according to his and other testimony, it must have been taken between about 9:15 and 9:30 o'clock. The defendant and his wife and mother were at the theater. He says he got there about 8:15 or 8:30 o'clock, and left the theater about 9:15, because his wife was sick, and needed air. Another witness says that he saw defendant come in about 9 o'clock, and that he sat there about fifteen minutes, and he and his wife went out. The identity of the car taken, and that it

was the one in the possession of the defendant a few minutes after the taking, is abundantly established. It is identified by the Miley garage people and others, where defendant had it to secure gasoline shortly after the taking. Defendant, as a witness, admits that he was at this garage at about the time stated, and purchased gasoline for the car, and that he was driving it. He says, however, that if it was Hooper's car he did not know it. As said, the identity of the car in possession of defendant is shown. We shall not go into the details of the evidence on the question of identification. Defendant's explanation of such possession is not entirely reasonable and convincing. It was such as to make it a question for the jury whether he had properly explained his possession. The evidence in regard to his explanation will be referred to later.

On the evening in question Mr. Hooper, the owner of the car, had driven it and parked it near the Lincoln theater. He entered the theater about 8:50 P. M. After attending the performance, he returned to the place where he had parked the car, at about 10:15 P. M. He says: "I discovered the car was gone; I never have seen the car since; I endeavored to locate the car; have never gained any information as to where the car is; I made one trip to Des Moines and two to Centerville; I got a tip that the car might be there some three weeks or a month after; went to Centerville at the suggestion of defendant's attorney; went around to each of the garages there; its fair market value was \$1,250."

He described the car, the kind and condition of the tires; that the car was newly painted, clean, and in good shape, and so on. A car with similar tires was traced about 6 miles southwest from Chariton, but the witness testifying to this says that he could not say that it was the Hooper car. There is evidence that there were two or three other cars of this same make and model in

Chariton and vicinity. The defendant lived in Des Moines, where he had been night clerk for a short time at the Lloyd hotel. He formerly lived at Chariton, where his mother lives. He had been subpoenaed as a witness to appear at 9 o'clock A. M. of the 8th, but the case had been dismissed. He intended to return to Des Moines on the afternoon train, but missed the train. He and his wife drove to Des Moines that night in a car, which the state claims is the Hooper car. Defendant says he was with two men. There is evidence that a few days previously defendant had attempted to get a man by the name of Hoover, living in Des Moines, to assist him in stealing an automobile, saying that a Buick car would be the easiest. Hoover is corroborated to some extent in this by his wife. Defendant testifies that when he and the other three returned from Chariton to Des Moines, and when defendant and his wife left the car at Sixth and Walnut, at about 1:30 o'clock in the morning, he saw Hoover there. This is denied by Hoover, who testifies that he saw defendant the morning of the 9th, and that defendant said to him that, if anyone asked if he (Hoover) had seen defendant, to tell them "Yes," about 1:30 the night before.

Defendant claims that the two strange men who let him and his wife out in Des Moines, turned north, in a direction that would take them out of Des Moines, to the north. Defendant says that, after he and his wife got out of the car, they had to wait until 2 o'clock for an owl car, and they looked in the shop windows until time for the car; lived about twelve or sixteen blocks from the point they got out. Defendant is twenty-two years of age. He was married in September, 1918, divorced, and married again in July, 1919. After testifying to some of the matters before referred to, he testifies in regard to his different residences and occupations; bell boy in Chicago, and another place in Illinois; his coming from

Kansas, being in San Francisco, the Philippines; his being called in the war service, but did not enter; was in the draft list in Chicago; had resided there; was there about a week and a half, or three weeks; and so on. Later he says he was in the service; went in as a cavalryman, but was transferred to the hospital corps on account of his health; was in there two years.

He says he met the two men he claims to have ridden from Chariton to Des Moines with, at the State Fair in Des Moines; that they gave their names as Edwards and Connor; doesn't know Connor's first name; heard them mention St. Paul, but they didn't say they lived there; saw them in the pool hall playing pool for money, at the back table—play greenhorns for money; defendant says he played with them twice; never met them outside the pool hall; when he met them, was with them for a short time; perhaps they were around Des Moines just a few weeks during the State Fair of 1919; he met these two men in Chariton about 7 o'clock in the evening of September 8th; they said they had been to a soldiers' reunion, but did not say where; they asked defendant what he was doing in Chariton, and when he was going back; they asked him if he would care to drive back with them; that his wife could go with them; defendant arranged to meet them about 9:30 o'clock; they inquired about a family of Taylors; that they knew him, and he had been to the State Fair; defendant told them he knew some Taylors, but they were not the ones; defendant and his wife arranged to go with them. They say it was talked over in the presence of defendant's mother, at her home. He says that, after leaving the theater about 9:15, he and his wife were walking around to get the air, and another reason was they thought they might possibly meet those two men that early. The second time around the square they met the men, who asked if they were ready. He introduced his wife to

them, and she said she was ready to go, and he testifies they got in the car; it was probably a quarter to 10; he and his wife got in the back seat, the other two in the front seat; it was a Buick car; there were the usual number of people on the street, but he does not recollect of seeing anyone he knew; the two men got mixed up in directions, and with the railroad track, and defendant explained to them that the track there was on an abandoned spur; they talked of needing gas, that they had forgotten to get it. The evidence of Hooper is that there were but two or three gallons of gasoline in the car when he left it; defendant directed the men to a garage, he says, but they were not selling gasoline there, and he directed them to another.

The men then said they wanted to send a message and get something to eat, and asked defendant if he could get the gas while they were doing that; he showed them where the depot was, and they drove there, and the two men got out; defendant and his wife then got in the front seat; did not know anybody around; there is a lunch counter at the depot, and both the telephone and telegraph station. They told defendant to get 10 gallons of gasoline, and handed his wife a \$10 bill; the two men got out at the depot, and defendant drove the car to Mileys, and got the gasoline, paying \$3 therefor; was at the garage about fifteen minutes; saw nothing suspicious about the actions of the men; in going to Mileys he thought it sounded like a tire was down, and he inspected it and found it all right; he was well acquainted with the garage people, and he is well known in Chariton; noticed one of the tires had a torn place in it, not worn; it was standing up all right, very little of the rubber torn; it was back in place. Hooper had testified that there was a torn place in one of the tires on his car. There were men around there, but he paid no attention to who they were, except the man who waited on him, whom he knew, and who knew defendant; went around

the block to go back to the depot, because he didn't want to turn in the street; went to the depot, and the men were waiting; they got in the front seat and defendant and his wife in the back; then drove around the end of the levee and onto the road—the road that leads to Des Moines; they took the middle road; went through towns; got off the road once; went a short distance, and they backed up; they had a spotlight, and went up the road and flashed it on the posts with the trail sign, the Capitol trail; has not seen the two men since; tried to locate them, tried to help Hooper recover his car; it must have been nearly 10 o'clock when we were at the depot; don't know whether they sent a telegram or not; they said they were going to get a lunch and send a wire; I suppose we were in the city about twenty minutes after getting in the auto; when he went to the depot for them he says there was no delay to speak of, perhaps two or three minutes; denies that he went to Hoover's house the morning of September 9th; denies the conversation as testified to by Hoover the morning of the 9th, and also denies the prior conversation, in regard to stealing the car.

This is the substance of defendant's story, although the different circumstances were gone into with much detail. Defendant's wife gave similar testimony as to the trip. His mother testified as to the conversation earlier in the evening; that they were going to Des Moines in a car, and so on. The manager of the telephone company at Chariton shows that there was a telephone call at 9:50, calling Russell. The call was from the pay station at the Burlington depot, for No. 100, at Russell. As near as he could make out from the ticket, the 100 resembles 110 in appearance. There is no showing as to who the party was making this call. Though it is about the time defendant says he let the two men out at the depot, the call was made by someone, whoever it was, a few minutes before

the time defendant estimates they got to the depot. The telephone operator at Russell says they do not have a phone No. 100 in Russell. They do have a No. 110, which is Mrs. Taylor. Another witness at Russell says there was a Mrs. Taylor, a widow, living on a farm, who had a grown son, who had been in Canada; she and her son were then in the state of Washington; went about September 20th.

Another lady living at Osceola testifies that she was in Chariton September 8th; visited and stayed with defendant's mother before the trial; intended to leave Chariton for home at 6 P. M.; missed that train; stayed to go on No. 5.

"I learned at about 9:30 P. M. the time that No. 5 would go; I left on No. 5 something like 3 in the morning; I called at the depot that night; the purpose of my visit to the depot about 9:30 was to find out what time No. 5 left; I went to the depot to find out about the time of No. 5; that was about 9:30, I believe; I wanted to know before I went to bed, so they would know what time to call me exactly; I stayed at Mrs. Pugh's until the morning train; while I was there, saw a car drive up; they were two men and Earle Prentice and his wife; did not know the other men; did not speak to them, but recognized who he was; I was after medicine for my brother, who had been sick for a good many years; in bed about six months; Dr. Brittell was his doctor; had medicine all the time; when I saw defendant at the depot he was getting out of the car; couldn't say what kind of a car it was, whether a Ford or a Pierce Arrow; don't think it was a Ford; couldn't describe the two other men."

This is the substance of her testimony, though she went into considerable detail both in direct and cross-examination. It will be observed that witness fixes the time she was at the depot at about 9:30, and the jury may have concluded that it was before 9:30, since she was there for the purpose of in-

quiring about the time of the 9:30 train. If this be true, it was before defendant went to the depot, according to his testimony, and about the time, or perhaps before, the car was taken. The witness was somewhat evasive in her answers when interrogated in regard to her use of morphine or opiates; denied that she used the drug, or that she had purchased any of doctors. No reason is given why she did not get medicine for her brother at Osceola, as well as Chariton. There is other evidence tending to show that she was addicted to the habit. This evidence will be referred to more in detail when we come to consider the error assigned on the admission of such evidence. The testimony shows the effects of the use of morphine as to vision, and so on. The state claims that this is important, since she claims to have seen the defendant, and that her testimony is weakened or destroyed by the evidence on this subject. At any rate, the weight of her testimony was for the jury.

Two other witnesses testify that they were at the depot at about 10:20 or 10:25 P. M. for the 11 o'clock train, and that they did not see defendant and the others at the depot, or see such a transaction as testified to by defendant and the witness last referred to. The jury may have concluded that these two witnesses were there at a time when, according to defendant's testimony, he would have been more likely to be at the depot, if he was there. The story about the two strange men may be a myth, or they may have been confederates. We are not called upon to pass upon this question, since it was the province of the jury to pass upon the question of defendant's explanation of his possession of the recently stolen car. Some of the circumstances are unusual, and out of the ordinary, but we shall not take the time or space now to repeat the circumstances that indicate to us that such is the fact. From the evidence before set out, we are of opinion that the evi-

dence was such as to make a jury question on that point, and as to the guilt or innocence of defendant. The jury had all the evidence, of which the foregoing is a condensed statement. The state cites on the question as to the sufficiency of the evidence: *State v. Rebbeke*, — Iowa, —, 178 N. W. 364; *State v. Kimes*, 145 Iowa, 346, 348, 124 N. W. 164; *State v. Hayward*, 153 Iowa, 265, 267, 133 N. W. 667.

2. It is contended by appellant that it was not shown in the evidence that the owner of the car did not consent to its being taken. It is contended by appellant that this is necessary, and we understand the state to so concede, but they claim that the fact may be proven by the circumstances. The owner was on the stand, and could have readily testified to that had he been asked. There is no pretense anywhere in the record that defendant or anyone else had the consent of the owner to take it. In fact, defendant makes some claim that the car was not identified, and claims that he did not take the car at all, either with or without the consent of the owner. The place from which it was taken, and the time of night, the fact that it was taken secretly, while the owner was in the theater, the owner's conduct, afterwards, in immediately commencing a search for the car; the fact that the car was never heard of, and the other circumstances in the record,—are sufficient

Evidence—
circumstantial
—absence of
consent to
larceny.

to sustain a finding that it was not with the consent of the owner. The authorities hold that this may be proven by circumstantial evidence.

3. We have heretofore briefly referred to the matter of the use of morphine by the lady who claims to have seen defendant at the depot. We do not understand appellant to claim that this was not proper cross-examination of the witness, as bearing upon her credibility, but his contention is that it was a collateral matter, and that the state is bound

by her answers, and may not impeach her thereon. To this general rule they cite *Livingston v. Heck*, 122 Iowa, 74, 94 N. W. 1098; *State v. Roscum*, 119 Iowa, 330, 93 N. W. 295; 40 Cyc. 2562, 2569, 2570. See also 28 R. C. L. 207, 613.

Appellant also cites *Botkin v. Cassady*, 106 Iowa, 334, 336, 76 N. W. 722, where it was held that, under the circumstances of that case, evidence of the use of morphine or opiates was improperly admitted, but in that case there was no evidence as to the effect of such use on the mind, memory, etc. Such is not the situation in the instant case. The state contends that under the record in this case it was not a matter of collateral evidence or impeachment, but that the evidence was properly admitted as independent evidence.

Without going into the evidence too much in detail, Dr. Hougherty testified, over objection, that the lady referred to applied to him in his capacity as druggist, and in connection with his drug business, for morphine, and that the last time she so applied was February 21, 1919. He also testified to the effects, symptoms, and characteristics noticeable in the user of morphine or an opiate. The color of the face is characteristic; as to the poison of morphine, nervousness is another prominent factor—the nervousness and the change, the general change, in a person's characteristics; that the eyes are not especially affected, except during a period of excitement following an administration of the drug. Mrs. Atha, a cousin of the witness referred to, and who had known her for fifteen or sixteen years, when asked if she had seen the person use a white tablet, answered that she had, but couldn't swear what it was, but testified that she had seen her dissolve those little white tablets, and use them with a hypodermic needle, and inject it in her skin; had seen her use that at different times in that way.

"I refuse to answer the purpose for which she was taking that medi-

cine, and who administered it; I know she had a couple of operations."

The evidence does not show that the witness was under the influence of an opiate, either at the time she testified, or at the precise time she claims to have seen defendant at the depot. But the evidence does tend to show that at about that time, or before, she was in the habit of using it. The evidence is, perhaps, not as strong as in *People v. Webster*, 139 N. Y. 73, 34 N. E. 730, 734, but in that case, under the evidence therein, it was held that such evidence was competent as independent evidence. Appellee also cites, in support of the ruling: 40 Cyc. 2575; *State v. Fong Loon*, 29 Idaho, 248, L.R.A.1916F, 1198, 158 Pac. 233; *State v. Dillman*, 183 Iowa, 1147, 168 N. W. 206; *Potter v. Browne*, 90 N. W. 912 [197 N. Y. 288, 90 N. E. 812]. We find no such case as the last one cited, and the *Dilman* Case does not quite reach the point. The cases are not in harmony on the question. It has been held that it may be shown that, at the time the facts sworn to occurred, the witness was intoxicated, and that this may be done not only by the evidence of another witness, but by cross-examination of the witness himself; and that it is unnecessary to lay a foundation for the introduction of proof of this character by first questioning the witness. *Bliss v. Beck*, 80 Neb. 290, 114 N. W. 162, 16 Ann. Cas. 366; notes in 16 Ann. Cas. 368, 369; Ann. Cas. 1918A, 642. In some courts the broad rule prevails that the habitual use by a witness of a drug or narcotic which tends to impair the mind, affect the memory, or lower character may be shown for the purpose of affecting credibility. *State v. Fong Loon*, supra; Ann. Cas. 1918A, 640, note. In 28 R. C. L. p. 617 (§ 206), it is said that any evidence going to show that the mind and memory of the witness are impaired by disease, or otherwise, and are in a feeble condition, is competent to discredit his testimony. *Alleman v. Stepp*, 35

Am. Rep. 288, and note, 52 Iowa, 626, 3 N. W. 636, and *Derwin v. Parsons*, 52 Mich. 425, 50 Am. Rep. 262, 18 N. W. 200, are cited in support of the text. In our case of *Alleman v. Stepp*, supra, the case was reversed because evidence was excluded tending to show that the mind of defendant, who had testified as a witness, was impaired. A number of cases are cited in the *Alleman* Case. Other courts take the view that, in order to discredit or weaken the testimony of a witness, it is not enough to show that the witness is in the habit of using opiates, but that the proof must go further, and show that the mind is impaired generally by its use, or that he was under the influence of the opiate at the time the transaction occurred, or the testimony taken. *State v. Gleim*, 17 Mont. 17, 31 L.R.A. 294, 52 Am. St. Rep. 655, 41 Pac. 998, 10 Am. Crim. Rep. 46; *State v. Schuman*, 89 Wash. 9, 153 Pac. 1084, Ann. Cas. 1918A, 633.

It has been held that the insanity of a witness may be shown. *State v. Pryor*, 74 Wash. 121, 46 L.R.A. (N.S.) 1028, 132 Pac. 874. It is not permissible, however, to compare the mind of the witness with the mind of others. *People v. Enright*, 256 Ill. 221, 99 N. E. 936, Ann. Cas. 1913E, 318; *Alleman v. Stepp*, supra; *Dundas v. Lansing*, 75 Mich. 499, 5 L.R.A. 143, 13 Am. St. Rep. 457, 42 N. W. 1011. We are of opinion that this evidence was ad-
missible and proper, Witness—
impeachment—
drug habit. to be considered by the jury for what it was worth.

4. The defendant, called in rebuttal, testified that he had a conversation with Hoover after September 8th. He was then asked:

Q. In that conversation with Hoover, who mentioned Centerville?

Q. State whether or not in that conversation—whether that conversation was before or after Hooper's car was said to have been taken?

Q. Under whose direction did you go to the house?

Q. What, if anything, did Hooper have to do with your going to that house?

These questions were objected to by the state as immaterial, and not surrebuttal. The objections were sustained. The purpose of this evidence is not apparent. No offer was made as to what the purpose was. We take it that it had reference to the efforts of defendant to assist Hooper in locating the car. The defendant had testified in regard to that in chief, and that since he was accused he had paid closer attention to Hoover, and to learn who his friends were; that he sent his wife to Centerville, as a result of his investigations of Hoover, to

see if they were possibly the people who drove the car; that he was at Hoover's residence three or four days after the night he returned from Chariton, and had a conversation with him. It seems to us the evidence was not surrebuttal, and that, in any event, its exclusion was not prejudicial.

**Appeal—
rejection of
evidence—
nonprejudicial
error.**

We discover no prejudicial error in the record, and the judgment is therefore affirmed.

Evans, Ch. J., and Weaver and De Graff, JJ., concur.

Petition for rehearing denied September 30, 1921.

ANNOTATION.

Use of drugs as affecting competency or credibility of witness.

As to impeachment of witness by expert evidence tending to show mental or moral defects, see annotation appended to *State v. Driver*, post, 932. The present annotation includes cases on the question whether expert evidence is admissible to show the effect of the use of drugs, for the purpose of affecting the competency or credibility of a witness.

Although the authorities on the question indicated in the above title are somewhat conflicting, the rule supported by the majority of the cases appears to be that, for the purpose of discrediting a witness, evidence is inadmissible to show that he is a user of opium, morphine, or similar drugs, or to show the effects of the use of such drugs, unless it is proven that the witness was under their influence at the time of the occurrences as to which he testifies, or at the time of the trial, or that his mind or memory or powers of observation were affected by the habit. See the following cases:

Florida.—*Eldridge v. State* (1891) 27 Fla. 162, 9 So. 448.

Georgia.—*McDowell v. Preston* (1858) 26 Ga. 528; *Gordon v. Gilmore* (1913) 141 Ga. 347, 80 S. E. 1007.

Indian Territory.—*Williams v. United States* (1904) 6 Ind. Terr. 1, 88 S. W. 334.

Iowa.—*Botkin v. Cassady* (1898) 106 Iowa, 334, 76 N. W. 722.

Minnesota.—*State v. King* (1903) 88 Minn. 175, 92 N. W. 965.

Montana.—*State v. Gleim* (1895) 17 Mont. 17, 31 L.R.A. 294, 52 Am. St. Rep. 655, 41 Pac. 998, 10 Am. Crim. Rep. 46.

Nebraska.—*Katleman v. State* (1919) 104 Neb. 62, 175 N. W. 671.

Washington.—*State v. Schuman* (1915) 89 Wash. 9, 153 Pac. 1084, Ann. Cas. 1918A, 633.

It was held in *McDowell v. Preston* (Ga.) supra, that a witness's testimony could not be discredited by showing through another witness that the former was in the habit of taking laudanum, unless it was first shown that such witness's mind was impaired by it, or that he was, at least, under the influence of it at the time he testified.

To a similar effect is *Gordon v. Gilmore* (Ga.) supra, where the rule was laid down that testimony of a witness, whose evidence was taken by interrogatories, that another witness was at that time "an habitual user of

morphine," was inadmissible, without showing that the mind of such witness was impaired by the habit, or that she was under the influence of the drug at the time when she testified, or when the facts occurred in regard to which she testified.

And the credibility of a witness, it was held in *State v. Gleim* (Mont.) *supra*, cannot be impeached by showing that she was addicted to the morphine habit, unless it is shown that she was under the influence of the drug at the time the event happened about which she testified, or that she was under its influence at the time she testified, or that her powers of recollection are impaired by the habitual or excessive use of the drug.

So, evidence as to the use of opium, it was held in *Eldridge v. State* (Fla.) *supra*, cannot be introduced to impair the credit of a witness, unless it is shown that the witness was under the influence of it when examined, or when the event in question occurred, or that his mind was impaired generally by the use of it. And in this case where a witness on cross-examination had denied that he was an habitual user of morphine, it was held that evidence offered in rebuttal to show by other persons that the witness was addicted to morphine was erroneously admitted, there being no testimony that he was under its influence either at the time of the trial or at the time of the event about which he testified, or that his mind was impaired generally by its use.

And the doctrine that evidence of the use of opium cannot be introduced to impair the credit of a witness, unless it is shown that the witness was under the influence of opium when examined, or that his powers of observation or recollection were affected by the habit, is approved also in *State v. Schuman* (Wash.) *supra*. And in this case, where it was not contended that the witness was under the influence of drugs at the time she testified, and there was no evidence that physicians, who were called as experts to prove that a person who is a user of cocaine loses the power to distinguish truth from

15 A.L.R.—58.

falsehood and that his word is unreliable, had examined the witness for the purpose of determining her mental state, it was held that testimony of the experts was properly excluded.

And in *State v. Schuman* (Wash.) *supra*, where the prosecuting witness, on cross-examination, denied that she used cocaine, morphine, or any other drugs, it was held that the defendant should not be permitted to introduce testimony of other witnesses to prove that the prosecuting witness used drugs, and that the witness had admitted that she was a user of cocaine. The court held that this evidence was inadmissible, since the rule applied that a cross-examining party is concluded by the answer which a witness makes to a question pertaining to a collateral matter, and since no proper foundation was laid for the impeaching questions, even if the matter was one permitting impeachment by independent evidence, as the prosecuting witness had not been asked whether she had made such an admission.

Also, in *Williams v. United States* (Ind. Terr.) *supra*, it was held not erroneous to refuse to permit a witness in a criminal case to testify that a certain witness for the government was "a coke fiend," and to exclude from the jury expert medical testimony to the effect that the excessive use of cocaine makes its user a liar and unreliable. The court, after quoting the doctrine that the habitual use of morphine may be shown, and, if proved, is a circumstance for the jury to consider in determining the mental condition of the "accused," said: "Hence it appears that the mental condition of the accused may be examined into, but not a witness; the jury are the judges of the credibility of the witnesses. 'And it has been held inadmissible, in order to attack veracity, to prove the bad character of a female witness for chastity, or to show she is a prostitute, . . . or to prove habits of intemperance, which do not affect the perceptive or narrative powers.' . . . Evidence of the use of opium cannot be introduced to impair cred-

it, unless it be shown that the witness was under the influence of opium when examined, or that his powers of observation or recollection were affected by the habit. . . . Hence the court committed no error in excluding this question."

So, the mere fact that a witness had taken morphine was held immaterial, and her denial of that fact not a ground for impeachment, in *Botkin v. Cassady* (1898) 106 Iowa, 334, 76 N. W. 722, *supra*, where there was no evidence as to the frequency or amount of morphine taken by the witness, nor whether it was taken on prescription of a physician or as a cure for some ailment, nor any evidence that the mind or memory of the witness had been affected by its use. In this case a witness for the defendant was asked on cross-examination as to whether she was "addicted to the use of morphine." The answer being in the negative, the plaintiff was called in rebuttal and permitted to testify that, while they were together, the defendant had taken morphine or opium every night. The admission of this evidence was held prejudicial error.

Other cases cited above seem to take even a stronger position against the admissibility of evidence of the use of drugs to impeach a witness.

Thus, it was held in *State v. King* (1903) 88 Minn. 175, 92 N. W. 965, *supra*, that evidence offered by the defendant to show that a witness called by the state was a confirmed user of opium, and had been addicted to its use for years, and further that the use of opium renders the user unreliable in his statements and prone to falsehood, was properly excluded. It was said: "We are of opinion that the court ruled correctly on this question. Whether the witness was a confirmed opium eater or not, or whether the indulgence renders the user unreliable and untruthful in his statements, was a collateral issue, which the court properly declined to try. The witness was before the court. His mental condition was obvious to both court and jury, and it was for them

to say whether he was in a condition of mind to understand and appreciate his testimony, whether he was fabricating, or whether his testimony was straightforward and unequivocally given. His appearance, demeanor, and the manner in which he gave his testimony, were sufficient to inform the jury of the condition of his mental faculties, and from which they could judge of his credibility."

And the rule above quoted was approved and applied in *Katleman v. State* (1919) 104 Neb. 62, 175 N. W. 671, *supra*, in which the court held that the opinion of an expert as to the effect of the use of a narcotic on the credibility of a witness was not admissible in evidence. In this case testimony was introduced tending to show that the witness was addicted to the use of morphine and other narcotics. Expert testimony was then offered to prove that the use of such drugs tends to render a person unreliable in his statements and generally untruthful. It was held that the rejection of this expert testimony was not erroneous.

And where a witness on cross-examination denied that he was in the habit of using morphine to excess, it was held in *Franklin v. Franklin* (1891) 90 Tenn. 44, 16 S. W. 557, a will-contest case, that evidence was incompetent that he had the morphine habit and carried its use to such excess as to impair his mind and affect his moral character. In this case, where the witness was accused of forgery of a will, it seems that this evidence, as well as that he was in the habit of using whisky to excess, was offered chiefly for the purpose of showing that he was capable of committing such a crime. But the court said that, if offered for the purpose of attacking his veracity, it was equally incompetent.

There are, however, several cases in which evidence as to the use of drugs by a witness, and as to its effect generally, has been held admissible, without apparently requiring proof of the other matters stated in the above rule.

Thus, it was held in the reported

case (*STATE v. PRENTICE*, ante, 904) that independent evidence was admissible to show that a witness, who testified for the defendant that she had seen him at a certain place on the night in question, was in the habit of using morphine, and that it has certain effects on the physical and mental condition of those who use it, although it was not shown that the witness was under the influence of an opiate, either at the time she testified or at the time of the occurrence to which her testimony referred. The testimony in this case, it will be observed, was by a druggist from whom the witness had purchased morphine, and a relative of the witness, who had seen her use it. The witness denied that she used the drug, or that she had purchased any; and it was unsuccessfully contended that this was a collateral matter, as to which the witness's answers on cross-examination were conclusive.

So, it was held in *Beland v. State* (1920) 86 Tex. Crim. Rep. 285, 217 S. W. 147, that in a criminal case a defendant may show that the prosecuting witness, on whose testimony the state relies almost entirely for a conviction, is an habitual user of cocaine, morphine, and opium, since the evidence is admissible as affecting the credibility of the witness and the weight of his testimony. The contention in this case, which was overruled, was that such testimony was inadmissible unless it was shown that the witness was under the influence of the drug at the time he testified. And in *State v. Fong Loon* (1916) 29 Idaho, 248, L.R.A.1916F, 1198, 158 Pac. 233, it was held that one acting as interpreter in taking the dying declaration of a foreigner, alleged to have been murdered, might, upon trial of the accused for homicide, be shown to be an habitual user of narcotic drugs, for the purpose of affecting his mental capacity correctly to interpret the questions propounded and answers given. In this case it was held that counsel should have been permitted to show, by cross-examination of the witness himself, his habitual use of opium and other narcotics, and fur-

ther to establish, by competent evidence, the effect of the habitual use of such narcotics upon the mental faculties of the witness. It was said that the habitual use of morphine, cocaine, and other like narcotics, which inevitably tend to impair the mind and destroy the memory and moral character of a witness, may be shown for the purpose of affecting his credibility or the weight that should be given to his testimony. And the court, in this connection, called attention to the distinction between admitting such evidence to discredit a witness and admitting it for the purpose of affecting his competency to testify at all.

If the offer was to show the excessive use of the drug, to such an extent as ordinarily would impair the mind and memory, the evidence has been held admissible, as has also been the case where the witness was shown to be constantly, or at the time of the occurrence in question, or at the time of the trial, under its influence.

Thus, where the defendant proposed to show that one of the main witnesses for the state in a criminal case was a cocaine fiend, the offer to prove this being through one who would have testified that he had known the witness for many years, and this testimony was excluded, as was also that subsequently offered of a medical expert to show the effect of the habitual use of morphine and cocaine, the court in *Anderson v. State* (1912) 65 Tex. Crim. Rep. 365, 114 S. W. 281, held that the ruling was erroneous. It was said that if the witness was a cocaine fiend to such an extent that it would impair her moral and mental sensibilities, this matter was a legitimate subject of inquiry for the jury, as it certainly would affect the credibility of the witness and the weight to be given her testimony.

It was held also, in *People v. Webster* (1893) 139 N. Y. 73, 34 N. E. 730, that evidence was admissible for the state in a murder case to show the extent to which a witness for the defense was controlled by the opium habit, and to contradict such witness's testimony, upon her denial that

she had stated she was so addicted to the use of the drug at the time the homicide occurred that she could not live without it, where this witness was one of the principal witnesses for the defense, claiming to have been present when the killing occurred, had admitted upon cross-examination that she was in the habit of taking opium, and, in reply to the question whether she was under its influence at the particular time, replied, "Not any more than any other time," and had admitted that at the time of her former examination before a police magistrate she was taking opium frequently. The court said that the witness claimed to have observed the entire occurrence, and to be able to give a minute description of the fatal encounter, and that the value of her testimony depended largely upon the accuracy of her perception; that if she was then under the influence of a powerful narcotic, whose well-known properties were to distort the vision and produce mental confusion, it was material to show it; and that her denial of an alleged admission that if she gave up the use of opium it would kill her was the denial of a material fact, with respect to which she might be contradicted, and was not within the rule which concludes the cross-examining party by the answers of the witness.

And where a witness admitted that for a number of years he had been habitually using opium in large quantities, and during the taking of his testimony, which occupied several days, opium was regularly administered to him, he being unable to proceed without it, the court in *State v. Concannon* (1901) 25 Wash. 327, 65 Pac. 534, said in effect that the habitual use of opium, as shown, is known utterly to deprave the victim and render him unworthy of belief; that while this is primarily a question of his credibility which the jury may determine, yet it is within the discretion of the trial court, when the appearance and action of the witness show him to be under the influence of the drug to such a degree as to be incapable of an honest and intelligent

conception of the nature of his testimony, to exclude him from testifying while in such a condition; that apparently the trial court did not, in this instance, consider that the witness had reached this stage of untrustworthiness, and that a court of review, not having equal opportunity to see the witness, would rarely interfere with such discretion exercised at the trial. But the uncorroborated testimony of the witness, an accomplice, was held insufficient for conviction.

It was held, also, in *Wilson v. United States* (1914) 232 U. S. 563, 58 L. ed. 728, 34 Sup. Ct. Rep. 347, that, because of its bearing upon the reliability of the accused as a witness, she might be asked, after she had admitted on cross-examination that she was addicted to the use of morphine and that she last used it before coming into the court room, how often she used it, and whether she had with her the implements to take the dose. The objection was that the evidence was inadmissible, because the accused had not put her character in issue. But the court said: "As we read the record, the evidence was not offered or admitted for its bearing upon her character, but rather to show that she was so much addicted to the use of the drug that the question whether, at the moment of testifying, she was under its influence, or had recovered from the effects of its last administration, had a material bearing upon her reliability as a witness. It seems to us that in this aspect the evidence was admissible."

Where, on a prosecution for selling morphine without a physician's prescription, the evidence for the state showed that the prosecuting witness was under the influence of morphine at the time of the alleged sale to her by the defendant, and at the time she was arrested and related her story to the officer, it was held that the defendant should be allowed to prove by expert testimony the effect of the drug upon the mind and memory of the user. *State v. Smith* (1918) 103 Wash. 267, 174 Pac. 9.

But in *State v. Smith* (Wash.) *supra*, where instructions were re-

fused which directed the jury to view with caution and suspicion the testimony of prostitutes and drug users, the court said that while testimony was admissible showing the character of, or effect of the use of drugs upon, a witness as affecting her credibility, it was not proper for the court to violate the constitutional prohibition against commenting upon the evidence, by instructing the jury that it should regard the testimony of any class of witnesses with caution or suspicion.

And although belonging to a class which is somewhat distinct from the class of cases above cited, attention is called to *State v. Cannon* (1898) 52 S. C. 452, 30 S. E. 589, in which it was held that a requested instruction would have invaded the province of the jury, and was properly refused, to the effect that if the jury found that the defendant made statements or confessions while suffering great pain and mental anxiety, and was under the influence of morphine or other narcotics, they should view and consider the evidence with great caution; and, if such were the facts, they should not give such testimony "any more weight than that of a feather" in making up their verdict.

One who was stupefied by drugs at the time he alleged that he was robbed, so that he became an easy

prey to a confidence game played on him, and did not realize until afterwards what happened, was held in *Pones v. State* (1901) 43 Tex. Crim. Rep. 201, 63 S. W. 1021, not incompetent to testify, in a prosecution for the theft, as to what later dawned on him as having occurred, notwithstanding a statute providing that "insane persons, who are in an insane condition of mind at the time . . . when the event happened of which they are called to testify, are incompetent witnesses," the witness not being insane at the time within the meaning of the statute.

Where a witness admitted that he was in the habit of using a certain amount of morphine daily, it was held in *State v. Robinson* (1895) 12 Wash. 491, 41 Pac. 884, that a physician should not be permitted, for the purpose of weakening the witness's testimony, to testify as to the effect of the use of that quantity of morphine. The court said that if the question propounded had gone generally to the effect upon the mental faculties of such use, it would have been error to have excluded the answer; but that by the form of the question the witness was asked to express his opinion as to the effect of such use upon the veracity of the witness, and that, so limited, the exclusion of the answer was proper.

R. E. H.

STATE OF WEST VIRGINIA

v.

W. W. DRIVER, Plff. in Err.

West Virginia Supreme Court of Appeals — April 26, 1921.

(— W. Va. —, 107 S. E. 189.)

Witness — impeachment — opinion as to mental capacity.

1. The usual method of impeaching the credibility of a witness as one who will not tell the truth and is unworthy of belief is to show the bad general reputation of the witness for truth and veracity in the community where she lives, by impeaching witnesses who know that reputation. It is not proper to permit medical experts, who have heard only a portion of the evidence given, to testify from what they have heard and seen in the court room, and from observation of the witness on the stand, that she is what is termed in the medical profession a "moron,"

Headnotes 1-9 by LIVELY, J.

and belongs to a kind or class of morons who are prone to tell lies, and that therefore she is unworthy of belief, and no weight should be given to her testimony.

[See note on this question beginning on page 932.]

— twelve-year-old girl — discretion.

2. The question of the competency of a girl twelve years old, as a witness in a criminal case, is addressed to the sound discretion of the judge, and it is his duty to make a careful and full examination of her as to age, intelligence, capacity, and legal and moral accountability; and where the record discloses that such was done, both by the judge and by extended cross-examination by counsel, disclosing in her unusual intelligence, memory, and legal accountability, the discretion of the court in permitting her to testify will not be disturbed.

[See 28 R. C. L. 450.]

— refusal of expert examination.

3. In such case the judge, upon being satisfied as to her competency by inspection and full examination conducted by himself and counsel in his presence, may properly refuse to appoint a commission of medical experts to examine her and to report to him their opinion of her competency or credibility.

Grand jury — member an officer — effect.

4. An indictment will not be quashed or abated because one of the grand jury which found it was an officer. Section 12, chap. 157, Code.

Trial — time for production of evidence — discretion.

5. The time at which admissible evidence can be introduced in a trial is necessarily governed by the trial judge, and is within his discretion, and unless that discretion has been abused, and it is plain that prejudice thereby has resulted to a litigant, an appellate court will not reverse.

[See 26 R. C. L. 1037, 1038.]

Jury — visit to theater — effect.

6. Where the jury in a felony case, during the recess of the trial, attended by a proper officer, visits a moving picture theater, and it is shown by uncontradicted evidence of the officer

and members of the jury that no separation of the jury was had, that they occupied seats together and in view of the officer and each other, and that no person approached or spoke to any of them, no prejudice to the defendant can be presumed, and it is not reversible error.

[See 16 R. C. L. 309.]

Appeal — improper evidence — want of objection.

7. Assignment of error in the appellate court, predicated on the introduction of improper evidence to the jury, given by a competent witness, will not be considered, when the record discloses that the party complaining neither objected nor excepted to the introduction of the evidence.

[See 2 R. C. L. 90 et seq.]

Evidence — rape — former conduct.

8. In a prosecution for an attempt to commit rape on a female under the age of consent, evidence of former attempts by the defendant upon the same female is admissible to show the lustful disposition of the defendant toward her, and the existence and continuance of illicit relations between them.

[See 22 R. C. L. 1207.]

Appeal — instructions — considered as whole.

9. Instructions must be considered together as a whole; and if one instruction has been given, fully covering a principle of law applicable to the case, it is not error to refuse other instructions to the same effect, although differently expressed.

[See 14 R. C. L. 817.]

Evidence — attempted rape — exhibition of nude pictures.

10. Upon prosecution for attempt to rape a twelve-year-old girl, evidence is admissible that accused had shown pictures of nude women to his victim and other girls, and requested them to permit him to photograph them without clothes on.

ERROR to the Circuit Court for Cabell County to review a judgment convicting defendant of an attempt to commit rape, and refusing to award a new trial. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Warth, McCullough, & Peyton and J. W. Perry, for plaintiff in error:

An indictment found by a grand jury upon which a disqualified person is sitting is void.

United States v. Hammond, 2 Woods, 197, Fed. Cas. No. 15,294; State v. Symonds, 36 Me. 128; Doyle v. State, 17 Ohio, 222; State v. Cole, 17 Wis. 674; McQuillen v. State, 8 Smedes & M. 587; 2 Bishop, New Crim. Proc. 865, note; Renegar v. United States, 26 L.R.A. (N.S.) 689, 97 C. C. A. 172, 172 Fed. 646, 19 Ann. Cas. 1117; Angle v. United States, 97 C. C. A. 184, 172 Fed. 658.

The prosecuting witness, Agatha Bragg, was incompetent to testify.

1 Wigmore, Ev. § 492.

The question of competency must be raised before the witness testifies.

State v. Michael, 37 W. Va. 565, 19 L.R.A. 605, 16 S. E. 803; State v. Hoke, 76 W. Va. 36, 84 S. E. 1054.

The question of competency of the witness having been raised, the court should determine that question upon a careful examination into the facts and condition of the mind of the witness.

State v. Cremeans, 62 W. Va. 143, 57 S. E. 405.

The court erred in refusing to permit the experts produced by the defendant to testify as to the mental condition and capacity of the witness, Agatha Bragg.

11 Am. & Eng. Enc. Law, 145; Reg. v. Hill, 2 Den. C. C. 254, Temp. & M. 582, 20 L. J. Mag. Cas. N. S. 222, 15 Jur. 470, 5 Cox, C. C. 259, 5 Eng. L. & Eq. Rep. 547; Holcomb v. Holcomb, 28 Conn. 177; Coleman v. Com. 25 Gratt, 865, 18 Am. Rep. 711.

The court erred in admitting irrelevant and improper testimony.

State v. Littleton, 77 W. Va. 804, 88 S. E. 458; 2 Bishop, New Crim. Proc. p. 1070; State v. Kinney, 26 W. Va. 141; Kerr v. Lunsford, 31 W. Va. 675, 2 L.R.A. 668, 8 S. E. 493; Taylor v. Baltimore & O. R. Co. 33 W. Va. 57, 10 S. E. 29; Michaelson v. Cautley, 45 W. Va. 542, 32 S. E. 170; Wheeling Mold & F. Co. v. Wheeling Steel & I. Co. 62 W. Va. 295, 57 S. E. 826.

The separation and misconduct of the jury were prejudicial to the rights of accused.

Gant v. State, 55 Tex. Crim. Rep. 284, 116 S. W. 801; State v. Morden, 87 Wash. 465, 151 Pac. 832, 16 R. C. L. 305.

The giving of an instruction, singling out certain evidence, was error. State v. Dodds, 54 W. Va. 289, 46 S. E. 288.

It was error to refuse defendant's instructions as to intent.

Uhl v. Com. 6 Gratt. 706; State v. Hager, 50 W. Va. 370, 40 S. E. 393; Glover v. Com. 86 Va. 386, 10 S. E. 420; Cunningham v. Com. 88 Va. 37, 13 S. E. 309; Reagan v. State, 28 Tex. App. 227, 19 Am. St. Rep. 833, 12 S. W. 601; Broadbudd v. Com. 126 Va. 733, 101 S. E. 321; 23 Am. & Eng. Enc. Law, 2d ed. p. 868; 1 Bishop, Crim. Law, § 662.

Messrs. E. T. England, Attorney General, and R. A. Blessing, Assistant Attorney General, for the State:

The plea in abatement was properly overruled.

State v. Henderson, 29 W. Va. 147, 1 S. E. 225; State v. Martin, 38 W. Va. 568, 18 S. E. 748; Eastham v. Holt, 43 W. Va. 599, 27 S. E. 883, 31 S. E. 259; State v. Cox, 52 Vt. 471; United States v. Reeves, 3 Woods, 199, Fed. Cas. No. 16,139; Thompson & M. Juries, 140, 537; People v. Jewett, 3 Wend. 321.

The court did not err in permitting the prosecuting witness, Agatha Bragg, to testify.

State v. Cremeans, 62 W. Va. 184, 57 S. E. 405; State v. Hoke, 76 W. Va. 36, 84 S. E. 1054; Uthermohlen v. Bogg's Run Min. & Mfg. Co. 50 W. Va. 457, 55 L.R.A. 911, 88 Am. St. Rep. 884, 40 S. E. 410; Smith v. Com. 85 Va. 924, 9 S. E. 148; Coleman v. Com. 25 Gratt. 865, 18 Am. Rep. 711; District of Columbia v. Armes, 107 U. S. 519, 27 L. ed. 618, 2 Sup. Ct. Rep. 840; Evans v. Hettich, 7 Wheat. 453, 5 L. ed. 496; State v. Kelley, 57 N. H. 549, 3 Am. Crim. Rep. 229; Holcomb v. Holcomb, 28 Conn. 177; Lopez v. State, 30 Tex. App. 487, 28 Am. St. Rep. 935, 17 S. W. 1058; State v. Scanlan, 58 Mo. 204, 1 Am. Crim. Rep. 185; State v. Hannett, 54 Vt. 83, 4 Am. Crim. Rep. 38; Whart. Crim. Ev. 3d ed. § 357; People v. Gray, 251 Ill. 431, 96 N. E. 268.

It was not error to refuse a physical examination of the prosecuting witness, Agatha Bragg.

Whart. Crim. Ev. § 517, p. 1074; 1 Thomp. Trials, § 866; 3 Jones, Ev. § 400; Bowers v. State, 45 Tex. Crim. Rep. 185, 75 S. W. 299; People v. McCoy, 45 How. 216; McGinnis v. State, 24 Ind. 500; People v. Mead, 50 Mich. 228, 15 N. W. 95; Day v. State, 63 Ga. 667.

The court did not err in the charac-

ter of, nor the order in admitting, testimony, on re-examination nor re-cross-examination.

Hall v. Lyons, 29 W. Va. 410, 1 S. E. 582; Taylor v. Baltimore & O. R. Co. 33 W. Va. 39, 10 S. E. 29; Michaelson v. Cautley, 45 W. Va. 533, 32 S. E. 170; Whart. Crim. Ev. §§ 494, 495, p. 1025; Whart. Ev. § 506; Dowler v. Citizens' Gas & Oil Co. 71 W. Va. 417, 76 S. E. 845, Ann. Cas. 1914C, 341; McManus v. Mason, 43 W. Va. 196; 27 S. E. 293; Tate v. Bank of New York, 96 Va. 765, 32 S. E. 476; Savage v. Bowen, 103 Va. 540, 49 S. E. 668; Morotock Ins. Co. v. Fostoria Novelty Co. 94 Va. 361, 26 S. E. 850; Burke v. Shaver, 92 Va. 345, 23 S. E. 749; Taylor v. Com. 77 Va. 692; Brooks v. Wilcox, 11 Gratt. 411.

The court did not err in refusing to set aside the verdict of the jury and award a new trial on the allegation that jury had not been kept together and in the custody of a sworn officer.

State v. Hoke, 76 W. Va. 36, 84 S. E. 1054; State v. Ice, 34 W. Va. 244, 12 S. E. 695; State v. Shores, 31 W. Va. 491, 13 Am. St. Rep. 875, 7 S. E. 413; State v. Poindexter, 23 W. Va. 807; State v. Weisengoff, 85 W. Va. 271, 101 S. E. 450.

Testimony of prior assaults by the defendant upon the prosecutrix was admissible.

State v. Pennington, 41 W. Va. 599, 23 S. E. 918; Lipham v. State, 125 Ga. 52, 114 Am. St. Rep. 181, 58 S. E. 817, 5 Ann. Cas. 66; Com. v. Merriam, 14 Pick. 518, 25 Am. Dec. 420; People v. Marrin, 205 N. Y. 275, 43 L.R.A. (N.S.) 754, 98 N. E. 474; Sykes v. State, 112 Tenn. 572, 105 Am. St. Rep. 972, 82 S. W. 185; Manning v. State, 43 Tex. Crim. Rep. 302, 96 Am. St. Rep. 873, 65 S. W. 920; State v. Kelley, 65 Vt. 531, 36 Am. St. Rep. 884, 27 Atl. 203, 9 Am. Crim. Rep. 354; People v. Gray, 251 Ill. 431, 96 N. E. 268.

Instructions as to intent, offered on behalf of defendant, were properly refused.

Hall v. Lyons, 29 W. Va. 410, 1 S. E. 582; Taylor v. Baltimore & O. R. Co. 33 W. Va. 39, 10 S. E. 29; Michaelson v. Cautley, 45 W. Va. 533, 32 S. E. 170; State v. Bingham, 42 W. Va. 234, 24 S. E. 883; State v. Morrison, 49 W. Va. 210, 38 S. E. 481; Richards v. Com. 107 Va. 881, 59 S. E. 1104; Glover v. Com. 86 Va. 382, 10 S. E. 420; Alexander v. State, 58 Tex. Crim. Rep. 621, 127 S. W. 189; Nider v. Com. 140 Ky. 684, 131 S. W. 102, Ann. Cas. 1913E,

1246; Com. v. Shaw, 134 Mass. 221; Whart. Crim. Law, § 710.

Lively, J., delivered the opinion of the court:

W. W. Driver was convicted of an attempt to commit rape, and sentenced to confinement for one year in the penitentiary, by the common pleas court of Cabell county on June 22, 1920. The court refused to award a new trial, and defendant brings the case here for review on writ of error.

A plea in abatement to the indictment was tendered and refused, and exceptions taken. The plea averred that James H. Marcum, one of the jurors who found the indictment, was, at the time he sat on the grand jury, holding the office of president of the Berkeley Springs Board, and disqualified to act as a grand juror by reason of § 2, chap. 22, Acts 1919, which in part says that the persons listed by the jury commissioners, and whose names are placed in the ballot box to be drawn as grand jurors, "shall not be officeholders under the laws of the United States or of this state." Section 12, chap. 157, of the Code (§ 5548), provides: "No presentment or indictment shall be quashed or abated on account of the incompetency or disqualification of any one or more of the grand jurors who found the same." Does the Act of 1919 repeal § 12, chap. 157? Section 2 of chapter 22, Acts 1919, amended and re-enacted § 2 of chapter 157, Code, and places the duty of selecting and drawing the grand jury upon jury commissioners, a duty formerly resting upon the county court. Under the old law constables, keepers of hotels or taverns, surveyors of roads, and owners or occupiers of steam or water gristmills were ineligible to be selected. The ban against these persons has been removed by the new law, except a constable, who is an officer under the laws of this state. The grand jurors selected under the old law were required to be freeholders, but under the new law that qualification is removed, so that the men listed now

for such service shall be of good moral character, who have never been convicted of a felony or any scandalous offense, who shall be bona fide citizens of the state and county for at least one year immediately preceding the preparation of the lists, and shall not be officeholders under the laws of the United States or of this state. In *State v. Henderson*, 29 W. Va. 147, 1 S. E. 225, the same question arose as is presented here. A grand juror was not a freeholder, and the prisoner moved to quash the indictment for that reason, insisting that § 12 above quoted would be inapplicable, as it would be in conflict with the qualification section,—the same objection presented here. Judge Johnson said: "Section 2, which provides that the list from which the grand jurors shall be drawn shall contain only freeholders, is clearly modified by § 12, which says, in effect, that, if one drawn on the grand jury is not a freeholder, that fact shall not vitiate an indictment found by him. This is a wise provision, because it would be very detrimental to the public interests, if perhaps a hundred indictments should be liable to be quashed or abated because one who was not a freeholder happened to be placed on the list and was drawn as a grand juror."

The two sections must be read in pari materia, and effect given to each. Whether or not a prisoner who has been held to answer an indictment could successfully prevent an officer from being selected as a grand juror is not necessary to be determined here. It does not arise. But it is clear that after indictment has been found the disqualification or incompetency of one or more of the grand jurors is cured. We can see no good reason for overruling the third point of the syllabus in *State v. Henderson*, supra. It is based on reason and good public policy. See also *State v. Martin*, 38 W. Va. 568, 18 S. E. 748.

A demurrer to the indictment was

overruled, but this assignment of error is not urged, and is practically abandoned. We perceive no defect in the indictment.

Agatha Bragg, a girl twelve years old, upon whom the attempted rape was alleged to have been committed, was offered as a witness, and objection was made to her competency to give evidence. The court thereupon went into a lengthy examination of her competency upon her voir dire, and, being satisfied of her competency, directed the trial to proceed, when the defendant offered to show by Dr. L. V. Guthrie and others that Agatha Bragg was a moral pervert, and not trustworthy. The court refused to hear the proffered evidence, and the defendant excepted. The jury then returned to the court room and the trial proceeded. When the state rested Dr. L. V. Guthrie was examined as a witness by the defendant, and, after having qualified as an expert by showing his long familiarity and practice as a physician with nervous diseases generally, and with lunatics and imbeciles, he was asked if he was familiar with the class of people known as "morons." He answered in the affirmative, and proceeded to explain what is meant by the term "moron," and defined a moron to be a high-grade mental defective, or high-grade feeble-minded.

"It may be applied where there is a moral defectiveness, or where there is a mental defectiveness, or where there are both. Usually it is both, but sometimes the defectiveness is in the moral make-up more than the mental, or may be vice versa. The characteristics as to be expected by what I have said in regard to being defective, delinquent, usually get into trouble unless they are carefully guided, and take to evil habits if their surroundings and environment are of evil nature, or if they are permitted to hunt evil associates. They drift toward the bad much more than toward the good. They are usually notorious liars, fail to adjust themselves in their surroundings, and make up very largely

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member an
officer—effect.

the class known as never-do-wells, the class of people who can't get along; and to the layman he does not understand why it is such a boy or girl does not get along, but, upon careful examination by persons who are competent to make that examination, the defect is usually detected with more or less ease; but some cases require considerable observation to detect the defect. They may be perfect in their physical make-up. Some of them are very sprightly in their mental make-up, so far as superficial appearances are concerned, but a careful examination by a party competent to make that examination readily detects the defect, with the exception of a few cases which require prolonged observation.

"If the individual is perverted morally you would naturally expect them to be liars. The type of moron that you usually come in contact with are notorious liars, and they have a disposition, especially in the female sex—their lies usually weave into some sexual question. Now, among the morons we have a condition known as mythomania, which comes from the words 'myth' and 'mania'—a myth, something that does not exist, or in the fancy, and mania, a desire or mania to represent facts that do not exist. I usually see nearly all of those cases in the female sex. I have recently seen one in a young man, but they invariably, almost, weave their stories into some sexual question. It may be possible that those desires come to our attention at the time of sexual questions, breaking into the girl's conscience. They are usually so notorious as liars that physicians and those who are engaged in handling that class of people make it a rule never to permit themselves to be in the presence of a girl of that type unless there is a witness present, from the mere fact of the liability to make statements against you."

He was then asked if he had heard the testimony of Agatha Bragg, and replied that he had heard a portion of it, but not all. He was then asked

if from what he had heard of her testimony, and from what he had heard from the other witnesses concerning her tendency to be mixed up with sexual affairs, what would be his opinion of her condition, morally or mentally, in regard to his definition of a moron. An objection to the question was sustained, and the defendant excepted. The witness was then asked if from what he had heard of her testimony and the statements made by other witnesses concerning the life she had led, and his observation of her, he would say that she was a moron. Objection to this question was sustained and exception taken, and the record was vouched by the statement of counsel that the answer of the witness would be that she is what is known as a moron, and as such is untrustworthy of belief. The witness was then asked to read to the jury from "Medical Defectives," by Barr, the definition of "morons;" but upon objection, he was not permitted to do so, and again exception was taken. Dr. Florence Mateer was then introduced and qualified as an expert by stating that she was then chief psychologist in a new institution for the state of Ohio, the Bureau of Juvenile Research, and had been such since September, 1918; that she had extensive training and study in the examination of delinquents, and especially delinquent children who had been found guilty and sent to an institution. She then gave a definition of the word, "moron," practically the same as that given by Dr. Guthrie, and said:

"There are some who are mentally inferior that are perfectly good, but incompetent; they can't hold a job, and they are just inferior—nice, inoffensive housemaids—the kind that stick by a family forty years and never ask for more than \$5 dollars a week. Then there are other kinds, seemingly bright, what we call verbalistic,—that is, they can speak well, tell a clear story, speak readily, and are bright enough, but all the mind they have goes to delinquency and wrongdoing, and to consequent

lying, stealing, immorality, even to the point of murder, and all that sort of thing.

"In our experience with defective delinquents, as we call them, the moron who is delinquent we usually differentiate from the inoffensive kind. We have found them almost always immoral unless they have been protected in their childhood, if they have a good home and normal parents, which is not the rule, because they inherit their condition, and they will be good themselves because they are trained into the habits of goodness and are too stupid not to keep on the same way; but if they come from poor homes and negligent parents they are subject to whatever delinquency that there might be in the community, and they are consequently delinquent, and lying and stealing and sexual immorality usually go together. In our study of prostitutes in Massachusetts we found that immorality and prostitution were correlated; that is, they came together in about 90 per cent of the cases examined."

She was then asked if she had heard the testimony of Agatha Bragg, and replied that she had, a part of it, the most of it; and upon being asked if from what she had heard she would designate her as a moron, the state objected, the objection was sustained, and the prisoner again excepted, counsel stating that if the witness had been permitted to answer her reply would be that Agatha Bragg is what is known as a moron, and as such is untrustworthy of belief.

We have detailed the evidence which is the basis of this assignment of error at some length, and perhaps with unnecessary detail, in order that the full import of the proffered testimony may be obtained.

It is not clear just in what class of morons these expert witnesses would have placed Agatha Bragg. In fact, from the definitions given, it would be rather difficult to designate with accuracy the different classes or divisions. The classification would ex-

tend from "nice, inoffensive housemaids who stick by a family forty years and never ask for more than \$5 a week," down to those who commit offenses of less or greater gravity, even to the point of murder. Healey's book on the "Individual Delinquent" defines "morons" to be "those who equal the mental performance of a child between the ages of seven and twelve years." Dr. Mateer testified that the term "moron" is a general term invented about ten years ago by Dr. Goddard, at the time she worked under him, to designate a class who might be either mentally inferior or morally inferior, and who, because of that inferiority, were called socially incapable. They could not get along in the community because of their impossibility of keeping from breaking the laws, and who consequently needed institutional care, but who were much brighter than the so-called imbecile or feeble-minded. The experts would have testified, according to the vouched record, that they would have classified her as a lying moron and unworthy of belief. The evidence was designed to be an attack upon her truthfulness, aimed at her credibility. The inference to be drawn from the testimony, if it had been permitted, was that she was an habitual and confirmed liar because of her mental defectiveness. It will be perceived that these experts had not heard all of the testimony of and concerning the Bragg girl. The jury had heard all of it with the attentiveness, discrimination, and unbiased judgment usual with jurors sworn to impartially try the issues, and, having heard the definition and characteristics of morons from the expert medical testimony, they could well determine whether she was a moron, and to which class she belonged, and whether she was worthy of belief. It was an attempt, in a measure, to substitute the opinion of the experts for that of the jury, and to tell them that they should disregard her evidence. Moreover, the methods of impeaching a witness are well de-

finer, and are the result of hundreds of years of practical experience.

The three general classes of evidence by which a witness may be impeached are: (1) Character evidence tending to show that the witness lacks truthfulness; (2) that on former occasions he has failed to state material facts, or different or conflicting facts testified to by him on the present occasion; (3) evidence showing that his present testimony is materially variant from acts done, or statements made, at other times. Opinion evidence which assails the witness's truth and veracity must be founded on the knowledge of the assailed witness's reputation for truth and veracity among his friends. This is a universal method among English-speaking people. In some jurisdictions it extends to the witness's bad reputation for morality, but such is not the method in this state or in the states generally. 1 Greenl. Ev. 16th ed. § 461. An impeaching witness may include, as an element in estimating his opinion of the general reputation of an assailed witness, his own knowledge of particular acts and conduct; but he cannot testify from his own knowledge alone,—the general reputation governs. Hence a person's knowledge of an assailed witness's reputation, gained alone from what has been said against him on the trial, or from his conduct on the trial, is not sufficient to render him

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impeachment—
opinion as to
mental capacity.**

competent as a character witness. It was attempted to make the experts competent by showing that they had partially heard the evidence, had observed the girl on the stand, had concluded that she was a moron of the class of liars, and hence unworthy of belief. We are not convinced that the time-honored and well-settled and defined rule of impeachment of the veracity of a witness should be thus innovated upon. It is yet to be demonstrated that psychological and medical tests are practical, and will detect the lie on the witness stand. "The witness to reputation must be

one who, by residence in the community or otherwise, has had an opportunity to learn the community's estimate, and the preliminary inquiry, whether he knows the person's reputation, is usually insisted upon." 1 Greenl. Ev. 16th ed. § 461d. We think the proffered evidence was properly refused.

The defendant, a short time after the indictment was returned, moved the court to appoint a medical commission to report upon the mental capacity of Agatha Bragg, alleging that she was of the type known as a "moron," and incapable of sufficient understanding to apprehend the obligation of an oath, and incapable of giving a correct account of the matters charged in the indictment. The record does not disclose what disposition was made of the motion, but it may be considered as having been refused. No commission was appointed, and no report made that we can find. It is for the court to determine whether a witness is capable of understanding the obligation of an oath, and has sufficient mind and memory to testify with reasonable intelligence, and, if the judge is convinced by personal examination and inspection, we know of no rule or reason why he should invoke the aid of a commission. The discretion vested in the trial judge on the competency of a child to give evidence is rarely reviewed by an appellate court, and decision either way will not constitute error unless there is a flagrant abuse. *Uthermohlen v. Boggs Run Min. & Mfg. Co.* 50 W. Va. p. 469, 55 L.R.A. 911, 88 Am. St. Rep. 884, 40 S. E. 410; 1 Whart. Crim. Ev. §§ 357, 719.

We hold that there was no error in refusing to appoint a medical commission to inquire into the competency of the witness, and an inspection of the examination of the child on her voir dire confirms the judgment of the trial judge that she was competent to testify. Her answers were clear and intelligent. The judge had the opportunity of observing her demeanor, an important

—refusal of
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ination.

factor, which is not accorded to this court by a printed, lifeless record. Shall we say the trial judge erred? Besides, her evidence given on the trial, detailing the facts of and circumstances surrounding the crime, was unusually clear for a child of her years, and a severe and extended cross-examination by trained and expert counsel failed to appreciably discredit her account of the unfortunate and sordid occurrence in any of its details.

This girl attended the Galliaville public school in Huntington, and was in the sixth grade, where she studied history, physiology, arithmetic, spelling, reading, and writing. According to her testimony, she first met the defendant in a moving picture theater on September 21, 1919, when he gave her and her companion, Eva Ratcliff, some chewing gum and 20 cents to pay carfare to Galliaville, where witness lived. Some time afterwards he stopped his automobile and took her to the Holderby school, which she was then attending. Afterwards she took four rides with him in his car. On the first of the four trips she was accompanied by Sybil Stanley, and they drove out the Sixteenth street road, 6 or 8 miles, to a deserted log house by the roadside, where she was taken into the kitchen, and where he attempted to have illicit communication with her on a bench. The Stanley girl remained in the car, with instructions to sound the "honk" three times if anyone approached the house. He afterwards took the Stanley girl into the deserted building and remained with her there a short time. He gave witness \$1 and the Stanley girl 50 cents. Afterwards she went with him in his car to the same place, accompanied by Belva Stanley, a girl about fourteen years old, and the same attempt was made, whether successful or not the witness does not fully disclose. The Stanley girl, becoming curious, "peeped through a crack," and plainly saw what transpired. Defendant on that occasion

had a small tube of vaseline, which the Bragg girl obtained, when he left the room hurriedly, thinking someone had taken away his car, and which she gave to the Stanley girl, who threw it under the floor through a hole in the flooring. Afterwards an investigating party took the Stanley girl to the deserted house, and a boy in the party crawled under the house and found the tube of vaseline, which tube and contents were introduced in evidence. The two girls, Agatha and Belva, testified that defendant told them on this occasion that his name was Chief Davis. Later another trip was made to the deserted house by the defendant and the two last-named girls, when a repetition was had of the former occurrences. On the 19th of January, 1920, the day before defendant was arrested, Agatha made another trip with defendant in his car to the deserted house about 4 o'clock that afternoon, when there was a practical repetition of the former occurrences. She testified that he told her to say nothing to anyone, or they, the girls, would be sent away from home; and that she did not know his true name until after he had been arrested. On these occasions she made no outcry or resistance, and seemed to enter into the relations without objection. There was no material conflict in the testimony of the three girls concerning these trips to the deserted house. On the last visit, when Agatha was not accompanied by either of the other girls, J. D. Keller and his boy, fourteen years old, were near the deserted house, getting some fodder in a field, and noticed the car standing near the house, but saw no one. He gave the time at between 3:30 and 4 o'clock in the afternoon. The next day, when the investigating officers came, he and his son accompanied them to the house, when his son found the tube of vaseline. He did not see the car come, and after noticing it there, and thinking it belonged to the owner of the house, whom he desired to see, he started down to see him, but

when he got there the car was gone, and had left after he started toward it, going out of view of the car in order to reach the road.

There were several witnesses and circumstances corroborative of the testimony of the young girls. Mrs. Dunkle, a janitress at the Galliaville school building, testified that defendant would drive around the school building and stop and talk with Agatha Bragg, and after his visits she would run off from school. She saw him at the school building on the 19th of January, and had seen the Stanley girl with him in his car on a previous occasion. She never noticed him about the school building until after these girls had been returned to that school from the Holderby school, to which the sixth grade had been temporarily sent. He would ride past the school building usually in the mornings. Her attention was especially directed to the defendant's visits and actions after the girl began to run off from school after his visits. Eva McConnell, a teacher in the school, saw him come to the school building several times and talk with the Bragg girl. Her attention was especially directed toward him on account of the actions of the girl. On one occasion she heard her say to him while he was in his car on the boulevard, "I thought you were going to bring Sybil out with you this afternoon," and then she (the Bragg girl) went on down the boulevard, and he followed her in the car. She saw him about the schoolhouse nearly every day for several days, and sometimes twice a day. She saw him there on the 19th of January, the day before he was arrested. She testified that Agatha Bragg was not at school the afternoon of the 19th, having been excused for alleged sickness from the afternoon session. Opal Garland testified practically the same as Miss McConnell as to his frequent visits to the schoolhouse, and also heard Agatha say to him, "I thought you were going to bring Sybil out this evening." Pauline Burks, a child of twelve years, saw the defendant on

the morning of the 19th of January near the school building as she was going to school, and saw him wave his hand to Agatha Bragg; and again in the afternoon, at about 3:30 o'clock, she was with Agatha, going for milk, and in front of the residence of a Mrs. King, when he again passed in his car, and Agatha left her, and went on down the road. Fay Pritchard on one occasion saw Agatha get into the car with defendant, accompanied by Sybil Stanley, Corby Smith, another girl, and a little boy, in front of the Baptist church on Fifth avenue, and she thought it was while Agatha was attending the Galliaville school.

Dr. Gerlach, a witness for the defense, saw Agatha at the office of the chief of police on January 20th, the day defendant was arrested, and at the request of the chief made a physical examination of her genital organs, and found no departure from normal, although she complained of a great deal of pain when he inserted one finger into the vagina. He found no bruises or evidences that she had been molested in any way. There was some contradiction of this witness's statement by others, who testified that he had stated that he found the child had not been entered, but that he found bruises indicating the application of some force.

Three witnesses, Arrington, Herald, and Johnson, testified that Agatha Bragg's reputation for truth and veracity in the neighborhood where she lived was bad, and that they would not believe her on oath.

The defendant testified that he had met Agatha Bragg at a picture show, and the next time he saw her was out on the boulevard while he was in his car, taking his boy to the high school. After accounting for his movements and whereabouts on January 19th up until about 3 o'clock in the afternoon, he stated that he left home and came down to the Huntington Spring Bed Company, where he stayed about one-half hour, and went from there out to Galliaville to see a Mr. Sizemore about selling his car to him, but, not seeing

him, came back toward town, and was on his way to the office of a brick company, when Agatha Bragg stopped him on the hill just the other side of the boulevard, about 4:30 or 5 o'clock, and got in the car, and he drove her down to the Eighth street car line, where he left her, and from there drove to the brick company's office, reaching there about 5 o'clock P. M., and stayed there a considerable time afterwards. This was the only ride the girl took in the car that day. He then gave an itinerary of his travels as a salesman from the 29th of December, 1919, until the 18th of January, 1920, showing that he was not in the city of Huntington between those dates except on the 5th of January and the 18th of January, when he returned from Virginia. He denied that he had taken the trips to the deserted house, and flatly contradicted the evidence of the girls in that particular. S. T. Drummond, superintendent of the Huntington Spring & Bed Company, corroborated the defendant's testimony by stating that he came to his place of business on January 19, about 3 o'clock, and stayed there an hour or an hour and a half; and Dorsey Evans testified that defendant came to the brickyard office about 5 o'clock P. M. of January 19, on business. Dr. L. T. Vinson, C. M. Wallace, Dan Holton, and G. A. Northcott, all men of high character and standing, testified to the good reputation of the defendant for honesty and good citizenship in the community. After some rebuttal evidence of minor importance had been given, the state recalled the defendant, who was asked if, on one occasion, he did not show and give to Sybil Stanley three pictures of naked women, and ask her to strip off her clothes and let him take her picture with a kodak, and which he denied. He was also asked if he was not at the home of Mrs. Stanley, or passing her home, when she told him he must not again take any of her children in his car, and told him he was a son of a bitch, and if he ever did so again she was going to kill him.

This he denied also. To this examination the defendant's counsel excepted and objected, not to the form of the questions, but because of the time in the trial when the foundation for impeachment was laid. Then Mrs. Stanley was recalled and contradicted the defendant by detailing her conversation with him and her threats against him for taking her child into his car; and Sybil Stanley was also recalled, and stated that defendant had given her pictures of naked women, and had asked her to let him take her nude picture. Exceptions were taken to the introduction of this evidence, and it is here insisted upon as error.

Other evidence showed that Sybil Stanley had confessed to the theft of various articles, and was incorrigible. It was clear that Agatha Bragg would run away from home, was unmanageable, and had stayed all night in a livery stable with another girl and two boys, and was generally loose in her morals and virtue. She and the two Stanley girls had been previously adjudged as incorrigible and delinquent by the juvenile court, and ordered to be taken to some state reform institution; but the order was held in abeyance for the purpose of hearing their evidence on the trial of this case, and to save the expense of their return for that purpose.

The attempted rape was alleged to have been committed on the 19th of January, 1920, the indictment was returned on February 6, 1920, and on February 11th following the defendant moved the court to appoint Dr. L. V. Guthrie, a physician, to make a complete physical examination of Agatha Bragg, which was denied, and exception taken. Just what physical examination was contemplated is not set out in the motion, but it is now urged that if an examination has been made it would have strengthened the testimony of Dr. Gerlach, who examined her the day following the alleged crime, and testified as hereinbefore set out. The only portion of Dr. Gerlach's

evidence which was in question was whether or not there were any bruises or abrasions. He testified that there were none. Other witnesses who heard his statements, made immediately after the examination, testified that he said there were some bruises of a slight character. Examination on February 11th would not likely have revealed evidences of slight bruises made on the 19th of January, and evidence of no bruises at that later date would have had very little, if any, probative force. There was no claim that she had been entered, the state did not attempt to prove that she had been, and the proposed examination could have been of no benefit to the prisoner in that regard. It might have been detrimental, if, perchance, the examination had revealed an effective entrance, although it might have been effected by someone since the day of the alleged attempt by the defendant. It is somewhat doubtful if she could have been forced to undergo an examination of her sexual organs, especially at that late date. The question arose in *Whitehead v. State*, 39 Tex. Crim. Rep. 89, 45 S. W. 10. The state was the prosecutor; and the order requested was to require the prosecutrix, who was a witness, to undergo an examination of her private parts. The court refused the order, and the appellate court, in sustaining the lower court, said: "In the nature of things, . . . the propriety of such an order must usually rest largely in the discretion of the trial court, and it would only be in the case of a plain abuse of such discretion that the appellate court would interfere,"—citing 1 *Thomp. Trials*, § 862. Under the facts here, we think the court properly refused the motion.

The evidence of Agatha Bragg, Sybil Stanley, and Mrs. Stanley concerning the exhibition to the girls of pictures of nude women by defendant, and his request to take kodak pictures of the girls while nude, is relied upon as error, on the ground that it was irrelevant, and in no way tended to evidence the

crime alleged in the indictment, and was introduced after the evidence in chief had been given, at an improper time in the trial, after rebuttal evidence had begun. We think the evidence was admissible as having a bearing upon the commission of the offense. It tended to show the purpose for which defendant was inducing these girls to enter his car, culminating in the trips to the abandoned house. The evidence that he often came to the schoolhouse, and sought interviews with the girls, taken by itself, might be construed to be for an innocent and proper purpose; but, viewed in the light of subsequent events, was permissible to show a sinister design, his opportunity for carrying out that design, and in corroboration of the evidence of the two girls. The nude-picture incident was indicative of the motive for seeking their society. It must be borne in mind that this attempt at rape was not by force or putting in fear. It was apparently consented to and possibly desired. No outcry or resistance was made, no disarrangement of apparel, no complaint on her part afterwards. It was the school authorities and the officers of the law who became suspicious, and, with the parents, elicited confessions, made the investigations, and began the prosecution. Had the girls been over the age of consent, there could have been no case under this evidence. The statute makes the offense rape if consummated. The child, under the law, cannot consent. The exhibition of these nude pictures, if true, was an assault upon her morality, a breaking down of her modesty, if she had any, and clearly indicative of his state of mind toward her, his intent afterwards consummated. Intent is a necessary element of crime. Evidence tending to show intent is always admissible. If it was admissible evidence, and we think it was, the time in the trial at which it was presented is of little consequence.

**Evidence—
attempted rape—
exhibition of
nude pictures.**

The trial court's discretion in the

mode of conducting trials and the order and time of introducing evidence will not be disturbed, unless grossly abused. *McManus v. Mason*, 43 W. Va. 196, 27 S. E. 293; *Goodwin v. Tony Pocahontas Coal Co.* — W. Va. —, 106 S. E. 76; *Philadelphia & T. R. Co. v. Stimpson*, 14 Pet. 463, 10 L. ed. 535; *Smith v. Mayer*, 3 Colo. 210; and *Godbe v. Young*, 1 Utah 57. Even where a case has gone to the jury the courts have permitted them to be recalled and further evidence taken. *Livingston's Case*, 7 Gratt. 658. "Whether a party shall introduce further evidence after that of the adverse party has been heard is a matter of sound discretion of the court, and its exercise will rarely, if ever, be the cause of reversal." *State v. Littleton*, 77 W. Va. 809, 88 S. E. 460, and cases there cited.

Error is assigned because the jury was placed in the charge, on one or more occasions during recess of the court, of James A. Poteet, the regular janitor of the courthouse, who had been sworn in as a deputy sheriff upon the request of the sheriff at the beginning of the term, for that purpose. The orders of the court entered on the 22d day of June showed that the jury was placed in charge of James A. Poteet, specially appointed by the court, who was sworn to keep the jury together and not allow them to separate, nor to converse with them himself touching the matter of the trial, nor to allow any other person to converse with them on any subject without leave of the court, and return them to court at 9 o'clock the next morning; but on motion of the defendant the order was changed to show that the jury was on that day committed to the charge of Clingenpeel, deputy sheriff, who was sworn, etc., and that the following morning the jury was brought into court by James A. Poteet, who had been sworn in as special deputy for the June term of the court.

The affidavit and examination of Poteet showed that he was duly appointed and sworn in by the trial court as a deputy to take charge of the jury at the adjourning hour, and duly sworn to keep the jury together, not let them talk, etc., and that he took the jury that night to a motion picture house to view a motion picture therein, and set them all down together in one row except one of them, who sat immediately to his left, and two who sat in front in the second row, the intervening seats being broken down. The jurors were all in his view during the entire time, and no one talked to any of them. They all came out together, in his charge, and went to an ice cream parlor and sat down together, by themselves, and ate some ice cream, no one being near to them or any of them, and no one spoke to any of them while there. On this occasion the jury was first put in custody of Clingenpeel, regular deputy, who turned them over to Poteet at 7 o'clock P. M., and they remained in his custody continuously from that time until the next morning, when they returned into court, and during all that time were not separated and no one spoke to any of them. The sheriff also testified that Poteet was sworn in by the court, at his suggestion, for the term as deputy, and continued to act as such, and was such deputy at the time of the trial of the defendant, W. W. Driver. One of the jurors, C. C. Dusenberry, was also sworn and corroborated Deputy Poteet, and stated that they were all together at all times, both in the picture show and when they got ice cream, and no one spoke to any of them on either of the occasions. This juror went that night, accompanied by the entire jury, to his residence, which he entered by a side door and obtained a nightshirt; this he accomplished in about two minutes, and saw no one and spoke to no one. Four other jurors corroborated the statements made by Poteet, Clingenpeel, and Dusenberry. The evidence of the other jurors was not taken, because they had been discharged and were no longer in attendance upon the court.

Was it error because the jury was

placed in the custody of Clingenpeel, deputy, on the adjournment of the court on the 22d and brought back to the court room on the following morning by Deputy Poteet? The same question arose in *State v. Poin-dexter*, 23 W. Va. 812. In that case the jury was placed in the custody of the deputies, and returned in the custody of the sheriff, and the court held it was not error. Section 6 of chapter 159 of the Code (§ 5582) requires that the jury, after being impaneled and sworn in a felony case, shall be kept together by the sheriff, or other officer, until they agree upon a verdict or are discharged. It would be unreasonable and extremely technical to hold that if a jury should be placed in the custody of an officer, and that officer should be stricken with illness or die, then another officer could not take custody, and, in consequence, the trial would cease. Clingenpeel delivered the jury to the custody of Poteet after supper, but for what reason or necessity it does not appear. The main reason of the statute is that the jury shall be kept together by a proper officer or officers, and the record conclusively shows that this was done. The judge may take charge of a jury in the temporary absence of the sheriff to whom they have been committed. *Phillips v. Com.* 19 Gratt. 485. It is not necessary that a deputy having a jury in charge during a trial for felony should be sworn every day to keep the jury together, and not permit anyone to talk to them, etc.; the law requires him to perform that duty without being sworn each day. *State v. Shores*, 31 W. Va. 492, 13 Am. St. Rep. 875, 7 S. E. 413; *State v. Ice*, 34 W. Va. 244, 12 S. E. 695; *State v. Kellison*, 56 W. Va. 690, 47 S. E. 166. Poteet was sworn as a special deputy at the beginning of the term and at noon recess of the day when custody was delivered. The law in this state is so defined concerning the separation and misconduct of jurors while in charge of the officer that it would serve no useful purpose to again review it. The leading case is *State v. Cartright*, 20 W. Va. 32, followed

by *State v. Robinson*, 20 W. Va. 713, 43 Am. Rep. 799; *State v. Harrison*, 36 W. Va. 729, 18 L.R.A. 224, 15 S. E. 982, 9 Am. Crim. Rep. 626; and the well-considered case of *State v. Cotts*, 49 W. Va. 615, 55 L.R.A. 176, 39 S. E. 605. In the last case the law is well stated as follows: "But where there has been an improper separation or misbehavior of the jury during the trial, if the verdict is against the prisoner, he is entitled to the benefit of the presumption that the irregularity has been prejudicial to him, and the burden of proof is upon the prosecution to show, beyond a reasonable doubt, that the prisoner has suffered no injury by reason of the separation or misbehavior; and, if the prosecution fails to do this, the verdict should be set aside."

In that case the jury had been separated into two parts, each in charge of a deputy, one part going to the camp grounds and the other remaining in the courthouse yard. That night they all were taken to see the accidental burning of a building, which had attracted a large crowd; and two of the jurors had gone into a cigar store for cigars, leaving the other jurors and deputy on the sidewalk; and there were several instances where different members of the jury had been spoken to on immaterial matters by outsiders. But it was clearly shown by affidavits that nothing of a prejudicial nature, to the injury of the defendant, transpired. The presumption of injury was successfully rebutted. The visit of the jury to the picture show may have been an irregularity, as tending to take their minds from more carefully and effectually deliberating on the grave case then in their keeping; but the picture, so far as the record shows, would not have that tendency, and the affidavits clearly show there was no separation or misconduct. The ice cream incident is of no importance. The jury was kept together and separate from all other persons while in the room, and spoke to no one. There is no more misconduct

Jury—visit to
theater—eject.

in procuring ice cream for the jury in this manner than there would be in procuring their meals at a restaurant. Nor can we see any prejudicial conduct in allowing Juror Dusenberry to get his nightshirt at his home. His affidavit clears all doubt.

Another assignment of error is the action of the court in allowing the Bragg and Stanley girls to testify about attempts made by the defendant prior to the 19th of January, 1920, because they constituted separate offenses, which he was not prepared to defend. We find no

Appeal—improper evidence—want of objection.

objection or exception taken by the defendant on the record. He has

waived the introduction of this evidence.

Even if objection had been made, the evidence would have been properly admitted to show the lustful disposition of the defendant, and that such other illicit or adulterous acts between him and the girl under

Evidence—rape—former conduct.

the age of consent tended to corroborate the particular

attempt charged in the indictment. *People v. Gray*, 251 Ill. 431, 96 N. E. 268. "The general rule that evidence of other crimes is inadmissible does not apply to proof of other acts of sexual intercourse between parties in statutory rape cases; that is, in prosecutions for rape on a female under the age of consent, . . . even though such other acts constitute separate and distinct crimes." 16 C. J. p. 608, title "Rape." See also 1 Wigmore, Ev. §§ 398 et seq.

Only one instruction was given for the state, and defendant asserts it to be erroneous "because it singled out certain evidence and made said evidence prominent to the exclusion of all other evidence." A reading of the instruction answers the objection. The instruction is as follows: "The court instructs the jury that if you believe from all the evidence in the case beyond a reasonable doubt that the defendant on the 19th day of January, 1920, or prior to said date, took Agatha Bragg, a female

child under the age of fourteen years, into the house and laid her on a bench in said house, as testified to by the witnesses in the case, and while in that position he pulled up her clothes, exposing her privates, and that the said W. W. Driver, with intent to have carnal knowledge of said Agatha Bragg, and while in that position, placed his male organ against the privates of Agatha Bragg with intent aforesaid, that then the said W. W. Driver is guilty as charged in the indictment, even though the jury believes from the evidence in the case that said conduct of said defendant was with the consent of said Agatha Bragg."

Just what particular evidence is made prominent by this instruction to the exclusion of other evidence we fail to see. The instruction is based upon all the evidence from which the jury may find the defendant guilty as charged, if they believe beyond a reasonable doubt that the act was committed in a particular manner and with intent to have carnal knowledge of Agatha Bragg.

The defendant offered six instructions, the first three of which were given and the others refused. The instructions refused were all to the effect that the defendant was not guilty unless he had intent to commit the crime as charged. The instruction given by the state fully covered this point, and told the jury that they must believe beyond reasonable doubt that the defendant had intent to have carnal knowledge of Agatha Bragg, and did certain acts with intent aforesaid, before they could find him guilty as charged. It is not proper to repeat instructions stressing the same point, or theory, although the wording may be different or variant. Instructions are designed to define for the jury, and to direct their attention to, the principles of law which apply to and govern the facts established. They must be considered as a whole, and if a legal principle is fully set out in one instruction, it will not be error to refuse another or others concerning

Appeal—Instructions—considered as whole.

the same. Where instructions given, no matter on which side, fairly and clearly lay down the law of the case, it is not error to refuse others on the same points, though good. *Nicholas's Case*, 91 Va. 742, 21 S. E. 364; *McCray v. Fairmont*, 46 W. Va. 442, 33 S. E. 245; *State v. Prater*, 52 W. Va. 132, 43 S. E. 230; *Meyer's Sons v. Falk*, 99 Va. 385, 38 S. E. 178, 9 Am. Neg. Rep. 644.

We have closely scanned the record for error, and have carefully considered the assignments of error, and have been unable to find any upon which we could justify reversal.

Upon the general assignment of error because the verdict was contrary to the law and the evidence, we have considered all the evidence, and have concluded that the evidence for the state, although coming in part from apparently unreliable sources and contradicted flatly by the defense, was sufficient to sustain the verdict. We cannot invade the province of the jury as to the credibility of the witnesses and the weight to be given to their testimony and the circumstances.

We affirm the judgment of the lower court.

ANNOTATION.

Impeachment of witness by expert evidence tending to show mental or moral defects.

As to use of drugs as affecting the competency or credibility of a witness, see annotation appended to *State v. Prentice*, ante, 912. That annotation includes the cases in which the expert evidence related to the effect of the use of drugs.

The present annotation, as the title indicates, purports in general to deal only with the question of expert evidence, although a few cases are referred to where the nature of the evidence does not appear, or, a fortiori, expert evidence would seem admissible.

There are many cases holding that the question whether a person who is offered as a witness is mentally competent to testify is a preliminary question for the court to decide. It should be observed that the annotation does not deal with the question of evidence on this preliminary question of competency, but rather with the question as to the evidence to impeach or discredit a witness.

The rule appears to be that evidence of mental unsoundness of a witness may be shown to impeach his testimony, even though he may not be mentally incompetent to testify. Cases to this effect have frequently involved nonexpert evidence. No case has been found in which, as in the reported

case (*STATE v. DRIVER*, ante, 917), the medical expert offered to testify from information gained merely from the testimony, or a part of the testimony, of other witnesses. In a number of cases, however, evidence of experts has been held admissible on the question of the mental soundness of witnesses, for the purpose of impeaching or discrediting their testimony.

Delaware.—See *Armstrong v. Timmons* (1840) 3 Harr. 342.

Georgia.—*Jeffers v. State* (1916) 145 Ga. 74, 88 S. E. 571.

Iowa.—*Alleman v. Stepp* (1879) 52 Iowa, 626, 35 Am. Rep. 288, 3 N. W. 636.

Michigan. — *Derwin v. Parsons* (1884) 52 Mich. 425, 50 Am. Rep. 262, 18 N. W. 200.

North Carolina. — *Lord v. Beard* (1878) 79 N. C. 5.

Texas.—*Anderson v. State* (1912) 65 Tex. Crim. Rep. 365, 114 S. W. 281.

Washington.—*State v. Pryor* (1913) 74 Wash. 121, 46 L.R.A.(N.S.) 1028, 132 Pac. 874.

West Virginia.—See *State v. Perry* (1896) 41 W. Va. 641, 24 S. E. 634.

Where there was a direct conflict in the testimony of two witnesses in a civil action, and one of them was an aged woman who had had an attack of paralysis, it was held com-

petent to ask an expert witness if paralysis did not have a tendency to impair the mind of old persons. *Lord v. Beard* (N. C.) *supra*. The court said it was material for the jury to know which of the two witnesses was the more reliable, and to that end it was competent for an expert to testify as to the tendency of the disease with which one of the witnesses was affected, to impair those faculties of the mind, the full possession of which most fitted the witness to give exact and truthful testimony; and that the evidence of the expert went to weaken the force of the witness's testimony. This evidence was held admissible notwithstanding the physician who gave it had testified that he knew the witness well, had seen her about fifteen months subsequent to her paralytic attack, and could not then discover any impairment of her faculties.

And in *Alleman v. Stepp* (Iowa) *supra*, where the testimony of the plaintiff and that of the defendant as to a proposed settlement was conflicting, it was held that a physician who had known the defendant from a time prior to an operation upon him should be permitted to testify as to the condition of the defendant's mind as to memory before and after the injury, and as to whether, in the opinion of the witness, the defendant's mind was greatly impaired. The court said: "Surely, if defendant was suffering from an impaired mind, which affected his memory, the fact would tend to lessen the credit to be given to his testimony. Can it be doubted that the credibility of a witness may be assailed by showing his want of mental capacity? It is said that the infirmity of memory should be shown by cross-examination. But it might not be made to appear in that way, though it really existed. The witness was a physician and knew the defendant before and after the injury and the condition of his mind as to memory. He was surely competent to state the fact of defendant's loss of memory, and, in our judgment, he was competent to state his opinion of the defendant's mental condition, based upon his knowledge and observation of the de-

fendant before and after the injury. If in this way, it should be made to appear that defendant's memory was impaired by disease, his credibility would be impeached. Under familiar rules of the law the credibility of a witness may be impeached by showing moral defects. Mental defects in the witness, or loss or impairment of memory, will, according to the observation of all men, detract from the credibility otherwise due a witness, just as surely as do moral defects. . . . It is proper to say that the rule we recognize extends no farther than to permit the impeachment of a witness by showing an abnormal condition of the mind caused by disease, or habits which impair the memory. It will not permit evidence of the want of strength or accuracy of memory of a witness whose mind is not shown to be in an abnormal condition. While it is true that the memories of men of sound physical and mental health are not equally strong and accurate, or they are unequal in other faculties of the mind and in physical development, the law can devise no standard of measurement or test of the mind in its normal condition."

So, in an action for indecent assault, where the plaintiff was the sole witness to the facts upon which she relied for recovery, and her testimony was directly contradicted by that of the defendant, it was held proper, after it had been proved that the plaintiff was afflicted with a particular disease, to show by experts that a considerable proportion of women thus diseased were liable to hallucinations respecting the conduct of men toward them, although there was no direct evidence that the plaintiff was ever the victim of hallucinations. *Derwin v. Parsons* (1884) 52 Mich. 425, 50 Am. Rep. 262, 18 N. W. 200, *supra*. The court said that the plaintiff might be the victim of hallucinations without the fact being known, and that so long as the main facts to which she testified were in dispute, the circumstance which might produce delusion was not without significance.

It was held, also, in *Jeffers v. State* (1916) 145 Ga. 74, 88 S. E. 571, *supra*,

that a medical expert, after an examination of the prosecuting witness on a charge of rape, was properly permitted to state his opinion as to her mental development, and to testify that it was considerably below the average, and that he regarded her as a child. So far as appears, this evidence was introduced on the trial, and not on a preliminary examination, though whether for impeaching the credibility of the witness is not shown.

And in *State v. Pryor* (1913) 74 Wash. 121, 46 L.R.A.(N.S.) 1028, 132 Pac. 874, *supra*, it was held, on a prosecution for abortion, that medical testimony was erroneously excluded to prove that a witness who testified that instruments were used on her to effect the abortion was at the time of the alleged offense suffering from hysteria, which caused her to have hallucinations and illusions, since this evidence was admissible as affecting the credibility of the witness.

Whether criminal charges preferred by a female patient against a physician were the result of hallucination, while under the influence of chloroform and ether, was held in *State v. Perry* (1896) 41 W. Va. 641, 24 S. E. 634, *supra*, to be a question which must be determined by expert medical evidence; since the matter was not one of ordinary experience or knowledge.

In *Armstrong v. Timmons* (1840) 3 Harr. (Del.) 342, the court said that the opinions of medical men were entitled to peculiar weight on the question of mental capacity of a witness; but in this case, where physicians testified with reference to the sanity of a witness and the court found that he was incompetent, it seems that the objection was made as soon as the witness was called to the stand, and before he had been allowed to testify.

In *District of Columbia v. Armes* (1883) 107 U. S. 519, 27 L. ed. 618, 2 Sup. Ct. Rep. 840, it seems that expert medical testimony was admitted as to the impaired condition of a witness's mind, for the purpose of affecting his credibility as a witness; but the court did not pass directly upon the question of the admissibility of such testi-

mony. The action was for personal injuries, and the person injured was himself a witness. It appearing from his testimony that his mind was feeble, and hospital physicians having testified as to the impaired condition of his mind and memory, shown while in hospitals to which he was taken after the injury, it was sought to withdraw from the jury the witness's testimony on the ground that his mental faculties were so far impaired as to render him incompetent to testify. The court denied this request, but instructed the jury that the testimony must be taken with some allowance, considering his condition of mind and incapacity to remember all the circumstances. It was held that this ruling was not erroneous. The court laid down the rule that whether a lunatic or insane person has sufficient understanding to be admissible as a witness is a question to be determined by the court upon examination of the party himself, and of any competent witnesses who can testify to the nature and extent of his insanity.

However, in the reported case (*STATE v. DRIVER*, ante, 917), the court held that, for the purpose of impeaching the credibility of a witness, it was not proper to permit medical experts, who had heard only a portion of the evidence given, to testify from what they had heard and seen in the court room, and from observation of the witness on the stand, that she was what is termed in the medical profession a "moron," and belonged to a kind or class of morons who were prone to tell lies, and that therefore she was unworthy of belief, and no weight should be given to her testimony.

And in several other cases expert testimony as to mental unsoundness of a witness has been held, under the particular circumstances, inadmissible for the purpose of discrediting the witness's testimony.

Thus, where there was no evidence tending to show that the prosecuting witness on a charge of incest, who was under the age of consent, was physically or mentally diseased, or that her mind or memory had been affected by her early development, it was held

that testimony of a medical expert, offered to impeach the witness, as to the effect of premature sexual development on the mental development of a child, was properly excluded. *State v. Pelsner* (1917) 182 Iowa, 1, 163 N. W. 600.

And where the court had examined the proposed witness and ruled that she was competent to testify, and her testimony had been received, it was held in *People v. Harrison* (1912) 18 Cal. App. 288, 123 Pac. 200, that testimony of a physician as to the condition of the witness's mind as he had found it two years before the trial was incompetent. The remoteness of the evidence was only one of the grounds for its exclusion. The court said: "The declared purpose of the evidence was to show that the prosecutrix was incompetent some two years prior to the time when she testified. In no event could the proffered evidence be received. The court had properly ruled upon the competency of the witness attacked; moreover, the evidence offered by defendant did not relate to the question of her mental condition at the time when she testified, but to a period long anterior thereto. Neither could it be admitted for the purpose of impeachment, for the reason that it is not one of the modes prescribed by statute (Code Civ. Proc. §§ 2051, 2052) for impeaching a witness."

And after a witness in a criminal case had completed her testimony and had left the stand, it was held that the court had no power to compel her to submit to a medical examination to determine whether or not she was afflicted with hysteria, for the purpose of securing evidence affecting her credibility. *Goodwin v. State* (1902) 114 Wis. 318, 90 N. W. 170. In this case the request was made on the following day after the witness had testified, and the trial court refused the request, stating that it was satisfied as to the competency of the witness, both by previous observation and by her manner of testifying. The court upheld this ruling, on the ground that any other course would be an unwarranted invasion of the right of personal liberty.

Although, as before stated, the annotation purports to cover only cases relating to expert evidence, attention is called to several cases holding admissible evidence which, so far as appears, was not expert, to show mental unsoundness of a witness, for the purpose of discrediting his testimony, as it seems, a fortiori, that proper testimony of an expert would, under the ruling, be admissible. Among other cases of this class, attention may be called to *Thrash v. State* (1921) 146 Ark. 547, 226 S. W. 130; *Rivara v. Ghio* (1854) 3 E. D. Smith (N. Y.) 264; *Isler v. Dewey* (1876) 75 N. C. 466; *Bouldin v. State* (1920) 87 Tex. Crim. Rep. 419, 222 S. W. 555; *Fairchild v. Bascomb* (1862) 35 Vt. 398.

In *Thrash v. State* (Ark.) supra, the court said that it is admissible, in order to affect the credibility of a witness, to prove that he is subject to insane delusions, or that his mind and memory have become impaired by disease or other causes.

And in *Rivara v. Ghio* (1854) 3 E. D. Smith (N. Y.) 264, supra, it was held that the court erroneously rejected evidence of one who was called to prove, in a civil action, that the plaintiff's principal witness had been of imbecile mind and memory, although this offer was made after the witness had been examined without objection. The court said in effect that the evidence offered would tend to prove that less reliance should be placed upon the statements of the witness than those of one who was *compos mentis*; that when objection is not taken upon the calling of a witness, and therefore may perhaps be deemed waived as an objection to the competency of the witness, evidence may be given as going to the degree of credit to which the testimony of the witness is entitled, such evidence going not only to the question of competency of the witness, but also to that of credibility.

And where, in a criminal case, the defendant contended that the prosecuting witness was insane or feeble-minded, the court in *Bouldin v. State* (1920) 87 Tex. Crim. Rep. 419, 222 S. W. 555, supra, held that the defendant should have been permitted to prove

that such witness was idiotic and therefore incompetent, or, if not insane or idiotic so as to be incompetent, such proof would be admissible for the purpose of impeaching the testimony of the witness, on the same theory that a witness could be shown to be drunk when the occurrences about which he testified occurred. The court said that it seemed to be a well-settled rule that the feeble-minded condition of a witness may be shown to impair or impeach his credit as a witness.

So, where, after examination of a witness in a civil case, the opposing party offered to prove that a year prior to the trial the witness had had a severe disease of the brain and that his mind was still affected by it, it was held in *Fairchild v. Bascomb* (Vt.) *supra*, that the evidence was erroneously excluded, since it was admissible as tending to show that his memory and judgment were less reliable than if he had possessed full mental health and vigor, and, therefore, as affecting the degree of credit to be given to him.

Weakness of memory on the part of a witness may be shown to impeach his testimony, and the opinions of those who know him are competent for this purpose, even though they are not experts. *Isler v. Dewey* (1876) 75 N. C. 466, *supra*.

Attention is called, however, to several cases, in which, under the particular circumstances, the court held inadmissible evidence offered to show mental unsoundness or defects of a witness, for the purpose of discrediting his testimony. See, for instance, *State v. Spotted Hawk* (1898) 22 Mont. 83, 55 Pac. 1026; *State v. Whitsett* (1911) 232 Mo. 511, 134 S. W. 555; *Bell v. Rinner* (1864) 16 Ohio St. 45.

In *Bell v. Rinner* (Ohio) *supra*, it was held that the credibility of a competent witness could not be impeached by general evidence that the witness

was not possessed of ordinary intelligence or mental powers, since to do so would result in unwarranted trials of collateral issues.

In *State v. Whitsett* (1911) 232 Mo. 511, 134 S. W. 555, *supra*, it was held on a criminal trial that it was not error for the court to exclude evidence (whether expert or not does not appear) to impeach a witness on the ground that he was of unsound mind, where no objection to the testimony of the witness was made on this ground, and no request was made for the court to examine the witness on his voir dire, and it appeared that the witness's testimony was as clear, coherent, and consistent as that of any other witness in the case.

The case of *State v. Spotted Hawk* (Mont.) *supra*, is frequently cited in the class of cases under consideration, but in that case the evidence which was excluded was a certified copy of the witness's discharge from the Army on the ground of mental deficiency, about four years before the trial. And objection was also sustained to a question asked the witness as to whether he had not been discharged from the Army for the reason that he was periodically insane and generally an imbecile. The court said: "The question put to the witness is so shaped as to bring out an answer showing the estimate in which the witness was held by others, and not the fact as to his mental condition then or at any other time. It might have been competent to show his real mental condition, with a view of testing his credibility; but it was not competent to prove by him what others thought. Nor was the certificate competent. It is a mere *ex parte* statement by a person not shown to be qualified to speak as to the mental condition of the witness. It was also an attempt to impeach the witness on a collateral matter."

R. E. H.

DAVE DONOGHUE et al., Respts.,
v.
TONOPAH ORIENTAL MINING COMPANY, Appt.

Nevada Supreme Court—June 6, 1921.

(— Nev. —, 198 Pac. 553.)

Mines — noncompliance with proviso of resolution suspending assessment work — effect.

1. Failure to file a notice of intention to take advantage of the Resolution of Congress of October 5, 1917, suspending assessment work on mining claims during the war, in the office where the location notice was filed as required by the proviso of the act, because of uncertainty as to the county line and advice of the county officials that it should be filed in another county, where it was in fact filed, does not render the claim subject to relocation by another claimant.

[See note on this question beginning on page 942.]

Statute — interpretation — relief from injustice.

2. It is not the province of courts to concern themselves with the injustice, inconvenience, or hardships of a statute, where its meaning is plain.

[See 25 R. C. L. 1022, 1026.]

— giving just interpretation.

3. Where a statute is susceptible of two interpretations that one will be

given it which best comports with reason and justice.

[See 25 R. C. L. 1018.]

Forfeiture — equity will not enforce.

4. Equity never enforces forfeitures, nor extends its aid in the assertion of a mere legal right, contrary to the clear equity and justice of the case.

[See 10 R. C. L. 336, 337.]

(Coleman, J., dissents.)

APPEAL by defendant from a judgment of the District Court for Nye County (Averill, J.) in favor of plaintiffs and from an order denying a new trial in an action brought to determine an adverse claim to a certain piece of mining ground. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Hugh Henry Brown and Walter Rowson, for appellant:

When Congress suspended the annual Assessment Law for 1917 and 1918 and prescribed a substitute therefor, the lawmakers intended that one filing would suffice for a county-line group, and that said filing might lawfully be made in either county.

Dewey Min. Co. v. Miller, 96 Fed. 1; Cates v. Producers' & C. Oil Co. 96 Fed. 7; Walsh v. Erwin, 115 Fed. 531; Butte City Water Co. v. Baker, 196 U. S. 119, 49 L. ed. 409, 25 Sup. Ct. Rep. 211; Union Oil Co. v. Smith, 249 U. S. 337, 63 L. ed. 635, 39 Sup. Ct. Rep. 308; Nesbitt v. Delamar's Nevada Gold Min. Co. 24 Nev. 273, 77 Am. St. Rep. 807, 52 Pac. 609, 53 Pac. 178, 19 Mor. Min. Rep. 286;

De Lamar's Nevada Gold Min. Co. v. Nesbitt, 177 U. S. 524, 44 L. ed. 873, 20 Sup. Ct. Rep. 715; Field v. Tanner, 32 Colo. 278, 75 Pac. 917; 2 Lindley, Mines, p. 1584; 3 Lindley, Mines, p. 2480, ¶ 1.

The act is to be construed liberally, not strictly.

The Eudora, 110 Fed. 430; Church of the Holy Trinity v. United States, 143 U. S. 457, 36 L. ed. 227, 12 Sup. Ct. Rep. 511.

In Nevada a location certificate is not imperatively required to be recorded. An owner may have a valid title without it being recorded.

Ford v. Campbell, 29 Nev. 578, 92 Pac. 206; Gibson v. Hjul, 32 Nev. 360, 108 Pac. 759; Zerres v. Vanina, 134 Fed. 610; Indiana-Nevada Min. Co. v.

Gold Hills Min. & Mill. Co. 35 Nev. 158, 126 Pac. 965.

There is no forfeiture clause in the act.

2 Lindley, Mines, § 624; *Farmers & M. Nat. Bank v. Dearing*, 91 U. S. 35, 23 L. ed. 199; *Sutherland v. Purdy*, 148 C. C. A. 366, 234 Fed. 600; *Debney v. Iles*, 3 Alaska, 438; *Indiana-Nevada Min. Co. v. Gold Hills Min. & Mill. Co.* 35 Nev. 158, 126 Pac. 965; *Florence-Rae Copper Co. v. Kimbel*, 85 Wash. 162, 147 Pac. 881; *Emerson v. McWhirter*, 133 Cal. 510, 65 Pac. 1036, 21 Mor. Min. Rep. 470; *Emerson v. Yosemite Gold Min. & Mill Co.* 149 Cal. 50, 85 Pac. 122; *Belcher Consol. Gold Min. Co. v. Deferrari*, 62 Cal. 160; *Temescal Oil Min. & Development Co. v. Salcido*, 137 Cal. 211, 69 Pac. 1010, 22 Mor. Min. Rep. 360; 19 Cyc. 1358.

Mr. W. R. Gibson, for respondents:

A recording of a notice of intention to hold in Esmeralda county (where no part of the ground in controversy is situate, and where no records of the claims was made) was not such a compliance with the terms of the resolution of Congress as to warrant the court in holding that the location of the lode mining claim, Moy No. 3, was invalid by reason of the construction notice implied by such recordation.

23 R. C. L. 180; 20 R. C. L. 342, 343; *Ford v. Campbell*, 29 Nev. 578, 92 Pac. 206; *Lindley, Mines*, § 273, p. 623; *Newby v. Perkins*, 1 Dana, 440, 25 Am. Dec. 160; *Wilson v. Trenton*, 53 N. J. L. 645, 16 L.R.A. 200, 23 Atl. 278; *Rosina v. Trowbridge*, 20 Nev. 106, 17 Pac. 751; 20 Cyc. 1119; *Lynch v. Murphy*, 161 U. S. 247, 40 L. ed. 688, 16 Sup. Ct. Rep. 523.

Sanders, Ch. J., delivered the opinion of the court:

The complaint in this action is the short form of a complaint to quiet title to real estate. This action, however, was brought to determine an adverse claim to a certain piece of mining ground situate in the Tonopah mining district, Nye county, Nevada, segregated from the public domain by conflicting lode mining locations (that of the plaintiffs overlapping the prior location of the defendant).

The case differs from ordinary actions of this character in that the record shows, and it is conceded to be the fact, that plaintiffs base their

right to locate the ground, primarily, upon the assumption that the failure and neglect of defendant's predecessors in interest to comply literally with the proviso contained in a joint resolution of Congress caused the ground to revert to the public domain and rendered it subject to relocation. The resolution referred to was approved on October 5, 1917, by the Sixty-fifth Congress. It is entitled: "Joint Resolution to Suspend the Requirements of Annual Assessment Work on Mining Claims during the Years Nineteen Hundred and Seventeen and Nineteen Hundred and Eighteen." 40 Stat. at L. 343, chap. 75, Comp. Stat. § 4620b, Fed. Stat. Anno. Supp. 1918, p. 461.

The resolution reads as follows: "Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That in order that labor may be most effectively used in raising and producing those things needed in the prosecution of the present war with Germany, that the provision of section twenty-three hundred and twenty-four of the Revised Statutes of the United States (Comp. Stat. § 4620, 6 Fed. Stat. Anno. 2d ed. p. 533), which requires on each mining claim located, and until a patent has been issued therefor, not less than \$100 worth of labor to be performed or improvements to be made during each year, be, and the same is hereby, suspended during the years nineteen hundred and seventeen and nineteen hundred and eighteen: Provided, that every claimant of any such mining claim in order to obtain the benefits of this resolution shall file or cause to be filed in the office where the location notice or certificate is recorded on or before December thirty-first, of each of the years nineteen hundred and seventeen and nineteen hundred and eighteen, a notice of his desire to hold said mining claim under this resolution: Provided further, that this resolution shall not apply to oil placer locations or claims. . . . "

In the case at bar it is conceded that the claim owners had no idea or intention of abandoning their mining ground prior or subsequent to the 31st day of December, 1918; but, on the contrary, the testimony shows, and it is not disputed, that the owners in 1917 filed for record in the recorder's office of Nye county (where the certificate of location was recorded in 1915) their notice of desire to hold their claims under the resolution of Congress for both years 1917 and 1918, apparently believing that the one notice would answer for both years. In this, under a ruling of the Department of Justice, they were mistaken, and it became necessary for them, in order to obtain the benefits of the resolution, to file a like notice for the year 1918. They attribute their failure to file the notice in the recorder's office of Nye county for the year 1918, as they had done in 1917, to the following facts and circumstances:

The claim in dispute is one of a group consisting of four contiguous claims, known generally as the "Homestake Group." The history of the ground covered by the group dates from the formation of the Tonopah mining district. The group in 1917 was owned in common by three persons, all of whom were absent from the state of Nevada in 1918. One of the owners died in that year. The dividing line between Nye and Esmeralda counties cuts through the group, leaving the claims partly in Nye and partly in Esmeralda county. The exact location of the true line between these counties was a matter of doubt, speculation, and uncertainty until after the year 1913, when the legislature enacted a law authorizing the officials of these counties to re-establish it. Assuming that this was done, nevertheless much of the testimony in the case shows that the dividing line, in so far as it affects the ground covered by the group, was still a matter of doubt. But one claim of the group here in controversy is in Nye county. Much

testimony was offered by the defendant to show that the owners of the group and others were in doubt as to how the dividing line as established affected the group and other mining ground in its vicinity.

The proof shows that in 1918 one of the owners lived at Los Angeles and the other at Sacramento, California. Each wrote urgent letters, one to his friend in Tonopah and the other to his father-in-law, also residing there, to do all that was necessary and required to be done to hold their claims under the resolution of Congress for the year 1918. The friend of the owner living in Sacramento prepared the required notice and presented it to the recorder of Nye county for filing, in the month of December, 1918. He was informed by the recorder that the proper place for filing the notice was in the recorder's office of Esmeralda county, at Goldfield, Nevada. Thereupon he caused the notice to be filed in the recorder's office in said county, on or about the 27th day of December, 1918. Relying on the representation of the recorder of Nye county as being official and correct, he gave no further consideration to the matter, believing, of course, that he had complied, for and on behalf of his friend, with the requirement of the resolution of Congress.

The other owner, living in Los Angeles, wrote his father-in-law on the 10th of December, 1918, to do for him all that was necessary and required to be done under the resolution to hold his claims, stating therein that he did not want to give them up. This was followed by another communication, of December 20, 1918, in which he inclosed a formal notice of desire to hold the claims in accordance with the resolution of Congress, not knowing of the steps taken by his co-owner to hold the ground, and instructed his father-in-law to file the notice in Tonopah, Nye county. The father-in-law was of the same opinion as the county recorder of Nye county, that Goldfield was the proper place

for the recordation of the notice, basing his opinion upon his own experience, with the uncertainty of the whereabouts of the true dividing line between Nye and Esmeralda counties as it passed through the Homestake group and other mining locations in that vicinity; and it was his opinion also that, as the property consisted of a group of claims, the notice required could as well be filed in either county, and therefore he caused the notice to be filed in Esmeralda county.

The trial court, in arriving at its ultimate conclusion, disregarded all defendant's evidence, and decided that the failure of defendant's grantors to literally comply with the proviso operated as a forfeiture of the ground; that plaintiffs having entered upon the ground and made a valid relocation, the forfeiture was completed, and rendered a decree confirming and quieting title in plaintiffs. The defendant appeals.

We do not think it was the intention of Congress that the proviso should be interpreted so as to result in injustice, oppression, or absurd consequences. The particular situation, as disclosed by the above statement of facts, made the question of the interpretation of the proviso one to be influenced and controlled by the broad and important inquiry whether it was the intention of Congress to declare a forfeiture where the claim owner honestly and in good faith endeavored to comply with the terms of the proviso, but failed for the reasons above stated.

It is not a question of construction of the proviso, but one of interpretation as to whether or not Congress intended that its terms should be so inflexible as not to permit of exceptions. We think the meaning and effect of a public resolution of this character is to be determined under broad rules of liberal interpretation, especially as it appears upon the face of the resolution that it was approved when the

government was confronted with imminent exigencies, emergencies, and perils. It is true that every claim owner was not engaged directly in helping to win the war with Germany, which was the moving cause of the resolution. But Congress evidently assumed that every able-bodied citizen, or person who had declared his intention to become such, holding mining ground under the government's conditional grant, stood ready in return for its favor to bend his energies and lend his substance to the aid of the government in its time of need. But it is insisted that this public purpose yields to the strict letter of the proviso, which when interpreted literally shows that the assessment work was suspended for the benefit of individual claim owners, and that a claim owner who had failed to file or cause to be filed his notice of desire to hold lost his claim, and had no standing in a court of law or equity. We are not construing the proviso; it needs no construction. We are endeavoring to find the intention of Congress where a claimant failed and neglected, without fault of his own, but through an honest mistake, attributable to others, to cause to be filed in the proper recorder's office his notice of desire to hold his ground.

If the proviso is solely for the benefit of the individual claim owner, we are not in accord with an interpretation that nullifies its beneficent purposes. We think that reflection inevitably leads to the conclusion that exceptions, which are present and concurring in this case, arise from a failure to comply literally with the terms of the proviso. First, there is no fraud or deceit; second, no intention, shown by competent, clear, and satisfying proof, to abandon the claims; third, there is good faith, and an open and honest effort to comply; and, fourth, excusable neglect or omission of

Mines—non-compliance with proviso of resolution suspending assessment work—effect.

others to file the notice, not attributable to the claim owner.

This interpretation is supported, in a measure, by that of the Interior Department in a case arising under the Suspensory Act of 1893 (28 Stat. at L. 6, chap. 12). The Act of 1893, suspending the assessment work for that year, came before the department in *Cain v. Addenda Min. Co.* 24 Land Dec. 18. The owner was permitted to hold the ground under the resolution, though the company had not filed any declaration of intention whatever. It is true that it was in a contest which involved fraud of the worst kind; still the ruling indicates that each case arising between claim owners and third parties for failure to comply with the resolution is to be controlled and decided upon its own particular facts and circumstances.

It is true, from the situation developed from the trial of this case, that the representatives of the true owners of the ground in dispute, though acting in good faith, upon their own showing, could have taken the precaution, being in doubt, to file the notice in both Nye and Esmeralda counties; but their omission so to do, under the particular circumstances, should not be visited upon the owners. In arriving at this conclusion, we are mindful that it is not the province of

Statute—
interpretation—
relief from
injustice.

courts to concern themselves with the injustice and inconvenience or hardships of a law where its meaning is plain. Such a matter is addressed to Congress. But where it is clear that a strict and literal interpretation of a public resolution, concerning land in which the government has a proprietary interest, will result in manifest injustice, we may scrutinize it closely to see if it will not admit of some other interpretation. We take it that Congress is presumed to have intended an interpretation which would avoid results of this character. We freely

admit that the language of the proviso is susceptible of the interpretation that it is mandatory in terms, but we are of the opinion that its resulting effect is ^{—giving just interpretation.}

doubtful and susceptible of two interpretations, and under the well-settled rule we give it that interpretation which best comports with reason and justice. *State ex rel. Wright v. Dovey*, 19 Nev. 396, 12 Pac. 911; *State v. Kruttschnitt*, 4 Nev. 178, 14 Mor. Min. Rep. 130. See also 11 Enc. U. S. Sup. Ct. Rep. p. 151. It must be understood that this is an equitable action to quiet title that involves questions peculiarly equitable in their nature. Equity neither enforces forfeitures nor extends its aid in the assertion of a mere legal right contrary to the clear equity and justice of the case. *Jones v. New York Guaranty & I. Co.* 101 U. S. 622, 25 L. ed. 1030; *Defanti v. Allen Clark Co.* — Nev. —, 198 Pac. 549.

Forfeiture—
equity will not
enforce.

Entertaining the view that the facts in this case are such as in equity show the defendant to have the better right to the possession of the ground, it is the order that the judgment of the lower court be reversed, with directions to render and cause to be entered a decree in favor of the defendant, in accordance with the prayer of its affirmative defense, without further proceedings.

It being conceded that our conclusion is decisive of the case, we do not discuss other important and interesting questions.

It has been suggested that the case involves a Federal question. We will pass upon that, should occasion arise, at the proper time.

Ducker, J., concurs.

Coleman, J., dissents:

Petition for rehearing denied, September 7, 1921.

ANNOTATION.

Effect of act or joint resolution of Congress suspending requirement of assessment work on mining claims.

By the Joint Resolution of October 5, 1917 (Fed. Stat. Anno. Supp. 1918, p. 461), Congress suspended during the years 1917 and 1918 the requirement of annual assessment work on unpatented mining claims, provided a notice of intention to hold the claim under the resolution was filed in the office where the location notice was recorded. The reported case (*DONOGHUE v. TONOPAH ORIENTAL MIN. CO.* ante, 937) seems to be the only decision involving this resolution. In that case it appeared that the owners of a group of mining claims sought in good faith to file a notice of intention to hold the claims under the resolution. Because of a prevailing uncertainty as to the location of the county lines in that vicinity, and being misled by the advice of a recording officer, no notice was filed in the county in which one of the claims of the group was situated. A location was thereafter recorded covering the claim as to which no notice was properly filed, and the locator brought suit to quiet title. It is held that the joint resolution is not mandatory, and that the court had power to refuse to declare the original location to have been forfeited, the equities being with the original locator.

On November 3, 1893, due, it was said in *De Lamar's Nevada Gold Min. Co. v. Nesbitt* (1900) 177 U. S. 523, 44 L. ed. 872, 20 Sup. Ct. Rep. 715, to the financial panic then prevailing, Congress passed an act (28 Stat. at L. 6, chap. 12) in substantially the same terms as the joint resolution heretofore referred to, dispensing with assessment work for the year 1893. The provision of that act for the filing of

a notice of intention to claim its benefits was held by the Interior Department not to be mandatory. *Cain v. Addenda Min. Co.* (1897) 24 Land. Dec. 18, set out in the reported case (*DONOGHUE v. TONOPAH ORIENTAL MIN. CO.* ante, 937).

In *Royston v. Miller* (1896) 76 Fed. 50, 18 Mor. Min. Rep. 418, it was held that a part owner of a mining claim who performed the assessment work for 1893 could not forfeit the interest of his co-owner for the refusal of the latter to contribute thereto. The court said: "At the time Irvine completed the assessment work, he did not have such a vested right of recovery by contract as prevented Congress from repealing or suspending the provisions of the statute in so far as it provided for a forfeiture. The suspension of the provisions of the statute requiring annual work to be done necessarily suspended the right of forfeiture. The forfeiture imposed by the statute was for failing to do the work which the law then required to be done. The suspensatory or amendatory act provided that the work hitherto required need not be done in 1893, and hence it follows that the right of forfeiture could not thereafter exist for any act omitted in that respect during that year. The enforcement of a forfeiture cannot be had when the law excuses the performance of the condition."

In *De Lamar's Nevada Gold Min. Co. v. Nesbitt* (U. S.) supra, it was said obiter that a claim of right or title under the provisions of the Act of 1893 raised a Federal question, reviewable by writ of error in the Federal Supreme Court. W. A. S.

GEORGE R. WESTERMAN, Appt.,
v.
PENNSYLVANIA SALT MANUFACTURING COMPANY.

Pennsylvania Supreme Court—January 7, 1918.

(260 Pa. 140, 103 Atl. 539.)

Mines — right to use passageways for ore on adjoining land.

1. One receiving a grant in fee of the coal underlying a parcel of land may, until he exhausts the coal there located or loses his right by abandonment, use the passageways for the removal of coal which he owns under adjoining land.

[See note on this question beginning on page 957.]

— effect of suspension of mining.

2. The temporary suspension of mining in a particular tract when all the coal is removed except the pillars necessary for surface support does

not work an abandonment of the right of the owner of the coal to use the passageways to remove coal belonging to him in adjoining tracts.

APPEAL by plaintiff from a decree of the Court of Common Pleas for Allegheny County (Shafer, P. J.) dismissing a bill filed to enjoin the transportation of coal over adjoining tracts of land, and for an accounting. *Appeal dismissed.*

The facts are stated in the opinion of the court.

Mr. Nelson McVicar for appellant. Messrs. J. Merrill Wright and Daltzell, Fisher, & Hawkins, for appellee:

The deed contained a conveyance of "all the coal;" that is, the coal in veins then known or that might be later discovered.

King v. New York & C. Gas Coal Co. 204 Pa. 628, 54 Atl. 477, 22 Mor. Min. Rep. 515.

Plaintiff is not entitled to relief.

Lance v. Lehigh & W. B. Coal Co. 163 Pa. 84, 29 Atl. 755; Hammond v. Hammond, 258 Pa. 51, L.R.A.1918A, 590, 101 Atl. 855; King v. New York & C. Gas Coal Co. supra; New York & P. Coal Co. v. Hillside Coal & I. Co. 225 Pa. 211, 74 Atl. 26; Schobert v. Pittsburg Coal & Min. Co. 40 L.R.A. (N.S.) 826, and note, 254 Ill. 474, 98 N. E. 945, Ann. Cas. 1913B, 1104; Sorg v. Frederick, 255 Pa. 617, 100 Atl. 481.

If plaintiff did not grant an easement or an appurtenance by express words, he must surely be estopped by the seventeen years' lapse of time, during which he saw the work being carried on, "and connived at it without showing the least disagreement."

LeFevre v. LeFevre, 4 Serg. & R. 241, 8 Am. Dec. 696; Potter v. Rend, 201 Pa. 318, 50 Atl. 821, 22 Mor. Min. Rep. 1;

Collison v. Philadelphia Co. 233 Pa. 350, 82 Atl. 474.

There is no evidence of damage to the plaintiff.

Booher v. Browning, 169 Pa. 18, 32 Atl. 85.

Assuming that the plaintiff is entitled to recover at all, he could at most recover only nominal damages.

Webber v. Vogel, 159 Pa. 235, 28 Atl. 226; Lance v. Lehigh & W. B. Coal Co. 163 Pa. 84, 29 Atl. 755; Springer v. J. H. Somers Fuel Co. 196 Pa. 156, 46 Atl. 370; New York & P. Coal Co. v. Hillside Coal & I. Co. 225 Pa. 211, 74 Atl. 26; Weisfield v. Beale, 231 Pa. 39, 79 Atl. 878.

The equities are with the defendant.

Berkey v. Berwind-White Coal Min. Co. 220 Pa. 65, 16 L.R.A.(N.S.) 851, 69 Atl. 329; Streng v. Buck Run Coal Co. 241 Pa. 560, 88 Atl. 796; Chartiers Block Coal Co. v. Mellon, 152 Pa. 286, 18 L.R.A. 702, 34 Am. St. Rep. 645, 25 Atl. 597; Becker v. Lebanon & M. Street R. Co. 188 Pa. 484, 41 Atl. 612.

Walling, J., delivered the opinion of the court:

This is a bill in equity for an injunction and accounting. Defendant

has been engaged in manufacturing in Allegheny county since 1850, with its plant located on the bank of the Allegheny river, where it owned a tract of land underlaid with coal from which it secured fuel. This supply was gradually exhausted, and about 1897 defendant purchased the coal in a block of approximately 2,500 acres of land, located conveniently to its plant. It was bought from various landowners, including 80 acres from plaintiff, and included four veins of mineable coal; the upper Freeport vein being about 200 feet below the surface and the others at a greater depth. As is customary in such cases the defendant treated this block as a single mining proposition, at least so far as relates to the upper Freeport vein, which it proceeded to mine as such. At the lower side of the block, near a creek, a main entrance was constructed, known as the Klondike mine. From there, as the mining progressed, a main passageway or haulage was gradually driven back into the block and through plaintiff's farm, which was near the entrance, and thence on into other lands. As the main driveway proceeded, first mining was done in this vein on the plaintiff's land, by which practically all the coal was taken except 25 to 30 per cent, which was left in place to support the surface, and is known as ribs or pillars. This first mining on plaintiff's land was completed in 1908, and no coal has since been mined thereon. However, the defendant is still in possession of the mine, and may at any time remove the ribs of coal by second mining, which would destroy the supports and let down the surface. Since about 1901 defendant has used this main entry or driveway through plaintiff's farm as a means of transporting coal from the lands in the rear thereof which is the only practicable way of mining such coal. The surface of the plaintiff's farm is intact, and the use of the underground passageway as above stated has done him no damage. This passageway cannot be used in

mining the coal in the lower veins. The conveyance of all the coal in, under, and upon plaintiff's farm was by a general warranty deed to defendant, its successors, and assigns, forever, with the right of ingress and egress for the purpose of mining and transporting the said coal, and waiving the right of surface support. The deed contains no limitation as to the time for removal of the coal thereby conveyed, nor any provision as to a passageway to other coal. Defendant made large expenditures in the purchase of this block of coal, and in preparation for its mining.

The bill seeks to enjoin defendant from using the passageway in question in transporting coal from other lands, and also to account and pay for such use theretofore had of the same. The court below overruled the exceptions filed for the chancellor's finding of facts and legal conclusions, and made absolute the decree dismissing the bill, from which plaintiff took this appeal. In our opinion the decree of the court below was right. The deed vested in the defendant a corporeal estate in fee in the coal; and until that estate is terminated by the exhaustion of the coal, or lost by abandonment, the vendee is entitled to the possession of the coal, and also of the space made by its removal, and may use such space in transporting coal from other lands. In the case of *Lillibridge*

v. Lackawanna Coal Co. 143 Pa. 293, 13 L.R.A. 627, 24 Am.

Mines—right to use passageways for ore on adjoining land.

St. Rep. 544, 22 Atl. 1035, 17 Mor. Min. Rep. 412, this court held that the owner of the coal also owned the chamber or space inclosing it, and, so long as such ownership continued, could use such space for the transportation of other coal. That case was expressly reaffirmed, and held to be a settled rule of property in the great mining regions of the commonwealth, in the case of *Webber v. Vogel*, 189 Pa. 156, 42 Atl. 4. Both of the above cited cases are quoted with approval and followed in the

opinion of this court by present Chief Justice Brown in *New York & P. Coal Co. v. Hillside Coal & I. Co.* 225 Pa. 211, 214, 74 Atl. 27, and it is there held that "a lessee of coal cannot be charged for rental for the use of gangways on the demised premises in transporting coal from other properties."

The rule stated by our brother Potter in delivering the opinion of this court in *Weisfield v. Beale*, 231 Pa. 39, 43, 79 Atl. 879, that, "when the defendant bought the coal in the Donley tract, he took a fee-simple estate in the coal, and, so long as that estate existed, he could haul through the gangways coal from other land. In so doing he was using his own property,"—is applicable here.

While a tract that is in open workable condition is being mined, the fact that there may be a temporary suspension of operations therein will not deprive the mine owner of the right to use the driveways for transportation of other coal, where he is acting in good faith and mining in the customary manner. We do not understand the language of the opinion in *Webber v. Vogel*, *supra*, to limit such right of transportation to the precise time that coal is being mined on the tract in question. Of course, defendant's right in plaintiff's farm will terminate as soon as the mineable coal therein has been removed; and the right in the upper vein will cease when all of such coal has been taken therefrom. The usual and practical way of mining such coal is in a block of 1,000 acres or more, and operating it as one mine, as defendant did here,—in which case it would not seem practical to follow first mining by second mining in each separate farm. In fact, that method would defeat the plan for general mining of the block. Defendant is in possession of the unmined coal bought from plaintiff, and of the space made by first mining, and may rightfully use the space in removing the balance of such coal; and why

15 A.L.R.—60.

not in the transportation of other coal? The coal in the ribs was not forfeited because left for a time to support the surface. In fact, the chancellor properly finds there was no abandonment. Since the balance of the coal and the right to remove it belong to defendant, as well as the space made by first mining, the mere fact that the removal of the ribs has been temporarily deferred to facilitate the general mining operation will not defeat defendant's right to use such space for the transportation of other coal. Neither the coal nor the space reverts to plaintiff because of such temporary suspension of mining. The deed gives defendant the coal, without any restriction as to the time when it shall be mined; so there is nothing upon which to base any claim of reversion. While we do not rule the case upon findings based on parol evidence, yet the chancellor finds in effect that plaintiff sold his coal to defendant with the understanding that it was to be used as the key to reach the coal lying beyond, and, because of that fact, received a consideration largely in excess of that paid his neighbors, and knew that defendant intended to mine the whole block as one property. Defendant has no perpetual right of way through plaintiff's land; its right will cease when the coal therein is exhausted or abandoned. But the coal is not yet exhausted, and it is clear that there has been no abandonment. The rule sustaining the right of transportation through an open mine seems to be supported by the weight of authority in other jurisdictions. See *Schobert v. Pittsburg Coal & Min. Co.* 254 Ill. 474, 40 L.R.A. (N.S.) 826, 98 N. E. 945, Ann. Cas. 1913B, 1104. In a note to that case, in 40 L.R.A. (N.S.) 826, it is stated that "it is generally held that a grantee of coal in place, with license to mine and remove it, in the absence of express stipulation, may, at any time before the coal is all removed, use the passages opened for

its removal for the transportation of coal from his adjoining lands."

The rule is different in the case of a right of way upon the surface of land, which is incorporeal and can be used only for the purpose specified in the grant. *Weisfield v. Beale*, supra; *Webber v. Vogel*, 159 Pa. 235, 28 Atl. 226; *Farrar v. Pittsburg & E. Coal Co.* 28 Pa. Super. Ct. 280. That there was no abandonment here, see *Sorg v. Frederick*, 255 Pa. 617, 100 Atl. 481; *Huss v. Jacobs*, 210 Pa. 145, 59 Atl. 991; *Youngman v. Linn*, 52 Pa. 413, 2 Mor. Min. Rep. 443.

Our conclusion, as above stated, being fatal to plaintiff's case, we deem it unnecessary to consider in detail the several assignments of error or the other questions presented in the record.

The assignments of error are overruled, and the appeal is dismissed, at the costs of appellant.

NOTE.

WESTERMAN v. PENNSYLVANIA SALT MFG. CO. (reported herewith) ante, 943, is illustrative of those cases which support the general rule, that a lessee or grantor of minerals in place, with the right to mine and remove, in the absence of express stipulation to the contrary, may, in conjunction with such removal, use the passages opened therefor, for the transportation of minerals from adjoining lands. And as shown in the annotation following **CLAYBORN v. CAMILLA RED ASH COAL CO.** (reported herewith) post, 957, which treats the general question of the right of the owner of the title to, or an interest in, minerals in place under one tract, to use the passages therein for transporting minerals taken from another tract,—it also indicates some of the limitation with which the general rule is surrounded.

W. F. CLAYBORN et al., Appts.,

v.

CAMILLA RED ASH COAL COMPANY et al.

Virginia Supreme Court of Appeals—November 18, 1920.

(128 Va. 383, 105 S. E. 117.)

Mines — right to use passage for benefit of adjoining tracts.

1. A grantee of coal in place has no right to use the space left, after its removal to the subjacent stratum, for the transportation of coal from adjacent tracts.

[See note on this question beginning on page 957.]

Injunction — against use of tunnel in mine.

2. Injunction lies to prevent the unauthorized use of a tunnel through his mine by the owner of coal in place to transport mineral from an adjoining tract, although no substantial pecuniary injury is done by such use.

— when granted.

3. The granting of a writ of injunction rests in sound judicial discretion to be exercised upon a consideration

of the nature and circumstances of the case.

[See 14 R. C. L. 307.]

— use of surface as pass way.

4. A landowner who has granted the coal in place beneath its surface is entitled to enjoin the grantee from using the surface of the land to convey men and animals from mine openings on lands lying on either side of his tract, for the mining of such adjoining tracts, although no increased injury is done to his property by such use.

(Prentis, J., dissents.)

APPEAL by plaintiffs from a decree of the Circuit Court for Russell County dismissing a bill filed to enjoin defendants from trespassing on certain land, and for an accounting. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. G. B. Johnson, S. H. Sutherland, and George C. Sutherland, for appellants:

Conceding that under the deed from William Hess to Fuller, dated January 1, 1890, about 75 acres of coal with the privilege to remove the same passed, the right to an injunction is clear.

Kennedy v. Maness, 138 N. C. 35, 50 S. E. 450; Hoard v. Huntington & B. S. R. Co. 59 W. Va. 91, 53 S. E. 278, 8 Ann. Cas. 929; Steelman v. Lafferty, 112 Va. 494, 71 S. E. 524; Glover v. Newsome, 132 Ga. 796, 65 S. E. 64; Archibald v. Davis, 50 N. C. (5 Jones, L.) 323; Virginia Iron, Coal & Coke Co. v. Crane's Nest Coal & Coke Co. 102 Va. 405, 46 S. E. 393; George v. Bates, 90 Va. 839, 20 S. E. 828; Blake v. Doherty, 5 Wheat. 369, 5 L. ed. 111.

The court should have granted the injunction, not only against acts of trespass on the outside, but against the hauling of the coal through and over the underground passage, through plaintiffs' property.

1 Minor, Real Prop. § 51; Goodtitle ex dem. Chester v. Alker, 1 Burr. 133, 97 Eng. Reprint, 231, 1 Ld. Kenyon, 427, 96 Eng. Reprint, 1044, 17 Eng. Rul. Cas. 549; Butler v. Telephone Co. Warren, Real Prop. 575; High, Inj. 4th ed. § 697; Lembeck v. Nye, 47 Ohio St. 336, 8 L.R.A. 578, 21 Am. St. Rep. 828, 24 N. E. 686; Warren Mills v. New Orleans Seed Co. 65 Miss. 391, 7 Am. St. Rep. 671, 4 So. 298; Hodges v. Seaboard & R. R. Co. 88 Va. 653, 14 S. E. 380; Manchester Cotton Mills v. Manchester, 25 Gratt. 828; Miller v. Wills, 95 Va. 337, 28 S. E. 337; Callaway v. Webster, 98 Va. 790, 37 S. E. 276; 2 Story, Eq. Jur. § 925; Sanderlin v. Baxter, 76 Va. 299, 44 Am. Rep. 165; Lemon v. Webb, Warren, Real Prop. 572; Crane's Nest Coal & Coke Co. v. Virginia Iron, Coal & Coke Co. 105 Va. 785, 54 S. E. 884.

A right of way acquired for one purpose cannot be used for another.

Virginia Hot Springs v. Lowman, 126 Va. 424, 101 S. E. 328; District of Columbia v. Robinson, 180 U. S. 92, 45 L. ed. 440, 21 Sup. Ct. Rep. 283; Elliott, Roads & Streets, § 136; Jones, Easements, § 291.

Messrs. Bird & Lively and McClagherty, Scott, & Richardson, for appellees:

Defendants own a corporeal freehold estate in the coal on the Helton tract.

Morison v. American Asso. 110 Va. 91, 65 S. E. 469; Virginia Coal & Iron Co. v. Kelly, 93 Va. 332, 24 S. E. 1020, 18 Mor. Min. Rep. 395; Lee v. Bumgardner, 86 Va. 315, 10 S. E. 3; Graves, Real Prop. pp. 13, 14.

The granting of the privilege to mine and remove this coal was simply expressing that which the law would have implied as necessarily incident to the estate granted; for a grant carries with it whatever may be necessary to the enjoyment of the grant, whether specified in the deed or not.

Devlin, Deeds, § 863; 27 Cyc. 688; 18 R. C. L. 1149; Stonegap Colliery Co. v. Kelly, 115 Va. 390, 48 L.R.A. (N.S.) 883, 79 S. E. 341.

Until all of the coal is exhausted, the owner of the coal is the absolute owner of the entire mine, including all of the chambers from which the coal has been removed and the right to remove or use so much of the superimposed and subjacent strata of rock as may be required for the full and proper use and enjoyment of the estate owned in the coal. And if the absolute owner, then, of course, he has the right to use such chambers and rock strata as he may wish, so long as he does not injure the owner of the surface.

18 R. C. L. 1149; 20 Am. & Eng. Enc. Law, 774; 27 Cyc. 699; 3 Lindley, Mines, 3d ed. 1914, p. 2008, § 813A; MacSwinney, Mines, pp. 67-69; Lillibridge v. Lackawanna Coal Co. 143 Pa. 293, 13 L.R.A. 627, 24 Am. St. Rep. 544, 22 Atl. 1035, 17 Mor. Min. Rep. 412; Westerman v. Pennsylvania Salt Mfg. Co. 260 Pa. 140, ante, 943, 103 Atl. 539; Armstrong v. Maryland Coal Co. 67 W. Va. 589, 69 S. E. 195; Bagley v. Republic Iron & Steel Co. 193 Ala. 219, 69 So. 17; Schobert v. Pittsburg Coal & Min. Co. 254 Ill. 474, 40 L.R.A. (N.S.) 826, 98 N. E. 945, Ann. Cas. 1913B, 1104; Consolidated Coal Co. v. Schmisser, 135 Ill. 371, 25 N. E. 795; Moore v. Indian Camp Coal Co. 75 Ohio St. 493, 80 N. E. 6; Madison v. Garfield Coal Co. 114 Iowa, 56, 86 N. W. 41, 21 Mor. Min. Rep. 358.

Plaintiffs are not entitled to an injunction to restrain alleged surface trespasses.

Deane v. Turner, 113 Va. 236, 74 S.

E. 165; 22 Cyc. 827; 14 R. C. L. 307; 2 Pom. Eq. Jur. § 816.

Kelly, P., delivered the opinion of the court:

This is a suit in equity, brought by the appellants, W. F. Clayborn and others, against the appellee Camilla Red Ash Coal Company, for an injunction and accounting. The decree appealed from denied the relief sought.

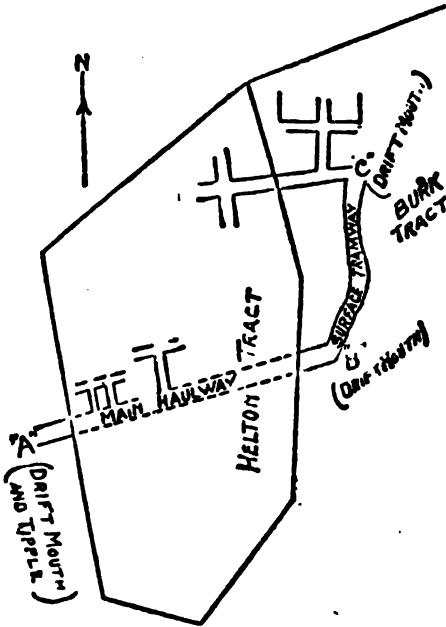
The appellants are the owners in fee of a tract of land containing about 8 acres, known as the Helton tract, except the coal thereon, which belongs to the appellee under a deed made in 1887, conveying "all the coal on, in, or under" the land, "with the right to mine and remove" the same. Adjoining this Helton tract on the west, the company owns in fee a tract of $2\frac{1}{4}$ acres; and adjoining the former on the east the company owns and operates a coal lease upon what is known as the Burk land. On the $2\frac{1}{4}$ -acre tract the company has a coal tippie and a mine opening, or drift mouth, at a point which for convenience we may designate as "A." From that point it has driven an underground haulway which extends east about 75 feet through the $2\frac{1}{4}$ -acre tract to the line of the Helton land, and then all the way through the latter and beyond to a second drift mouth at a point which we may designate as "B" on the Burk land, about 40 or 50 feet beyond the east line of the Helton tract. Thence the haulway extends a short distance in a northeasterly direction over the surface of the Burk tract to a third opening or drift mouth, which we may designate as "C," and from the latter the coal company has projected and extended its underground mining in such way as that it is now bringing out through the last-named drift mouth at C, coal mined from both the Burk tract and the Helton tract, and conveying all of it through the Helton tract by means of the underground haulway between the points A and B, as designated above. Until the haulway between these two

points was completed, the Helton tract was mined from entries or rooms leading off from that haulway, and during that time the coal mined from the Burk tract was brought from the drift mouth at C to the tippie at A over a surface route located in part on appellants' land, and used over that land under a contract pursuant to which the appellants were paid the sum of 10 cents per ton for all coal thus transported. After the underground haulway reached the drift mouth at B, however, the plan of operation was changed, and since then the Helton tract has been mined from the east side through entries leading off from the haulway extending back from the drift mouth at C on the Burk tract, and the entire output from both tracts has come through the Helton haulway to the tippie at A. The evidence is conflicting as to the exact proportion, but it is conceded that the company is taking considerably more coal from the Burk tract than from the Helton tract. All of the coal has been taken out of the haulway between A and B from the upper to the lower side of the seam, and in addition thereto some of the underlying stone has been removed, so that the track through the mine is resting upon the substratum, and not upon any part of the coal vein.

Considerable attention was given in the argument to the change in the manner of mining the Helton tract, the company contending that the change was made because the dip of the coal seam makes it best to mine the property from the east side, and the appellants, on the other hand, contending that the real reason for the change was to afford a plausible pretext for hauling the coal from the Burk land through the main haulway. In our view of the case, however, this question is not one of controlling importance. It does not affect the legal rights of the parties. It might, in some cases, be entitled to consideration in determining whether equity should grant or refuse an injunction.

(128 Va. 383, 106 S. E. 117.)

The accompanying sketch is not drawn to scale, nor does it purport to show the comparative acreage of the tracts, nor the exact bearings and distances, but it will serve to accurately illustrate the situation.



When the company completed the haulway from A to B, and began to haul coal from the Burk land through the Helton tunnel, the appellants protested, claiming that the company had no right to use the tunnel for any purpose except such as was connected with the mining of coal on that tract. The company disregarded the protest, and this suit followed.

The question thus arising is full of interest and importance. It is new in Virginia, but has been frequently passed upon under varying facts and circumstances in cases arising in England and in this country. The prevailing, if not wholly unbroken, current of authority, supports the general proposition that a grantee of coal in place is the owner, not of an incorporeal right to mine and remove, but of a corporeal freehold estate in the coal, including the shell or containing chamber, and that as such owner he has the

absolute right, until all of the coal has been exhausted, to use the passages opened for its removal for any and all purposes whatsoever, including in particular the transportation of coal from adjacent lands, so long as he operates and uses the passages with due regard to the rights of the surface owner. See MacSwinney, Mines, 67; 2 Snyder, Mines, § 1010, p. 853; 18 R. C. L. 1149, 20 Am. & Eng. Enc. Law, 2d ed. 774; 27 Cyc. 699; 3 Lindley, Mines, 3d ed. p. 2008, § 813a; Proud v. Bates, 34 L. J. Ch. N. S. 406, 6 New Reports, 92, 11 Jur. N. S. 441, 13 L. T. N. S. 61, 15 Mor. Min. Rep. 227; Hamilton v. Graham, L. R. 2 H. L. Sc. App. Cas. 166; Lillibridge v. Lackawanna Coal Co. 143 Pa. 293, 13 L.R.A. 627, 24 Am. St. Rep. 544, 22 Atl. 1035, 17 Mor. Min. Rep. 412; Westerman v. Pennsylvania Salt Mfg. Co. 260 Pa. 140, ante, 943, 103 Atl. 539; Armstrong v. Maryland Coal Co. 67 W. Va. 589, 69 S. E. 195; Bagley v. Republic Iron & Steel Co. 193 Ala. 219, 69 So. 17; Schobert v. Pittsburg Coal & Min. Co. 254 Ill. 474, 40 L.R.A. (N.S.) 826, 98 N. E. 945, Ann. Cas. 1913B, 1104; Moore v. Indian Camp Coal Co. 75 Ohio St. 493, 80 N. E. 6; Madison v. Garfield Coal Co. 114 Iowa, 56, 86 N. W. 41, 21 Mor. Min. Rep. 358.

We are unable to follow to their full extent the authorities upon this question, notwithstanding their high source and formidable array. They seem to us unsatisfactory and illogical in themselves, and at variance with fundamental legal principles. In taking this position, we are not unmindful of the credit which ought to be given to a long line of judicial precedent, and have broken away from it in this case with reluctance and after much deliberation. The question, however, as already indicated, is an open one in Virginia. No rule of property can be said to have arisen in this state upon the subject. With particular reference to the case in hand, it cannot even be argued that the grantee of the coal may have contracted upon the

faith of the line of decisions in other American states, for the coal on the Helton tract was severed by a deed made in 1887 to the coal company's predecessor in title, and that was prior to any adjudication on the subject in this country. The older cases of *Consolidated Coal Co. v. Schmisser*, 135 Ill. 371, 25 N. E. 795, and *Genet v. Delaware & H. Canal Co.* 122 N. Y. 505, 25 N. E. 922, sometimes cited for the proposition, are not in point. The former did not pass upon the legal rights of the parties, but merely held that under the terms of the deed for the coal, and under the peculiar facts of the case, a court of equity ought not to enjoin the grantee of the coal on a certain tract of land from using the entries and shaft on that tract for the transportation of coal from adjacent lands. The latter (the New York case) involved a contract which expressly conferred on the mine owner the right here in question.

We are therefore not bound by precedent in this case, and are at liberty to follow the view which seems to us most in accord with right and justice and with the legal principles applicable to the question.

Undoubtedly the grantee of coal in place owns a corporeal hereditament; but all the American authorities agree that the right of the grantee to use the space left by the removal of coal terminates and the space reverts to the grantor when the coal has been exhausted. If, as contended, the conveyance of the coal carries with it the stratum above and below the coal,—the containing chamber,—why should the ownership of the space terminate as soon as all of the coal on the tract has been mined? We think the true and rational view is that the reverter takes place because the grantee has never at any time had a corporeal estate in the containing walls, and that the conveyance carries the estate in the coal only, with the necessary incidental easement to use

the containing walls for support and for the purpose of getting it out, just as it carries the right to sink a shaft or drive an opening, when necessary, upon and through the surface, to reach and remove the coal. We are unable to see any substantial difference between the use of a mine track in the mine, which rests upon the stratum or earth below the coal, and a tramway outside of the mine resting upon the surface. The right to use both, if both are reasonably necessary, when not expressly granted, is always implied in the deed for the coal; and yet the unmistakable result of the authorities, including those which hold that the tracks in the mines may be used to haul coal from adjoining lands, is that mining operations on the surface must be confined to the coal on the particular tract.

We shall not undertake a complete review of the authorities in support of the generally accepted doctrine. It would seem sufficient to say of them in general that they are right if the first and leading American case was right, and that they are wrong if that case was wrong, because, in the main, all the others have simply followed, with more or less elaboration, the principles laid down in that case. We refer to the case of *Lillibridge v. Lackawanna Coal Co.* 143 Pa. 293, 13 L.R.A. 627, 24 Am. St. Rep. 544, 22 Atl. 1035, 17 Mor. Min. Rep. 412. The observations in the majority opinion in that case (three of the seven judges dissenting) go to the full length contended for by the coal company in the controversy before us; but the Pennsylvania court, evidently not satisfied with the ultimate and necessary result of its discussion, adds this significant saving clause: "There is no averment in the bill that all the coal in the vein has been taken out, or that the tunnel is opened on the bed rock underneath the vein; on the contrary, it is alleged that the tunnel has been cut through the coal, by which we understand it is in the

very body or substance of the coal which was bought by the defendant."

It thus appears that the court in that case was not dealing with the usual and ordinary case, but with one in which the owner of the coal, instead of invading the underlying stratum, had cut a tunnel in such a way as that there was coal above and coal below,—in other words, had simply cut a hole through his own property,—a distinction which renders most of the opinion obiter dictum. Not one of the cases, so far as we have observed, which have followed this Pennsylvania case, has adverted to this distinguishing feature of the decision. We have mentioned it, not so much because it may have justified the result in that particular case, but because it indicates that the court itself recognized the inherent weakness in the proposition that when a man buys coal with the right to remove it, he becomes the owner of something which he does not buy. We may add that at least some of the English authorities cited and relied on in the Lillibridge Case appear to have involved tunnels which could very well have been regarded as exclusively supported underneath by minerals owned by the grantees.

Again, in the course of the opinion in the Lillibridge Case, the court uses this language: "Under all the decisions, the coal in place was absolutely owned in fee simple by the defendant. In a state of nature, the coal necessarily occupied space. How could the defendant own the coal absolutely and in fee simple, and not own the space it occupied? Or how is it possible to conceive of such a thing as the ownership of the space independently of the coal?"

It seems to us that a more pertinent and convincing question would have been this: If the defendant owned both the coal and the space, why did his right to the space terminate immediately when the coal was removed? A somewhat similar situation arises when one

buys a standing tree. He gets the tree as a part of the real estate, with an easement for support and removal, but he does not acquire any corporeal right in the soil or in the space which the tree occupies. It seems to us that the true and perfectly patent principle is that when a man buys coal, whether he stipulates for the privilege of taking it out or not, he simply gets the coal, with the right to remove it. The coal is his property. As to that he has a corporeal estate just as he has in standing timber. Coal and timber become personal property as soon as they are severed. The right to mine and remove is an incorporeal hereditament, an easement expressed in or incident to the grant of the fee, and in the exercise of this easement the grantee has no more right to put an additional burden upon the servient estate than he would have to haul timber from an adjoining tract over a tract upon

Mines—right to use passage for benefit of adjoining tracts.

which he had bought the timber with the right of removal. It is only fair to say that this view is directly challenged and rejected in the Pennsylvania case under consideration. The vital difference between the doctrine of that case and the conclusion we have reached is that the Pennsylvania case assumed that the conveyance of coal carries a corporeal interest in the walls containing the coal, as well as in the coal itself, whereas under our view this assumption is not warranted, and the conveyance carries a corporeal interest in the coal only, with an easement in the walls for support and removal.

The reasoning of the Pennsylvania court in the later case of Chartiers Block Coal Co. v. Mellon, 152 Pa. 286, 18 L.R.A. 702, 34 Am. St. Rep. 645, 25 Atl. 597, cannot, in our judgment, be reconciled with the rule apparently approved, though, as shown above, not actually involved in the decision, in the Lillibridge Case. In the Mellon Case, dealing with the right of the

surface owner to sink a shaft through an entry in coal owned by another to reach a deposit of oil below, it was held that when the surface owner has conveyed the coal under his land, his legal right of access to the strata underlying the coal is clear; that the grantee of the coal owns nothing but the coal and the right of access thereto and removal thereof; that when all the coal is removed the estate therein ends and the space occupied reverts to the grantor by operation of law; and that the grant of the coal does not convey any interest in the strata underlying it. The court in that case, per Paxson, Ch. J., said: "The grantee of the coal owns the coal, but nothing else, save the right of access to it and the right to take it away. Practically considered, the grant of the coal is the grant of a right to remove it. This right is sometimes limited in point of time; in others, it is without limit. In either event it is the grant of an estate determinable upon the removal of the coal. It is, moreover, a grant of an estate which owes a servitude of support to the surface. When the coal is all removed the estate ends, for the plain reason that the subject of it has been carried away. The space it occupied reverts to the grantor by operation of law. It needs no reservation in the deed, because it was never granted. The grantee has the right to use and occupy it while engaged in the removal of the coal, for the reason that such use is essential to the enjoyment of the grant. It cannot be seriously contended that after the coal is removed the owner of the surface may not utilize the space it had occupied for his own purposes, either for shafts or wells, to reach the underlying strata. The most that can be claimed is that, pending the removal, his right of access to the lower strata is suspended. The position that the owner of the coal is also the owner of the hole from which it has been removed, and may forever prevent the surface owner from reaching under-

lying strata, has no authority in reason, nor do I think in law."

In the still later Pennsylvania case of *Webber v. Vogel*, 159 Pa. 235, 28 Atl. 226, the court held that the grantee of the coal, with the right of way for mining and removing it, had no right to haul coal from adjoining lands through an open entry or pit on the granted premises. The opinion does not mention the *Lillibridge Case*, but the decision is in apparent conflict therewith. Upon a later appeal of the *Webber Case*, 189 Pa. 156, 42 Atl. 4, 19 Mor. Min. Rep. 639, the court undertook, with limited success, as it seems to us, to reconcile the former decision with the *Lillibridge Case*, on the ground that the former was dealing principally with surface rights, while the latter was dealing with the right to transport coal from other lands, not over the surface, but through underground passages—a distinction for which we think there is no logical foundation.

Another evidence of the inconsistency and the danger of the rule approved in the *Lillibridge Case* is found in the discussion of the question on the second appeal of the *Webber Case*, 189 Pa. 156, where the court stated that the right to transport coal from adjoining lands exists only so long as the coal on the particular tract in question is being mined in good faith, and that it would be a perversion of the intention of the parties to use such passageways merely and only for the purpose of reaching other coal, and, besides, that such use would be a continual menace to the stability of the surface. This qualification of the doctrine seems to us not only illogical, but inherently incapable of any practical administration. There is no safe or sound middle ground. The instant case affords a ready illustration of this statement. The *Camilla Coal Company* either owns in fee simple the substrata under the coal on the *Helton tract*, or else it has the right merely to use it to get out the coal. If the former, it

can use the substrata for any purpose it pleases; if the latter, it can use it only as an easement in connection with mining the coal on that tract. But even if there were any reasonable basis for saying that its ownership of the substrata existed only so long as it operated the mine on the Helton tract in good faith, how is the question of such good faith to be reasonably and fairly determined? It is mining a part of the Helton tract to-day, but is taking the greater part of its coal from the adjoining tract. Is it doing this sort of mining in good faith, or is it the plan to so operate the Helton mine as that there will always be some coal unmined on that tract so long as it may desire to bring coal from other tracts? How is the question to be fairly and safely answered?

In this connection it seems appropriate to refer briefly to the West Virginia case of *Armstrong v. Maryland Coal Co.* 67 W. Va. 589, 69 S. E. 195, cited and relied upon by the appellee. The main question at issue here came up rather indirectly and remotely in that case, but, in so far as it was dealt with at all, the opinion, like all others in America on the subject, purported to follow the Pennsylvania decisions. A significant suggestion is found in the opinion, however, and one entirely inconsistent with the second Webber Case, in which the West Virginia court (67 W. Va. 608) seems to hold that the grantee, after the coal has been practically exhausted in the particular tract, may extend his ownership of the haulways therein for an indefinite period for the purpose of transporting coal from other lands, merely "by leaving some of the coal unmined until the coal from adjoining tracts could be removed, and that, if need be, a few pillars could be left for subjacent support, which would answer all the requirements."

The case of *Moore v. Indian Camp Coal Co.* 75 Ohio St. 493, 80 N. E. 6, expressly declares that, while the grantee of coal in place

becomes the owner of a fee-simple estate therein, such estate "is, of course, determinable upon the exhaustion of the mine," a concession which, as we have already pointed out, seems to us to carry with it a refutation of the conclusion reached in all of these cases. Furthermore, in the course of the opinion, the court uses this argument: "It is evident that, if the mine owner is to be restricted to the exact . . . thickness of the vein of mineral, with no right to remove any portion of the superimposed strata for necessary headway in working or in making the mine secure, or with no right to use or remove any portion of the underlying strata for drainage, support for tramways, and the like, the grant to him of ownership in the mineral would be of little practical value, or none at all."

There is no sort of occasion for thus attempting to award to the owner of the mineral a corporeal estate in the underlying strata, "for drainage, supports for tramways, and the like," because he undoubtedly has the right of drainage and support, just as he has the right to use the surface for a drift mouth and for tramways, not as a part of his own estate, but as an easement incident to its reasonable enjoyment. Nor is there, as we see it, any occasion for the following comment of the court: "It is therefore illogical and inconsistent, and would be impracticable and unjust, to hold that, as fast as the mineral is taken out, the resulting empty space should revert to the owner of the upper strata. Such a narrow and technical interpretation of the grant would result in embarrassment to the mining industry which would be intolerable."

It is not contended in this case, and could not be reasonably contended in any case, that as fast as the coal is taken out of a particular haulway the mine owner loses his rights therein. Upon the contrary, it is conceded in this case, and would have to be conceded in every case, that reasonable mining rights

would entitle the mine owner to use all of the spaces left by him for transporting coal from other parts of the same tract so far as such spaces were reasonably necessary for that purpose.

When a surface owner conveys the coal on his land, whether or not he specifies, as was done in this case, that the grantee shall have the right to mine and remove the same, he knows that such right must exist if the grantee is to get any benefit of his estate; and it makes no difference whether he expressly grants the right to mine and remove the coal (if only these general terms are used), or leaves such right to be implied by law; but when nothing more is said than that the coal is granted, or that the coal is granted with the right to mine and remove it, nothing but the coal and the right to remove it ought to be understood to pass by the deed. If the coal owner expects more in connection with his easement for removing the coal, he ought to stipulate for it. Instead of applying this rule, the courts have reversed it, and have held that if the grantor does not intend to allow an easement in addition to that which is granted expressly or by implication, he must stipulate against it. If the decisions which we have reviewed are sound, they lead necessarily and unanswerably to the conclusion that in the instant case, so long as any part of the coal remains unmined on the Helton tract, the coal company may not only haul coal from the Burk tract and from any other tract, however remote, but may also haul lumber or anything else which it chooses through the Helton tunnel, for the simple reason that it is the absolute fee-simple owner of the haulway.

In *Schobert v. Pittsburg Coal & Min. Co.* 254 Ill. 474, 40 L.R.A. (N.S.) 826, 98 N. E. 945, Ann. Cas. 1913B, 1104, the court rested the opinion upon the authority of the cases of *Consolidated Coal Co. v. Schmisser*, 135 Ill. 371, 25 N. E. 795, and *Lillibridge v. Lackawanna*

Coal Co. 143 Pa. 293, 13 L.R.A. 627, 24 Am. St. Rep. 544, 22 Atl. 1035, 17 Mor. Min. Rep. 412,—all of which have been commented upon.

Any further discussion of the authorities, which we freely admit are numerous and practically all opposed to the views we have expressed, would amount to nothing more than a useless repetition of what has already been said in the course of this opinion. We repeat that we have been reluctant to depart from the apparently unbroken line of judicial decision upon this important question; but we have been unable to see that the doctrine, thus so strongly supported, is based upon sound legal principles. The opposing decisions perhaps had their genesis in considerations of expediency, and in a well-meant concession to the convenience and importance of the coal-mining industry at an early period of its development.

In our opinion the use which the coal company in the instant case is making of the tunnel through the Helton tract, in conveying coal from the Burk tract, places an additional and unlawful burden upon the estate of the appellants, which ought to be restrained. It is said, and is apparently true, that no substantial pecuniary damage is being done to the appellants by the use of the tunnel. The same might be said of the use of many other rights of way. A landowner might grant a right of way through his land to haul timber from that land, and the grantee might be able to bring over that right of way timber from an adjoining tract without doing any additional damage, and yet nobody would question the right of the landowner to prohibit and enjoin such additional use of the way. The violation of a property right is a legal injury. The track through the Helton tunnel rests upon land owned by the appellants. The coal company has the unquestioned right to use that tunnel so long as it needs it in hauling coal from the residue

*Injunction—
against use of
tunnel in mine.*

of the Helton tract. The appellants have never challenged that right. The use of it for any other purpose is a trespass, and the continued and daily use which the company is now making of it is a continued trespass, for which the only adequate remedy is an injunction. 1 High, Inj. 4th ed. §§ 22, 692, 702, 702a; 4 Words & Phrases, pp. 3772 et seq.; 2 Words & Phrases, 2d series, pp. 1206 et seq.

The writ of injunction is summary and extraordinary, and does not lie *ex debito iusticiæ*. The granting of it rests ~~—when granted.~~ in sound judicial discretion, to be exercised upon a consideration of the nature and circumstances of the case. If the appellants in this case had acquiesced in the tortious acts of the appellee until the latter had expended large sums of money which would be lost in consequence of a belated injunction, or if, without any such acquiescence, the loss entailed upon the appellee would be excessively out of proportion to the injury suffered by the appellants, or a serious detriment to the public, a court of equity might very properly, and in accordance with recognized practice, deny the injunction, and leave the parties to settle their differences in a court of law. If the deed for the coal had contained an express negative covenant against the use of the haulways for any other purpose than that of removing the coal on the Helton tract, then perhaps the court could not consider the question of comparative inconvenience or damage, but would be controlled by the express limitations in the deed. Where the negative or restrictive covenant is merely implied, however, the courts have more latitude of discretion. See 1 High, Inj. 4th ed. §§ 22, 1135; Consolidated Coal Co. v. Schmisser, *supra*; Madison v. Ducktown Sulphur, Copper & I. Co. 113 Tenn. 331, 83 S. W. 658; Cool-ey, Torts, Students' ed. p. 628.

But the case before us does not warrant a refusal of the injunction upon any of the exceptional grounds

above mentioned. The appellee was allowed to transport coal from the Burk tract over the surface of the lands owned by appellants, upon terms which appear to have been reasonable, and of which no complaint is made in the record. It is true that appellee is mining both tracts now as a unit, but this was not necessary, and the grantor of the coal on the Helton tract had nothing to do with making up that unit. The tracts are separate and distinct, and each is susceptible of a separate mining operation. If it be true that the coal on the Helton tract, owing to the dip of the vein, can best be mined from the west side, the company is free to pursue that course, because the appellants do not, and they could not lawfully, question the right to bring the coal from the Helton land out through the Burk tract and back again through the main haulway in the Helton tract to the tippie at A. The right to handle the Burk coal the same way, however, did not exist, was promptly challenged, and the challenge was disregarded. It is fairly apparent from the record that the company could have arranged with the appellants to use the Helton haulway for the Burk coal upon reasonable terms, just as had theretofore been done with reference to a surface right of way from the Burk tract to the tippie. Under these circumstances, we think the company should be enjoined from further illegal use of the haulway.

There is another branch of this case which may be briefly disposed of. It is conceded that the coal company is now, and at the time of the institution of this suit was, using the surface of the Helton tract as a travelway for its men and stock in going from the tippie at A to the drift mouth at C for the purpose of mining coal on the Burk tract. Appellants do not object and have never objected to this, or any other reasonable use of the surface of the Helton land in connection with mining the coal thereon, but

they do object to such use in so far as it is connected with the mining on the Burk tract, and have asked to have the same restrained. There was some conflict in the evidence as to whether the company had ever been notified by the appellants before this suit was brought that they must not use the surface of the Helton tract as a passageway for men and stock in getting from the tunnel to the opening on the Burk tract in connection with the mining thereon; but, whether this notice was given or not before the suit was brought, the suit itself was a sufficient notice, and it is conceded that the company has since that time continued to use the surface in the manner complained of. It is argued, as it was argued with reference to the use of the tunnel, that the appellants are not being damaged by this additional use of the surface; but whether this be true or not, it is certainly

—use of surface
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true that the additional use is in violation of appellants' rights, and is a continuing trespass. For the reasons already stated, the appellants are entitled to an injunction restraining this unlawful use of the surface.

The decree complained of will be reversed, and this court will enter an order enjoining and restraining the coal company from using the tunnel or the surface of the Helton tract for any other purposes than those reasonably necessary in connection with the mining on that tract, and the cause will be remanded to the lower court for a reference to a commissioner to ascertain what damage, if any, the appellants have sustained by reason of the unlawful use of the tunnel and the surface by the company in connection with its operation on the Burk land.

Burks, J., absent.

Prentiss, J., dissenting:

I cannot agree with the majority in its conclusions in this case, and, because I think the question involved is one of great importance, I

think that dissent should be expressed.

It appears from the majority opinion that its conclusions are contrary to the unbroken current of authority in England and in this country. I therefore think that the rule should be considered a rule of property, because doubtless many leases have been acquired in reliance upon the advice of counsel as to their legal effect. I also think that this rule is based upon right reason, both because the supposed injury to the owner of the surface by a tunnel for the removal of the coal under his land, which does not disturb the surface, is usually negligible, as well as because the right claimed for the coal operator should be considered as an incident to the grant. To express it differently, I think that a coal operation should be considered as a unit. The seam of coal frequently lies under many different tracts of land, and to require a separate opening or tunnel upon each tract of land for the removal of so much of the seam as underlies that tract would so increase the expense of mining coal as to depreciate its value; so that it is for the interest of each of the owners of the surface, before the execution of his lease, that the mine be operated economically, and that the expense of mining the whole seam be reduced to the lowest possible amount. I think, therefore, that it is fair to assume that the owner of the surface has already received compensation in the price he has received for his lease, and that the right to transport all of the coal in the seam to the mouth of the mine should be considered to be a mere incident of the grant, and, unless some special or unforeseen damage appears, an injunction should be refused.

A petition for rehearing having been filed, the following Per Curiam response was handed down March 24, 1921:

The court, having maturely considered the petition for rehearing in this case, is of opinion that the same should be denied.

In view of the insistence in the petition that the questions involved in this case ought not to be disposed of without the consideration of the full court, we deem it proper to add that Judge Burks, the only member

of the court who did not hear the oral argument, participated in the consideration and decision of the case, and concurs in the majority opinion and in the refusal to rehear.

ANNOTATION.

Right of owner of title to or interest in minerals in place under one tract to use the passages therein for transporting minerals taken from another tract.

The decided weight of authority, numerically at least, is to the effect that a grantee of minerals in place, with the right to mine and remove, in the absence of express stipulation to the contrary, may, at any time before the granted minerals are all removed, use the passages opened for its removal for the transportation of minerals from adjoining lands.

United States.—See *St. Louis Union Trust Co. v. Galloway Coal Co.* (1911) 193 Fed. 106, affirmed in (1913) 119 C. C. A. 294, 201 Fed. 1022.

Alabama.—*Bagley v. Republic Iron & Steel Co.* (1915) 193 Ala. 219, 69 So. 17. And see *Hooper v. Dora Coal Min. Co.* (1891) 95 Ala. 235, 10 So. 652.

Illinois.—*Consolidated Coal Co. v. Schmisser* (1890) 135 Ill. 371, 25 N. E. 795; *Schobert v. Pittsburg Coal & Min. Co.* (1912) 254 Ill. 474, 40 L.R.A. (N.S.) 826, 98 N. E. 945, Ann. Cas. 1913B, 1104.

Iowa.—*Madison v. Garfield Coal Co.* (1901) 114 Iowa, 56, 86 N. W. 41, 21 Mor. Min. Rep. 358.

Ohio.—*Moore v. Indian Camp Coal Co.* (1907) 75 Ohio St. 493, 80 N. E. 6 (discussed and quoted in *CLAYBORN v. CAMILLA RED ASH COAL CO.* (reported herewith) ante, 946.

Pennsylvania.—*Lillibridge v. Lackawanna Coal Co.* (1891) 143 Pa. 293, 13 L.R.A. 627, 24 Am. St. Rep. 544, 22 Atl. 1035, 17 Mor. Min. Rep. 412 (but see this case as explained in the *CLAYBORN CASE*); *Webber v. Vogel* (1899) 189 Pa. 156, 42 Atl. 4, 19 Mor. Min. Rep. 639, explaining decision on former appeal in (1893) 159 Pa. 235, 28 Atl. 226; *Potter v. Rend* (1902) 201

Pa. 318, 50 Atl. 821, 22 Mor. Min. Rep. 1; *New York & P. Coal Co. v. Hillside Coal & I. Co.* (1909) 225 Pa. 211, 74 Atl. 26; *Weisfield v. Beale* (1911) 231 Pa. 39, 79 Atl. 878; *WESTERMAN v. PENNSYLVANIA SALT MFG. CO.* (reported herewith) ante, 943; *Rockafellow v. Hanover Coal Co.* (1892) 12 Pa. Co. Ct. 241.

Virginia.—See *CLAYBORN v. CAMILLA RED ASH COAL CO.* (reported herewith) ante, 946, which, as shown infra, lays down a contrary rule.

West Virginia.—*Armstrong v. Maryland Coal Co.* (1910) 67 W. Va. 589, 69 S. E. 195.

England.—*Proud v. Bates* (1865) 34 L. J. Ch. N. S. 406, 11 Jur. N. S. 441, 6 New Reports, 92, 13 L. T. N. S. 61, 15 Mor. Min. Rep. 227; *Hamilton v. Graham* (1871) L. R. 2 H. L. Sc. App. Cas. 166; *Batten Pooll v. Kennedy* [1907] 1 Ch. 256, 76 L. J. Ch. N. S. 162 (holding such to be the rule where the conveyance is of a freehold interest and is such as to sever the land into layers, as distinguished from a mere reservation of an easement to remove the underlying minerals). But compare *Bowser v. Maclean* (1860) 2 DeG. F. & J. 415, 45 Eng. Reprint, 682, 30 L. J. Ch. N. S. 273, 6 Jur. N. S. 1220, 3 L. T. N. S. 456, 9 Week Rep. 112, 17 Eng. Rul. Cas. 453, and *Eardley v. Granville* (1876) L. R. 3 Ch. Div. 826, 45 L. J. Ch. N. S. 669, 34 L. T. N. S. 609, 24 Week Rep. 528, 17 Eng. Rul. Cas. 458, which, as shown infra, hold that a contrary rule applies in the case of copyhold lands held under the usual copyhold tenure; and *Ramsay v. Blair* (1876) L. R. 1 App. Cas. 701, which is set out infra.

At least, this is the general rule where the haulage does not unreasonably injure or interfere with the part of the land retained by the grantor. *Bagley v. Republic Iron & Steel Co.* (Ala.); *Consolidated Coal Co. v. Schmisser* (Ill.); *Moore v. Indian Camp Coal Co.* (Ohio); and *Lilli-bridge v. Lackawanna Coal Co.* (Pa.) — *supra*.

So it has been held that a lessee of certain coal lands for mining purposes, whose rights are to continue until all the merchantable coal shall be exhausted by actual mining, cannot be charged a rental for the use of the gangways on the demised premises in transporting coal from adjoining properties. *New York & P. Coal Co. v. Hillside Coal & I. Co.* (1909) 225 Pa. 211, 74 Atl. 26.

And it has been held that a grant of a strip of land in fee, but reserving all mineral rights, while it operates as a separation of the title to the land and the minerals, permits the grantor not only to remove the minerals under the lands conveyed, but to use the mining ways thereunder from the adjoining lands owned by the grantors as well as from other lands. *Attebery v. Blair* (1910) 244 Ill. 363, 135 Am. St. Rep. 342, 91 N. E. 475. In reaching this conclusion, the court said: "It is contended that after the coal shall be removed from under the right of way the defendant would not be permitted to use the rooms, entries, and mining ways to and from beds of coal in other lands. If the construction of the reservation contended for is correct, all that the grantors reserved was a right to remove the coal from under the strips of land, and could not afterward cross the same to remove coal from their own adjoining lands. No such unreasonable conclusion is insisted upon, and it is conceded that they would have the right to use the rooms, entries, and mining ways for mining ways to and from beds of coal on the remainder of their own lands. But there is no ground for a distinction between such use and the use of the mining ways for access to other lands. The purpose of the reservation was to separate the title to the coal under the surface from the title

to the surface, together with the mining rights connected with it. No conveyance of the coal or such rights was made, and the coal, with all the rights pertaining to it, remained in the grantors. The deeds, with the reservations, operated as a separation of the rights of property as between the land and the coal and the mining rights, . . . and we see no reason why the grantors could not use the space where the coal was found in any way which they saw fit, as though no conveyance had ever been made." But in England it has been held that a distinction must be drawn between a copyhold tenement with minerals under it and freehold land leased with a reservation of the minerals, the rule being that, in the case of a grant of land with a reservation of an easement to mine and remove the underlying minerals, the reservation does not permit the grantor to use the mine ways for the transportation of minerals from lands other than those granted. See *Batten Pooll v. Kennedy* [1907] 1 Ch. (Eng.) 256, 76 L. J. Ch. N. S. 162. And see *Durham & S. R. Co. v. Walker* (1842) 2 Gale & D. 326, 2 Q. B. 940, 114 Eng. Reprint, 364, 11 L. J. Exch. N. S. 440, 3 Eng. Ry. & C. Cas. 36, 17 Eng. Rul. Cas. 599, wherein, under a deed of land which reserved to the grantor the minerals thereon with the right to remove the same, it was held that the grantor had no right to use the premises for the transportation of minerals taken from other lands. So, in *Dand v. Kingscote* (1840) 6 Mees. & W. 174, 151 Eng. Reprint, 370, 2 Eng. Ry. & C. Cas. 27, 9 L. J. Exch. N. S. 279, under a deed of lands reserving coal mines therein with mining privileges, it was held that no easement was reserved except for the purpose of getting coal under the lands conveyed, so that the grantor could not transport coal taken from another tract, although the coal in both tracts was a part of the same mineral field.

Under the general rule the right of transporting minerals from adjoining lands through leased land exists only so long as the mineral conveyed is, in good faith, being mined. It was so

held in *Webber v. Vogel* (1899) 189 Pa. 156, 42 Atl. 4, 19 Mor. Min. Rep. 639, where the court argued that it would be a perversion of the intention of the parties to use the passageways merely and only for the purpose of reaching other minerals; that, besides such use would be a continual menace to the stability of the surface; that if such use were allowed, no owner of the land could tell when his estate would cease to be disturbed by workings underneath; and that the general rule laid down by the cases was not intended to give the grantee of minerals an undisputed and perpetual right of way under another's land; but that the owner of the land above and below has a right to the reversion of the space occupied by the granted minerals when that mineral is wholly removed.

So it has been held that when the grantee of coal in place has ceased to mine that coal to any appreciable extent, he may not, without an express grant of such right, use the openings for the purpose of transporting coal in large quantities from mines in adjoining lands. *Hooper v. Dora Coal Min. Co.* (1891) 95 Ala. 235, 10 So. 652. And a grantee of coal who agrees to pay a royalty cannot merely operate the leased premises to such an extent as to ostensibly perform his agreement and avoid a forfeiture, and use the land shafts and entries chiefly for removing coal from adjoining lands. *Peters v. Phillips* (1884) 63 Iowa, 550, 19 N. W. 662.

And it has been held that a grantee of coal operating on a royalty basis, with no allusion in the contract to mining elsewhere, cannot abandon the mining of the coal in the granted premises and use the shaft exclusively for working a mine on adjoining premises. *Leavers v. Cleary* (1874) 75 Ill. 349, 2 Mor. Min. Rep. 618. And that abandonment terminates the right to use the mine ways for the transportation of minerals from other lands, see *WESTERMAN v. PENNSYLVANIA SALT MFG. CO.* (reported herewith) ante, 943. But see *Armstrong v. Maryland Coal Co.* (1910) 67 W. Va. 589, 69 S. E. 195, as set out in

CLAYBORN v. CAMILLA RED ASH COAL CO. (reported herewith) ante, 946.

And, of course, where the minerals are removable under a grant or lease for a definite period, any right to use the mine ways for removal of minerals from other lands terminates with the expiration of the term of the grant or lease, unless expressly extended. *Schobert v. Pittsburg Coal & Min. Co.* (1912) 254 Ill. 474, 40 L.R.A.(N.S.) 826, 98 N. E. 945, Ann. Cas. 1913B, 1104; *Greek v. Wylie* (1920) 266 Pa. 18, 109 Atl. 529.

And any and all property right in mine ways terminates with exhaustion of the minerals granted. *Chartiers Block Coal Co. v. Mellon* (1893) 152 Pa. 286, 18 L.R.A. 702, 34 Am. St. Rep. 645, 25 Atl. 597; *Webber v. Vogel* (1893) 159 Pa. 235, 28 Atl. 226, on subsequent appeal in (1899) 189 Pa. 156, 42 Atl. 4, 19 Mor. Min. Rep. 639; *WESTERMAN v. PENNSYLVANIA SALT MFG. CO.* (reported herewith) ante, 943; *McBurney v. Glenmary Coal & Coke Co.* (1909) 121 Tenn. 275, 118 S. W. 694.

But a temporary suspension of operations will not deprive the owner of the minerals of the right to use the driveways for transportation of minerals from other tracts, provided he acts in good faith and mines in the customary manner. *WESTERMAN v. PENNSYLVANIA SALT MFG. CO.* (reported herewith).

The rule allowing the use of mine ways of one tract for the transportation of minerals from adjoining tracts of course obtains where the grant makes express provision for such further use of the granted premises. *St. Louis Union Trust Co. v. Galloway Coal Co.* (1911) 193 Fed. 106; *Madison v. Garfield Coal Co.* (1901) 114 Iowa, 56, 86 N. W. 41, 21 Mor. Min. Rep. 358; *Genet v. Delaware & H. Canal Co.* (1890) 122 N. Y. 505, 25 N. E. 922; *Wadsworth Coal Co. v. Silver Creek Min. & R. Co.* (1894) 40 Ohio St. 559; *McCracken v. Gumbert* (1890) 131 Pa. 36, 18 Atl. 1068, 17 Mor. Min. Rep. 279; *Stewart v. Northwestern Coal & I. Co.* (1892) 147 Pa. 612, 23 Atl. 882; *Potter v. Rend* (1902) 201 Pa. 318, 50

Atl. 821, 22 Mor. Min. Rep. 1; *Sorg v. Frederick* (1917) 255 Pa. 617, 100 Atl. 481; *Farrar v. Pittsburg & E. Coal Co.* (1905) 28 Pa. Super. Ct. 280; *Jones v. Island Creek Coal Co.* (1917) 79 W. Va. 532, 91 S. E. 391.

Accordingly, under a lease of coal lands for mining purposes, providing for the payment of royalty to the lessor as long as the mine shall be operated, not exceeding twenty-five years, with right of way over the surface for railway tracks to shaft and dumps, and stipulating that "if the second party desires to use the right of way upon the land after the coal has been exhausted from first party's land, they may continue to do so" for a certain rental, the lessee may, at least until the coal in the granted premises is exhausted, and within twenty-five years, use the entries, shafts, and surface right of way for the removal of coal from adjoining lands leased by the same lessee. *Madison v. Garfield Coal Co.* (1901) 114 Iowa, 56, 86 N. W. 41, 21 Mor. Min. Rep. 358.

And the grantee of coal, with mining rights and "with the privilege of mining and removing, through any entries made in said coal, other coal belonging, or which may hereafter belong," to him, has the right to bring coal from his adjoining lands through entries in the mine excavated in the granted premises to the bottom of the shaft therein, and there to raise it to the surface of the grantor's land. *Potter v. Rend* (1902) 201 Pa. 318, 50 Atl. 821, 22 Mor. Min. Rep. 1.

Likewise, under a lease conveying coal in place, with the right to mine and remove the same through any shafts, slopes, or tunnels that may be dug, together with the right to use the openings, buildings, and fixtures used in mining said coal for mining, preparing, and forwarding coal from any adjoining or contiguous lands until such lands shall be exhausted, the grant in connection with the adjoining lands is one of present enjoyment; and there is nothing to show that this privilege is to be made use of only after the coal conveyed is exhausted. Under such a lease the lessee has a present right to mine coal

from adjoining lands by means of the openings upon the leased land. *Genet v. Delaware & H. Canal Co.* (1890) 122 N. Y. 505, 25 N. E. 922.

Also, in case of a grant of coal, with the privilege of mining and a right of way for railroads over the surface, together with the privilege of "forever hereafter running their coal from other lands through the entries and railways made and used in taking out the coal above granted," where, because of a ravine, the coal from the adjoining lands can be transported through the entries under the granted land only after connecting such entries with the coal by means of a surface road, the grantee has the right, as incident to the one granted, to build such a road. *McCracken v. Gumbert* (1890) 131 Pa. 36, 18 Atl. 1068, 17 Mor. Min. Rep. 279.

And under a lease stipulating that the lessee may use any slopes, headings, entries, and passageways through, over, and across the lands leased, for the purpose of reaching, giving access to, or mining on any other lands which he may lease or buy, "provided said lands are within 2,500 feet of the main slope opened on the lands embraced in the lease," the lessee may use such passageways for the transportation of coal mined on adjoining lands, the nearest boundary of which is within the stipulated distance. *St. Louis Union Trust Co. v. Galloway Coal Co.* (1911) 193 Fed. 106, affirmed in (1913) 119 C. C. A. 294, 201 Fed. 1022.

And it has been held that where a grant of coal in place, with mining privileges, and with provisions for the termination of the agreement, also stipulates that the grantee shall have the right of way through, over, or under said land to transport coal from adjoining lands, these covenants are independent of each other, and the grantee may use the gangway of the mine as a means of reaching coal on an adjoining tract, notwithstanding mining operations on the granted tract have ceased. *Stewart v. Northwestern Coal & I. Co.* (1892) 147 Pa. 612, 23 Atl. 882.

And where a grant of certain coal

with mining privileges provides that, for any coal that the grantees shall remove from other lands through or over the granted premises, he shall have all the rights then possessed by the grantor, and where, at the time, the grantor had the right to use the entries upon the land granted for the purpose of removing coal from other lands, with the privilege, after those mines should be exhausted, of continuing such use of the entries by paying a certain rental, these provisions authorized the grantee to transport coal from his adjacent lands through the entries upon the granted premises, even after the coal upon the latter is exhausted. The court remarks, by way of illustrating the general rule, that a man who rents a farm adjoining his own may, during the lease, haul the produce of his own land across the leased land without any license from his landlord. *Wadsworth Coal Co. v. Silver Creek Min. & R. Co.* (1884) 40 Ohio St. 559.

And, of course, a perpetual right or privilege of using the mine ways for the transporting of minerals from other lands may be granted. See *Sorg v. Frederick* (1917) 255 Pa. 617, 100 Atl. 481.

On the other hand, the grant of mineral rights may, by express restriction, exclude the right to use mine ways in the granted tract for the transportation of mineral from adjoining tracts. *Schobert v. Pittsburg Coal & Min. Co.* (1912) 254 Ill. 474, 40 L.R.A.(N.S.) 826, 98 N. E. 945, Ann. Cas. 1913B, 1104; *Pruett v. O'Gara Coal Co.* (1911) 165 Ill. App. 470; *Rockafellow v. Hanover Coal Co.* (1892) 12 Pa. Co. Ct. 241. But a provision in a mining lease that the shafts for the removal of the minerals granted shall not be used for the raising of minerals from other lands does not prevent the abandonment of such shafts and the removal of the minerals through shafts and ways on other premises. *Pruett v. O'Gara Coal Co.* (Ill.) supra.

And it has been held that a grantee or lessee of minerals in place may, by implication, be precluded from using mine ways therein for the purpose of

removing minerals from other tracts. Thus, in *Thos. Beck & Sons v. Economy Coal Co.* (1910) 149 Iowa, 24, 127 N. W. 1109, under the maxim that the expression of one thing is the exclusion of another, it is held that under a lease of coal for mining purposes, providing for the mining of coal from other lands through a shaft located on the leased land, and also providing for the removal of coal from the leased premises through a shaft located on any other land, the lessee has no right to carry coal from other lands through entries on the leased land and up a shaft on still other land. Two judges out of six dissent on the ground that, since, in the absence of any particular stipulation, the general rule is otherwise, in order to avoid its operation there must be some stipulation in the lease indicating an intention to avoid it. Also a grantee of coal, with mining rights and the right to use 2 acres of surface land for a shaft and other appliances, the conveyance stipulating that at cessation of mining operations grantee shall remove all buildings and shafts, and fill up the holes, has no right to carry coal from his adjoining lands through the grantor's land and up the shaft located thereon, and to dump the waste on the land of the grantor. *Moore v. Price* (1904) 125 Iowa, 353, 101 N. W. 91. In reaching this conclusion the court said that it could be conceded for the purposes of the case under consideration that the purchaser of minerals may have the absolute right to use the spaces created by him for the purpose of removing minerals from adjoining lands, since such principle did not apply to the facts under consideration. And the grant of mineral rights, together with the right to use machinery and apparatus, including a mine railroad belonging to the grantor, has been held to carry no right to use the same in removing minerals from other lands. *McCloskey v. Miller* (1872) 72 Pa. 151.

And in *CLAYBORN v. CAMILLA RED ASH COAL CO.* (reported herewith) ante, 946, the Virginia supreme court of appeals has gone so far as

to squarely reject the rule permitting use of mine ways on one tract for the transportation of minerals from other tracts, by holding that a deed of minerals in place under a tract of land does not give the grantee the right or privilege of using the underground ways for transporting minerals from an adjoining tract. This decision is of special importance, since, in departing from the general rule which has generally been regarded, and in fact is characterized by the court itself, as supported by "the prevailing, if not wholly unbroken, current of authority," the court has reviewed the earlier American authorities and the reasoning upon which they are based and has pointed out what it regards as the true rule.

And in England it has been held that since, in the case of Crown manors, the copyholders have an estate in the soil throughout, except the trees and minerals, which remain the property of the Crown, and since, if the Crown removes the minerals, the copyholder becomes entitled to the possession of the space where the minerals were, and is entitled to use it as he wishes, it follows that under a lease from the Crown of the coal mines in such a manor, even though provision is made therein for the conveyance of coal from adjoining land through the pits or passages in the lands of the manor, such user is a

trespass against the copyholder, and the lessee may not use for such purposes either underground passages or surface railways. *Eardley v. Granville* (1876) L. R. 3 Ch. Div. 826, 45 L. J. Ch. N. S. 669, 34 L. T. N. S. 609, 24 Week. Rep. 528, 17 Eng. Cas. 458. So, in *Bowser v. Maclean* (1860) 2 DeG. F. & J. 415, 45 Eng. Reprint, 682, 30 L. J. Ch. N. S. 273, 6 Jur. N. S. 1220, 3 L. T. N. S. 456, 9 Week. Rep. 112, 17 Eng. Rul. Cas. 453, the court again applied the rule that in the case of copyhold land, the lord of the manor, although entitled to the minerals and to have access to work them, was not entitled to the possession of the underground tramways for the purpose of transporting minerals taken from the land outside the manor. And in *Ramsay v. Blair* (1876) L. R. 1 App. Cas. (Eng.) 701, it was held that under grants of land reserving the coal therein, with power to dig and carry away the same, the grantor had no right to carry through that land coal dug from other lands; and this without reference to the nature of the estate; but the reason for this conclusion was stated in *Batten Pooll v. Kennedy* [1907] 1 Ch. (Eng.) 256, 76 L. J. Ch. N. S. 162, to be that the reservation in the *Ramsay Case* was merely of an easement as distinguished from a grant sufficient in itself to sever the land into layers.

G. J. C.

OSCAR RUFF DRUG COMPANY v.

WESTERN IOWA COMPANY, Appt.

Iowa Supreme Court — February 15, 1921.

(— Iowa, —, 181 N. W. 408.)

Landlord and tenant — injury by negligent repairs — liability.

1. A landlord is liable in damages for injury proximately caused to the tenant's property by the negligent and careless manner in which the landlord makes repairs to the leased property.

[See note on this question beginning on page 971.]

— provision in lease against liability — construction.

2. A provision in a lease that the lessor shall not be liable for any injury

to property on the premises does not apply to the destruction of the property by negligence in making repairs under a contract while lessee was hold-

(— Iowa, —, 181 N. W. 408.)

ing over under the terms of the lease, which provided for the remodeling of the building by the lessor and the execution of a new lease at an increased rental.

— assumption of risk of negligence.

3. A tenant does not, by remaining in the building with his stock of goods when the landlord attempts to lower a floor in remodeling the building, assume the risk of injury from negligence in performance of the work.

Appeal — error in instruction — harmlessness.

4. An erroneous instruction as to duty of tenant with respect to overloading the building under the terms

of the lease is immaterial in an action to hold the landlord liable for injuries to tenant's property, caused by collapse of the building during alterations, if the evidence wholly fails to show that the collapse of the building was due to overloading.

Evidence — opinion — invading province of jury.

5. Opinion evidence as to the effect of specific work on the walls of a building which collapse while the work is in progress does not invade the province of the jury in an action by a tenant to hold the landlord, who is making the repairs, liable for injury to the tenant's property by the collapse.

APPEAL by defendant from a judgment of the District Court for Woodbury County (Anderson, J.) in favor of plaintiff in an action brought to recover damages for the loss of a stock of merchandise alleged to have been totally destroyed as the result of defendant's negligence. *Affirmed.*

Statement by Stevens, J.:

Action by the lessee of a building to recover damages of the lessor, for the value of a stock of merchandise consisting of drugs, paints, and oils which it is charged was totally destroyed as the result of the negligent manner in which the lessor caused certain repairs and alterations to be made upon the leased premises. There was a verdict in favor of plaintiff for \$71,532.74 and interest. Defendant appeals from the judgment entered thereon. The material facts are stated in the opinion.

Messrs. Shull, Stilwill, & Shull, Jepson & Struble, John B. Sullivan, and E. M. Corbett, for appellant:

Plaintiff's admitted failure to disclose the warning of the building expert that it should not attempt to remodel the building, as it was too old, and the remodeling could not be done, or to do anything whatever, constituted an assumption of the risk of damage to its own goods.

Jacob Doll & Sons v. Ribetti, — A.L.R. —, 121 C. C. A. 621, 203 Fed. 593, 5 N. C. C. A. 1; Dresser v. Bates, 162 C. C. A. 541, 250 Fed. 525, 229 Fed. 772; Wood v. Carpenter, 101 U. S. 135, 25 L. ed. 807; Shauer v. Alterton, 151 U. S. 607, 38 L. ed. 286, 14 Sup. Ct. Rep. 442; Bates v. Dresser, 251 U. S. 524, 64 L. ed. 388, 40 Sup. Ct. Rep. 247.

A landlord may, by contract, exempt himself from liability for negligence committed by him upon the demised premises.

Gerlach v. Grain Shippers Mut. F. Ins. Asso. 156 Iowa, 334, 136 N. W. 691; Kennedy Bros. v. Iowa State Ins. Co. 119 Iowa, 29, 91 N. W. 831; Santa Fe, P. & P. R. Co. v. Grant Bros. Constr. Co. 228 U. S. 177, 57 L. ed. 787, 33 Sup. Ct. Rep. 474; Fera v. Child, 115 Mass. 32; Henry H. Tuttle Co. v. Phipps, 219 Mass. 474, 107 N. E. 354; Smith v. Faxon, 156 Mass. 589, 31 N. E. 687.

Defendant's employee having no authority to release plaintiff from its covenant not to overload the premises, it cannot recover if the moving of the goods to the fourth floor contributed to the collapse.

Phenix Nerve Beverage Co. v. Dennis & L. Wharf & Warehouse Co. 189 Mass. 82, 75 N. E. 256; Anderson v. Miller, 96 Tenn. 35, 31 L.R.A. 604, 54 Am. St. Rep. 812, 33 S. W. 615.

Messrs. Henderson, Fribourg, & Hatfield and O. D. Nickle, for appellee:

A clause in the lease exempting the landlord from liability for any damages sustained by the tenant from any specific cause does not relieve the landlord from liability to the tenant for any affirmative, active, or direct act of negligence committed by such landlord.

Unterberg v. Israel, 103 Misc. 675, 171 N. Y. Supp. 133; Second United

Cities Realty Corp. v. Hare, 165 N. Y. Supp. 371; *Sacher v. Murray Lenox Land Co.* 171 N. Y. Supp. 216; *Drescher Rothberg Co. v. Landeker*, 140 N. Y. Supp. 1025; *Hine v. Cushing*, 53 Hun, 519, 6 N. Y. Supp. 850; *Worthington v. Parker*, 11 Daly, 545; *Wynne v. Haight*, 27 App. Div. 7, 50 N. Y. Supp. 187; *Sulzbacher v. Dickie*, 6 Daly, 469; *Turner v. McCarthy*, 4 E. D. Smith, 247; *Willard v. Bunting*, 34 N. Y. 153; *Samuel v. Princeton Constr. Co.* 157 N. Y. Supp. 135; *Glickauf v. Maurer*, 75 Ill. 289, 20 Am. Rep. 238; *Jefferson v. Jameson & M. Co.* 60 Ill. App. 587, reversed in 165 Ill. 138, 46 N. E. 272; *Smith v. Faxon*, 156 Mass. 589, 31 N. E. 687; *Gill v. Middleton*, 105 Mass. 477, 7 Am. Rep. 548; *Rolfe v. Tufts*, 216 Mass. 563, 104 N. E. 341, 5 N. C. C. A. 291; *Le Vette v. Hardman Estate*, 77 Wash. 320, L.R.A.1917B, 222, 137 Pac. 454; *Willcox v. Hines*, 100 Tenn. 538, 41 L.R.A. 278, 66 Am. St. Rep. 770, 46 S. W. 297; *Tarnogurski v. Rzepski*, 252 Pa. 507, 97 Atl. 697; *Smith v. Female Orphan Asylum*, 1 La. 547; *Mumby v. Bowden*, 25 Fla. 454, 6 So. 453; *Lynch v. Ortlieb*, — Tex. Civ. App. —, 28 S. W. 1017; *R. C. H. Covington Co. v. Masonic Temple Co.* 176 Ky. 729, L.R.A.1918A, 436, 197 S. W. 420; *Michael v. Billings Printing Co.* 150 Ky. 253, 150 S. W. 77; *Bains v. Dank*, 199 Ala. 250, 74 So. 341; *Mann v. Fuller*, 63 Kan. 664, 66 Pac. 627; *Upham v. Head*, 74 Kan. 17, 85 Pac. 1017, 20 Am. Neg. Rep. 348; *Murrell v. Crawford*, 102 Kan. 118, 169 Pac. 561; *Vollrath v. Stevens*, 199 Mo. App. 5, 202 S. W. 283; *Horton v. Early*, 39 Okla. 99, 47 L.R.A.(N.S.) 314, 134 Pac. 436, Ann. Cas. 1915D, 825; *Barman v. Spencer*, — Ind. —, 144 L.R.A. 815, 49 N. E. 9; *Aldag v. Ott*, 28 Ind. App. 542, 63 N. E. 480; *Railton v. Taylor*, 20 R. I. 279, 39 L.R.A. 246, 38 Atl. 980; *Peerless Mfg. Co. v. Bagley*, 126 Mich. 225, 53 L.R.A. 285, 86 Am. St. Rep. 537, 85 N. W. 568; *Gregor v. Cady*, 82 Me. 131, 17 Am. St. Rep. 466, 19 Atl. 108; *Evans v. Murphy*, 87 Md. 498, 40 Atl. 109; *Galvin v. Beals*, 187 Mass. 250, 72 N. E. 969, 17 Am. Neg. Rep. 55; *Robbins v. Atkins*, 168 Mass. 45, 46 N. E. 425, 1 Am. Neg. Rep. 617; *Callahan v. Loughran*, 102 Cal. 476, 36 Pac. 835; *Martin v. Richards*, 155 Mass. 381, 29 N. E. 591; *Nahm v. Register Newspaper Co.* 120 Ky. 485, 87 S. W. 296, 9 Ann. Cas. 209; *Curtis v. Kiley*, 153 Mass. 123, 26 N. E. 421; *McKenzie v. Hatton*, 141 N. Y. 6, 35 N. E. 929; *Eugene C. Lewis Co. v. Metropolitan*

Realty Co. 189 N. Y. 534, 82 N. E. 1126; *Mortrude v. Martin*, 185 Iowa, 1820, 172 N. W. 17.

Stevens, J., delivered the opinion of the court:

Plaintiff is a corporation, organized under the laws of the state of Iowa, of which Oscar Ruff is president, and on and prior to June 29, 1918, occupied the west storeroom of a four-story building situated on the corner of Fourth and Douglas streets, Sioux City, Iowa, the basement under the same, a portion of the second, and all the fourth floor of said building as lessee of the Western Iowa Company, a corporation, appellant herein, and conducted a wholesale and retail drug, paint, and oil business therein. The east and remaining storeroom of said building was occupied by the Chain Grocery Store, the two rooms being separated by a brick wall extending the entire length of the building, except about 20 feet at the front, and from the floor of the basement to the second story. Both rooms were 25x90 feet, fronted south on Fourth street, and were known as Nos. 401 and 403. The entrance from Fourth street was in the center of the building. The three lower stories were constructed of brick, and the fourth, a mansard roof, of wood and tin. Plaintiff's lease, which was entered into on December 1, 1915, by its terms expired on April 30, 1918. Several years before the lease was entered into, the floor of the east, or Chain storeroom, was lowered about 12 inches. On June 1, 1918, plaintiff and defendant entered into a contract by the terms of which defendant agreed to make certain alterations and repairs in plaintiff's storeroom, among others not necessary to mention the following:

"A. The ground floor of said store is to be lowered to or near a level with the sidewalk grade of the sidewalk on Fourth street, in front of said building.

"B. A new front is to be put in said storeroom, which front shall be similar to that now in the store

occupied by the Chain Grocery & Meat Company, at 403 Fourth street, Sioux City, Iowa; the front of the Douglas street side of said storeroom is to be rebuilt and an entryway to said store is to be put in, same to be as nearly like the entrance on Fourth street as the construction of the building will permit."

This contract further provided that, in consideration of the agreements and provisions thereof, as soon as the stipulated repairs and alterations were completed, the parties would enter into a new lease for a term of six years, commencing May 1, 1918, which should "be in substantially the same form as the lease of said premises heretofore existing between the parties hereto and above referred to." By the terms of said contract, plaintiff agreed to pay an additional \$100 per month rent for the premises under the new lease. In pursuance of said arrangement, Melvin J. Smith, president of the defendant company, at once made arrangements with F. X. Babue & Sons, building contractors in Sioux City, to make the contemplated alterations and improvements in said building, specifying that the work should be done under the supervision of Joseph Awe, an employee of defendant corporation. Babue, in accordance with his agreement, furnished the workmen necessary for the job and purchased the material to be used in the building. Work was commenced about June 19, 1918, and continued until June 29th, when, shortly after the noon hour, the brick wall between the two storerooms gave way, and the building collapsed, and a fire ensued, totally destroying plaintiff's stock of merchandise and fixtures. The building, as stated, was constructed of brick and mortar and was erected in 1872. The brick used in the structure were what are commonly known as sand brick, and it appears that the mortar had become rotten, so as not to hold the brick together. The center wall supported one end of the joists in both storerooms up-

on which the floors of the first and second stories rested. The wall in the basement was originally 21½ to 22 inches wide and above the basement 13 inches. It is claimed that the collapse of the building was due to the careless and negligent manner in which the work of lowering the floor in plaintiff's storeroom was performed. The joists were cottonwood, the ends of which were inserted in the wall, and, instead of removing them, they were sawed off and lowered, so as to rest upon a single course of brick built up from the foundation. To lower the joists it was necessary to remove brick from the single course to the depth of about 12 inches. It is claimed that the wall was so weakened by the removal of the brick to permit the floors to be lowered, together with the removal of some of the ends of the joists that were sawed off and to which iron anchors embedded in the wall were attached, by channeling into the wall, and by the partial destruction of a header course of brick, by the use of a cold chisel, as to cause it to give way and the building to fall.

It is also claimed that the defendant was negligent in failing to cause the building to be properly inspected before the work was begun, and in failing to provide proper support and protection to the wall while it was in progress. But, as appellant does not claim that the question of defendant's negligence should not have been submitted to the jury, we have no occasion to go into further details of the matters relied upon to constitute negligence.

The particular negligence charged in plaintiff's petition and submitted to the jury, as stated in the court's instruction, was: "The act of negligence charged against the defendant, and which plaintiff claims was the direct and proximate cause of the collapse of the building and resulting damage, is that the defendant was negligent in attempting to lower the storeroom floor, and in lowering the same, in the manner in which said work was done, and at-

tempted to be done, in the old, worn, and ruinous condition in which the walls of said building were at the time said work was done, which condition was known or should have been known by the defendant at the time. And this is the only act of negligence on the part of defendant which you are to consider in your determination of this case."

In addition to a general denial and the admission of formal matters alleged in plaintiff's petition, the defendant for answer pleaded specifically that the collapse of the building, and resulting fire, occurred without negligence upon its part, averred that the work of making alterations and repairs was done by competent workmen in a skilful manner. The defendant also alleged that, by the terms and provisions of the written lease entered into on December 1, 1915, the defendant was fully relieved and exempted from liability for the damages claimed, and that plaintiff, during the work of remodeling and repairing the building, and without knowledge of the defendant or Babue & Sons, negligently caused large quantities of paint, oils, and lead, and other goods and commodities, to be removed from the basement and placed upon the upper floors of the building in such manner as to overload the same, and that same contributed to the collapse of the said building. The portions of the lease referred to above and set out in defendant's answer are as follows: "And in no case whatever shall lessor (or those having estate in the premises) be liable to the lessee, or any other person, for any injury, loss, or damage to any person or property on the premises, nor for the use or abuse of water, nor for leakage from the roof, nor for bursting or leakage of pipes in any part of the building, nor for any damage whatever which may be caused by an overflow from sewers; nor for any nuisance made or suffered on the premises; . . . and all property of any kind that may be on the premises shall be at the sole

risk of the lessee, or those claiming through or under it; and that the lessor, its successors or assigns or its agents, may during the said term, at reasonable times, enter to view the said premises or to show the property and buildings to persons wishing to lease or buy, and may remove placards and signs not approved and affixed as herein provided, and may make repairs and alterations, if it should elect so to do, and may show the said premises and building to others, and at any time within three months next before the expiration of said term may affix to any suitable part of the said premises a notice for letting or selling the said premises or building, and keep the same so affixed without hindrance or molestation."

Aside from errors which appellant claims occurred during the trial and which will be noted later, the principal contentions of defendant upon this appeal are:

(1) That plaintiff's occupancy of the building, both at the time when the alterations were contracted for and when made, was subject to the express agreement, quoted above, that in no event whatever should the defendant be liable to plaintiff for injury, loss, or damage to its property on the premises, and that same, while kept thereon, was at the sole risk of plaintiff.

(2) That plaintiff assumed the risk of damage to its property, and failed to exercise the care required of it under the provisions of its lease and the circumstances shown.

The familiar general rules governing the relation and liability of a landlord to his tenant, for damages growing out of defects in the leased premises, or of the negligence of the landlord in making repairs, such as that the occupancy of the tenant is at his own risk as to unconcealed defects, and that it is the duty of the landlord, in attempting to make repairs or alterations upon leased premises, to do so in a reasonably prudent and careful manner, and that he is liable for damages proximately resulting from his failure to

do so, are not controverted. While counsel for appellee do not concede that plaintiff's occupancy of the building at the time of the collapse was under the lease that expired April 30th, the argument upon both sides proceeds largely upon this assumption. When, however, it comes to the question of the interpretation to be placed upon, and the legal effect to be accorded to, the so-called exemption clause of the lease, quoted above, the views of counsel are widely divergent.

It is the contention of appellant that this clause is all-inclusive, and, unless an exception as to negligence is to be implied, is conclusive against the plaintiff, whereas it is the claim of counsel for appellee that this clause waives the right to claim damages only for those things which might naturally, and which could ordinarily, follow from the occupation of a building, and for which the landlord would not be liable under the ordinary rules pertaining to the relationship of landlord and tenant, and to such as might have been reasonably anticipated might occur, and that damages such as resulted from the attempt to make repairs and alterations in the building were not within the contemplation of the parties.

It should be noted, at the very outset, whether given particular significance in argument by counsel or not, that the repairs were being made in pursuance of the separate agreement of June 1st, which specifically recognized that the former lease had expired, and provided that when the repairs were completed a new lease—the terms of which were no more definitely stated than that they would be substantially the same as the terms of the former lease—would be entered into for a term of six years commencing May 1, 1918; and that said agreement further designated the exact repairs to be made, and recited that it was to be done in consideration of the parties entering into a new lease for the term stated, at an increased rental of \$100 per month. It is true that provisions in leases, exempting the

landlord from liability for damages to the property of the tenant, caused by the negligence of the former, have been upheld, to some extent, by this court and the courts of other jurisdictions. *Griswold v. Illinois C. R. Co.* 90 Iowa, 265, 24 L.R.A. 647, 57 N. W. 843; *Hartford F. Ins. Co. v. Chicago, M. & St. P. R. Co.* 175 U. S. 91, 44 L. ed. 84, 20 Sup. Ct. Rep. 33; *Kennedy Bros. v. Iowa State Ins. Co.* 119 Iowa, 29, 91 N. W. 831; *Gerlach v. Grain Shippers' Mut. F. Ins. Asso.* 156 Iowa, 334, 136 N. W. 691; *New York Ins. Co. v. Chicago, B. & Q. R. Co.* 159 Iowa, 129, 140 N. W. 373; *Roeh v. Business Men's Protective Asso.* 164 Iowa, 199, 51 L.R.A. (N.S.) 221, 145 N. W. 479, Ann. Cas. 1915C, 813; *Peek v. North Staffordshire R. Co.* 10 H. L. Cas. 473, 11 Eng. Reprint, 1109, 32 L. J. Q. B. N. S. 241, 9 Jur. N. S. 914, 8 L. T. N. S. 768, 11 Week. Rep. 1023, 5 Eng. Rul. Cas. 286; *Fera v. Child*, 115 Mass. 32; *Henry H. Tuttle Co. v. Phipps*, 219 Mass. 474, 107 N. E. 354; *Checkley v. Illinois C. R. Co.* 257 Ill. 491, 44 L.R.A. (N.S.) 1127, 100 N. E. 942, Ann. Cas. 1914A, 1202.

A careful analysis of the court's decision in each of the cited cases reveals that the clause construed either specifically or definitely exempted the landlord from liability for damages resulting from certain designated causes, or else the lease involved was a lease of a certain portion of the right of way of a railroad for a nominal consideration for the erection of an elevator or other building of similar character and use. In the latter cases, the exemption provided was from liability for damages resulting from fires caused by the negligence of the company's servants. In none of these cases was the question of the liability of the landlord for damages caused by its negligence in making repairs upon leased premises involved. The clause in the lease involved in this controversy is couched in general terms, and does not specifically exempt the defendant from liability for the negligent acts of the landlord.

The defendant, it is true, reserved the right in the lease to enter upon the premises and make repairs; but the repairs in question were not being made under the terms of the lease, but in pursuance and under the terms of the separate agreement of June 1st, and were being made in consideration of a new lease, to be entered into between the parties, for a term of six years, at an additional rental of \$100 per month. The obligations to make the improvements did not arise out of the lease, but out of the provisions of the separate agreement. Practically all, if not all, of the courts of this country, hold that it is the duty of the landlord, in making improvements upon leased premises, although the work is done gratuitously by him, to exercise reasonable care to see to it that no injury results to the occupying tenant. If,

Landlord and tenant—injury by negligent repairs—liability.

therefore repairs are made by the landlord in a careless and negligent manner, he is liable to the tenant for such damages as are the proximate result of such negligence, and the tenant does not assume the risk of the landlord's negligence. *Mortrude v. Martin*, 185 Iowa, 1320, 172 N. W. 17; *Glickauf v. Maurer*, 75 Ill. 289, 20 Am. Rep. 238; *Gill v. Middleton*, 105 Mass. 477, 7 Am. Rep. 548; *Gregor v. Cady*, 82 Me. 131, 17 Am. St. Rep. 466, 19 Atl. 108; *Michael v. Billings Printing Co.* 150 Ky. 253, 150 S. W. 77; *Mann v. Fuller*, 63 Kan. 664, 66 Pac. 627; *Upham v. Head*, 74 Kan. 17, 85 Pac. 1017, 20 Am. Neg. Rep. 348; *Galvin v. Beals*, 187 Mass. 250, 72 N. E. 969, 17 Am. Neg. Rep. 55; *Vollrath v. Stevens*, 199 Mo. App. 5, 202 S. W. 283; *Tarnogurski v. Rzepiski*, 252 Pa. 507, 97 Atl. 697; *Mumby v. Bowden*, 25 Fla. 454, 6 So. 453; *R. C. H. Covington Co. v. Masonic Temple Co.* 176 Ky. 729, L.R.A.1918A, 436, 197 S. W. 420; *Bains v. Dank*, 199 Ala. 250, 74 So. 341.

Exemption clauses in various leases somewhat less sweeping and

comprehensive in their general terms have been held by the courts of other jurisdictions, particularly by the New York courts, not to operate as a waiver of the right of the tenant to recover damages from a landlord, resulting from the making of repairs in a negligent manner. *Eugene C. Lewis Co. v. Metropolitan Realty Co.* 189 N. Y. 534, 82 N. E. 1126; *Rolfe v. Tufts*, 216 Mass. 563, 104 N. E. 341, 5 N. C. C. A. 291; *Smith v. Faxon*, 156 Mass. 589, 31 N. E. 687; *Unterberg v. Israel*, 103 Misc. 675, 171 N. Y. Supp. 133; *Second United Cities Realty Corp. v. Hare*, 165 N. Y. Supp. 371; *Sacher v. Murray Lenox Land Co.* 171 N. Y. Supp. 216; *Worthington v. Parker*, 11 Daly, 545.

In *Mortrude v. Martin*, 185 Iowa, 1319, 172 N. W. 17, plaintiff sought to recover damages for injuries received by him caused by the falling of plaster from the ceiling of a store in which he was employed. One of the defenses urged was that the lease under which his employer occupied the premises as a tenant contained a clause giving the landlord permission to build additional stories to the building, and waiving claims for damages occasioned thereby. We held that this provision of the lease waived only such damages as might result from the proper construction of the building, and not such as might result from negligence in the construction thereof.

It will be remembered that the repairs in question were being made by workmen, furnished by a local contractor engaged by defendant, under the direct supervision and control of a foreman also in defendant's employ. No one connected with the plaintiff company had anything whatever to do therewith, or a right to exercise control over the workmen, or to direct the manner in which the work should be performed.

It is true that the so-called exemption clause of the lease is stated in broad and sweeping general

terms, but we cannot conceive that the waiver of damages resulting to the lessee from the negligence of the lessor in making specific repairs upon the building in pursuance of a separate, independent contract, resting upon a new consideration, could have been within the contemplation of the parties at the time the lease was entered into. No such repairs were in the mind of either party. It is our conclusion upon this point that, although it be conceded that plaintiff was occupying the premises at the time the building collapsed, under the terms

—provision in
lease against
liability—
construction.

and provisions of the lease that expired April 1st, he did not, by the provisions quoted, waive his right to claim damages for the total destruction of his stock of merchandise, as the result of the negligence of the defendant in repairing, altering, and reconstructing a portion of the building occupied by plaintiff, and in a measure at his instance and request.

II. Much evidence was introduced by plaintiff tending to show that the building, at the time the work of making repairs commenced, was in a dilapidated and ruinous condition; that the brick out of which it was constructed was of poor quality, and the mortar had lost its strength and was easily crumbled and had little or no adhesive force; and that the work was begun without inspection of the center wall of the building for the purpose of ascertaining whether the repairs could be safely made.

It is contended by counsel for appellant that the charge of negligence, submitted to the jury, was so inseparably connected with the ruinous and unsafe condition of the building that, aside from the exemption clause in the lease, plaintiff cannot recover, for the reason he was bound to make such examination of the premises as was necessary to determine whether they were safe for occupancy, and that defendant is not liable for injuries

resulting from such defects as were known to plaintiff, or would have been discovered by such inspection as it was his duty to make. Also that, if the issue of negligence submitted to the jury was not so inseparably based upon the unsafe condition of the building as to preclude recovery, the evidence conclusively shows that plaintiff assumed the risk and failed to exercise due care under the circumstances. The contention of counsel fails to distinguish between injuries resulting from unconcealed defects in the building and injuries resulting from the omission of the landlord to perform some duty, owing to the tenant, or from affirmative acts of negligence committed by him in making repairs upon the leased premises. The evidence does not disclose that the collapse of the building was due to its inherent weakness or to defects reasonably discoverable upon proper inspection thereof, but sufficient evidence that such collapse was due to the negligent manner in which the work of lowering the floor in the storeroom occupied by plaintiff was done was introduced to require submission of the question to the jury. Plaintiff, by remaining with his stock of goods in the build-
—assumption of
risk of negli-
gence.

ing, assumed no risk for injuries caused by the negligence of defendant in lowering the floor and making the other stipulated alterations in the building. It did appear from the testimony of one Raven, an architect who was called as a witness for plaintiff, that, before the contract for the repairs and alterations of the building was entered into, he told Ruff that the building was in such a condition that extensive repairs or alterations could not be safely made thereon. Ruff did not communicate this conversation to the defendant. He testified, however, that the conversation was a casual one, that it had entirely gone from his mind, and that, so far as he knew, Raven was not speaking from knowledge obtained from an inspection of the

building, and he paid little attention to what he said.

The case does not, in our opinion, come within the rule announced in *Dresser v. Bates*, 162 C. C. A. 541, 250 Fed. 525, and other cases cited upon this point in the brief of appellant. Plaintiff's cause of action was not based upon the ruinous condition of the building, due to its age and deterioration, but upon the negligent manner in which the work was attempted to be done, and done. Clearly, there was no assumption of the risk by the plaintiff, and we need not refer particularly to the large number of authorities cited by counsel.

III. We have carefully analyzed appellant's exceptions to the ninth paragraph of the court's charge to the jury, and reach the conclusion that same is without merit. The exceptions to paragraph 11 are likewise without substantial merit. The lease provided that during the term the premises should not be overloaded, damaged, or defaced by the lessee. It appears from the record that a quantity of merchandise was removed by plaintiff from the basement to the fourth floor of the building just before the work of making the alterations commenced. Evidence to the effect that the merchandise was removed upon the orders of defendant's superintendent so as to give more room to the workmen employed in lowering the floor was introduced. This was, however, denied by the witnesses for defendant. It is also shown that a considerable quantity of paper had been recently removed from the fourth floor, and that the merchandise taken from the basement did not exceed 2,000 or 3,000 pounds in weight, which was much less than the weight of the rolls of paper referred to.

The court, in paragraph 11, instructed the jury that it was the duty of plaintiff to use reasonable and ordinary care not to permit anything to be done which would overload the premises, in view of the condition of the building and the alterations and remodeling contem-

plated, so far as the same were known to the plaintiff. Counsel for appellant contends that the instruction was erroneous for the reason that it should have stated that plaintiff was absolutely bound not to overload the premises, and that it was its duty to determine, at its peril, whether this was being done. Whether the instruction was correct as stated, or whether it should have been framed upon the theory of counsel, we think no prejudice could have resulted to defendant on account of the form in which it was given. The evidence wholly fails to show that the collapse of the building was due to overloading. As stated, the weight of merchandise on the fourth floor was, according to record, appreciably less than it customarily was.

Appeal—error in instruction—harmlessness.

IV. A witness, who properly qualified as an expert on building construction, was asked a hypothetical question which assumed certain facts shown in evidence with reference to the condition of the building and the manner in which the work of lowering the floor was done, to give his opinion as to what would be the effect upon the center wall of doing the work in the manner assumed. He answered that he would expect it to cause the wall to collapse. The objection to the question was that it invaded the province of the jury and asked the witness to pass upon the ultimate facts. The objection is not well taken. The witness had a right to express an opinion based upon the facts offered in evidence and assumed in the hypothetical question as to the effect upon the building of doing the work in the manner stated. We need not review the authorities cited, but the question comes reasonably within the rule of *Morgan v. Fremont County*, 92 Iowa, 644, 61 N. W. 231; *Kitteringham v. Sioux City & P. R. Co.* 62 Iowa, 285, 17 N. W. 585; *Brier v. Chicago, R. I. & P. R. Co.* 183 Iowa, 1212, 168 N. W. 339.

Evidence—opinion—invading province of jury.

(— Iowa, —, 181 N. W. 408.)

Some other minor questions are discussed by counsel for appellant, but it is impossible, in an opinion of permissible length, to review all of the points discussed by counsel in argument, or to point out either their inapplicability to the case at bar, or their want of controlling importance. On account of the large amount involved, this is one of unusual importance. Aided by the careful manner in which the record was prepared and the exhaustive treatment of the propositions relied upon for reversal by counsel in their respective briefs, we have given the entire record the fullest possible consideration.

To give the effect urged by appellant to the provisions of the lease quoted above would, under the circumstances shown, it seems to us, be to place an unwarrantable interpretation thereon, and by implication or construction to add something thereto which manifestly was not within the contemplation of the parties at the time the instrument was executed.

Failing to discover grounds for reversal in the record, the judgment of the court below is affirmed.

Evans, Ch. J., and Arthur and Faville, JJ., concur.

Petition for rehearing denied.

ANNOTATION.

Liability of landlord for damage to tenant's goods through negligence in making repairs.

I. Negligence of landlord or his servant:

a. In general:

1. Repairs gratuitously made, 971.
2. Repairs made under covenant or other obligation, 974.

b. Effect of exemption clause in lease, 974.

II. Negligence of independent contractor:

- a. View that landlord is not liable generally, 975.
- b. View that landlord is liable generally, 976.
- c. View that liability of landlord depends on duty to repair, 979.

I. Negligence of landlord or his servant.

a. In general.

1. Repairs gratuitously made.

Although a landlord may be under no obligation to his tenant to make repairs, he is not justified in making them without regard to danger to the property of the tenant. If his negligence, or that of his servant, in making gratuitous repairs, results in damage to his tenant's goods, he is, according to the view generally adopted, liable for the injury.

Arkansas. — Sparks v. Murray (1915) 120 Ark. 17, 178 S. W. 909.

Florida. — Mumby v. Bowden (1889) 25 Fla. 454, 6 So. 453.

Illinois. — Bernauer v. Hartman Steel Co. (1889) 33 Ill. App. 491. See also Glickauf v. Maurer (1874) 75 Ill. 289, 20 Am. Rep. 238; Mitchell v. Plaut (1889) 31 Ill. App. 148.

Iowa. — Rice v. Whitley (1901) 115 Iowa, 748, 87 N. W. 694.

Kansas. — Mann v. Fuller (1901) 63 Kan. 664, 66 Pac. 627.

Kentucky. — Michael v. Billings Printing Co. (1912) 150 Ky. 253, 150 S. W. 77.

Louisiana. — See Smith v. Female Orphan Asylum (1830) 1 La. 547.

Maryland. — See Evans v. Murphy (1898) 87 Md. 498, 40 Atl. 109.

New York. — See Willard v. Bunting (1865) 34 N. Y. 153; Roberts v. Kornblum (1909) 131 App. Div. 286, 115 N. Y. Supp. 616; Walker v. Shoemaker (1875) 4 Hun, 579; Hine v. Cushing (1889) 53 Hun, 519, 6 N. Y. Supp. 850.

Oklahoma. — Horton v. Early (1913) 39 Okla. 99, 47 L.R.A.(N.S.) 314, 134 Pac. 436, Ann. Cas. 1915D, 825.

Pennsylvania. — Tarnogurski v. Rzepski (1916) 252 Pa. 507, 97 Atl. 697.

Texas.—*Lynch v. Ortlieb* (1894) — Tex. Civ. App. —, 28 S. W. 1017; *Ara v. Rutland* (1915) — Tex. Civ. App. —, 172 S. W. 993.

West Virginia.—*Charlow v. Blankenship* (1917) 80 W. Va. 200, L.R.A. 1917D, 1149, 92 S. E. 318, 17 N. C. C. A. 225.

As was said in *Horton v. Early* (Okla.) *supra*: "Notwithstanding that plaintiff was not legally bound to repair the roof, yet, having undertaken so to do, he is liable for the damage sustained on account of a failure to make said repairs in a proper and skillful manner. The principle that governs in such cases being that, although the landlord is not bound to repair in the absence of an express covenant to repair, where no controlling statute interferes, and though his promise to repair, made subsequent to the execution of the lease, is without consideration, and hence is unenforceable, yet if he shall voluntarily and gratuitously undertake, during the term, to repair the demised premises, he is bound in so doing to use ordinary care and diligence. He may be held responsible for his negligence or lack of care and skill, or the negligence of his servants, or those employed by him in doing what, in the first instance, he was not bound to do. The distinction is made by the authorities between nonfeasance and misfeasance of the landlord. In other words, the law distinguishes between the failure or refusal of the landlord to do what he has not promised to do, or is not legally bound to do, and his doing it in a negligent manner. But if the landlord voluntarily repairs and actually enters upon the carrying out of his scheme of repair, he will be responsible for the want of due care in the execution of the work, upon the principle of liability for negligence, without reference to any question of implied contract to repair, or implied consideration."

So, in *Lynch v. Ortlieb* (Tex.) *supra*, with respect to a landlord's liability for negligence in making gratuitous repairs, the court said: "Under the original contract appellant was not bound to make repairs, and, whatever

the motive which induced him to undertake to repair the wall,—whether to subserve his own interest by preserving the property or to protect the tenant,—if it was done in such a negligent and unskilful manner as to cause the wall to fall down, the considerations which may have induced him to undertake it would be immaterial. A different rule would prevail if appellant undertook to repair the wall, and merely failed to protect it from falling."

Likewise in *Tarnogurski v. Rzepski* (Pa.) *supra*, the court said: "While plaintiff, under the terms of his lease, agreed to make all repairs, defendant did not stand on this agreement, but voluntarily, at the request of plaintiff, undertook to make the necessary repairs to the pipes, and, having done so, became liable for any damage due to his negligent performance of the work."

The making of ineffective repairs by a landlord, though the lease does not require him to make repairs, has been held to subject the landlord to liability for damage to his tenant's goods, due to the insufficiency of the repairs. *Sparks v. Murray* (1915) 120 Ark. 17, 178 S. W. 909; *Mann v. Fuller* (1901) 63 Kan. 664, 66 Pac. 627. The liability of a landlord for ineffective repairs where he is not bound to make any repairs is apparently to be explained on the ground that the tenant is entitled to rely on the sufficiency of such repairs as the landlord has undertaken. See *Sparks v. Murray* (Ark.) *supra*, wherein the defendant set up as a counterclaim to an action on promissory notes given for rent the damage to his goods caused by the failure of the plaintiff landlord to make effective repairs on the roof of the demised premises after he had undertaken and attempted to make them. Reversible error was predicated on a refusal to give an instruction that if the landlord made an agreement to repair the roof, which was relied on by the defendant tenant, but did the repair work in such an improper and unskilful manner as to cause damage to the defendant's stock of goods through the leaking of rain

water, there should be a finding for the defendant on his counterclaim of the amount of such damage. The court said: "While it is true there is no stipulation or covenant in the lease requiring the lessor to make repairs, and he is not, under the terms of it, bound to do so, still there is substantial testimony tending to show that he agreed to repair the roof, and undertook and attempted to do so, and that injury resulted to the tenant from his negligence in not making the repairs effective; and the requested instruction would properly have submitted to the jury the question of his liability for damages therefor. . . . The law appears to be settled that, notwithstanding the landlord is under no implied obligation to make repairs or improvements upon leased premises, in the absence of a covenant or agreement to do so, still if he undertakes to make such improvements or repairs, and makes them in such a negligent and careless manner as to injure the tenant, the tenant may recover damages therefor."

The fact that repairs are made by a landlord in response to complaints and requests on the part of his tenant will not bar a recovery by the latter for damage to his goods, due to the negligent manner in which the repairs are made. *Ara v. Rutland* (1915) — *Tex. Civ. App.* —, 172 S. E. 993.

And clearly a landlord is liable for a negligent injury to a tenant's personal property while making repairs under a special agreement permitting him to make repairs, but requiring him to do the work with diligence, care, and caution. *Walker v. Shoemaker* (1875) 4 Hun (N. Y.) 579.

A fortiori, the consent of a tenant to an alteration does not bar a recovery by him against his landlord for damage to his goods, caused by the negligent manner in which the alteration is made, if the consent is given with the condition that the tenant's goods are to be protected from damage and exposure. *Willard v. Bunting* (1865) 34 N. Y. 153.

A tenant who rents only a part of a building may recover for damage to his goods from negligent repairs made

by the landlord on the part of the building over which he retains control. *Charlow v. Blankenship* (1917) 80 W. Va. 200, L.R.A.1917D, 1149, 92 S. E. 318, 17 N. C. C. A. 225.

Similarly a tenant is entitled to recover for damages to his goods due to the negligence of the landlord in making repairs on a building adjoining the premises occupied by the injured tenant. *Hine v. Cushing* (1889) 53 Hun, 519, 6 N. Y. Supp. 850.

In at least a few jurisdictions damage sustained by a tenant on account of a negligent injury to his goods in the making of gratuitous repairs by the landlord may be set up by way of counterclaim in an action by the landlord for rent. *Sparks v. Murray* (1915) 120 Ark. 17, 178 S. W. 909; *Walker v. Shoemaker* (N. Y.) *supra*; *Horton v. Early* (1913) 39 Okla. 99, 47 L.R.A.(N.S.) 314, 134 Pac. 436, Ann. Cas. 1915D, 825.

A concurrent cause of damage to a tenant's goods will not bar a recovery against a landlord for negligence in the making of repairs, if the damage would not have occurred but for the landlord's negligence. But if a part of the damage can be attributed to some cause other than the negligent repairs, and if the two causes are independent in their operation, the liability of a landlord for negligent repairs is confined to the damage proved to have resulted from his negligence. *Rice v. Whitley* (1901) 115 Iowa, 748, 87 N. W. 694.

In Massachusetts, it has been held that a landlord is not liable for damage to his tenant's goods, caused by the negligence of the landlord or his servant in making gratuitous repairs. *McKeon v. Cutter* (1892) 156 Mass. 296, 31 N. E. 389. In that case the court said: "In the case at bar, if we assume that the jury would have been warranted in finding that the defendant made repairs on the pipes, we are of opinion that the case was rightly taken from the jury. There was no conflict of evidence as to the terms of the letting. The law imposed the duty on the plaintiff to keep the pipes in repair. If the defendant, at the request of the plaintiff, made repairs upon the

pipes, this would be a gratuitous act, which would not impose any liability upon him. The ruling that the action could not be maintained was, therefore, right."

2. Repairs made under covenant or other obligation.

There appears to be no dissent from the view that a landlord who is under a legal obligation, by covenant or otherwise, to make repairs, is bound, in performing the obligation, to exercise reasonable care to prevent injury to his tenant's goods. If, in the course of the making of the required repairs, he or his servant negligently causes damage to the personal property of his tenant, the latter is entitled to recover from him for the loss. *Dempsey v. Hertzfield* (1860) 30 Ga. 866; *Flynn v. Trask* (1866) 11 Allen (Mass.) 550; *Slafter v. Siddall* (1906) 97 Minn. 291, 106 N. W. 308; *Worthington v. Parker* (1885) 11 Daly (N. Y.) 545; *Walker v. Swayzee* (1856) 3 Abb. Pr. (N. Y.) 138; *Randolph v. Feist* (1898) 23 Misc. 650, 52 N. Y. Supp. 109. See also *Franco v. Maker* (1916) 223 Mass. 71, 111 N. E. 721; *Blumenthal v. Prescott* (1902) 70 App. Div. 560, 75 N. Y. Supp. 710; *Coleman v. Central Trust Co.* (1898) 25 Misc. 295, 54 N. Y. Supp. 561. Compare *Hollander v. W. & E. Realty Co.* (1918) 105 Misc. 49, 172 N. Y. Supp. 455. See also the reported case (*OSCAR RUFF DRUG CO. v. WESTERN IOWA CO.* ante, 962).

Thus, in *Slafter v. Siddall* (1906) 97 Minn. 291, 106 N. W. 308, it was held that where a display window was improperly constructed under a contract between a lessor and a lessee, requiring the former to construct the window, the tenant was entitled to recover from the landlord for damage to his goods caused by the faulty workmanship.

So, in *Franco v. Maker* (1916) 223 Mass. 71, 111 N. E. 721, the court held that where tenants impliedly agreed to remain in the demised premises if the landlord would thaw certain frozen sewer pipes, an undertaking of the latter to thaw the pipes was not gratuitous, and, therefore, he was liable

for damage to personal property of the tenants, negligently caused by a fire started by the landlord to thaw the pipes.

Similarly in *Coleman v. Central Trust Co.* (1898) 25 Misc. 295, 54 N. Y. Supp. 561, a landlord who had covenanted to keep the demised premises in repair was held to be liable for the damage to his tenant's goods resulting from the negligence of the landlord's servant in making repairs on the roof of the building occupied by the tenant.

In an action on the contract a landlord has been held to be liable for damage to his tenant's goods due to the insufficiency of repairs, where he contracted to put the demised premises in good condition and repair, and so keep and maintain them. *Flynn v. Trask* (1866) 11 Allen (Mass.) 550. However, a landlord has been held not to be liable to a subtenant for damage to his personal property due to the insufficiency of repairs, though he may have been under an obligation to his tenant to make the repairs. *Hollander v. W. & E. Realty Co.* (1918) 105 Misc. 49, 172 N. Y. Supp. 455.

b. Effect of exemption clause in lease.

There are several decisions to the effect that a clause in a lease purporting to exempt a landlord from liability for injury to a tenant or his goods, but not specifically referring to damage negligently inflicted, does not relieve a landlord from liability for damage to his tenant's goods due to the negligence of himself or his servant in the making of repairs. *Worthington v. Parker* (1885) 11 Daly (N. Y.) 545; *Randolph v. Feist* (1898) 23 Misc. 650, 52 N. Y. Supp. 109; *Second United Cities Realty Corp. v. Hare* (1917) 165 N. Y. Supp. 371. See also the reported case (*OSCAR RUFF DRUG CO. v. WESTERN IOWA CO.* ante, 962).

The reported case (*OSCAR RUFF DRUG CO. v. WESTERN IOWA CO.*) is apparently to the effect that where repairs are made by a landlord under a special agreement entered into after the lease was executed, and the lessee's stock of goods is damaged by the negligent manner in which the re-

pairs are made, the landlord is not relieved from liability by a general stipulation in the lease purporting to exempt the landlord from any injury, loss, or damage to any person or property on the premises. The court, however, points out that although counsel on both sides based their arguments on the construction to be given to the stipulation in the lease, it had expired before the repairs were made. It is, therefore, not clear whether the actual decision in the case is on the construction of the exemption clause in the lease or on the liability of a landlord for negligence in making repairs in the absence of such a clause.

A clause in a lease to the effect that the landlord was not to be answerable "for damages caused by the elements, by leakage in roof or piping," has been held not to exempt a landlord who was under a general obligation to keep the demised premises in repair, from liability for damage to a tenant's stock of goods, caused by the negligent adjustment of a roof leader pipe during the course of an alteration. *Worthington v. Parker* (N. Y.) *supra*. A like conclusion has been reached under the following clause in a lease: "The landlord shall not be liable for any damage caused by leakage of water or for any cause or event." *Randolph v. Feist* (1898) 23 Misc. 650, 52 N. Y. Supp. 109.

So, a landlord has been held to be liable for damage to a tenant's personal property from the overflow of water caused by a negligent repair of a drain pipe by the former, though the lease of the premises contained the following clause: "And the party of the first part shall not be liable for damages by reason of leakage of Croton water, or for any cause in any event." *Second United Cities Realty Corp. v. Hare* (1917) 165 N. Y. Supp. 371, wherein the court said: "This clause does not relieve the landlord from the consequences of his own negligence."

It has been held, however, with respect to a counterclaim for damage to a tenant's goods by negligence in making repairs, that effect should be given to a clause in a lease providing that

the landlord was not to be liable to the tenant for damage from water or for any other damage resulting from the carelessness, negligence, or improper conduct of any other tenant or agents or employees. *Unterberg v. Israel* (1918) 103 Misc. 675, 171 N. Y. Supp. 133. In that case the court said: "Undoubtedly under all the authorities this clause in the lease would exempt the landlord from any liability resulting from leakage caused by the negligence of any agents or employees, or from ordinary wear and tear, or from sudden action of the elements. If the defendant's counterclaim seeks a recovery for damages sustained in that manner, then a trial of the counterclaim would be useless. The plaintiff, however, would be responsible for any affirmative act of negligence committed by herself."

II. Negligence of independent contractor.

a. View that landlord is not liable generally.

In at least two jurisdictions the courts apply the general doctrine relative to independent contractors, and hold that if the landlord selects a competent contractor, and the work contracted for is not inherently dangerous, the landlord is not liable for injury to the tenant's goods caused by the negligence of the contractor. *Lawrence v. Shipman* (1873) 39 Conn. 586; *Meany v. Abbott* (1867) 6 Phila. (Pa.) 256.

Thus, a mason employed by a landlord to make repairs has been held to be an independent contractor, so as to relieve the landlord from liability for damage to the tenant's property caused by the mason's negligence. *Lawrence v. Shipman* (Conn.) *supra*, wherein the facts relative to the employment were stated as follows: "The mason was employed in a single transaction at a specified price for the job. By the terms of the contract he was to accomplish a certain specified result, the choice of means and methods and details being left wholly to him. The employment was of a mechanic in his regular business, recognized as a distinct trade, requiring

skill and experience, and to which apprenticeships are served. The contractor's duty was to conform himself to the terms of the contract, and he was not subject to the immediate direction and control of his employers."

In *Meany v. Abbott* (Pa.) *supra*, Sharswood, P. J., said in holding that a landlord was not liable for damage to a tenant from the negligent construction of a water-closet by a plumber employed by the landlord to do the work according to a plan submitted by the plumber: "In the case before us the defendant made a contract with a plumber, recommended to him by one of his tenants, who built the addition according to his own plan. . . . The defendant could not be expected to be acquainted with the art of a plumber, or to know wherein the plan was defective. He is not shown to have given directions, or to have interfered in the work. The question is, Did the relation of master and servant exist between the defendant and the plumber? It is plain that in this case it did not. It is now the clear and well-settled law that where a man has work done for him by a contractor, he is no more liable for the negligence of such contractor and his servants than he is for the negligence of a tenant who occupies premises under a letting from him. It would be a monstrous load of responsibility to throw upon a man to make him pay for the negligence or unskillfulness of every artisan, mechanic, or workman he employs. The rule of respondeat superior, even within its most restricted limits, is severe enough. A man must then not only be presumed to know the law, but all other arts and sciences. If I contract with a reputable machinist to put up a steam engine in my tenanted house, for the benefit of one of my tenants, and he does so, it would certainly be a hard measure of justice to hold me responsible for all damage resulting from its faulty construction."

The insolvency of an independent contractor, or the fact that he is financially irresponsible, is not a sufficient reason for holding a landlord who employs him to make repairs liable for

his negligent injury to a tenant's property. *Lawrence v. Shipman* (Conn.) *supra*.

b. View that landlord is liable generally.

In some jurisdictions the courts hold that a covenant for quiet enjoyment imposes an obligation on the landlord to avoid negligent injuries to the goods of his tenant, and that this obligation cannot be avoided by the employment of an independent contractor to make repairs. It is therefore held in these jurisdictions that a landlord is liable for damage to a tenant's goods through negligent repairs by an independent contractor, irrespective of the duty of the landlord to have the repairs made. *Peerless Mfg. Co. v. Bagley* (1901) 126 Mich. 225, 53 L.R.A. 285, 86 Am. St. Rep. 537, 85 N. W. 568; *Dalkowitz v. Schreiner* (1908) — Tex. Civ. App. —, 110 S. W. 564. See also *Nahm v. Register Newspaper Co.* (1905) 120 Ky. 485, 87 S. W. 296, 9 Ann. Cas. 209; *Michael v. Billings Printing Co.* (1912) 150 Ky. 253, 150 S. W. 77; *Blickley v. Luce* (1907) 148 Mich. 233, 111 N. W. 752; *Wertheimer v. Saunders* (1897) 95 Wis. 573, 37 L.R.A. 146, 70 N. W. 824, 2 Am. Neg. Rep. 480. Compare *R. C. H. Covington Co. v. Masonic Temple Co.* (1917) 176 Ky. 729, L.R.A. 1918A, 436, 197 S. W. 420.

Thus, in *Peerless Mfg. Co. v. Bagley* (Mich.) *supra*, the court said: "Did the employment of such a contractor relieve the defendants from liability to plaintiff? They insist that it did; that the case is within the rule that, when one employs a competent, experienced, and independent contractor to do a lawful work, he is not liable, either for defects in the system or in the apparatus or machinery. The learned counsel cite *Devlin v. Smith* (1882) 89 N. Y. 470, 42 Am. Rep. 311; *King v. New York C. & H. R. Co.* (1876) 66 N. Y. 181, 23 Am. Rep. 37; *Engel v. Eureka Club* (1893) 137 N. Y. 100, 33 Am. St. Rep. 692, 32 N. E. 1052; *McCafferty v. Spuyten Duyvil & P. M. R. Co.* (1874) 61 N. Y. 178, 19 Am. Rep. 267; *Miller v. New York, L. & W. R. Co.* (1890) 125 N. Y. 118, 26 N. E. 35. None of those cases involves

the relation of landlord and tenant. They are cases coming clearly within the rule as to nonliability for the negligence of independent contractors. There is, however, another rule, and which may be called an exception to that above stated, viz., that, where one owes an absolute duty to another, he cannot acquit himself of liability by delegating that duty to an independent contractor. To apply the rule to the present case, it may be thus stated: Where a landlord undertakes to make repairs or improvements for his tenant, he cannot relieve himself of the consequences of neglect in the performance of his agreement by employing an independent contractor."

So, in *Nahm v. Register Newspaper Co.* (1905) 120 Ky. 485, 87 S. W. 296, 9 Ann. Cas. 209, the court said: "The landlord is under a positive duty to his tenant that he shall have quiet enjoyment of the premises. He cannot himself tear off the roof above the tenant's head without being responsible for the consequent injury to the tenant's goods, and what he cannot do directly himself he cannot relieve himself of responsibility for by contracting for its being done by another. A master cannot relieve himself of a nonassignable duty which he owes to a servant, by contracting with another for its performance. A railroad cannot relieve itself from responsibility for the exercise of its franchises by contract with another. The principle runs through the entire law, and has often been applied between landlord and tenant." It is not certain, however, whether the damage for which the action was brought was due to negligence or was a natural consequence of the alteration which the landlords employed independent contractors to make. Negligence on the part of the independent contractors was referred to in the pleadings; but the decision apparently goes no further than to hold that if the landlords made an agreement with independent contractors the performance of which, in the ordinary mode of doing the work, necessarily or naturally damaged the tenant's property,

the landlords were liable for the damage.

In *Michael v. Billings Printing Co.* (1912) 150 Ky. 253, 150 S. W. 77, the court, after holding that the person who made the repairs for which the suit was brought was not an independent contractor, stated that, even if he was, the landlord could not escape liability for his negligence.

Likewise, in *Wertheimer v. Saunders* (1897) 95 Wis. 573, 37 L.R.A. 146, 70 N. W. 824, 2 Am. Neg. Rep. 480, the court said: "The evidence shows that the work of putting on the roof, in the present instance, was undertaken in consequence of the solicitation and request of the plaintiff, through his agent, Ayers, and by entering upon the performance of the work, through the medium of a contract with third parties, the defendants assumed and owed the plaintiff a particular duty in the premises; namely, that reasonable care and caution should be used in conducting the work of taking off the old roof and putting on the new one, to avoid doing any injury to the property of the plaintiff. This was an absolute duty imposed by law, upon the particular facts, and was just as binding as if the defendants had stipulated in the lease for its performance. The work to be done was one attended with risk and danger to the property of the tenant by reason of its exposure to the elements. That one upon whom the law devolves a duty cannot shift it over upon another, so as to exonerate himself from the consequences of its nonperformance, is very clear."

In *Dalkowitz v. Schreiner* (1908) — Tex. Civ. App. —, 110 S. W. 564, a landlord was held to be liable for an injury to a tenant's goods, due to insufficient repairs by an independent contractor, though the landlord was under no obligation to have the repairs made. The court said: "The landlord, in the first instance, was under no obligation to the tenant to repair this roof, but undertook to do so by putting on a new roof, and thereby, under all the authorities, assumed the responsibility of doing this work with due care in reference to its tend-

ency to inflict damage upon the tenant. It is well settled that such undertaking, though gratuitous, is attended by a duty to perform the service in a careful manner, and is not destitute of consideration to support it. See *Gregor v. Cady* (1889) 82 Me. 131, 17 Am. St. Rep. 466, 19 Atl. 108; *Mann v. Fuller*, 63 Kan. 664, 66 Pac. 627; *Wertheimer v. Saunders* (Wis.) supra; *Blumenthal v. Prescott* (1902) 70 App. Div. 560, 75 N. Y. Supp. 710; *Gill v. Middleton* (1870) 105 Mass. 478, 7 Am. Rep. 548; *Lasker Real Estate Asso. v. Hatcher* (1894) — Tex. Civ. App. —, 28 S. W. 404; *Lynch v. Ortlieb* (1894) — Tex. Civ. App. —, 28 S. W. 1017; *Eberson v. Continental Invest. Co.* (1906) 118 Mo. App. 67, 93 S. W. 298. The above cases also serve to show that the rule of independent contractor does not avail to relieve appellee of responsibility. The contractor was her representative in and about the work, so far as appellants are concerned. For these reasons we conclude that judgment should have been for plaintiffs, and the facts, including the amount of the damage, being undisputed, judgment should be rendered here in their favor. Appellee's recourse, if any, is against her contractor."

Similarly it has been held that a landlord is liable for damage to a tenant's merchandise, caused by negligent alterations made, with the permission of the landlord, by another tenant at his own expense. *Blickley v. Luce* (1907) 148 Mich. 233, 111 N. W. 752. That case was treated as substantially one in which a landlord had repairs made by an independent contractor, the court saying: "If the landlord had directed the tenant to make the repairs at the landlord's expense, in whole or in part, the men who carried out the work would have represented the landlord, whether they were independent contractors or not. The duty to so reconstruct the building as not to injure the plaintiff would be an absolute duty, resting upon the landlord, which he could not delegate to another, and thereby escape liability. . . . Whatever the rule might be as to a stranger, it can

make no difference in principle as to plaintiff, who occupied under a covenant for quiet enjoyment, whether the expense of reconstruction was borne by the landlord or another, acting by his authority. In either event, the invasion of plaintiff's possession would be due to the authority of the landlord, who had agreed to protect it, and, in either event, the landlord should be held liable for the negligent execution of the work, the result of which, directly attributable to the authority of the landlord, was an eviction of the tenant."

But it has been held that where a landlord, under no previous obligation to make repairs, entered into an agreement with his tenant to the effect that the former should have repairs made for their mutual benefit by an independent contractor, the landlord was not liable for damage to the tenant's goods, due to the negligence of the contractor. *Lasker Real Estate Asso. v. Hatcher* (1894) — Tex. Civ. App. —, 28 S. W. 404.

Where damage to a tenant's goods from the negligent manner in which repairs by an independent contractor were made occurred during the term of a new lease, executed several weeks after the expiration of the term of the lease during which the improvements had been negligently made, and the new lease had, before the damage occurred, been assigned by the lessee, a partnership, to a corporation organized to carry on the business of the partnership, it was held that the corporation could not recover from the landlord for the damage suffered. *R. C. H. Covington Co. v. Masonic Temple Co.* (1917) 176 Ky. 729, L.R.A.1918A, 436, 197 S. W. 420. After stating that the corporation had failed to prove its averment of a renewal clause in the earlier lease, the court said: "When the lease to Covington & Banks expired on the last day of the year 1913, it was its duty to give possession of the property, if it could not effect another contract for the rental of the property. If the partnership then made a contract for a lease upon the property, it occupied the situation of a new tenant. With the

expiration of the lease under which the property was held, the rights of the tenant, growing out of the lease, expired with it, except such as were incident to the tenant's right to the removal of his property. No damages occurred to Covington & Banks while the lease under which it held the property was in existence, and in fact no damages were ever suffered by the partnership. When the lease was made to Covington & Banks on February 10, 1914, the general rule applicable to the liability of a landlord to the tenant for the condition of the premises must necessarily prevail. That general rule, which is of almost universal application, is, in the absence from the contract of any undertaking on the part of the landlord that the premises are in any particular condition, the tenant must and does take the premises as he finds them. There is no undertaking by the landlord that the premises are fit for the purpose for which they are let, or that they are in any particular condition, to be implied from the mere fact of letting them to rent, but if the landlord knows at the time of the letting, that the premises are in an unsafe or dangerous condition, and such condition cannot be discovered by the tenant by the exercise of ordinary care, and the landlord fails to disclose the dangerous condition, or conceals it, he is liable to the tenant, his family, servants, and guests for injuries sustained by them, and resulting from the unsafe and dangerous condition of the premises. If the landlord is without knowledge, at the time of the letting, of any dangerous defect in the premises, he is not responsible for any injuries which result from such defect."

c. View that liability of landlord depends on duty to repair.

In some jurisdictions the liability of a landlord for injury to a tenant's goods, due to the negligence of an independent contractor in making repairs, depends on whether the repairs are being made gratuitously, or whether they are made in the performance of a duty resting on the land-

lord. Under this view there is no liability for the negligence of an independent contractor in making gratuitous repairs. *Bains v. Dank* (1917) 199 Ala. 250, 74 So. 341; *S. W. Noggle Wholesale & Mfg. Co. v. Sellers & M. Roofing Co.* (1916) — Mo. App. —, 183 S. W. 659.

Thus, a landlord not under an obligation to make repairs has been held not to be liable for damage to a tenant's goods, caused by negligent repairs, where it appeared that the work required peculiar skill, though it was not inherently dangerous, and the landlord selected a competent contractor for the work, which was done according to the latter's methods, or in compliance with requests of the tenant, and not under the control or direction of the landlord. *S. W. Noggle Wholesale & Mfg. Co. v. Sellers & M. Roofing Co.* (Mo.) supra.

So, in *Bains v. Dank* (Ala.) supra, a landlord was held not to be liable for damage to his tenant's goods, caused by the negligence of independent contractors in placing a new roof on the house occupied by the tenant, where it appeared that the repair work was gratuitous on the part of the landlord and was done at the request of the tenant. The court explained: "The evidence shows that the work was being done by said firm as independent contractors, and if there was any negligence on their part (a question upon which we would indicate no opinion), the landlord would not be liable therefor. The repair work was being made gratuitously on the part of the landlord, at the tenant's request. The evidence is without dispute that the contractors were entirely competent and reliable."

In *Honnemeyer v. Fischer* (1905) 27 Ohio C. C. 8, a decision apparently based on the theory that a landlord is not liable for the act of an independent contractor in making gratuitous repairs, it was held that a landlord cannot avoid responsibility for damage to a tenant's goods through negligent repairs, by employing an independent contractor to do the work, where the circumstances show that the repairs will be attended with dan-

ger to the tenant's property if made at the time selected by the landlord.

If only a short time is required for the work, and the landlord remains in control of the premises, a person employed by him to make gratuitous repairs is a servant instead of an independent contractor, and the landlord is liable for damage to a tenant's goods, caused by the workman's negligence. *Mumby v. Bowden* (1889) 25 Fla. 454, 6 So. 453; *Glickauf v. Maurer* (1874) 75 Ill. 289, 20 Am. Rep. 238.

Where no special terms showing the character of the employment were agreed on by a landlord and one employed by him to repair the plumbing of a building, it was held that the plumber was not an independent contractor, but a servant, and that therefore the landlord, though not bound to make the repairs, was liable for a negligent injury to a tenant's goods by the plumber. *Bernauer v. Hartman Steel Co.* (1889) 33 Ill. App. 491.

However, a landlord who is under a legal obligation to make repairs cannot avoid liability for injury to his tenant's goods by showing that the repairs which caused the damage were made by an independent contractor. *Eberson v. Continental Invest. Co.* (1906) 118 Mo. App. 67, 93 S. W. 297. See also *Mumby v. Bowden* (Fla.) supra; *O'Rourke v. Feist* (1899) 42 App. Div. 136, 59 N. Y. Supp. 157; *Sulzbacher v. Dickie* (1876) 51 How. Pr. (N. Y.) 500. Compare *Hyde v. Wilmore* (1895) 14 Misc. 340, 35 N. Y. Supp. 681, wherein the view was apparently taken that a landlord is in no case liable to the tenant for the negligence of an independent contractor in making repairs.

As was said in *Eberson v. Continental Invest. Co.* (Mo.) supra: "The covenant of the defendant, in the lease, to repair, is a personal one, the performance of which it could not delegate to another so as to absolve it from liability for damages resulting from the negligent performance of the duty. By its contract with Hogg & Reed to make the repairs, plaintiff substituted them in its stead, and made them its agent for the performance of the work of restoration;

in such circumstances, the rule of responsibility is thus stated by Professor Wharton: "The rule that the principal is not liable for the contractor's torts is "inapplicable to cases where the contractor is intrusted with the performance of a duty incumbent upon his employer, and neglects its fulfillment, whereby an injury is occasioned."'"

In *Sulzbacher v. Dickie* (N. Y.) supra, it appeared that a tenant's goods were damaged because an independent contractor, in placing a new roof on the demised building, neglected to protect the interior against rain storms during the course of the work. The landlord, who engaged the contractor, was held to be liable for the damage, on the ground that the contractor was not bound to protect the premises in the absence of an express stipulation to that effect, and that there was no such stipulation in the contract. In the opinion Daly, Ch. J., doubted the correctness of the view, but felt obliged to adopt it on the authority of *Buffalo v. Holloway* (1852) 7 N. Y. 493, 57 Am. Dec. 550, wherein it was held that an independent contractor engaged by a city to construct a sewer in a street was not, in the absence of an express contract therefor, bound to take necessary measures for the protection of travelers. In a separate opinion Robinson, J., placed the liability of the landlord on the dangerous character of the repair work, saying: "Where the act undertaken is one from its very character either a nuisance or one dangerous to others, the person undertaking it is not released from responsibility to any person thereby injured, although he has entered into a contract with some third person to perform it, and the injury has occurred through the negligence of the latter." The result reached by the court, if not its reasoning, is in accord with the weight of authority, since the landlord had covenanted to make repairs.

But where a tenant agrees to the making of repairs desired by the landlord, if the landlord employs a competent independent contractor to do the work he is not liable for a negli-

gent injury by the latter to the tenant's goods. *Jefferson v. Jameson & M. Co.* (1896) 165 Ill. 138, 46 N. E. 272. In that case the court said: "Where the owner employs a mechanic, and sets him to work in repairing a building or in the construction of a new building, and furnishes the material to be used, and retains direction of and control over the details of the work and the men employed, in such case the mechanic would be the mere servant of the owner, and the owner would be liable for the negligence of the servant. But where the contractor is given the entire possession of the building where the work is being done, and uses his own means and methods for accomplishing the work, and is not under the immediate control of the employer, but works under a plan adopted before he contracted to perform the work, he occupies the position of a contractor, and the employer will not be responsible for damages resulting from his negligence. *Morgan v. Smith* (1893) 159 Mass. 570, 35 N. E. 101. Here, as appears from the evidence, appellant let the work of repairing the building to a competent and experienced mechanic, gave him entire control over the building, and surrendered to him all supervision and direction over the manner of doing the work. Indeed, after the contract for the repairs was made, appellant had nothing whatever to do with the building or the work, but the entire management and control were in the hands of the contractor. Under such circumstances appellant was

not liable, and the court erred in refusing the propositions of law submitted by him on this branch of the case. The fact that appellee was a tenant of appellant, occupying the building where the repairs were made, does not, in our opinion, make this case an exception to the general rule heretofore announced. Appellee contracted in writing with appellant, for a certain consideration therein expressed, that the improvement or repairs might be made. Having agreed that the repairs might be made, it occupies no better position, so far as its right to recover damages is concerned, than a stranger. In other words, after appellee contracted that the work might be done, it and appellant, so far as the work was concerned, occupied the position of strangers to each other. If appellant had gone on and employed mechanics and done the work himself, and damages had resulted through the negligence of his servants, he would be liable. But, on the other hand, if he saw proper to let the contract to a contractor, and surrender the possession of the property to him, and give him the entire supervision and control of the work in all its details, and damages resulted through the negligence of the contractor, the latter alone would be liable for such damages."

But the burden is on the landlord to show that the tenant consented to the making of repairs. *Northern Trust Co. v. Palmer* (1898) 171 Ill. 383, 49 N. E. 553. W. S. R.

MASSACHUSETTS BONDING & INSURANCE COMPANY, Plff. in Err.,

v.

OLLIE E. VANCE.

Oklahoma Supreme Court — June 25, 1913.

(— Okla. —, 180 Pac. 693.)

Insurance — parol — effect.

1. Parol insurance, comprehending the subject of insurance, the time when the risk attaches and ends, the amount of indemnity, the parties,

Headnotes by SPRINGER, C.

and the premium, contains all the elements essential to a binding contract of insurance, and is enforceable.

[See note on this question beginning on page 995.]

Trial — jury — question of agency.

2. On the trial of a case, where the authority of an agent to bind his principal is made an issue by the pleadings, and where there is any competent evidence bearing upon the issue of agency and the extent of the authority of such agent, and the evidence thereon is conflicting, the issue as to such agency and the extent of his authority are questions to be determined by the jury under appropriate instructions, and its finding thereon will not be disturbed on appeal.

[See 21 R. C. L. 856, 857.]

Attorney and client — authority to compromise.

3. An attorney who is employed to institute and prosecute a suit has no implied authority to make a compromise or settlement, or to receive a tender.

[See 2 R. C. L. 996.]

Estoppel — retaining benefits.

4. For the purpose of defeating liability, a party will not be heard to say he never made a contract, and, inconsistent with such assertion, retain the benefits flowing from the alleged transaction.

[See 10 R. C. L. 694.]

ERROR to the District Court for Payne County (Cullison, J.) to review a judgment in favor of plaintiff, and overruling a motion for new trial, in an action brought to recover the amount alleged to be due on a parol contract of insurance. *Affirmed.*

The facts are stated in the Commissioner's opinion.

Messrs. P. D. Mitchell and Charles B. Mills for plaintiff in error.

Mr. Walter Mathews, for defendant in error:

The evidence was sufficient to prove the authority of the alleged agent to make the contract in question.

10 Enc. Ev. 10; National Surety Co. v. Miozrany, 53 Okla. 322, 156 Pac. 651; Union Mut. L. Ins. Co. v. Wilkinson, 13 Wall. 222, 20 L. ed. 617; Western Home Ins. Co. v. Hogue, 41 Kan. 524, 21 Pac. 641; Cooley, Ins. p. 345; McFarland v. T. W. Lanier & Bro. 50 Okla. 336, 150 Pac. 1097; Brownell v. Moorehead, — Okla. —, 165 Pac. 408; Case v. Posey, 55 Okla. 163, 154 Pac. 1165; Gast v. Barnes, 44 Okla. 107, 143 Pac. 856; Central Mortg. Co. v. Michigan State L. Ins. Co. 43 Okla. 33, 143 Pac. 175; Iowa Dairy Separator Co. v. Sanders, 40 Okla. 656, 140 Pac. 406; Wrought Iron Range Co. v. Leach, 32 Okla. 706, 123 Pac. 419; Ricker Nat. Bank v. Stone, 21 Okla. 833, 97 Pac. 577; United States Fidelity & G. Co. v. Shirk, 20 Okla. 576, 95 Pac. 218; Mechem, Agency, p. 83.

Having failed to deliver the policy, in accordance with the oral agreement, and plaintiff having suffered an injury in the meantime, the action was properly brought for a breach of the oral contract.

Davenport v. Peoria M. & F. Ins. Co. 17 Iowa, 276; Sproul v. Western Assur.

Co. 33 Or. 98, 54 Pac. 180; Hardwick v. State Ins. Co. 20 Or. 547, 26 Pac. 840; McCabe Bros. v. Aetna Ins. Co. 9 N. D. 19, 47 L.R.A. 641, 81 N. W. 426; Sanford v. Orient Ins. Co. 174 Mass. 416, 75 Am. St. Rep. 358, 54 N. E. 883.

If plaintiff, at the time of entering into the contract of insurance, paid the agent \$5.30 as first premium for the insurance and as a part of such contract, and defendant, with notice of the nature of the terms and manner of entering into the contract, and of the fact of plaintiff's injuries, has kept the money, or permitted the agent to keep it, and failed, after such knowledge, to return or repay him such sum, the defendant is liable on the contract.

United States Fidelity & G. Co. v. Shirk, 20 Okla. 576, 95 Pac. 218; Minneapolis Threshing Mach. Co. v. Humphrey, 27 Okla. 694, 117 Pac. 203; American Bankers' Ins. Co. v. Thomas, 53 Okla. 11, 154 Pac. 44; Roff Oil & Cotton Co. v. King, 46 Okla. 31, 148 Pac. 90; J. I. Case Threshing Mach. Co. v. Lyons & Co. 40 Okla. 356, 138 Pac. 167; Whitcomb v. Oller, 41 Okla. 331, 137 Pac. 709.

Springer, C., filed the following opinion:

In this opinion the plaintiff in error will be referred to as the company, and the defendant in error

(— Okla. —, 180 Pac. 693.)

will be referred to as the insured. This action was commenced in the district court of Payne county, Oklahoma, by the insured, to recover \$3,600 upon a parol contract of insurance.

In the petition filed in this case it is alleged: That on the 19th day of August, 1915, E. Evans was the agent of the company, and had authority to solicit and enter into contracts of insurance against accidents or injury, which would bind the company for the payment of the amount agreed upon in event accident or injury intervened during the life of the insured. That on the 19th day of August, 1915, the insured, being a pipe line constructor by occupation, entered into a parol contract of insurance with the company, through its said agent, E. Evans, at Cushing, Oklahoma, whereby the company agreed to indemnify the insured against the effects of injury resulting from accidental means which would prevent him from pursuing his occupation, or a similar occupation, should such injury be received prior to the 1st day of October, 1915, by paying the insured the sum of \$3,600, should the injury disable him from pursuing his occupation for a period of five years or longer, or, in event the injury disabled him from pursuing such occupation for less than five years, the company should pay the insured the sum of \$60 per month during the time of his disability. That, as a consideration for the indemnity against injury to the insured, he paid the company the sum of \$5.30, as reward or premium for such indemnity, and which should extend from and including the 19th day of August, 1915, up to the 1st day of October of that year. The petition further alleges that on the 21st day of August, 1915, while the insured was pursuing his occupation, he was accidentally injured, which resulted in the permanent loss of his right arm.

To this petition the company interposed a general demurrer, which was presented to the court and over-

ruled, and exceptions saved. The company then filed an answer, in which it is denied that E. Evans was the agent of the company, having authority to enter into contracts of insurance, as alleged and set forth in the petition, and further denying that any such contract of insurance was ever made, and in the answer it is affirmatively alleged that on the 19th day of August, 1915, the insured made an application to the company upon its regular printed form of applications for a policy of accident insurance, to begin at noon on the date of the policy to be issued by the company in pursuance to the application, and that in said application, and as a part and parcel of the same, there was contained the following stipulation and agreement: "I understand and agree that I have made the foregoing statements as representations to induce the issue of the policy, and to that end I agree that, if any one or more of them be false, all right to recover under said policy shall be forfeited to the company, if such false statements were made with the actual intent to deceive, or if it materially affects either the acceptance of the risk or the hazard assumed by the company; that the insurance hereby applied for will not be in force until the delivery of the policy to me while I am in good health and free from all injury; and that the agents or solicitors of the company are not authorized to extend credit or waive or modify any of the terms hereof. I agree to pay the advance premium of three and 48/100 dollars before the first day of each month without notice."

It is further alleged in the answer that on the 19th day of August, 1915, the application was mailed to the company from Cushing, Oklahoma, to a branch office at Saginaw, Michigan; that the policy to be issued in pursuance to the application was a home office policy, and that the home office alone had authority to issue policies and enter into insurance contracts; that, upon re-

ceipt of the application at the branch office at Saginaw, Michigan, it was discovered that a mistake as to the occupation of the insured had been made in the application, and the same was returned to Cushing, Oklahoma, for the purpose of procuring a correction of the mistake, and that said application was destroyed and a new one was made and forwarded to the home office; and that, in pursuance thereof, a policy was issued on the 26th day of August, 1915, which contained the provision that said policy should be null and void unless delivered to the insured while he was in good health and uninjured.

To the answer the insured filed a verified reply, in which he specifically denies that he signed the application as alleged and set forth in the answer, and denies specifically that he ever signed but one application, and denied that the application he signed on the 19th day of August, 1915, contained the provision set forth in the answer, and denies specifically that the application he signed contained a mistake as to his occupation, and specifically denies that the policy was ever delivered to him as alleged and set forth in the answer. And the reply reiterates the allegations of the petition, the receipt of the premium, and retention thereof by the insurer, and other facts constituting estoppel and waiver by the insurer to deny the contract which he alleges was made.

The case was tried to the court and jury at the May, 1916, term, in Payne county, Oklahoma, and the jury returned a verdict in favor of the insured for the full sum of \$3,600. In due time a motion for a new trial was filed and presented to the court, which was overruled and denied, and exception saved, and the case is now properly before this court for review.

The first question presented for the consideration of this court is the contention of the company that the petition did not state facts sufficient to constitute a cause of ac-

tion, for the facts therein alleged are against the plain commands of the statutory law of this state, and against the policy of the law. The precise question here presented involves the validity of a parol contract of insurance. The origin of insurance is wrapped in the obscurity of the past to such an extent that an examination of the most learned authors upon this subject leaves one in doubt as to its true origin. Some of the authors contend that insurance was known to and practised by the ancients; still others contend that it had its origin during the days of the Roman republic; and still others contend that it had its inception in the necessities of maritime commerce, and the risks and hazards consequent upon it. While we may not be able to trace to a definite source the invention of insurance, we know that it was practised in various forms down through the ages, and in almost all forms of human activity, and did not need to be in any particular form, so long as it embodied all the elements of an enforceable contract, until it became more modernized in the twelfth century, when written contracts or policies of insurance first made their appearance among the merchants in northern Italy. Insurance had its origin in the necessity of commerce, and has expanded with its progress and facilitated itself to the wants and needs of an advancing civilization, and has been extended into every field of human endeavor, protecting all forms of commerce, agriculture, and life. Wherever danger is apprehended or protection required, it holds out its fostering hand and promises indemnity. This is the principle that underlies the contract, and it can never, without violation of its true spirit and intent, be made by the insured a source of profit; its sole aim being to protect against loss, damage, or injury.

Much doubt and uncertainty regarding the precise question here presented seem to have at one time existed among the courts and text-

writers upon this important subject, which led to a riot of confusions in the decisions of courts of last resort, and text-writers as well. This question first came before the supreme court of the state of Missouri in the case of *Henning v. United States Ins. Co.* 47 Mo. 425, 4 Am. Rep. 332, and Justice Wagner, delivering the opinion of the court, held: "At common law there is nothing absolutely requiring that the contract should be in writing."

And after stating that there was such confusion and disagreement in the books as to the power of insurance companies to make contracts of insurance by parol, and after reviewing a number of the leading cases upon the subject, and construing the act of that state incorporating the defendant company, it was declared that "all the conditions of the policies issued by said company shall be printed or written on the face thereof," and that authority had been given the company to make by-laws, one of which required the president to sign all policies or contracts by which the company was to be bound, and another required every proposal of insurance to be by written application, signed by the applicant or his agent, and held: "That by virtue of the act of incorporation and the by-laws referred to there could be no original and binding contract by parol."

A learned writer (1 *Duer*, Ins. 60), writing upon this interesting subject, uses this language: "Indeed, it may be well doubted whether an action upon a contract merely oral would be now sustained, since the usage of written contracts have become so ancient and so universal in their use that it may be considered to have acquired the force of law."

The view laid down by this author was adopted by the supreme court of the state of Ohio in the case of *Cockerill v. Cincinnati Mut. Ins. Co.* 16 Ohio, 148, as well upon the ground also of universal usage and the authority of the books, as upon the ground that the charter

required the policy to be in writing,—the precise question there presented being whether a policy which had become void by the sale of the property insured could be revived by parol agreement. But after a careful examination of this authority we are conclusively led to the conviction that it is not supported upon either ground by the authorities, and, indeed, it is no longer an authority in the state of Ohio; it being overruled in the case of *Dayton Ins. Co. v. Kelly*, 24 Ohio St. 345, 15 Am. Rep. 612.

The question was again presented to the supreme court of the state of Missouri in the case of *Baile v. St. Joseph F. & M. Ins. Co.* 73 Mo. 371, and after going exhaustively into the decisions of that state, and as well the various text-writers upon the subject, the *Henning Case* was overruled, and in the body of the opinion it is said: "It must now be considered as the well-settled doctrine by the nearly universal concurrence of the authorities that oral agreements of insurance are enforceable, although the charter of the company contains similar provisions to those contained in chapter 67, *supra*. The principle underlying these decisions is this: That the right to make contracts of insurance, like any other right of contracting, exists as at common law, unless prohibited by statute; that the contract of insurance having its origin in mercantile law and usage, the distinction which denies the power to enter into such a contract, except in the particular modes and forms, is without foundation, and repugnant to and inconsistent with that general capacity of contracting which the common law concedes to every person ordinarily competent to enter into binding engagements; that the provisions of the charter of a company that they shall have the right to make contracts of insurance by the signature of a president, etc., are regarded by the courts as merely enabling, and not restrictive of the general power to effect contracts in any other mode not unlawful, dictated by conven-

ience; and that 'the distinction between a contract to insure or to issue a policy of insurance and the policy itself is obvious and constantly recognized by the courts.' *May, Ins.* ¶¶ 14, 22, 23, 128; *Kelly v. Commonwealth Ins. Co.* 10 Bosw. 82; *Sanborn v. Fireman's Ins. Co.* 16 Gray, 448, 77 Am. Dec. 419; *First Baptist Church v. Brooklyn F. Ins. Co.* 19 N. Y. 305; *Relief Fire Ins. Co. v. Shaw*, 94 U. S. 574, 24 L. ed. 291; *New England F. & M. Ins. Co. v. Robinson*, 25 Ind. 536."

In construing the act by which the insurance company was incorporated within the state of Missouri, the court uses this language: "Besides that, § 8, *supra*, requiring the signature of the president, etc., uses no prohibitory words; relates not to agreements to insure, but only to policies when completed and ready for official signature."

In 1906 this question was again presented to the supreme court of the state of Missouri, in the case of *King v. Phoenix Ins. Co.* 195 Mo. 290, 113 Am. St. Rep. 678, 92 S. W. 892, 6 Ann. Cas. 618. Justice Marshall, delivering the opinion of the court, after going exhaustively into the subject, and citing many courts and text-writers in support of the later rule laid down by that court, and quoting with approval from the *Baile Case*, went further than that court had ever previously gone, and held: "That unless prohibited by statute, a corporation has all the rights of contracting under the common law that an individual has."

And further held: "That the correct doctrine announced by the great weight of authority is that parol contracts of insurance are valid unless expressly prohibited by statute. The rule thus announced in this state is in harmony with and amply supported by the great weight of modern authority." 195 Mo. 290.

The validity of a parol contract of insurance was presented to the supreme court of the state of Illinois in the case of *Firemen's Ins. Co. v. Kuessner*, 164 Ill. 275, 45 N. E. 540,

wherein it is held: The mere fact that a company is authorized by its charter to make contracts of insurance in writing, or empowered to issue written policies, does not invalidate such contracts when made orally, or alter the common-law principle that oral contracts of insurance are valid.

The enforceability of a parol contract of insurance was questioned in the case of *Security F. Ins. Co. v. Kentucky F. & M. Ins. Co.* in the supreme court of the state of Kentucky, 7 Bush, 81, 3 Am. Rep. 301. In the summer of the year 1861, *McFerran, Manifee & Co.*, owning a large quantity of cotton purchased in Georgia for release in New York, to be shipped from Columbus to Appalachicola Florida and to be thence shipped in the *Mary Lucretia* and *Metropolis* ships to the city of New York, procured from the appellee an oral contract for insurance against the perils of navigation, which the appellant reinsured to appellee, and to fill up the uninsured gap between the landing and transshipment of the cotton at Appalachicola, the owners also obtained from the appellee on the 10th day of October, 1865, an oral contract for insurance against fire risks. On a suit to enforce the parol contract of insurance thus entered into the supreme court of the state of Kentucky held: "An oral contract to issue a policy of insurance is binding and may be specifically enforced, or the court may award damages the same as in an action on an executed policy. A provision in a company's charter requiring that 'all policies and contracts of insurance . . . shall be subscribed by the president' relates only to executed insurances, and does not abridge the common-law right to make an oral executory contract for insurance."

This question was brought to the attention of the Supreme Court of the United States for its disposition in the case of *Commercial Mut. M. Ins. Co. v. Union Mut. Ins. Co.* 19 How. 318, 15 L. ed. 636, and was argued January 22, 1857, decided

February 17, 1857. The question there involved was in equity to compel the specific performance of a contract to make reinsurance on the ship *Great Republic*. The case originated in the circuit court of the United States for the district of Massachusetts. The circuit court made a decree in favor of the complainants, and the respondents appealed. The facts involved in that case are not dissimilar to the facts involved in the case for our disposition. It appears that the complainants, a corporation established in New York, having made insurance of the ship *Great Republic* to a large amount, authorized Charles W. Story, at Boston, to apply for and obtain from either of the insurance companies their reinsurance to the extent of \$10,000. On the 24th day of December, 1853, Mr. Story made application to the president of the defendant corporation for reinsurance, at the same time presenting a paper, partly written and partly printed as embodying the terms of the application. The president of the company, after consulting one of the directors of the company, declined to take the risk for a premium of 3 per cent, but offered to take it for $3\frac{1}{4}$ per cent. Mr. Story, answering him, stated that it was more than he was authorized to give, and left the office. Mr. Story apprised his principals by telegraphic despatch that the risk could be taken for $3\frac{1}{4}$ per cent for six months, or 6 per cent for twelve months. The answer on the same day advised him to enter into the contract for six months. Mr. Story informed the president he was willing to pay $3\frac{1}{4}$ per cent for the reinsurance described in the proposal, and took a pen and altered the 3 per cent provision in the proposal to $3\frac{1}{4}$ per cent by adding $\frac{1}{4}$ to 3 on the paper, and the president thereupon assented to the terms contained in the paper, but informed Mr. Story that no business was done at the office on that day, and the next day he would attend to it. After the verbal contract of insurance had been entered

into, and on the night of the same day, the ship *Great Republic* was destroyed by fire while at a wharf in the city of New York. On the next day, being the 27th day of December, the complainants tendered their notes for the agreed premium and demanded a policy of insurance. The defendant declined to issue the policy; several grounds having been relied upon as a basis for its refusal. Among other grounds relied upon as a justification for the refusal was Massachusetts Rev. Stat. chap. 37, §§ 12, 13: "Insurance corporations can make valid policies of insurance only by having them signed by the president and countersigned by the secretary."

In disposing of the contention thus raised the Supreme Court of the United States, through Justice Curtis, said: "But we are of opinion that this statute only directs the formal mode of signing policies, and has no application to agreements to make insurance."

In construing the statute above referred to, it seems that the Supreme Court of the United States was placing upon the statutes of the state of Massachusetts the construction that had been placed upon them by the supreme court of that state. *New England M. Ins. Co. v. De Wolf*, 8 Pick. 63; *M'Culloch v. Eagle Ins. Co.* 1 Pick. 276; *Thayer v. Middlesex Mut. F. Ins. Co.* 10 Pick. 326. The first syllabus of the same opinion is as follows: "An agreement by parol to make an insurance is good. Statute of Massachusetts, which provides that insurance corporations can make valid policies of insurance only by having them signed by the president and secretary (Rev. Stat. chap. 37, §§ 12, 13), only directs the formal mode of signing policies, and has no application to agreements for insurance."

The same question was again presented to the Supreme Court of the United States in the case of *Relief F. Ins. Co. v. Shaw*, 94 U. S. 574, 24 L. ed. 291. Justice Bradley, delivering the opinion of the court, said: "That a contract of insur-

ance can be made by parol, unless prohibited by statute or other positive regulation, has been too often decided to leave it an open question. That it is not usually made in this way is no evidence that it cannot be so made. To avoid misunderstanding in a contract of such importance and complexity, it is undoubtedly desirable that it should always be in writing; and such is the requirement of many codes of commercial law. But the very existence of the requirement shows that it was deemed necessary to make it. The question came before the supreme judicial court of Massachusetts in 1860, on a contract made under circumstances very nearly similar to those of the present case; and it was adjudged that a parol contract of insurance can be made. *Sanborn v. Fireman's Ins. Co.* 16 Gray, 448, 77 Am. Dec. 419."

In this case the construction of the Massachusetts statute was again under consideration, and the court quoted with approval the language of Judge Hoar, wherein it is said: "We cannot think that a provision in the charter of an insurance company, authorizing contracts authenticated by the signature of a particular officer, and without any words of restriction, should generally be construed to limit the powers of the company, and to prevent them from making contracts within the ordinary scope of their chartered powers. On the contrary, the phraseology of those statutes respecting the execution of policies should be regarded as consisting simply of enabling words, not restraining the power which they confer to make contracts, of which the policies are the evidence." 16 Gray, 454.

And substantially the same views were expressed by the court of appeals of New York in *First Baptist Church v. Brooklyn F. Ins. Co.* 19 N. Y. 309. The particular provision of the Massachusetts statute under consideration in the *Relief F. Ins. Co.* Case was as follows: "In all insurance against loss by fire hereafter made by companies chartered or doing business in this common-

wealth, the conditions of insurance shall be stated in the body of the policy; and neither the application of the insured nor the by-laws of the company shall be considered as a warranty, or a part of the contract, except so far as they are incorporated in full into the policy, and appear on its face before the signatures of its officers."

In answer to the contention of the appellant that the language of the Massachusetts statute conclusively shows that it contemplated nothing but a written contract of insurance, and that it closed the door absolutely to contracts resting in parol, the court said: "It is evident that the object of this statute was not to prohibit parol contracts of insurance, but to prohibit the practice of referring to a set of conditions not contained and set out in the policy, but embodied in some other paper or document. The statute was passed for the benefit of the insured, in order that they might not be entrapped by conditions to which their attention might never be called, and which they might inadvertently overlook and disregard, if they were not embraced in their policies. It applies in terms only to policies, that is, to written contracts of insurance, and has no application whatever to parol insurance. It does not prohibit them, nor affect them in any way."

After going somewhat into the history and origin of the question of insurance, and after reviewing the conflicting views of the various courts and text-writers upon the question of parol insurance, May on *Ins.* 4th ed. vol. 1, § 14, lays down the following rule: "However great may be the inconvenience to the parties, and however injudicious it may be to leave the terms of the contract to the uncertainties of even the most accurate and retentive memory, it seems, nevertheless, that a contract of insurance, the terms of which are not in writing, is sufficient to bind the parties, when there is no statute law to the contrary."

The general rule with reference to parol accident insurance comes within the scope laid down in the foregoing quotation: "Within the rule above stated an oral agreement for present or immediate insurance covering accident risk is valid and binding. And the general rule applies that, when a contract of insurance has been agreed on, the execution of a policy is not essential to its validity, unless it is part of the contract that execution and delivery are prerequisite to its taking effect." 1 Joyce, Ins. 2d ed. § 31b; Mathers v. Union Mut. Acci. Asso. 78 Wis. 588, 11 L.R.A. 83, 47 N. W. 1130; Washburn v. United States Casualty Co. 106 Me. 411, 76 Atl. 902; Preferred Acci. Ins. Co. v. Stone, 61 Kan. 48, 58 Pac. 986.

Our attention has been specifically called to § 3403, Rev. Laws 1910, which provides: "A contract of insurance is an agreement by which one party, for a consideration, promises to pay money or its equivalent or to do an act valuable to the assured upon the destruction, loss or injury of something in which the other party has an interest, and it shall be unlawful for a company to make a contract of insurance upon or relative to any property interests or lives in this state, or with any resident thereof, or for any person as insurance agent or insurance broker, to make, negotiate, solicit or in any manner aid in the transaction of such insurance, except as authorized by the laws of this state, and if the insurance commissioner shall notify any company of his disapproval of any form of policy, it shall be unlawful for such company to issue any policy in the form so disapproved. All contracts of insurance on property, lives or interests in this state shall be deemed to be made therein."

The contention is made here that the language of this statute, "and if the insurance commissioner shall notify any company of his disapproval of any form of the policy, it shall be unlawful for such company to issue any policy in the form so disapproved," is conclusive that our

statute contemplates that an enforceable insurance contract can alone be made in writing. We do not believe that our statute is susceptible to such a narrow construction. That part of the statute has no reference whatever to the making of a contract, and was not intended to regulate the manner or method of making one, but was intended to give the insurance commissioner the authority to control the form of policy, which was evidence of a contract previously made. That part of the statute which the company seeks to invoke in its favor was not intended for its benefit at all, but for the benefit of the insured. It was intended to give the insurance commissioner control over the forms of policy for the purpose of preventing insurance companies from hampering their policies with the imposition of restraint affecting their liability before a recovery can be had. Neither is there anything in the Statute of Frauds of this state which prevents an insurance company from entering into a parol contract of insurance, nor is it against the policy of the law of this state; and, on the contrary, we believe parol contracts of insurance are in harmony with the general policy of our law: "The issuance and delivery of an insurance policy is not essential to establish liability upon an insurance contract, which may rest in parol; but, where no policy is issued or delivered, it is essential to show that a contract of insurance was entered into." McCracken v. Travelers' Ins. Co. 57 Okla. 284, 156 Pac. 640.

After a careful and exhaustive review of all the authorities upon the subject, we are irresistibly forced to the conclusion that the best-reasoned cases, and the overwhelming weight of authority, are in favor of the ^{Insurance—} validity and en- ^{parol—effect.} forceability of parol contracts of insurance, where not obnoxious to statutory enactment. Many of the courts throughout the Union, notably Missouri and Ohio, which formerly adhered to the rule that parol

contracts of insurance were not enforceable, have overruled their earlier cases and adopted a rule in favor of their enforcement. Having reached this conclusion, we must hold that there was no error in the order of the court overruling the demurrer to the petition.

Second. The next question presented for our consideration is the authority of the agent, Evans, to enter into an insurance contract binding upon the company. It is alleged in the petition that Evans had the authority to solicit and issue contracts of insurance, and that such a contract was entered into, ascertaining the subject of insurance, the commencement and duration of the risk and the amount thereof, the parties, the interest of the assured, and the premium,—all of which is denied by the company. We have been somewhat disturbed in arriving at a satisfactory conclusion on this branch of the case. The company specially pleaded that Evans had no authority whatever, except to solicit contracts of insurance, and further pleaded the making of a written application, and attached a copy thereof to its answer, which contained provisions conclusively showing that the home office alone had authority to issue policies upon the application, and further provided the policy issued upon the application should be of no force or effect, unless delivered to the insured while in good health and uninjured, and attached an alleged copy of the application to its answer. The company also attached to its answer what is alleged to be a copy of the policy that was issued in pursuance to the application, which also contains a provision that the risk should not attach unless delivered to the insured while in good health and uninjured. In his verified reply the insured denied signing the application, or any other application containing such a provision, and denied the application that he did sign contained such a provision, and specifically denied that such a policy, or that any policy, was ever issued to him. On the trial of the case the in-

sured introduced in evidence a letter from G. Renfro, general agent of the company, which is as follows:

Mr. Ollie E. Vance,
Cushing, Oklahoma.

Dear Sir:—

Under date of Sept. 13th I received your preliminary notice of accident, and taking the matter up with my district manager, Mr. W. C. Rice, of your city, who informs me that Agent E. Evans secured your application for policy on August 19th, and it was agreed between yourselves and him that same would not be sent in until August 21st, and that policy was not delivered to you until August 28th. Inasmuch as you state that you received your injury before policy was issued in your favor, although I am very sorry, we are unable to be of some assistance to you.

Yours very truly,
G. Renfro, Agency Director.

The insured introduced in evidence a certified copy of the certificate of appointment by the company of E. Evans, which is as follows:

To the Insurance Commissioner of the State of Oklahoma:

This is to certify that the persons named in the following schedule have been duly appointed agents for the transaction of the business of casualty insurance in the state of Oklahoma, from June 22, 1915, to February 28, 1916, for the Massachusetts Bonding & Insurance Company, . . . so far as they may be legally empowered by their letters of appointment, powers of attorney, and the instructions which may be given them by said company.

In witness whereof, I have hereunto set my hand and caused the corporate seal of said company to be affixed, at the city of Saginaw, in the state of Michigan, this 22d day of June, 1915.

[Seal of Company.]

W. H. Howland, Sup.

A great deal of other evidence was introduced pertaining to the manner and method of both Rice

and Evans in conducting the business of the company, and the representations they made and the authority they pretended to have and exercise, and also a great deal of literature of the company was introduced, which describes the methods and manner of the company in the transaction of its business, the large amount, and volume of business it does, and its large capital stock, and tells how promptly it pays its policy holders in case of loss, and says, "Grants insurance that insures," and closes by admonishing the reader to "see our agent to-day; to-morrow may be too late."

The insured himself testified that on the 19th day of August, 1915, he was the holder of an accident insurance policy in the First Texas State Insurance Company, and that his policy expired on the next day, and that he was in the habit of carrying accident insurance, and, not wanting to be unprotected, went to a man by the name of Rugle, who was conducting a hotel in the city of Cushing, where he understood the agent of the First Texas State Insurance Company was located. After inquiry he was informed by Mr. Rugle that he did not know anyone representing that company, but was informed by him that Evans was writing a good insurance, and Rugle then introduced the insured and Evans, and the insured told Evans he wanted to take out some accident insurance. Evans explained to him the kind of accident insurance he was writing, and the insured told him that his policy in the First Texas State Insurance Company would expire the next day, and that he did not want to be without insurance, and unless he was prepared to write insurance that would go into immediate effect he did not want it. Evans informed him that the kind of insurance he was writing would go into effect immediately, and requested him to sign an application, and told him that if he would do so, the policy would be written and mailed to him the next day.

The insured further testified that Evans went into details in explaining the advantages of the kind of insurance he was writing over other kinds of insurance, and laid great emphasis and stress upon the fact that his insurance went into immediate effect, and that there was no delay, and that the insured would not be without protection. The conversation took place in the office and presence of Mr. Rice, who is referred to in the letter of Renfro as district manager. The insured testified that a table was shown him, which fixed the rate of premium to be paid from the 19th day of August, 1915, to the 1st day of October of that year, and that the total amount was \$5.30; that he paid \$3.30 of the money before leaving the office of Rice; that he went to the bank for the purpose of procuring the other \$2, and the bank was closed, and the next morning, before going to work, he procured a grocery man to cash his check, and that he took the \$2 remaining unpaid to the office of Rice and paid it to someone in charge, and received the receipt, which had been prepared by Evans the previous evening. The insured testified that Evans told him that the payment of \$5.30 would insure him against accident from the 19th day of August, 1915, to the 1st day of October of the same year, and that in case of a permanent loss of an arm or leg or an eye, or anything of that nature, that he would be paid the sum of \$3,600, and that in case of temporary injury he would be paid the sum of \$60 per month during the time of his disability, not exceeding a period of five years. The evidence shows that the insured told him that upon these terms he would enter into the contract with him, and that Evans drew up the application embodying the terms of his verbal contract, and requested him to sign it, and to pay the \$5.30, and that he would write and send the policy to him the next day.

Thus it is seen the contract ascertained the subject of insurance, the

commencement and duration of the risk, the amount of indemnity, the parties, and the premium. The verbal contract contained every element necessary to a binding and enforceable contract between the parties. The insured testified on the trial of the case that he never did receive the policy thus applied for.

On the trial of the case the purported application, which the insured denied that he had signed, was presented to him, and he denied positively that he had ever signed it, and other witnesses, who claimed to be acquainted with the signature of the insured, testified it was not his. And the agent, Evans, testifying for the company, said that the application was not the one the insured signed on the 19th day of August, 1915, but attempted to account for the application in this way: Evans testified the application that was signed by the insured on the 19th day of August, 1915, was sent to the company at its home office, which refused to issue the policy, because a wrong statement concerning the occupation of the insured was contained therein, and that it was sent back for correction. Evans testified that he himself destroyed the application the insured signed on the 19th day of August, 1915, but that he did not know whether the insured signed the application upon which it is contended the policy was issued or not, as he was not present, but left the matter of procuring a corrected application to a party by the name of Crabbs, and that he was gone from the office and was out of town, and when he returned Crabbs handed him the application which it is contended the insured signed, and that he sent it in to the company for the purpose of having a policy issued.

The evidence of the insured shows that on the 21st day of August, 1915, he received an injury to the brachial plexus, resulting in paralysis of the right arm, and several physicians, testifying for the insured, say that the injury is permanent.

Upon the trial of the case the company failed utterly to establish the allegations of its answer that the insured had signed the application containing the provisions specially pleaded as a defense, and it also failed to prove the issuance of a policy, or if there was the delivery of it to the insured. On the trial of the case the company attempted to introduce in evidence a purported copy of the policy that it had issued to the insured, but the court rejected the offer, for the reason that no evidence was introduced, laying the foundation for the introduction of secondary evidence.

The agent, Evans, testifying for the company, said that he had no authority whatever to enter into or issue contracts of insurance, but that his sole authority was restricted to that of receiving applications, which were transmitted to the home office for its approval or rejection. He also testified that the insured paid him \$5.30 as premium on the 19th day of August, 1915. Evans further testified that the company had never issued him a power of attorney or letter of instructions. Mr. Rice testified that he was district manager for the company, and that he transacted a general insurance and real estate business in the city of Cushing, and that the sole authority of Evans was to receive applications and transmit them to the home office for its acceptance or rejection, and, if accepted, to issue policies thereon.

The evidence being thus presented, the court submitted the question of apparent authority of Evans to the jury under appropriate instructions. It is now urged that the court erred in thus submitting the question of apparent authority to the jury. The question of apparent authority was before this court in the case of *National Surety Co. v. Miozrany*, 53 Okla. 322, 156 Pac. 651, and we said: "In legal significance, an agent's authority is the sum total of the powers which his principal has caused him or permitted him to seem to possess.

(— Okla. —, 180 Pac. 693.)

It is not limited to the powers actually conferred, and to those to be implied as flowing therefrom, but includes, as well, the apparent powers which the principal, by reason of his acts or conduct, is estopped to deny. *Howe v. Martin*, 23 Okla. 561, 138 Am. St. Rep. 840, 102 Pac. 128; *Wheeler v. McGuire*, 86 Ala. 398, 2 L.R.A. 808, 5 So. 190; *Louisville & N. R. Co. v. Tift*, 100 Ga. 86, 27 S. E. 765. . . . The instructions of the agent include, not only terms of the power which are intended to be made known to those who deal with the agent, and the deviations from which will render ineffectual his act, but also private instructions or directions to the agent as to the manner in which he shall execute his commission, but which, from their nature, or the desire of the principal, it is manifest that it is not expected the agent shall disclose to persons with whom he deals. Between these there is a material distinction. The former are part of the agent's authority; the latter, however they may affect the agent, can have no effect to qualify the liability of the principal to third persons to whom they are not, and are not intended to be, communicated. While, as between the principal and the agent, the scope of the latter's authority is that authority which is actually conferred upon him by his principal, which may be limited by secret instructions and restrictions, such instructions and restrictions do not affect third persons ignorant thereof; and, as between the principal and third persons, the mutual rights and liabilities are governed by the apparent scope of the agent's authority, which is that authority which the principal has held the agent out as possessing, or which he has permitted the agent to represent that he possesses, and which the principal is estopped to deny. *Merchants' Nat. Bank v. State Nat. Bank*, 10 Wall. 604, 19 L. ed. 1008; *Antrim Iron Works v. Anderson*, 140 Mich. 702, 112 Am. St. Rep. 434, 104 N. W. 319; *General Cart-*
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age & Storage Co. v. Cox, 74 Ohio St. 284, 113 Am. St. Rep. 959, 78 N. E. 371; *Bently v. Doggett*, 51 Wis. 224, 37 Am. Rep. 827, 8 N. W. 155; *Fishbaugh v. Spunaugle*, 118 Iowa, 337, 92 N. W. 58; *Banks Bros. v. Everest*, 35 Kan. 687, 12 Pac. 141."

The certificate of appointment of Evans by the company says that he has "been duly appointed agent for the transaction of casualty insurance in the state of Oklahoma," etc., and does not limit his authority in any manner whatever. The company permitted him to hold himself out as having authority to enter into contracts of insurance, and the literature of the company which Evans exhibited to the insured was abundantly sufficient upon its face to lead one to the same conclusion. This case comes clearly within the rule laid down by the Supreme Court of the United States in the case of *Union Mut. L. Ins. Co. v. Wilkinson*, 13 Wall. 222, 20 L. ed. 617: "Insurance companies who do business by agencies at a distance from their principal place of business are responsible for the acts of the agents within the general scope of the business intrusted to their care, and no limitations of their authority will be binding on parties with whom they deal, which are not brought to their knowledge."

In discussing the authority of an agent, *Cooley's Briefs on Insurance*, 345, holds the rule to be: "Though the powers of an agent may be limited by definite restrictions on his authority and by the nature of his agency, the determination of his powers and consequently the rights of the insured must rest in the first instance on the general principle that the powers of an agent are *prima facie* coextensive with the business intrusted to his care, and will not be narrowed by limitations not communicated to the person with whom he deals. The real question is not what power the agent has, but what power the company has held him out as having."

The evidence as to the authority

of the agent being made an issue by the pleadings, and the evidence thereon being conflicting, it was the

**Trial-jury—
question of
agency.**

duty of the trial court to submit that question to the jury under appropriate instructions.

"Where there is any competent evidence bearing upon the issue of agency, the extent of the authority of such agent, and the evidence is conflicting, the issue as to such agency and the extent of authority of such agent are questions to be determined by the jury." *Central Mortg. Co. v. Michigan State L. Ins. Co.* 43 Okla. 33, 143 Pac. 175; *Iowa Dairy Separator Co. v. Sanders*, 40 Okla. 656, 140 Pac. 406.

"Agency is a fact to be proved, as any other fact; and the apparent authority of an agent is to be gathered from all the facts and circumstances in evidence, and is a question for the jury." *Wrought Iron Range Co. v. Leach*, 32 Okla. 706, 123 Pac. 419; *Ricker Nat. Bank v. Stone*, 21 Okla. 833, 97 Pac. 577.

And again: "While there seems to be no particular dispute on the facts, except as to the agency of Mr. Neville, we think the court below adopted the proper practice in submitting the conflicting evidence on this point to the jury." *United States Fidelity & G. Co. v. Shirk*, 20 Okla. 576, 95 Pac. 218.

We have carefully examined the instructions of the court, submitting the issue of agency and the extent of the authority of such agent to the jury, and are of the opinion that the court did not err, either in the submission of the issue or the form of its submission.

The next proposition presented for our consideration is the question of estoppel raised by both the pleadings and the evidence. If upon the trial of this case the company had proven that an application containing the provisions pleaded as a defense was signed by the insured, that a policy was duly issued thereon and delivered to the insured, and that he had kept and retained the

same, an entirely different proposition would be presented for our disposition upon the question of estoppel.

Conceding to be true the contention of the company that Evans never had any authority to enter into contracts of insurance, nevertheless the company, by its own acts, is estopped to deny he had such authority, or to deny that such a contract was made. We must dispose of this case on the record as it appears here. The evidence in this case shows, and it is nowhere denied, that, growing out of the transaction on the 19th day of August, 1915, between the insured and Evans, the company was paid the sum of \$5.30 as premium, and there has never been a valid tender made to the insured of the premium thus paid.

The testimony in this case conclusively shows that the insured made the necessary proof of the injury and demand for the payment of the policy, and that such proof was made to the general agent of the company on the 13th day of September, 1915; but, notwithstanding such proof and demand, the company never made any offer to return the premium until the day before the trial of this case in May, 1916. The day before the trial of this case the attorney representing the company went to the attorney for the insured and tendered him the amount of the premium, \$5.30, and the evidence shows that at that time the attorney for the company was notified by the attorney for the insured that he had no right or authority whatever to consider the question of tender. The

**Attorney and
client—authority
to compromise.**

company, believing that it had brought itself within the requirements of the law, elected to stand upon the attempted tender thus made, and at no time, by pleading or otherwise, did it attempt to make any other tender. In the case of *American Bankers' Ins. Co. v. Thomas*, 53 Okla. 11, 154 Pac. 44, this court said: "But where, in ad-

(— Okla. —, 180 Pac. 693.)

dition to the facts stated, the check given in payment of the premiums was collected, and the proceeds placed to the credit of defendant, pursuant to a prior arrangement with the bank, and, being thus received, has since been retained by defendant with knowledge of all the facts, held to constitute a waiver of such condition precedent, and that defendant is estopped to urge that no risk attached under the contract of insurance."

For the purpose of defeating liability a party will not be heard to say he never made a contract, and, inconsistent with such assertion, re-

**Estoppel—
retaining
benefits.**

tain the benefits
flowing from the
alleged transaction.

In view of these facts, we must hold that the company is without

power to assert that its agent had no authority to make the contract which it is alleged he did, or to say no contract was made, and at the same time keep and retain all the benefits flowing from such alleged contract. By keeping and retaining the premium paid, the company is denied the right to say that Evans had no authority to make the alleged contract, or to deny that there was a parol contract of insurance.

It follows that the judgment of the lower court should be affirmed; and it is so ordered.

Per Curiam:

Adopted in whole.

Petition for rehearing denied August 27, 1918.

Amended petition for rehearing denied May 27, 1919.

ANNOTATION.

Oral contracts of insurance.

I. Original contracts:

- a. Validity, generally, 995.
- b. Essential elements, 999.
- c. Effect of charter or special statutory provisions, 1001.
- d. Evidence to establish, 1004.
- e. Applicability of terms and conditions of usual written policy:

1. Where claim is on oral contract of original insurance, 1008.
2. Where claim is for breach of oral contract to issue policy, 1009.

II. Agreements to renew or extend:

- a. Validity, generally, 1010.
- b. Essential elements, 1011.
- c. Effect of charter or special statutory provisions, 1012.
- d. Evidence to establish, 1012.
- e. Applicability of terms and conditions of usual written policy, 1016.

III. Contracts in mutual companies, 1017.

IV. Effect of Statute of Frauds, 1020.

This note does not deal with the question of agents' power of authority to make oral contracts, nor does it go into the necessity of a prepayment of the premium.

The rights and remedies arising out of delay in passing upon an application for insurance are the subject of the annotation following Bradley v. Federal L. Ins. Co. post, 1021.

I. Original contracts.

a. Validity, generally.

In some of the earlier cases oral contracts of insurance were held invalid. *Lindauer v. Delaware Mut. Safety Ins. Co.* (1853) 13 Ark. 461; *Bishop v. Clay F. & M. Ins. Co.* (1881) 49 Conn. 167; *Bell v. Western M. & F. Ins. Co.* (1843) 5 Rob. (La.) 423, 39 Am. Dec. 542; *Courtney v. Mississippi M. & F. Ins. Co.* (1838) 12 La. 233; *Platho v. Merchants' & M. Ins. Co.* (1866) 38 Mo. 249; *Cockerill v. Cincinnati Mut. Ins. Co.* (1847) 16 Ohio 148 (virtually overruled); *Dayton Ins. Co. v. Kelly* (1873) 24 Ohio St. 345, 15 Am. Rep. 612; *Jones v. Provincial Ins. Co.* (1858) 16 U. C. Q. B. 477, dicta.

Thus, the view was taken in *Lindauer v. Delaware Mut. Safety Ins. Co.* (1853) 13 Ark. 461, that oral contracts of insurance would encourage fraud, and should not be upheld.

And in *Bell v. Western M. & F. Ins. Co.* (1843) 5 Rob. (La.) 423, 39 Am. Dec. 542, it was held that a contract of insurance, especially where the insurer was a corporation, must be in writing.

So far as the law is concerned, however, an insurance contract does not differ from other contracts; and if the minds of the parties have met in regard to the essential parts of the agreement, it does not matter whether the form of the contract is written or oral; and the power to make completed oral contracts of insurance, as well as agreements to insure, is now sustained by practically all of the cases, in the absence of charter or statutory regulations forbidding them.

United States.—**Commercial Mut. M. Ins. Co. v. Union Mut. Ins. Co.** (1856) 19 How. 318, 15 L. ed. 636; **Merchants Mut. Ins. Co. v. Lyman** (1873) 15 Wall. 670, 21 L. ed. 246; **Relief F. Ins. Co. v. Shaw** (1876) 94 U. S. 575, 24 L. ed. 291; **Franklin F. Ins. Co. v. Colt** (1873) 20 Wall. 560, 22 L. ed. 423; **Piedmont & A. L. Ins. Co. v. Ewing** (1876) 92 U. S. 377, 23 L. ed. 610; **Eames v. Home Ins. Co.** (1877) 94 U. S. 621, 24 L. ed. 298; **Union Mut. Ins. Co. v. Commercial Mut. M. Ins. Co.** (1855) 2 Curt. 524, Fed. Cas. No. 14,372; **Constant v. Allegheny Ins. Co.** (1861) 3 Wall. Jr. 313, Fed. Cas. No. 3,136; **Humphry v. Hartford F. Ins. Co.** (1879) 15 Blatchf. 504, Fed. Cas. No. 6,875; **Fitton v. Fire Ins. Asso.** (1884) 20 Fed. 766; **Weeks v. Lycoming F. Ins. Co.** (1878) 29 Pittsb. L. J. 12, Fed. Cas. No. 17,353; **Potter v. Phenix Ins. Co.** (1894) 63 Fed. 382.

Alabama.—**Mobile Marine Dock Co. v. McMillan** (1858) 31 Ala. 711; **Alabama Gold L. Ins. Co. v. Mayes** (1878) 61 Ala. 163; **Home Ins. Co. v. Adler** (1884) 77 Ala. 242; **Hartford F. Ins. Co. v. King** (1894) 106 Ala. 519, 17 So. 707; **Sun Ins. Office v. Mitchell** (1914) 186 Ala. 420, 65 So. 143; **Cherokee L. Ins. Co. v. Brannum** (1919) 203 Ala. 145, 82 So. 175.

Arkansas.—**Ætna Ins. Co. v. Short** (1916) 124 Ark. 505, 187 S. W. 657; **Jenkins v. International L. Ins. Co.** (1921) — Ark. —, 232 S. W. 3.

California.—**Crawford v. Transat-**

lantic F. Ins. Co. (1899) 125 Cal. 611, 58 Pac. 177; **Harron v. London F. Ins. Co.** (1891) 88 Cal. 16, 25 Pac. 982.

Georgia.—**New York L. Ins. Co. v. Babcock** (1898) 104 Ga. 67, 42 L.R.A. 88, 69 Am. St. Rep. 134, 30 S. E. 273.

Illinois.—**Hartford F. Ins. Co. v. Wilcox** (1870) 57 Ill. 180; **Hartford F. Ins. Co. v. Farrish** (1874). 73 Ill. 166; **Firemen's Ins. Co. v. Kuessner** (1896) 164 Ill. 275, 45 N. E. 540; **People's Ins. Co. v. Paddon** (1881) 8 Ill. App. 447; **Stoelke v. Hahn** (1894) 55 Ill. App. 497, affirmed in (1895) 158 Ill. 79, 42 N. E. 150; **Fire Asso. of Phila. v. Smith** (1895) 59 Ill. App. 655; **Concordia F. Ins. Co. v. Heffron** (1899) 84 Ill. App. 610; **Fire Ins. Co. v. Sinsabaugh** (1901) 101 Ill. App. 55; **Hawthorne v. German Alliance Ins. Co.** (1913) 181 Ill. App. 88; **Wilson v. Hartford F. Ins. Co.** (1914) 188 Ill. App. 181.

Indiana.—**Peoria M. & F. Ins. Co. v. Walser** (1864) 22 Ind. 73; **New England F. & M. Ins. Co. v. Robinson** (1865) 25 Ind. 536; **American Horse Ins. Co. v. Patterson** (1867) 28 Ind. 17; **Western Assur. Co. v. McAlpin** (1899) 23 Ind. App. 225, 77 Am. St. Rep. 423, 55 N. E. 119; **Posey County Fire Asso. v. Hogan** (1906) 37 Ind. App. 573, 77 N. E. 670; **Live Stock Ins. Asso. v. Stickler** (1917) 64 Ind. App. 191, 115 N. E. 691; **National Live Stock Ins. Co. v. Cramer** (1918) 63 Ind. App. 211, 114 N. E. 427.

Iowa.—**Viele v. Germania Ins. Co.** (1868) 26 Iowa, 9, 96 Am. Dec. 83 (dictum); **Revere F. Ins. Co. v. Chamberlin** (1881) 56 Iowa, 508, 8 N. W. 338, 9 N. W. 386; **Green v. Liverpool & L. & G. Ins. Co.** (1894) 91 Iowa, 615, 60 N. W. 189.

Kansas.—**Western Massachusetts Ins. Co. v. Duffey** (1864) 2 Kan. 347; **Phoenix Ins. Co. v. Ireland** (1899) 9 Kan. App. 644, 58 Pac. 1024; **Wilson v. German-American Ins. Co.** (1913) 90 Kan. 355, 133 Pac. 715.

Kentucky.—**Johnson v. Connecticut F. Ins. Co.** (1886) 84 Ky. 470, 2 S. W. 151; **Security F. Ins. Co. v. Kentucky M. & F. Ins. Co.** (1869) 7 Bush, 81, 3 Am. Rep. 301; **Phoenix Ins. Co. v. Spiers** (1888) 87 Ky. 286, 8 S. W. 453; **Fidelity & C. Co. v. Ballard** (1899) 105

Ky. 253, 48 S. W. 1074; *Deadman v. Royal Ins. Co.* (1890) 12 Ky. L. Rep. 389; *Commercial Union Assur. Co. v. Urbansky* (1902) 113 Ky. 624, 68 S. W. 653; *Hartford F. Ins. Co. v. Trimble* (1904) 117 Ky. 583, 78 S. W. 462; *Shawnee F. Ins. Co. v. Roll* (1911) 145 Ky. 113, 140 S. W. 49; *Bracken County Ins. Co. v. Murray* (1915) 166 Ky. 821, 179 S. W. 842; *Georgia Casualty Co. v. Bond-Foley Lumber Co.* (1920) 187 Ky. 511, 219 S. W. 442.

Louisiana.—*Stockton v. Firemen's Ins. Co.* (1881) 33 La. Ann. 577, 39 Am. Rep. 277.

Maine.—*Walker v. Metropolitan Ins. Co.* (1868) 56 Me. 371.

Maryland.—*Phoenix Ins. Co. v. Ryland* (1888) 69 Md. 437, 1 L.R.A. 548, 16 Atl. 109.

Massachusetts.—*Mowles v. Boston Ins. Co.* (1917) 226 Mass. 426, 115 N. E. 666; *Sanborn v. Fireman's Ins. Co.* (1860) 16 Gray, 448, 77 Am. Dec. 419; *Markey v. Mutual Ben. L. Ins. Co.* (1875) 118 Mass. 193, 19 Am. Rep. 431; *Com. v. Goodwin* (1877) 122 Mass. 19; *Putnam v. Home Ins. Co.* (1877) 123 Mass. 324, 25 Am. Rep. 93; *Emery v. Boston M. Ins. Co.* (1885) 138 Mass. 398; *Wainer v. Milford Mut. F. Ins. Co.* (1891) 153 Mass. 335, 11 L.R.A. 598, 26 N. E. 877; *Baker v. Commercial Union Assur. Co.* (1894) 162 Mass. 358, 38 N. E. 1124; *Sanford v. Orient Ins. Co.* (1899) 174 Mass. 416, 75 Am. St. Rep. 358, 54 N. E. 883; *Cunningham v. Connecticut F. Ins. Co.* (1909) 200 Mass. 333, 86 N. E. 787; *McQuaid v. Aetna Ins. Co.* (1917) 226 Mass. 281, 115 N. E. 428; *Sheridan v. Massachusetts F. & M. Ins. Co.* (1919) 233 Mass. 479, 124 N. E. 249; *Park & P. Co. v. Agricultural Ins. Co.* (1921) — Mass. —, 130 N. E. 208.

Michigan.—*Westchester F. Ins. Co. v. Earle* (1876) 33 Mich. 143; *Roger Williams Ins. Co. v. Carrington* (1880) 43 Mich. 252, 5 N. W. 303.

Minnesota.—*Salisbury v. Hekla F. Ins. Co.* (1884) 32 Minn. 458, 21 N. W. 552; *Quinn-Shepherdson Co. v. United States Fidelity & G. Co.* (1919) 142 Minn. 428, 172 N. W. 693.

Mississippi.—*Liverpool & L. & G. Ins. Co. v. Hinton* (1918) 116 Miss. 754, 77 So. 652.

Missouri.—*Henning v. United States Ins. Co.* (1871) 47 Mo. 425, 4 Am. Rep. 332; *Baile v. St. Joseph F. & M. Ins. Co.* (1881) 73 Mo. 371; *Vining v. Franklin F. Ins. Co.* (1901) 89 Mo. App. 313; *Lingenfelter v. Phoenix Ins. Co.* (1885) 19 Mo. App. 252; *Brownfield v. Phoenix Ins. Co.* (1889) 35 Mo. App. 54; *Shepard v. Boone County Home Mut. F. Ins. Co.* (1909) 138 Mo. App. 20, 119 S. W. 984; *McIntyre v. Federal L. Ins. Co.* (1910) 142 Mo. App. 256, 126 S. W. 227.

Nebraska.—*McCann v. Aetna Ins. Co.* (1873) 3 Neb. 198; *Carter v. Bankers L. Ins. Co.* (1909) 83 Neb. 810, 120 N. W. 455; *Rankin v. Northern Assur. Co.* (1915) 98 Neb. 172, 152 N. W. 324.

New Hampshire.—*Gerrish v. German Ins. Co.* (1875) 55 N. H. 355.

New York.—*Perkins v. Washington Ins. Co.* (1821) 4 Cow. 645; *First Baptist Church v. Brooklyn F. Ins. Co.* (1859) 19 N. Y. 305; *Audubon v. Excelsior Ins. Co.* (1863) 27 N. Y. 217; *Tyler v. New Amsterdam F. Ins. Co.* (1866) 4 Robt. 151; *Fish v. Cottenet* (1871) 44 N. Y. 538, 4 Am. Rep. 715; *Rhodes v. Railway Pass. Ins. Co.* (1871) 5 Lans. 71; *Ellis v. Albany City F. Ins. Co.* (1872) 50 N. Y. 402, 10 Am. Rep. 495; *Angell v. Hartford F. Ins. Co.* (1874) 59 N. Y. 171, 17 Am. Rep. 322; *Cooke v. Aetna Ins. Co.* (1878) 7 Daly, 555; *Van Loan v. Farmers' Mut. F. Ins. Asso.* (1881) 24 Hun, 132; *Ruggles v. American Cent. Ins. Co.* (1889) 114 N. Y. 415, 11 Am. St. Rep. 674, 21 N. E. 1000; *Clarkson v. Western Assur. Co.* (1895) 92 Hun, 527, 37 N. Y. Supp. 53; *Reynolds v. Westchester F. Ins. Co.* (1896) 8 App. Div. 193, 40 N. Y. Supp. 336; *International Ferry Co. v. American Fidelity Co.* (1913) 207 N. Y. 350, 101 N. E. 160; *Struzewski v. Farmers' F. Ins. Co.* (1919) 226 N. Y. 338, 123 N. E. 661.

North Carolina.—*Floars v. Aetna L. Ins. Co.* (1907) 144 N. C. 232, 11 L.R.A. (N.S.) 357, 56 S. E. 915; *Lea v. Atlantic F. Ins. Co.* (1915) 168 N. C. 478, 84 S. E. 813.

North Dakota.—*Boos v. Aetna Ins. Co.* (1911) 22 N. D. 11, 132 N. W. 222.

Ohio.—*Flint v. Ohio Ins. Co.* (1838) 8 Ohio, 501; *Suydam v. Columbus Ins. Co.* (1849) 18 Ohio, 459; *Palm v. Me-*

dina County Mut. F. Ins. Co. (1851) 20 Ohio, 529; Newark Mach. Co. v. Kenton Ins. Co. (1893) 50 Ohio St. 549, 22 L.R.A. 768, 35 N. E. 1060; Dayton Ins. Co. v. Kelly (1873) 24 Ohio St. 345, 15 Am. Rep. 612; Bennett v. Connecticut F. Ins. Co. (1891) 27 Ohio L. J. 15.

Oklahoma.—MASSACHUSETTS BONDING & INS. Co. v. VANCE (reported herewith) ante, 981; McCracken v. Travelers' Ins. Co. (1916) 57 Okla. 284, 156 Pac. 640.

Oregon.—Hardwick v. State Ins. Co. (1891) 20 Or. 547, 26 Pac. 840; British Ins. Co. v. Lambert (1894) 26 Or. 199, 87 Pac. 909.

Pennsylvania.—Hamilton v. Lycoming Mut. Ins. Co. (1847) 5 Pa. 339; Patterson v. Benjamin Franklin Ins. Co. (1875) 81* Pa. 454; Benner v. Fire Asso. of Phila. (1910) 229 Pa. 75, 140 Am. St. Rep. 706, 78 Atl. 44; Keystone Mattress & Spring Bed Co. v. Pittsburgh Underwriters (1902) 21 Pa. Super Ct. 38; Ripka v. Mutual F. Ins. Co. (1908) 36 Pa. Super. Ct. 517; Smith v. Odlin (1807) 4 Yeates, 468.

South Carolina.—Stickley v. Mobile Ins. Co. (1890) 37 S. C. 56, 16 S. E. 280, 838.

Tennessee.—Continental Ins. Co. v. Schulman (1917) 140 Tenn. 481, 205 S. W. 315.

Texas.—Pacific Mut. Ins. Co. v. Shaffer (1902) 30 Tex. Civ. App. 313, 70 S. W. 566; Austin F. Ins. Co. v. Brown (1913) — Tex. Civ. App. —, 160 S. W. 973; Ginners' Mut. Underwriters' Asso. v. Fisher (1920) — Tex. Civ. App. —, 222 S. W. 285; Grimes v. Virginia F. & M. Ins. Co. (1920) — Tex. Civ. App. —, 218 S. W. 810.

Vermont.—Wood v. Rutland & A. Mut. F. Ins. Co. (1859) 31 Vt. 552.

Virginia.—Haskin v. Agricultural F. Ins. Co. (1884) 78 Va. 700.

Washington.—Thompson v. Germania F. Ins. Co. (1907) 45 Wash. 482, 88 Pac. 941; Ogle Lake Shingle Co. v. National Lumber Ins. Co. (1912) 68 Wash. 185, 122 Pac. 990.

West Virginia.—McCully v. Phoenix Mut. L. Ins. Co. (1881) 18 W. Va. 782; Croft v. Hanover F. Ins. Co. (1895) 40 W. Va. 512, 52 Am. St. Rep. 902, 21 S. E. 854.

Wisconsin. — Northwestern Iron

Co. v. Aetna Ins. Co. (1868) 23 Wis. 160, 99 Am. Dec. 145; Northwestern Iron Co. v. Aetna Ins. Co. (1870) 26 Wis. 78; Strohn v. Hartford F. Ins. Co. (1873) 33 Wis. 648; Fleming v. Hartford F. Ins. Co. (1877) 42 Wis. 616; Taylor v. Phoenix Ins. Co. (1879) 47 Wis. 366, 2 N. W. 559, 3 N. W. 584; Campbell v. American F. Ins. Co. (1888) 73 Wis. 100, 40 N. W. 661; Mathers v. Union Mut. Acci. Asso. (1891) 78 Wis. 588, 11 L.R.A. 83, 47 N. W. 1130; John R. Davis Lumber Co. v. Scottish Union & Nat. Ins. Co. (1896) 94 Wis. 472, 69 N. W. 156; Whitman v. Milwaukee F. Ins. Co. (1906) 128 Wis. 124, 5 L.R.A. (N.S.) 407, 116 Am. St. Rep. 25, 107 N. W. 291.

Wyoming.—Summers v. Mutual L. Ins. Co. (1904) 12 Wyo. 369, 66 L.R.A. 812, 109 Am. St. Rep. 992, 75 Pac. 937; Royal Ins. Co. v. Walker Lumber Co. (1916) 24 Wyo. 59, 155 Pac. 1101, Ann. Cas. 1917E, 1174.

England. — Kaines v. Knightly (1682) Skinner, 55, 90 Eng. Reprint, 26.

Canada.—McKay v. O'Neil (1890) 22 N. S. 346; Westminster Woodworking Co. v. Stuyvesant Ins. Co. (1915) 22 B. C. 197, 25 D. L. R. 284.

And the fact that, when policies are issued, a special indorsement is required, permitting the shipping of lumber on deck, does not invalidate a parol contract, since, in case of such a contract, the particular agreement may be by parol. Northwestern Iron Co. v. Aetna Ins. Co. (1870) 26 Wis. 78.

It was recognized in Hartford F. Ins. Co. v. Whitman (1906) 75 Ohio St. 312, 79 N. E. 459, 9 Ann. Cas. 218, that valid oral contracts to issue a policy and of insurance might be made, but it was held that, in order that a contract of the latter class be enforceable, it must take effect immediately and must not be executory; and there was held to be no evidence in that case of a parol contract of insurance in presenti.

In Christie v. North British Ins. Co. (1825) 3 Shaw & D. (Scot.) 360, it was intimated that insurance might be effected without the delivery of a policy; but it was held that the agent's statement that the applicant might

hold himself insured would not support an action as upon a policy, whether it would support another kind of action or not.

b. Essential elements.

In order to result in a valid oral contract of insurance there must be a mutual agreement. *Bell v. Peabody Ins. Co.* (1901) 49 W. Va. 437, 38 S. E. 541.

And such agreement must embrace all of the essential elements of the contract.

Alabama.—*Alabama Gold L. Ins. Co. v. Mayes* (1878) 61 Ala. 163.

Indiana.—*Posey County Fire Asso. v. Hogan* (1906) 37 Ind. App. 573, 77 N. E. 670.

Kentucky.—*Johnson v. Connecticut F. Ins. Co.* (1886) 84 Ky. 470, 2 S. W. 151.

Missouri.—*Worth v. German Ins. Co.* (1896) 64 Mo. App. 583.

Nebraska.—*Glatfelter v. Security Ins. Co.* (1918) 102 Neb. 464, 167 N. W. 572; *Kor v. American Eagles F. Ins. Co.* (1920) 104 Neb. 610, 178 N. W. 182.

Virginia.—*Haskin v. Agricultural F. Ins. Co.* (1884) 78 Va. 700.

Washington.—*Ogle Lake Shingle Co. v. National Lumber Ins. Co.* (1912) 68 Wash. 185, 122 Pac. 990.

West Virginia.—*Croft v. Hanover F. Ins. Co.* (1895) 40 W. Va. 508, 52 Am. St. Rep. 902, 21 S. E. 854.

Wisconsin.—*Stehlick v. Milwaukee Mechanics' Ins. Co.* (1894) 87 Wis. 322, 53 N. W. 379; *John R. Davis Lumber Co. v. Scottish Union & Nat. Ins. Co.* (1896) 94 Wis. 472, 69 N. W. 156.

These necessary elements include subject-matter, parties, risk insured against, amount, duration, and premium.

United States.—*Weeks v. Lycoming F. Ins. Co.* (1878) Fed. Cas. No. 17,353.

Alabama.—*Alabama Gold L. Ins. Co. v. Mayes* (1878) 61 Ala. 163; *Commercial F. Ins. Co. v. Morris* (1894) 105 Ala. 498, 18 So. 34.

Illinois.—*People's Ins. Co. v. Paddon* (1881) 8 Ill. App. 447; *North American Ins. Co. v. Bird* (1898) 175 Ill. 42, 51 N. E. 686.

Indiana.—*Live Stock Ins. Co. v. Stickler* (1917) 64 Ind. App. 191, 115 N. E. 691.

Kentucky.—*Hartford F. Ins. Co. v. Trimble* (1904) 117 Ky. 583, 78 S. W. 462; *Shawnee F. Ins. Co. v. Roll* (1911) 145 Ky. 113, 14 S. W. 49.

Louisiana.—*Stockton v. Firemen's Ins. Co.* (1881) 33 La. Ann. 577, 39 Am. Rep. 277.

Missouri.—*Worth v. German Ins. Co.* (1896) 64 Mo. App. 583.

Nebraska.—*Bridges v. St. Paul F. & M. Ins. Co.* (1918) 102 Neb. 316, L.R.A. 1918D, 1199, 167 N. W. 64.

New York.—*Tyler v. New Amsterdam F. Ins. Co.* (1866) 4 Robt. 151.

Oklahoma.—*MASSACHUSETTS BONDING & INS. CO. v. VANCE* (reported herewith) ante, 981.

Oregon.—*Cleveland Oil Co. v. Norwich Ins. Soc.* (1898) 34 Or. 228, 55 Pac. 435.

Pennsylvania.—*Keystone Mattress & Spring Bed Co. v. Pittsburgh Underwriters* (1902) 21 Pa. Super. Ct. 38.

West Virginia.—*Croft v. Hanover F. Ins. Co.* (1895) 40 W. Va. 508, 52 Am. St. Rep. 902, 21 S. E. 854.

It will be observed, however, upon referring to *l. e. infra*, that the difficulty arising from this source in establishing an oral contract is frequently obviated, in part, at least, by the presumption that the parties contemplated the provisions and conditions of the usual written policy.

In *Commercial F. Ins. Co. v. Morris* (Ala.) *supra*, where the validity of oral agreements for insurance was involved, the court said: "The authorities agree that before a contract of insurance, or to insure, is binding, all the essential elements and terms of the contract must be understood and mutually assented to. A mere expression of a desire by one intending to procure insurance, or a proposition made to an insurance agent to insure property, and an assent or acceptance by the agent to insure, without more, would not amount to a contract of insurance or an agreement to insure. The subject-matter, period, rate to be paid, and amount of insurance, and perhaps other elements, must be agreed upon, expressly or by implication, before there can be an absolute, binding agreement between the parties; nor would the mere fact that

there had been previous dealings of insurance, between the parties alone, without some reference to such previous dealings, be sufficient to show a completed and binding contract that the parties intended to and did adopt the provisions of the former dealings. Where, however, there exists a contract of insurance, not expired, and there is an agreement between the parties to renew the policy, and no change is suggested or agreed upon, it will be implied that the renewal contract included and adopts all the provisions of the existing contract of insurance. Such a contract is complete in all respects, and, upon failure to comply with the agreement, the party offending may be compelled by bill in equity specifically to perform the agreement, or held liable in a court of law for damages resulting from a breach of the agreement."

Thus, a parol contract of insurance, made with an agent representing several companies, is invalid where no specific company is designated before a loss occurs. *Grimes v. Virginia F. & M. Ins. Co.* (1920) — *Tex. Civ. App.* —, 218 S. W. 810.

And where one is agent for several insurance companies, and, at the time an application is made for him to insure, nothing is said as to the company, but he simply states that he will call the property insured, it cannot be said that a contract of insurance is effected with one of the companies represented by the agent. *Kleis v. Niagara F. Ins. Co.* (1898) 117 Mich. 469, 76 N. W. 155.

And lack of identity of parties was held, in *Hartford F. Ins. Co. v. Trimble* (1904) 117 Ky. 583, 78 S. W. 462, to render invalid an attempted oral contract of insurance with an agent representing two companies, there having been nothing said as to which company the risk should be placed with.

And the minds of the parties cannot be said to have met, so as to establish an oral contract of insurance, where no company was agreed upon, and there was only an understanding that the agent would see what he could do respecting the matter, and would notify the applicant later. *John R.*

Davis Lumber Co. v. Scottish Union & Nat. Ins. Co. (1896) 94 Wis. 472, 69 N. W. 156.

The fixing of a time for its commencement is also necessary to the completion of an oral contract of insurance. *Whitman v. Milwaukee F. Ins. Co.* (1906) 128 Wis. 124, 5 L.R.A. (N.S.) 407, 107 N. W. 291.

And an oral contract for insurance is incomplete for uncertainty, in the absence of any definite understanding as to the duration of the risk contemplated. *Strohn v. Hartford F. Ins. Co.* (1875) 37 Wis. 625, 19 Am. Rep. 177; *Home Ins. Co. v. Adler* (1882) 71 Ala. 516.

And a declaration by an insurance agent that it is "all right; I will do so, —I will cover it," made during a conversation relative to the issuance of a fire insurance policy, without any understanding as to when the risk should attach, or the duration of it, fails to establish a complete contract. *Cleveland Oil Co. v. Norwich Ins. Soc.* (1898) 34 Or. 228, 55 Pac. 435.

An oral contract is also invalid for uncertainty where it is silent as to the rate of insurance. *Home Ins. Co. v. Adler* (Ala.) *supra*.

And in *Strohn v. Hartford F. Ins. Co.* (Wis.) *supra*, an attempted oral contract to insure tobacco stored in a warehouse on an "open policy," at a fixed rate, the amount of the policy changing from time to time as the quantity of tobacco should change, was held invalid, the amount of premium to be paid not being determined, and the agreement being, therefore, incomplete.

But if the intention of the parties to the contract as to the amount of premium to be paid, or the duration of the policy, can be gathered from the circumstances of the case, an oral contract will be sustained, although no express agreement was made as to premium, or duration of risk. *Concordia F. Ins. Co. Heffron* (1899) 84 Ill. App. 610.

And in *Worth v. German Ins. Co.* (1896) 64 Mo. App. 583, it was held that, although the exact amount of the premium to be paid is not known at the time of the making of an oral con-

tract of insurance, but the rate is to be taken from a certain compilation of rates, the contract is complete and capable of definite ascertainment.

And an agreement by an agent of a syndicate with an established business house whose shipments it had insured the previous year, to carry all of the insurance of such firm for the next year at the same rate as they had carried the insurance the previous year, is sufficiently definite in terms to constitute a valid contract to insure. *Ames-Brooks Co. v. Aetna Ins. Co.* (1901) 83 Minn. 346, 86 N. W. 344.

c. Effect of charter or special statutory provisions.

It has been held that the fact that a standard form of policy has been adopted does not render oral contracts of insurance invalid. *Hicks v. British America Assur. Co.* (1900) 162 N. Y. 284, 48 L.R.A. 424, 56 N. E. 743; *Lea v. Atlantic Ins. Co.* (1915) 168 N. C. 478, 84 S. E. 813; *Floars v. Aetna L. Ins. Co.* (1907) 144 N. C. 232, 11 L.R.A. (N.S.) 357, 56 S. E. 915.

And a statute providing that "if the insurance commissioner shall notify any company of his disapproval of any form of policy, it shall be unlawful for such company to issue any policy in the form disapproved," does not refer to the making of a contract, and does not render oral contracts of insurance invalid. *MASSACHUSETTS BONDING & INS. CO. v. VANCE* (reported herewith) ante, 981.

And a statute requiring all policies to be signed does not prevent parol insurance. *Walker v. Metropolitan Ins. Co.* (1868) 56 Me. 371.

And corporations authorized by their charters to make insurance and issue policies are not precluded from entering into parol contracts of insurance. *Firemen's Ins. Co. v. Kuessner* (1896) 164 Ill. 275, 45 N. E. 540; *Continental Ins. Co. v. Roller* (1902) 101 Ill. App. 77.

And in another case a charter provision that policies of insurance, before becoming binding, should be signed by the president and countersigned by the secretary, was held to have no application to oral contracts, but by its terms

to be applicable only to written policies. *Stoehlke v. Hahn* (1895) 158 Ill. 79, 42 N. E. 150.

And oral contracts are not prevented by a charter providing that all policies or contracts of insurance which may be entered into by the company shall be subscribed by the president and signed and attested by the secretary, and, being so signed and attested, shall be binding without the company's seal, as this does not require all contracts to be in writing, but merely dispenses with the corporate seal for authenticating such as are in writing. *Security F. Ins. Co. v. Kentucky M. & F. Ins. Co.* (1870) 7 Bush (Ky.) 81, 3 Am. Rep. 301.

And a provision of the charter, authorizing the making of contracts by the signature of the company's president, or such other person as its rules and by-laws should direct, does not prevent the company from making an oral contract of insurance. *Sanborn v. Fireman's Ins. Co.* (1860) 16 Gray (Mass.) 448, 77 Am. Dec. 419.

And a provision of a by-law that, in case of the absence, inability, or death of the president, policies and other papers shall be signed by two directors, relates only to the formal execution of papers which require signing, and does not exclude the making of oral contracts of insurance by any officer who may have authority. *Emery v. Boston M. Ins. Co.* (1885) 138 Mass. 398.

Neither is the making of such contracts prevented by a provision of a charter that all conditions of the policies issued by the company shall be printed or written on the face of the policy, and that certain named officers shall sign the policies or contracts made by order of the directors. *Henning v. United States Ins. Co.* (1872) 2 Dill. 26, Fed. Cas. No. 6,366.

And a statute that insurance companies can make valid policies of insurance only by having them signed by the president and countersigned by the secretary does not prohibit the making of a valid oral agreement to insure. *Commercial Mut. M. Ins. Co. v. Union Mut. Ins. Co.* (1857) 19 How. (U. S.) 318, 15 L. ed. 637, affirming (1855) 2

Curt. C. C. 524, Fed. Cas. No. 14,372; New England F. & M. Ins. Co. v. Robinson (1865) 25 Ind. 536; Davenport v. Peoria M. & F. Ins. Co. (1864) 17 Iowa, 276; Sanford v. Orient Ins. Co. (1899) 174 Mass. 416, 75 Am. St. Rep. 358, 54 N. E. 883; Goodhue v. Hartford F. Ins. Co. (1900) 175 Mass. 187, 55 N. E. 1039; Cooke v. Ætna Ins. Co. (1878) 7 Daly (N. Y.) 555.

And a provision in the charter that the contract shall be in writing or print, and under the seal of the corporation, does not prevent the making of a valid oral contract to issue a policy. Franklin F. Ins. Co. v. Colt (1873) 20 Wall. (U. S.) 560, 22 L. ed. 423.

And in Franklin F. Ins. Co. v. Taylor (1876) 52 Miss. 441, it was held that the delivery of a policy after a loss, and enforcement of payment of it, would be compelled in equity, although the agreement for the policy was by parol, notwithstanding the fact that the charter of the company required all policies to be in writing.

And in Somerset County Mut. F. Ins. Co. v. May (1875) 2 W. N. C. (Pa.) 43, an equally divided court affirmed a judgment in favor of the applicant, where the one taking the application failed to notify the applicant of the rejection of the application, although a by-law of the company required the approval of two directors to every application in order to bind the company.

In an early Missouri case, Henning v. United States Ins. Co. (1871) 47 Mo. 425, 4 Am. Rep. 332, where there was a provision of the act incorporating the insurer that "all the conditions of policies issued by said company shall be printed or written on the face thereof," and a by-law providing that the president "shall sign all policies or other contracts by which the company are bound," and a rule that every proposal for insurance should be by written application, signed by the applicant, it was held that these provisions prevented the making of a parol contract of insurance.

But in Baile v. St. Joseph F. & M. Ins. Co. (1881) 73 Mo. 371, where the charter required that the condition of all policies issued should be written or

printed on the face of the policies, and that all policies and contracts of insurance should be subscribed by the president and attested by the secretary, the court pointed out that the provisions were similar to those in the Henning Case, but that the court in that case evidently overlooked a statute providing that parol contracts might be binding on aggregate corporations if made by an agent duly authorized or under the general regulations of the corporations, and held that, in view of this statute, an oral contract to insure was valid. The court stated that it was unnecessary for it to overrule the Henning Case, pointing out that the action in that case was on an alleged oral and completed agreement, while the suit at bar was to specifically enforce an agreement to insure. With reference to the cases holding oral contracts of insurance binding, the court said: "This view is certainly the better one, even where there is no such general provision as that above quoted, making oral contracts of aggregate corporations valid. It must now be considered as the well-settled doctrine by the nearly universal concurrence of the authorities that oral agreements of insurance are enforceable, although the charter of the company contains similar provisions to those contained in chapter 67, supra. The principle underlying these decisions is this: That the right to make contracts of insurance, like any other right of contracting, exists as at common law, unless prohibited by statute; that, the contract of insurance having its origin in mercantile law and usage, the distinction which denies the power to enter into such a contract, except in particular modes and forms, is without foundation, and repugnant to, and inconsistent with, that general capacity of contracting which the common law concedes to every person ordinarily competent to enter into binding engagements; that the provisions of the charter of a company that they shall have the right to make contracts of insurance by the signature of a president, etc., are regarded by the courts as merely enabling, and not restrictive of the gener-

al power to effect contracts in any other mode not unlawful, dictated by convenience; and that "the distinction between a contract to insure or to issue a policy of insurance, and the policy itself, is obvious and constantly recognized by the courts. . . . In view, however, of the broad statutory provisions heretofore cited, relating to the power of aggregate corporations to contract orally, all difficulty as to the power to make, in the present circumstances, an oral contract of insurance, vanishes. Besides that, § 8, supra, requiring the signature of the president, etc., uses no prohibitory words; relates not to agreements to insure, but only to policies when completed and ready for official signature."

And the Baile Case was followed in *King v. Phoenix Ins. Co.* (1906) 195 Mo. 290, 113 Am. St. Rep. 678, 92 S. W. 892, 6 Ann. Cas. 618, which relied on the statute providing that parol contracts may be binding on corporations. The provisions restricting the mode of issuing policies does not appear.

It has been recognized in Georgia that, at common law, an oral contract of insurance was valid. *Simonton v. Liverpool, L. & G. Ins. Co.* (1874) 51 Ga. 76; *Delaware Ins. Co. v. Pennsylvania F. Ins. Co.* (1906) 126 Ga. 380, 55 S. E. 330, 7 Ann. Cas. 1184.

But under the Georgia statute providing that a contract of fire insurance, "to be binding, must be in writing," an oral contract is now held invalid. *Clark v. Brand* (1878) 62 Ga. 23; *Athens Mut. Ins. Co. v. Evans* (1909) 132 Ga. 703, 64 S. E. 993; *Delaware Ins. Co. v. Pennsylvania F. Ins. Co.* (Ga.) supra; *Thomas v. Funkhouser* (1893) 91 Ga. 478, 18 S. E. 312; *Planters & People's Mut. F. Asso. v. De Loach* (1901) 113 Ga. 802, 39 S. E. 466.

See also *Croghan v. New York Underwriter's Agency* (1874) 53 Ga. 109, under II. c, and IV., on Statute of Frauds.

In *Simonton v. Liverpool, L. & G. Ins. Co.* (Ga.) supra, it was held, under the Georgia statute, that, in order to permit the court to relieve one who has acted on a parol agreement, it must ap-

pear that the act was in pursuance of the contract, on the faith of it, and induced by it.

In Louisiana it has been held that where the charter and by-laws of a corporation provide that the policy shall be in writing, and signed by the president, a parol contract of insurance cannot be made. *Courtney v. Mississippi, M. & F. Ins. Co.* (1838) 12 La. 233.

And in Pennsylvania it has been held that a company cannot make a valid oral contract of insurance, or to insure, where its charter provides that "the president and directors shall have full power on behalf of said corporation to make insurance . . . and to make, execute, and perfect such and so many contracts, bargains, agreements, policies, and other instruments as shall or may be necessary, and as the nature of the case shall or may require; and every such contract, bargain, agreement, and policy to be made by the said corporation shall be in writing or in print." *Benner v. Fire Asso. of Phila.* (1910) 229 Pa. 75, 140 Am. St. Rep. 706, 78 Atl. 44; *Hazlett v. Allegheny Ins. Co.* (1874) 1 Walk. (Pa.) 336, 1 W. N. C. 24.

In *Spitzer v. St. Mark's Ins. Co.* (1856) 6 Duer (N. Y.) 6, it was held that there could be no parol original contract to insure, or parol agreement to transfer a risk, where the charter provided that the president or other person appointed by the board of directors for that purpose should be authorized in the name and on behalf of the company to make contracts of insurance with any person or persons, and that the policies issued pursuant to such contracts should be signed by the president and countersigned by the secretary, and that such policies should be binding as if made under the seal of the company.

And in *Sanford v. Trust F. Ins. Co.* (1842) 1 N. Y. Leg. Obs. 214, it was held that a parol contract of insurance could not be made by a company whose charter provided that "the policies must be subscribed by the president and countersigned by the secretary . . . and there shall be distinctly and legibly printed or written upon the

face of every policy of insurance or other contract or obligation, made by the said corporation, the amount of its capital actually paid in."

Under 30 Vict. chap. 23, no marine insurance is valid unless contained in a stamped policy. *Ionides v. Pacific F. & M. Ins. Co.* (1871) L. R. 6 Q. B. (Eng.) 674, 41 L. J. Q. B. N. S. 33, 25 L. T. N. S. 490, affirmed in (1872) L. R. 7 Q. B. 517, 41 L. J. Q. B. N. S. 190, 26 L. T. N. S. 738, 21 Week. Rep. 22, 1 Asp. Mar. L. Cas. 330, 13 Eng. Rul. Cas. 471.

And an oral agreement to execute a marine policy cannot be enforced. *Fisher v. Liverpool M. Ins. Co.* (1873) L. R. 8 Q. B. (Eng.) 469, 42 L. J. Q. B. N. S. 224, affirmed in (1874) 43 L. J. Q. B. N. S. 114, L. R. 9 Q. B. 418, 30 L. T. N. S. 501, 22 Week. Rep. 951, 2 Asp. Mar. L. Cas. 454.

In *Jones v. Provincial Ins. Co.* (1858) 16 U. C. Q. B. 477, an action brought to recover the amount alleged to be due for a fire loss was held not to be maintainable because no policy had issued. The court intimated that no insurance could be effected by parol, but that there might be an action for failure to deliver the policy, or in equity, to compel specific performance.

d. Evidence to establish.

It has been held that oral contracts of insurance must be established by clear evidence. *Deadman v. Royal Ins. Co.* (1890) 12 Ky. L. Rep. 389; *Cleveland Oil Co. v. Norwich Ins. Soc.* (1898) 34 Or. 228, 55 Pac. 435; *Patterson v. Benjamin Franklin Ins. Co.* (1875) 81* Pa. 454.

And in *American Can Co. v. Agricultural Ins. Co.* (1909) 12 Cal. App. 133, 106 Pac. 720, it was held that, as oral contracts of insurance are rarely made, and are outside the ordinary course of business, the proof must be clear and convincing that such a contract was actually entered into, that each party understood it in the same light, and in regard to the same subject-matter.

The evidence in *Stockton v. Firemen's Ins. Co.* (1881) 33 La. Ann. 577, 39 Am. Rep. 277, disclosing only an agreement as to the premises on which

the property to be insured was situated, and the rate of premium, was held insufficient to establish an oral contract of insurance.

And the evidence in *Cleveland Oil Co. v. Norwich Ins. Soc.* (1898) 34 Or. 228, 55 Pac. 435, was held insufficient to establish an oral contract of insurance, there being a lack of evidence showing the duration of the alleged contract.

And no valid oral contract of insurance was shown where there was no evidence as to the duration of insurance issued by the defendant on risks similar to that in question, or what time would be implied in case there was no agreement, and there was no evidence that the parties said anything as to the commencement or duration of the risk. *Cleveland Oil Co. v. Norwich Ins. Soc.* (Or.) supra.

And there was no valid oral contract of insurance where the testimony showed that an agent agreed to cover a risk, but failed to show that there was any agreement as to the rate of premium, or the time during which it was to continue. *Keystone Mattress & Spring Bed Co. v. Pittsburgh Underwriters* (1902) 21 Pa. Super. Ct. 38.

And in *Glatfelter v. Security Ins. Co.* (1918) 102 Neb. 464, 167 N. W. 572, where the action was on an oral contract for insurance, and it was alleged that the insurance was to be for a sum not exceeding a stated amount, and the plaintiff testified that he did not know the exact amount of the premium, and his evidence as to the making of the oral contract was contradicted, the jury's finding in the defendant's favor was sustained.

And in *Cauman v. American Credit Indemnity Co.* (1918) 229 Mass. 278, 118 N. E. 259, Ann. Cas. 1918E, 841, where a recovery was sought against a credit insurance company, the court stated that it was plainly apparent upon the evidence that no oral contract of insurance was ever entered into or contemplated, but that it showed that the negotiations were all in anticipation of a written policy, which was not issued because the parties never were able to agree upon the terms.

In *Cunningham v. Connecticut F. Ins. Co.* (1909) 200 Mass. 333, 86 N. E. 787, there was held to be no parol contract shown for immediate insurance, where it appeared from the evidence that one applied for insurance to an agent representing several companies, but nothing was said as to the companies in which the policies should be written, as to the amount to be assumed by each company, as to the premium or the term of the policies, and it was agreed that the applicant would get them at some later date.

And in *Ripka v. Mutual F. Ins. Co.* (1908) 36 Pa. Super. Ct. 517, the evidence was held not to support a finding that an oral contract was made that the company should be liable for loss accruing before issuance of a policy, where there was evidence that the agent went to the applicant's place, examined the property to be insured, filled up an application, which was signed, and was paid a certain fee, and that, before the application could be forwarded, the property burned.

And in *Myers v. Liverpool & L. & G. Ins. Co.* (1876) 121 Mass. 338, where there was evidence that one who was building a house applied to an agent for insurance, and stated that he wanted a certain amount from that date, and was quoted a rate, and that he told the agent when he got the policy to bring it to him, and subsequently, in response to letters from the agent, asking him to call for the policy, made several trips to the agent's office, but failed to find him in, it was held that the evidence failed to show an oral contract to insure.

The evidence in *California Ins. Co. v. Settle* (1915) 162 Ky. 82, 172 S. W. 119, which was that the agent promised to issue a policy on plaintiff's property for a certain term and amount, on a specified date in the future, at an agreed premium, was held to establish merely a promise to issue a policy at a future date, which was never completed, and was insufficient to show an existing oral contract of insurance.

And in *McCann v. Aetna Ins. Co.* (1874) 3 Neb. 198, where the substance of the plaintiff's evidence was

that he went to the office of the defendant's agent, and by a verbal agreement with the agent effected an insurance, but the agent and another who was present testified that the agent told the plaintiff he could not issue a policy, but would take his application, and that the plaintiff left without making an application, it was held that a parol contract of insurance was not established.

And in *Peoples' Ins. Co. v. Paddon* (1881) 8 Ill. App. 447, there was held to be no meeting of the minds and no valid contract, where insured called at an insurance office to see one of the firm, who acted as the insurer's agent, to place insurance, and, not finding him in, left his book and policy marked for certain changes, but the agent did not see these, and, although he talked with the insured on the street subsequently, no definite agreement was made.

And in *Mooney v. Merriam* (1908) 77 Kan. 305, 94 Pac. 263, where the evidence was to the effect that the plaintiff went to the insurance agent's office with the latter, to see if a policy was in force on his property, and, while it was being looked up, other parties came in, and the plaintiff, not wishing to wait, told the agent to find out whether a policy was in force, and if not, to make out one the same as one which had expired some time before, to which the agent assented, it was held that the evidence was too indefinite with reference to the subject-matter, the risk insured against, the duration, the amount, and the premium, to establish a contract.

And a present oral contract of insurance was not contemplated, where the agent, when the applicant went to his office and handed him the balance of the premium due, apologized, and stated that the policies were not ready, but would be mailed. *Agricultural Ins. Co. v. Fritz* (1897) 61 N. J. L. 211, 39 Atl. 910.

And in *Cauman v. American Credit Indemnity Co.* (1918) 229 Mass. 278, 118 N. E. 259, Ann. Cas. 1918E, 841, the evidence was held to show that the negotiations of the parties were all in anticipation of a written

policy, and that no oral contract of insurance was ever entered into, or even contemplated.

In *Patterson v. Benjamin Franklin Ins. Co.* (1875) 81* Pa. 454, the evidence was held insufficient to show a contract to insure between the taking of the risk and the issuing of a policy, where the agent stated that the rate would be a certain percentage for three years, and applicant told him all right, that he would take a policy for that period, and an arrangement was made for paying the premium, and the agent said to another who came in while he was making his memorandum that he had just insured the applicant, and that the other had better let him insure his mills.

And in *Dinning v. Phoenix Ins. Co.* (1873) 68 Ill. 414, the evidence was held insufficient to show an oral contract of insurance, where plaintiff's agent testified that the defendant's agent stated that the risk was covered, but the latter directly denied this.

The question in some cases has been held to be for the jury.

Thus, in *North American Ins. Co. v. Bird* (1898) 175 Ill. 42, 51 N. E. 686, where the evidence was conflicting as to whether the essentials of an oral contract of insurance were agreed upon, the question was held to have been properly submitted to the jury, and a finding that such a contract was made was upheld.

And the question whether there was a complete contract of insurance was held to be for the jury in *Consolidated Mfg. Co. v. West Chester F. Ins. Co.* (1892) 13 Pa. Co. Ct. 321, and a verdict for the plaintiff was sustained, there being testimony that the defendant's agent agreed to write a policy for a certain amount in the defendant company; that the terms were agreed upon, and the agent declared that the insurance began from the time of the application; although the agent testified that he was to try to place the insurance asked for, and, if he effected any, it was to take effect from that day, but that the policies written by him were canceled before a loss occurred.

And in *McIntyre v. Federal L. Ins.*

Co. (1910) 142 Mo. App. 256, 126 S. W. 227, where it appeared that the defendant undertook to reinsure risks of a company whose assets had been transferred to defendant, and there was evidence that the defendant's agent told the plaintiff to go on with her premiums, that the policy and its value were the same as those of the other company, and a letter was written, indicating that the defendant would pay the full amount of the original policy, and premiums were paid, it was held that the plaintiff was entitled to go to the jury on the issue that she had paid her money under the terms of an oral contract, and a judgment for the plaintiff was affirmed.

The following cases illustrate the character of evidence which has been held to establish a valid oral agreement:

Thus, in *Shawnee F. Ins. Co. v. Roll* (1911) 145 Ky. 113, 140 S. W. 49, the testimony was held to sustain a finding that an oral contract of insurance existed, there being evidence by the plaintiff that he applied to an agent, who, he understood, represented only one company, for a certain amount on his property, and that the agent agreed to issue a policy, and stated that he was insured, although the defendant's evidence contradicted this.

And in *Audubon v. Excelsior Ins. Co.* (1863) 27 N. Y. 216, there was held to be an agreement shown for present insurance where it appeared that an application was made for insurance on property similar to that on which a policy had before been issued, to which the parties referred, and that all of the terms were agreed upon except the rate of premium, and that the agent stated that the company would insure the property, and would send a policy later, it appearing that the parties knew the rate of premium for the similar risk which had been covered shortly before.

And in *Newark Mach. Co. v. Kenton Ins. Co.* (1893) 50 Ohio St. 549, 22 L.R.A. 768, 35 N. E. 1060, where an agent, authorized to keep a property owner's insurance up to a certain amount in good companies represented by him, told the property owner that a

certain policy had been canceled, and the latter agreed that new policies proposed by the agent should be exchanged for the one canceled, there was held to be a valid contract, although no mention was made of the companies, the property, the premium, duration, or conditions, it appearing that the agent had selected companies, and that it was understood that the policies were to cover the same property insured by the canceled policy, and it being presumed that the usual terms, etc., were contemplated.

And in *Continental Ins. Co. v. Roller* (1902) 101 Ill. App. 77, there was a valid contract where a property owner applied to an agent for additional insurance, and the latter stated that he would put him in a certain company, although there was nothing said concerning the time or rates, there having been a previous conversation concerning these matters.

In *Ruggles v. American Cent. Ins. Co.* (1889) 114 N. Y. 415, 11 Am. St. Rep. 674, 21 N. E. 1000, the evidence was held to justify the finding of a binding agreement from date, where the agent stated that he would bind the risk if the company was not on, and, in answer to the question when it was binding, answer that it was in force from the date of the conversation.

And in *Ellis v. Albany City F. Ins. Co.* (1872) 50 N. Y. 402, 10 Am. Rep. 495, the evidence was held to show an agreement to issue a policy where there was testimony that a property owner applied to an agent representing several companies for insurance, that the amount to be insured was agreed upon and the premium determined; that the agent agreed to insure as requested, and it was left to him to select the companies, and that he determined to place a certain amount in the defendant, entered the contract on his register, received the premium, and credited it to defendant.

And there was a valid agreement to issue a policy where it appeared that an application was made for insurance on a cargo of lumber; that the agent gave the applicant a tariff of rates, varying with the date of sailing, stat-

ing that the premiums would be according to those rates; that they agreed to the insurance at those rates, and the agent told him to consider the cargo insured, provided the vessel sailed before a certain date, the amount insured being the invoice cost of the cargo, increased by a certain percentage; although the exact amount, or the precise date of sailing, could not be definitely fixed at the time. *Bunten v. Orient Mut. Ins. Co.* (1861) 8 Bosw. (N. Y.) 448.

And the evidence in *Baile v. St. Joseph F. & M. Ins. Co.* (1881) 73 Mo. 871, disclosing an oral contract for a policy between the agents of the plaintiff and defendant, the receipt of the premium, an agreement as to the subject-matter and duration of the policy, was held to show a contract to insure, which would be specifically enforced, although the risk insured against had not been expressly agreed upon, the court stating that this could be supplied by reasonable intendment from the nature of the insurer's business and the property involved.

And the evidence in *Fire Ins. Co. v. Sinsabaugh* (1902) 101 Ill. App. 55, was held to show that the defendant company was properly chosen by the agent, who also represented other companies, to carry the risk.

And in *Cooke v. Aetna Ins. Co.* (1878) 7 Daly (N. Y.) 555, the evidence was held to show a valid contract for insurance where plaintiff, who held a policy with the defendant, after moving a part of the property, asked the agent to transfer the insurance, and the agent assented, and stated that the insurance would be binding from date, and that he would examine the property and let him know what the rate would be.

And in *Ford v. Stevens Motor Car Co.* (1920) 203 Mo. App. 669, 220 S. E. 980, evidence in effect that the defendant motor car company orally agreed to protect the purchaser of a car to a certain amount by liability insurance was held sufficient to prima facie establish an oral contract of insurance.

In *Rhodes v. Railway Pass. Ins. Co.* (1871) 5 Lans. (N. Y.) 71, where one who was on the way to take a train met

an agent of an accident insurance company, and handed him the premium for insuring him for a certain time, and the agent received the money, and promised to make out the policies as soon as he reached his office, it was held that if an action could not be maintained upon the contract as one of insurance, it could be on the contract to prepare and deliver a policy.

In *Quinn-Shepherdson Co. v. United States Fidelity & G. Co.* (1919) 142 Minn. 428, 172 N. W. 696, the evidence of oral talks was held to show no contract of or for fidelity insurance. There was evidence in this case that although, in certain lines of insurance, it is common to cover the applicant from the time of his application, it is not customary to make fidelity insurance effective at once without an investigation of the employees, except in the case of renewals. But on a second appeal of this case, the evidence was held sufficient to take the question of the existence of an oral contract to the jury, and to support a finding in the affirmative. (1921) — Minn. —, 183 N. W. 347.

e. Applicability of terms and conditions of usual written policy.

1. Where claim is on oral contract of original insurance.

It is generally held that, in cases of oral insurance contracts for original insurance, where no terms are expressly agreed upon, it is presumed that the parties contemplated those contained in policies usually issued to cover like risks. *Maryland Casualty Co. v. Industrial Acci. Commission* (1919) 179 Cal. 716, 178 Pac. 858; *Smith v. State Ins. Co.* (1884) 64 Iowa, 718, 21 N. W. 145; *Springfield F. & M. Ins. Co. v. Jenkins* (1888) 9 Ky. L. Rep. 932; *Salisbury v. Hekla F. Ins. Co.* (1884) 32 Minn. 458, 21 N. W. 552; *Vining v. Franklin F. Ins. Co.* (1901) 89 Mo. App. 311; *Hubbell v. Pacific Mut. Ins. Co.* (1885) 100 N. Y. 41, 2 N. E. 470; *Sproul v. Western Assur. Co.* (1898) 33 Or. 98, 54 Pac. 180; *Cleveland Oil Co. v. Norwich Ins. Soc.* (1898) 34 Or. 228, 55 Pac. 435; *Northwestern Iron Co. v. Aetna Ins. Co.* (1870) 26 Wis. 78.

It has been held in an action on a fire insurance contract that the rights

of one whose property is destroyed by fire after an oral contract to insure is entered into, but before a policy is issued, are subject to the provisions of the standard policy, including those governing proofs of loss. *Hicks v. British America Assur. Co.* (1900) 162 N. Y. 284, 48 L.R.A. 424, 56 N. E. 743.

And in *Rhodes v. Railway Pass. Ins. Co.* (1871) 5 Lans. (N. Y.) 71, it was held that whether an action against an accident company was on the contract of insurance, or on an agreement to deliver a policy, a recovery could be had only according to the terms and conditions of the usual policy.

And where one applied for additional insurance, and an oral contract was made therefor, it was held subject to the same terms and conditions as the original policy. *Green v. Liverpool & L. & G. Ins. Co.* (1894) 91 Iowa, 615, 60 N. W. 189.

But a condition in a policy issued after a loss does not attach as a condition of an oral contract of insurance unless it is shown that the condition is a usual one in policies issued covering like risks, or unless the insured accepts the policy, and his acts amount to an admission that it sets forth the terms agreed to. *Salisbury v. Hekla F. Ins. Co.* (1884) 32 Minn. 458, 21 N. W. 552.

And in the *Salisbury Case*, where a present oral contract of insurance of a manufactory was made, and a written policy was to be subsequently issued, but before the issuance of the policy, and while the manufactory was running at night, a loss occurred, it was held that a policy subsequently issued, containing a condition prohibiting the operation of the mill at night, was not conclusive upon the insured, and that he might by parol rebut its terms, although the policy was delivered to him.

And it has been held that a complaint in an action upon a parol contract, which alleges the making of an oral contract of insurance and the happening of a loss, is sufficient, and need not set forth the terms of a policy issued subsequently to the happening of a loss, since this was not the contract of insurance, although it might

be evidence of the contract. *Ganser v. Fireman's Fund Ins. Co.* (1885) 34 Minn. 372, 25 N. W. 943.

In *Kelly v. Commonwealth Ins. Co.* (1862) 10 Bosw. (N. Y.) 82, where the evidence showed the making of an independent oral contract of insurance, and also an agreement subsequently to deliver a policy, it was held that the conditions of a written contract such as that which was to be finally issued were not a part of the oral contract, and that a condition of such policy, requiring prepayment of premiums, formed no part of the oral contract to insure, and need not be complied with.

In *Ætna Ins. Co. v. Northwestern Iron Co.* (1867) 21 Wis. 464, where the action was upon an alleged policy of marine insurance, it not being entirely certain from the evidence whether the parties made a contract for issuing a policy or made a parol agreement of insurance, it was held that the insurer was entitled to show that the usual course of business of marine insurance companies was to receive propositions for insurance by parol or verbally, and that, when accepted, the transaction was entered and recorded in the books of the company as an agreement between the parties for insurance upon the terms and conditions of the policies in use, and that a policy was to issue at any time upon request, and that the parties so contracted in the case at bar.

See also *Newark Mach. Co. v. Kenton Ins. Co.* (1893) 50 Ohio St. 549, 22 L.R.A. 768, 35 N. E. 1060, under I. d.

2. Where claim is for breach of oral contract to issue policy.

The terms and conditions of policies such as are usually issued to cover risks in like cases have also been held to govern the rights of the parties in proceedings brought to recover for a breach of contract to issue a policy, in the absence of a waiver of compliance with such conditions by the insurer.

Thus, in *Barre v. Council Bluffs Ins. Co.* (1889) 76 Iowa, 609, 41 N. W. 373, which was an action based upon a breach of an oral agreement to issue a policy, it was held that a policy such as was usually issued in like cases was contemplated, and that where the form

of policy usually issued required immediate notice of loss, and provided that noncompliance with the conditions should defeat recovery, the insured was precluded from maintaining an action where no such notice was given, there being no waiver by the insurer.

And in *Rhodes v. Railway Pass. Ins. Co.* (1871) 5 Lans. (N. Y.) 71, it was held that whether an action was on a contract of insurance, or on an agreement to deliver a policy, a recovery could be had only according to the terms and conditions of the usual policy.

And in *Western Assur. Co. v. Meuth* (1889) 10 Ky. L. Rep. 718, where the application had been accepted, and the agent agreed to issue a policy as soon as he received a blank, and a loss occurred before the policy was issued, it was held that the inference was that the blank was the kind that the company used in issuing policies generally, and that a provision of the usual policy as to limitation of time for suit was binding.

So, in *Eames v. Home Ins. Co.* (1877) 94 U. S. 621, 24 L. ed. 298, where a bill in equity was brought to require the insurer to issue a policy, in accordance with an application, and a plea was filed, alleging that the contract did not specify what kind of a policy was desired, it was held that it would be presumed that the parties contemplated a policy containing such conditions and limitations as were usual in such cases, or as had been before used between the parties.

And in *Humphry v. Hartford F. Ins. Co.* (1878) 15 Blatchf. 35, Fed. Cas. No. 6,874, it was held that a count claiming damages for the breach of an alleged contract to insure and to issue a policy set up a legal cause for action, and that the same damages could be recovered as if suit were brought on a policy issued in the form in which it was agreed to be issued. The agreement in this case was apparently oral, but the fact does not clearly appear.

In *McCann v. Ætna Ins. Co.* (1873) 3 Neb. 198, where the complainant sought a decree ordering the execu-

tion and delivery of a policy in accordance with a parol agreement, and a recovery thereon, it was held that, although there was a parol contract, the plaintiff was not entitled to the relief asked, where he had failed to give the insurer a notice of a loss, and to deliver an account of the loss, signed and sworn to by him, to the insurer, since these were held to be conditions precedent. It does not appear, however, whether these conditions were such as were ordinarily contained in a policy such as that applied for, or not.

In *Nebraska & I. Ins. Co. v. Seivers* (1889) 27 Neb. 541, 43 N. W. 351, it was held, in an action for the breach of a parol contract to insure, or issue a policy, that it was unnecessary to allege or prove service upon the insurer of proof of loss within the time usually limited by the policies of that company; that if it were not for the *McCann Case* (Neb.) *supra*, they would be inclined to follow certain cases holding that when an insurer enters into a parol contract to issue a policy, and fails to do so, it waives its right to demand proof of loss arising under such contract of insurance. The court apparently limited the decision in the *McCann Case* to the point that proof of loss must be furnished, but not necessarily in conformity with the terms of the usual written policy.

In *Sanford v. Orient Ins. Co.* (1899) 174 Mass. 416, 75 Am. St. Rep. 358, 54 N. E. 883, where the action was based on a breach of an oral contract to insure plaintiff's property, and not upon a contract of insurance, it was held that the provisions which were to be inserted in the policy as to the mortgagee and as to arbitration were not applicable.

II. *Agreements to renew or extend.*

a. *Validity, generally.*

In the absence of charter or statutory provisions prohibiting them, oral contracts of renewal, as well as oral agreements to renew, are held valid.

Arkansas.—*Ætna Ins. Co. v. Short* (1916) 124 Ark. 505, 187 S. W. 657; *King v. Cox* (1896) 63 Ark. 204, 37 S. W. 807.

California.—*Gold v. Sun Ins. Co.* (1887) 73 Cal. 216, 14 Pac. 786; *American Can Co. v. Agricultural Ins. Co.* (1909) 12 Cal. App. 133, 106 Pac. 720.

Illinois.—*Hawthorne v. German Alliance Ins. Co.* (1913) 181 Ill. App. 88; *Fire Asso. of Phila. v. Smith* (1895) 59 Ill. App. 655.

Kansas.—*Phoenix Ins. Co. v. Ireland* (1899) 9 Kan. App. 644, 58 Pac. 1024.

Maine.—*Greenlaw v. Aroostook County Patrons Mut. F. Ins. Co.* (1918) 117 Me. 514, 105 Atl. 116.

Mississippi.—*Liverpool & L. & G. Ins. Co.* (1910) 142 Mo. App. 256, 126 754, 77 So. 652.

Missouri.—*McIntyre v. Federal L. Ins. Co.* (1910) 142 Mo. App. 256, 126 S. W. 227.

New York.—*Post v. Ætna Ins. Co.* (1864) 43 Barb. 351; *Springer v. Anglo-Nevada Assur. Corp.* (1890) 33 N. Y. S. R. 543, 11 N. Y. Supp. 533.

Texas.—*Westchester F. Ins. Co. v. Robinson* (1917) — Tex. Civ. App. —, 192 S. W. 793; *American Cent. Ins. Co. v. Robinson* (1920) — Tex. Civ. App. —, 219 S. W. 277; *Austin F. Ins. Co. v. Adams-Childers Co.* (1921) — Tex. Civ. App. —, 232 S. W. 339.

Wisconsin.—*Scott v. Home Ins. Co.* (1881) 53 Wis. 238, 10 N. W. 387.

And it has been held that an insurance company may contract by parol for the renewal of a policy, although it is stipulated on the face of the policy that this shall not be done. *Cohen v. Continental F. Ins. Co.* (1877) 67 Tex. 325, 60 Am. Rep. 24, 3 S. W. 296.

And the court in *Underwood v. Pennsylvania F. Ins. Co.* (1912) 134 N. Y. Supp. 105, recognized that an oral agreement to renew might be valid, but held that the circumstances must be such as to show authority by the agent to make such a contract, and that such authority was not shown in that case.

In *McCabe Bros. v. Ætna Ins. Co.* (1899) 9 N. D. 19, 47 L.R.A. 641, 81 N. W. 426, a parol agreement by an agent to renew a policy was held to have been made by him in his representative capacity as agent, and not personally, and a recovery for a breach

was allowed against the insurer. And this case was followed in *Boos v. Aetna Ins. Co.* (1911) 22 N. D. 11, 132 N. W. 222, where the evidence, which is not set out, was held sufficient to sustain a verdict in an action for a breach of a parol agreement to renew, made before the expiration of a policy.

An oral extension of the insurance so as to include additional parties or risks has also been held valid.

Thus, a parol confirmation of a policy to a new owner of the insured property has been held valid. *Pratt v. New York Cent. Ins. Co.* (1873) 64 Barb. (N. Y.) 589; *Wood v. Rutland & A. Mut. F. Ins. Co.* (1859) 31 Vt. 552.

And in *Amazon Ins. Co. v. Wall* (1877) 31 Ohio St. 628, 27 Am. Rep. 533, an agent's oral agreement that a policy which had been held by a mortgagee should have the force and effect of a new policy in the hands of a purchaser of the property was held valid.

And a written policy may be changed by a subsequent oral agreement to cover additional property. *Kennebec Co. v. Augusta Ins. & Bkg. Co.* (1856) 6 Gray (Mass.) 204.

And in *Emery v. Boston M. Ins. Co.* (1885) 138 Mass. 398, it was held that a valid oral agreement might be made to indorse an additional risk on a policy, which provided that no risk should be binding until indorsed thereon.

And an oral contract to substitute a mortgage clause in a policy is valid, and is not rendered invalid by § 2596, Code 1906, which sets forth the statutory mortgage clause. *Hartford F. Ins. Co. v. J. R. Buckwalter Lumber Co.* (1918) 116 Miss. 822, 77 So. 798.

The complaint in *Gold v. Sun Ins. Co.* (1887) 73 Cal. 216, 14 Pac. 786, which was an action to recover for failing to comply with a contract to renew a policy, was held good on demurrer, where it informed the defendant when the contract to renew was made, what was its subject-matter, the amount, and stated that the defendant had received a valuable consideration for its promise to renew.

In *Struzewski v. Farmers' F. Ins. Co.* (1919) 226 N. Y. 338, 123 N. E. 661,

an action based upon a policy of insurance, it was held error to allow an amendment alleging an oral contract with the defendant through its agent to renew the insurance at the end of every expiring three-year period, the court holding that this would wholly change the cause of action.

b. Essential elements.

See also cases under II. d and e.

It is generally held that agreements to renew need not be as definite as to terms as an agreement to issue a policy, since the agreement will be presumed to have reference to the terms of the existing policy, and these agreements have been upheld where there was no specific agreement as to terms. *Commercial F. Ins. Co. v. Morris* (1894) 105 Ala. 498, 18 So. 34; *Baldwin v. Phoenix Ins. Co.* (1889) 107 Ky. 356, 92 Am. St. Rep. 362, 54 S. W. 13; *Georgia Home Ins. Co. v. Kelley* (1908) — Ky. —, 113 S. W. 882; *Mallette v. British American Assur. Co.* (1900) 91 Md. 471, 46 Atl. 1005; *Wiebeler v. Milwaukee Mechanics' Mut. Ins. Co.* (1883) 30 Minn. 464, 16 N. W. 363; *Abel v. Phoenix Ins. Co.* (1900) 47 App. Div. 81, 62 N. Y. Supp. 218.

And in *Western Assur. Co. v. McAlpin* (1899) 23 Ind. App. 220, 77 Am. St. Rep. 423, 55 N. E. 119, where the plaintiff had applied for a renewal of a policy, and a contract to insure was held to be shown, the court stated that if any of the essentials were not expressly discussed they were understood; that all the essentials need not be expressly negotiated, as the terms of the usual policy, the usual rate, etc., might be presumed to have been intended.

And in *Brown v. Home Ins. Co.* (1910) 82 Kan. 442, 108 Pac. 824, there was held to be a valid oral contract to renew a policy upon its expiration without obtaining the approval of the home office, although the application for the original policy made that necessary, and although the agreement was for a renewal on the terms and conditions of the old policy; the court stating that the essential elements of the original policy imported into the new were that the identical

property should be reinsured upon the same valuation, for the same time, and for the same premiums.

And there is a valid contract to insure for three years, where it appears that the plaintiff held a policy of the defendant which was about to expire, and that, before it expired, the agent agreed orally to renew it, increasing the amount to a stated sum and extending it to other property, although nothing was said as to the length of time or the rate of premiums, as the presumption would be that these were the same as in the original policy. *Wiebeler v. Milwaukee Mechanics' Mut. Ins. Co.* (1883) 30 Minn. 464, 16 N. W. 363.

While it is true that an agreement to renew a policy does not have to be as certain and definite as to terms as an agreement to issue a policy, in view of the fact that such agreement will be presumed to have reference to the terms and conditions of the existing insurance, yet the evidence must establish a definite agreement to renew. *Fireman's Fund Ins. Co. v. Searcy* (1914) 157 Ky. 749, 163 S. W. 1103; *Gresham v. Norwich Union F. Ins. Soc.* (1914) 157 Ky. 402, 163 S. W. 214.

It was held in *Benner v. Fire Asso. of Phila.* (1910) 229 Pa. 75, 140 Am. St. Rep. 706, 78 Atl. 44, that in order that an oral agreement to renew be valid, the parties must agree on the subject-matter, amount, and elements of the risk, the rate of premium, and all the circumstances peculiar to the contract. And to the same effect is *Etter v. St. Paul F. & M. Ins. Co.* (1913) 54 Pa. Super. Ct. 187.

c. Effect of charter or special statutory provisions.

It has been held that a company has the power to make an oral agreement to renew where its charter empowers it to make contracts of insurance, but another section of the charter provides that the policies and other contracts shall be binding if subscribed by certain officers, although not under the corporate seal. *First Baptist Church v. Brooklyn F. Ins. Co.* (1859) 19 N. Y. 305.

But a provision in the acts of incor-

poration of an insurer that every contract, bargain, agreement, and policy to be made by the company should be in writing or in print has been held to refer to preliminary contracts to renew, as well as to executed contracts, so that a valid parol agreement to renew could not be made. *Benner v. Fire Asso. of Phila.* (1910) 229 Pa. 75, 140 Am. St. Rep. 706, 78 Atl. 44.

In *Croghan v. New York Underwriters' Agency* (1874) 53 Ga. 109, the court said that "a contract of insurance must, by the Code, be in writing" (evidently referring to the statute applied in the Georgia cases cited *supra*, I. c). "It is very plain that the alleged renewal was not in writing, and if not, it is absurd to sue on a contract." The declaration in this case was originally *ex delicto*, based on fraud, or negligence in failing to renew, but the plaintiff amended by adding a count *ex contractu*,—whether on the theory of a contract to renew or a contract of renewal is not quite clear, although the court seemed to approve the latter.

See also Georgia cases under I. c, and also IV., on Statute of Frauds.

d. Evidence to establish.

See also cases under II. b, *supra*.

In *Baubie v. Aetna Ins. Co.* (1873) 2 Dill. 156, Fed. Cas. No. 1,111, where recovery was sought on an alleged oral agreement by an agent to keep certain property insured by renewing a policy at its expiration, the court instructed the jury that the burden was on the plaintiff to establish the existence of a contract binding on both parties, which subsisted at the time of loss, and which bound the plaintiff to pay the premiums, as well as the defendant to pay the loss, in case the property burned.

The testimony in *Home Ins. Co. v. Adler* (1884) 77 Ala. 242, was held to show a valid oral agreement to renew a policy, or issue another upon the expiration of an existing policy.

And in *Abel v. Phoenix Ins. Co.* (1900) 47 App. Div. 81, 62 N. Y. Supp. 218, there was held to be a valid agreement to renew where a person had had his last insurance in a particular

company through its agent, and he orally agreed to renew.

In *Baker v. Commercial Union Assur. Co.* (1894) 162 Mass. 358, 38 N. E. 1124, the evidence was held to warrant a finding for the plaintiff, where there was testimony that an agent having charge of the plaintiff's insurance told an agent of a company having policies on the plaintiff's property, at about the time of their expiration, to hold them, that he wanted to see the plaintiff before they were revived, and that the agent agreed to do so.

And in *Wilson v. Hartford F. Ins. Co.* (1914) 188 Ill. App. 181, a refusal to grant a peremptory instruction was held correct, there being uncontradicted evidence by the plaintiff that he left his policy with the agent, and made an agreement for a renewal on or before its expiration.

And the plaintiff's evidence in *Fireman's Fund Ins. Co. v. Searcy* (1914) 157 Ky. 749, 163 S. W. 1103, although it was contradicted, was held to support a finding for the plaintiff, where it tended to show an agreement with the agent at the time a policy was issued that if the insured property was not sold and notice given to the insurer before the expiration of the policy, it would renew it.

And the evidence in *Struzewski v. Farmers' F. Ins. Co.* (1917) 179 App. Div. 318, 166 N. Y. Supp. 362, reversed on other grounds in (1919) 226 N. Y. 338, 123 N. E. 661, was held to show a valid oral contract by an agent, made for the defendant, to renew from year to year, there being testimony that he talked with the plaintiff about companies, stated that the defendant was the best he knew, and that he would keep his property insured in that company.

And a valid contract to reinsure was held to be shown where it appeared that one who had carried a policy with the defendant received a notice that the company would not carry so large an amount on his property, and that he went to the agent and told him of the notice, and that the agent agreed that the company would reinsure for half the original amount, although there was no express agreement as to

the rate and duration, the circumstances justifying an inference that those should be the same as in the prior policy. *Winne v. Niagara F. Ins. Co.* (1883) 91 N. Y. 185.

And in *Eifert v. Hartford F. Ins. Co.* (1921) — Minn. —, 180 N. W. 996, where the plaintiff had several policies in different companies, about to expire on different dates, and testified that she told the agent who wrote all of the policies to renew them all just as they were before, and that the agent said "All right," it was held that a valid contract was shown to insure the property for the same amount and length of time from the expiration of the existing policies.

And in the following cases the evidence was held sufficient to show a valid contract of renewal or to renew:

— where a property owner telephoned an insurance agent to issue policies of certain amounts on specified property for ninety days, and at the expiration of that time, unless otherwise ordered, to keep the policies in force, and the agent answered, "All right," *Hawthorne v. German Alliance Ins. Co.* (1913) 181 Ill. App. 88;

— where the agent of a property owner requested insurer's agent to renew a policy when it expired, and he agreed to do so, *Fire Asso. of Phila. v. Smith* (1895) 59 Ill. App. 655;

— where an agent authorized to accept risks and renew policies inquired whether the insured wished a policy renewed, and the latter stated that he wished it renewed for a stated time, and, on the day the policy was to expire at noon, the insured, in the evening, inquired if the policy had been renewed, and the agent asked when it expired, and, upon being told that it expired on that day, stated that he would go to his office and renew it, but failed to do so, *Post v. Aetna Ins. Co.* (1864) 43 Barb. (N. Y.) 351;

— where there was testimony by the insured's wife that the agent wrote, inquiring whether her husband wished to renew a policy, and that she told the agent that her husband directed her to say that he wished it renewed, and would send a check for the premium, to which the agent assented,

Mallette v. British American Assur. Co. (1900) 91 Md. 471, 46 Atl. 1005;

— where, about the time of the expiration of a policy, the agent agreed for the company, with the insured, to renew the policy and to attend to it right away, and the minds of the parties met as to the terms, and there was an agreement as to the payment of the premium, and nothing was left to be done except to make out and deliver a renewal receipt, **King v. Hekla F. Ins. Co.** (1883) 58 Wis. 508, 17 N. W. 297;

— where the petition alleged that the agent agreed, before the expiration of a policy, in consideration of the usual premium of a stated sum, that the policy should be renewed on its expiration, for one year, upon the same property, situated at the same place, and for the same amount, **American Cent. Ins. Co. v. Hardin** (1912) 148 Ky. 246, 146 S. W. 418;

— where it appeared that one appointed agent for a foreign insurance company had acted as its agent for five or six years, and had acted for the insurer in insuring the plaintiff's property; that two days before a policy on such property expired the agent asked plaintiff if he wished to continue the insurance, and received an affirmative answer; that the agent left an application, and on the date the policy was to expire called for the application and forwarded it to the insurer, stating that the insurance would not be interrupted,—that it would be continued from the expiration of the policy; that the agent refused payment of the premium, and stated that it could be paid within thirty days; that two days after the agreement to renew, and before the issuance of a policy, or the usual time for receiving a renewal, and before plaintiff was notified that the insurer did not wish to carry the risk, the property burned, **Willson v. German American Ins. Co.** (1914) 95 Neb. 774, 146 N. W. 945;

— where the agents stated to insured that his policy with a certain company had expired, and asked if he did not want to renew, and insured replied that he did, and in answer to the agent's question whether he did not

want the insurance placed in another designated company, the insured consented to the change, and the agent said that he would place the insurance in such company, **Firemen's Ins. Co. v. Kuessner** (1898) 164 Ill. 275, 45 N. E. 540;

— where there was evidence that the plaintiff stated to the defendant's agent that his policy had expired, and that he desired to have it renewed for the same amount and upon the same terms as the former policy, and the agent stated that he would attend to the matter immediately, **Western Assur. Co. v. McAlpin** (1899) 23 Ind. App. 220, 77 Am. St. Rep. 423, 55 N. E. 119.

The agreement was held uncertain as to parties and as to the amount and rate in **Bridges v. St. Paul F. & M. Ins. Co.** (1918) 102 Neb. 316, L.R.A. 1918D, 1099, 167 N. W. 64, where the evidence showed that, for a number of years, the plaintiff had been insured through an agency representing several companies; that the agent had orally agreed to keep the property insured, and had done so for a number of years, during which time there had been a change of companies and amount; that the premiums had been charged to the insured's account at a bank carried on by the agent, and that the agency failed to renew the insurance, and the plaintiff, whose account was overdrawn at the bank, failed for over five months to demand a policy or tender the premium.

And in **Gresham v. Norwich Union F. Ins. Soc.** (1914) 157 Ky. 402, 163 S. W. 214, it was held that the language was too vague, uncertain, and indefinite to constitute a binding contract to renew, where the plaintiff's evidence was that, several months before the expiration of his policies, he talked with the agent, who urged the taking of more insurance, but, upon plaintiff's refusal to take more, and his statement that the agent could carry the policies he had, he stated that he wanted to carry those policies, and did not want to lose any, if he didn't get any more.

And no present contract of insurance which will support an action to recover for a loss is shown by evidence

that, shortly before the expiration of a former policy, plaintiff instructed his cashier, who was also the insurer's agent, to renew the policy when it expired, which the agent promised, but neglected to do. *Idaho Forwarding Co. v. Fireman's Fund Ins. Co.* (1892) 8 Utah, 41, 17 L.R.A. 586, 29 Pac. 826.

And a new contract of insurance in præsenti was not effected by a statement by the insured to the agent that he wanted to renew his insurance, that he was going away, and wanted it done before he went, to which the agent replied, "All right," and stated that there was nothing else for the applicant to do,—that he would attend to it. *Taylor v. Phoenix Ins. Co.* (1879) 47 Wis. 365, 2 N. W. 559, 3 N. W. 584.

And in *Johnson v. Connecticut F. Ins. Co.* (1886) 84 Ky. 470, 2 S. W. 151, where there was evidence that, at the time a property owner applied for a renewal of two policies, he stated to the agent that he wanted insurance to a certain amount on his property, and that they looked at the agent's books, and believed from the entries that, with the two policies renewed, there was insurance to the amount desired, but that such was not the fact, as certain other policies had expired, it was held that no contract of renewal or to insure resulted with the companies whose policies had expired, and which the agent and the plaintiff by mistake believed to be in force.

And in the following cases the evidence was held insufficient to establish a valid contract of renewal, or to renew:

—where the insured, while talking with the agent about renewing the policy on his house, told him not to forget the insurance on his barn, and the agent stated that he would renew it, and that the insured need not worry, *Benner v. Fire Asso. of Phila.* (1910) 229 Pa. 75, 140 Am. St. Rep. 706, 78 Atl. 44;

—where the evidence tended to show instructions to an agent representing several companies to keep certain property insured, but there was no proof of an agreement that the insurance was to be placed in the defendant company, *Hartford F. Ins. Co.*

v. Trimble (1904) 117 Ky. 583, 78 S. W. 462;

—where an agent authorized to receive proposals, fix rates, counter-sign, issue, and renew policies, subject to the company's rules, about four weeks before the expiration of a policy providing that it might be renewed upon payment of premiums or a receipt given, had a conversation with the insured, in which, according to the latter's evidence, he told the agent that he did not wish to increase his insurance, but that the agent could carry what he had, and the latter said that he would renew it for another year; but the agent testified that he never made such a statement, and no renewal receipt was ever given or any premium paid, and for six months after a loss the insured made no claim that his property was covered, *O'Reilly v. London Assur. Corp.* (1886) 101 N. Y. 575, 5 N. E. 568;

—where it appeared that ten months before a policy expired the agent agreed with one who had purchased the insured property that he would reinsure when the policy expired if the rates were the same in the company which held the risk, but agreed to consult with the insured if the rates were more, and there was evidence that the agent subsequently stated that he would attend to it, *Brown v. Dutchess County Mut. Ins. Co.* (1901) 64 App. Div. 9, 71 N. Y. Supp. 670;

—where the agent told plaintiff when he took a policy for five years that, at its expiration, he would have the company renew it, but nothing was said as to the term or rate of premium, *Etter v. St. Paul F. & M. Ins. Co.* (1913) 54 Pa. Super. Ct. 187;

—where there was testimony that slips for renewal of a policy were made out by the plaintiff's broker and left with the insurer's agent after business hours, with a statement that there were some renewals, to which the agent replied "All right," but that no covering note was given, or any mention made of the plaintiff's name, the rate of insurance, or other terms of the proposed contract, *American*

Can Co. v. Agricultural Ins. Co. (1909) 12 Cal. App. 133, 106 Pac. 720.

In *Deadman v. Royal Ins. Co.* (1890) 12 Ky. L. Rep. 389, where an agent agreed that, at the expiration of the policy, he would reinsure the holder it was held that there was no completed contract of insurance, but merely a personal undertaking by the agent, for a violation of which the insurer was not liable.

And in *Westchester F. Ins. Co. v. Robinson* (1917) — Tex. Civ. App. —, 192 S. W. 793, where the agent, at the time a policy was issued, orally agreed that he would keep the property insured by renewing the policy before it expired, it was held that there was not an executed contract to insure in the future, but an agreement to contract in the future to renew the policy, and the agreement was held the individual undertaking of the agent, and not binding on the insurer.

c. Applicability of terms and conditions of usual written policy.

See also cases under II. b.

It is held that where an oral contract is made to renew a policy, and there is no evidence introducing new terms, it will be presumed that the renewal is made upon the same terms and conditions as those contained in the original policy. *King v. Cox* (1896) 63 Ark. 204, 37 S. W. 877; *Ætna Ins. Co. v. Short* (1916) 124 Ark. 505, 187 S. W. 657; *Wiebeler v. Milwaukee Mechanics' Mut. Ins. Co.* (1883) 30 Minn. 464, 16 N. W. 363; *Liverpool & L. & G. Ins. Co. v. Hinton* (1918) 116 Miss. 754, 77 So. 652; *Orient Ins. Co. v. Wingfield* (1908) 49 Tex. Civ. App. 202, 108 S. W. 788; *American Cent. Ins. Co. v. Robinson* (1920) — Tex. Civ. App. —, 219 S. W. 277.

And in *Green v. Liverpool & L. & G. Ins. Co.* (1894) 91 Iowa, 615, 60 N. W. 189, an action on an oral contract, where the insured applied for insurance in addition to a policy issued by the insurer which he already had, and agreed with the agent that the former policy should be canceled and a new one issued, it was held that, although the former policy was void, its terms and conditions became a part

of the new contract, and that a limitation contained in the first policy as to the location of the property covered was binding.

So, in *Mallette v. British American Assur. Co.* (1900) 91 Md. 471, 46 Atl. 1005, where one count alleged an oral agreement to renew a policy, it was objected that nothing was said at the time of the alleged oral renewal as to the terms and conditions, but it was held that where there is an agreement for a renewal of a policy, the insured is justified in assuming that the premium and all the terms and conditions of the renewal will be the same as those of the original, unless he has notice of some proposed change; and this was held to be especially true where the original policy provided that it might, by renewal, be continued under the original stipulations.

And in *Abel v. Phenix Ins. Co.* (1900) 47 App. Div. 81, 62 N. Y. Supp. 218, it was held that the terms of the policy were sufficiently designated and agreed upon by the use of the word "renew" in an oral contract to renew an existing policy.

In *Commercial F. Ins. Co. v. Morris* (1894) 105 Ala. 498, 18 So. 34, the court laid down the rule that the mere fact that there have been previous dealings of insurance between the parties, without some reference to such previous dealings, is not sufficient to show a completed and binding contract that the parties intended to and did adopt the provisions of the former dealings; but it was held that where a contract of insurance exists, and has not expired, and there is an agreement to renew it, and no change is suggested or agreed upon, it will be implied that the renewal contract includes and adopts all the provisions of the existing contract. And in this case, where the plaintiff counted on a parol contract to insure and a parol contract to renew an existing policy, it was held that where the evidence showed that the parties contracted with reference to previous dealings, it was competent to show the terms of such dealings; and that where the agreement was to renew an existing contract of insurance, it was proper

to admit the existing contract in evidence.

In *King v. Cox* (1896) 63 Ark. 204, 37 S. W. 877, in an action to recover on an oral contract of insurance, the court stated that the policy which was to be renewed according to the parol agreement was to be upon the same terms and conditions as the prior policy. The original policy stipulated that it might, by a renewal, be continued under the original stipulations in consideration of the premium for the renewal term, provided that any increase of hazard must be made known to the insurer at the time of renewal, or the policy should be void.

In *Brown v. Home Ins. Co.* (1910) 82 Kan. 442, 108 Pac. 824, which was an action to recover upon a preliminary parol contract, there was a parol agreement to renew insurance on the same terms as those contained in the first contract, and it was held that the essential elements of the original contract imported into the renewal contract were that the identical property originally insured should be re-insured upon the same valuation, for the same time, and for the same premium as in the original contract; and where that contract did not require the obtaining of the approval of the home office to the risk, such approval was held not necessary to the renewal, although the application for the original insurance stated that the action of the agent was not binding before the contract had been approved by the home office. It appears, however, that at the time the first contract was made, the agent was not a general agent of the company, authorized to issue policies, but, at the time of the renewal, he had such authority.

In *First Baptist Church v. Brooklyn F. Ins. Co.* (1859) 19 N. Y. 305, where an action was brought on an oral agreement to renew a policy, it was held that it was competent for the parties to contract for a renewal by a verbal agreement, and to waive the payment of the premium in advance, notwithstanding a provision of the original policy that it might be continued by indorsement on the policy, or the giving of a receipt and the prepayment of the premium.

In *McCabe Bros. v. Aetna Ins. Co.* (1899) 9 N. D. 19, 47 L.R.A. 641, 81 N. W. 426, where an action was brought to recover for the breach of a parol agreement to renew a policy, it was held that provisions of the former policy respecting renewals, waivers, etc., had reference only to the contract of insurance and of renewal, and did not apply to a preliminary agreement to insure or to renew.

In a memorandum opinion in *Wilson v. Hartford F. Ins. Co.* (1915) 200 Ill. App. 626, it is stated that a recovery could be had on an oral contract to renew a policy, although the action was not commenced within the period named in the original policy.

In *Taylor v. Phoenix Ins. Co.* (1879) 47 Wis. 365, 2 N. W. 559, 3 N. W. 584, where it was claimed that a policy had been renewed by an oral contract, it was held that there was no waiver shown of a provision of the prior policy stipulating that it should be renewed only when the premium was paid and indorsed upon the same policy, or a receipt given for the same, where it appeared that the insured, upon casually meeting the insurance agent through whom he had taken the first policy, stated that he wanted to renew it, and that he was going away, and the agent replied, "All right," and agreed to a lower rate of premium, and stated, in answer to the insured's inquiry as to whether there was anything else which the agent wanted him to do, that there was nothing, but that he had the description of the property at the office, and would attend to that.

III. Contracts in mutual companies.

It will be observed that some cases in which mutual companies were involved are cited in other subdivisions of the note. The present subdivision is concerned only with those in which the fact that the company was a mutual company was a factor considered in reaching a decision.

A parol contract of insurance by mutual benefit societies has been held valid where the agreement has been entered into and completed, except as to the issuance or delivery of a certificate or policy. *Knights of Macca-*

bees v. Gordon (1907) 83 Ark. 17, 102 S. W. 711; Alliance Co-op. Ins. Co. v. Corbett (1904) 69 Kan. 564, 77 Pac. 108; Lorsch v. Supreme Lodge, K. H. (1888) 72 Mich. 316, 2 L.R.A. 206, 40 N. W. 545.

And in *State Mut. F. Ins. Co. v. Taylor* (1913) — Tex. Civ. App. —, 157 S. W. 950, it was held that, in the absence of a provision of the by-laws requiring all contracts of a mutual company to be in writing, or a statute or charter provision limiting the method in which the company may bind itself to written contracts, such a company can make an oral contract of insurance.

And in *Gay v. Farmers' Mut. Ins. Co.* (1883) 51 Mich. 245, 16 N. W. 392, it was held that an oral contract of insurance could be made by a mutual insurance company, there being nothing in the by-laws rendering a written policy necessary, and it appearing that the charter made it the absolute right of farmers in a certain county to become members of the company upon subscribing the articles and applying for insurance, and it appearing that the applicant in that case was already a member of the company.

And in *Loomis v. Jefferson County Patrons' Fire Relief Asso.* (1904) 92 App. Div. 601, 87 N. Y. Supp. 5, it was held that the fact that the plan of the mutual company contemplated a written application did not prevent a director from making an oral agreement for temporary insurance, there being nothing in the by-laws inhibiting a director from making such an agreement, and a recovery was allowed on an oral agreement to renew.

And in *Brown v. Franklin Mut. F. Ins. Co.* (1896) 165 Mass. 565, 52 Am. St. Rep. 535, 43 N. E. 512, the court held that a mutual company, as well as a stock company, could make an oral contract of insurance, and the words of a by-law providing that "the directors may authorize the president and secretary to make insurance, and will issue policies at such rates of insurance and under such limitations and restrictions as they shall prescribe," were held merely enabling words which did not restrain the

power of the company to make oral contracts.

And in *Zell v. Herman Farmers' Mut. F. Ins. Co.* (1890) 75 Wis. 521, 44 N. W. 828, it was held that a mutual company could bind itself by an oral contract of insurance, although the by-laws provided that all applications should be examined and approved by the board of directors or by a committee appointed before a policy was issued, and also provided that the secretary should issue policies after applications had been approved, and an instruction to agents provided further that policies would be issued in the home office, signed by the president and secretary, and that, as soon as an application was approved by the respective committees, the insurance should be in force from noon of the same day.

And it was stated in *Palm v. Medina County Mut. F. Ins. Co.* (1851) 20 Ohio, 529, that it is not necessary that any writing should be executed to perfect a contract of insurance, and in that case, where an application had been made to the agent of a mutual company, and premium notes had been given with security, a contract was held to have resulted which was effective from the date of the application, although the property insured was destroyed before the application was received by the company.

And in *Hamilton v. Lycoming Mut. Ins. Co.* (1847) 5 Pa. 339, a parol agreement by a mutual company for insurance was held complete from the time of compliance with the insurer's conditions, where it appeared that one having an interest in property applied to an agent of a mutual company for insurance, and gave a premium note, and paid a percentage of it; that a certificate was issued, stating that the applicant would be insured for a certain period if the application was approved; that the company requested a certain alteration on the premises, and that the applicant procured a certificate from the owners of the building; that he performed these conditions and requested the agent to call and see them, which he promised to

do, but neglected to do so before a loss occurred.

And the evidence in *State Mut. F. Ins. Co. v. Taylor* (1913) — *Tex. Civ. App.* —, 157 S. W. 950, was held sufficient to warrant a finding that a contract had been made by a mutual company to insure the plaintiff's property, and that all the essentials had been agreed upon, there being evidence that the agent knew where the applicant's goods were situated, and had seen them; that it was understood that the insurance was to be for one year; that while the precise amount of premium was not known at the time the oral contract was made, the parties knew approximately what it was, it being simply a matter of calculation.

And a judgment for the plaintiff in an action against a mutual company upon a parol contract to issue a policy was held justified in *Van Loan v. Farmers' Mut. F. Ins. Asso.* (1882) 90 N. Y. 280, affirming (1881) 24 Hun, 132, where the evidence showed that the plaintiff applied for insurance to the defendant's director and agent; that he examined the property and agreed upon the amount to be insured, and made a survey which was complete except as to the plaintiff's name; that the survey was approved by the secretary, and a record made on the books, a blank being left for the plaintiff's name.

And it was assumed in *Shepard v. Boone County Home Mut. F. Ins. Co.* (1909) 138 Mo. App. 20, 119 S. W. 984, that a valid contract of insurance might be made by a mutual company, but the evidence in that case, to the effect that the plaintiff told the agent some time before a policy expired that he wanted to renew it, and would call shortly at the agent's office, and arrange to take out a policy, was held insufficient to establish a contract, it appearing that he forgot the matter, and never called to complete the contract.

And in *Barlow v. Farmers' Mut. F. Ins. Co.* (1906) 128 Ill. App. 580, where recovery was sought on an alleged oral contract with a mutual insurance company of which the plain-

tiff was a member, the court stated that, in order to make a valid oral contract of insurance, one party must propose to be insured and the other must agree to insure; and that the subject, the period, the amount, and the rate must be ascertained or understood, and the premium paid if required; that there must be a definite and certain contract, express or implied, covering all these essential elements, but that some of these could be supplied by implication in the case at bar, where the insurance sought was understood by the plaintiff and the agent to be in the defendant company, and its by-laws fixed the premium on ordinary farm risks and made the term perpetual.

But in *Bracken County Ins. Co. v. Murray* (1915) 166 Ky. 821, 179 S. W. 842, it was held that co-operative or assessment companies were authorized to insure only their members, and that one did not become a member merely by making an application for insurance; and it was consequently held that no recovery could be had on an oral contract of insurance to continue pending the acceptance of an application, the applicant not being a member entitled to insurance in the company.

And in *Belleville Mut. Ins. Co. v. Van Winkle* (1858) 12 N. J. Eq. 333, where the charter of a mutual company provided that all policies should be subscribed by the president and attested by the secretary, and also that every person who became a member should, before he received his policy, deposit a promissory note for such a sum as should be determined by the directors, it was held that no valid contract resulted from the secretary's oral statement to an applicant that he was insured from a certain time, there having been no deposit of a note for the premium, although the secretary had stated that this might be attended to later.

And an oral contract by the agent of a mutual company, with one already a member of the company, has been held invalid before the application is received by the secretary, where a by-law provided that, as soon

as the application was received by the secretary, the company should be liable for all losses sustained until the application was refused. *Goldberg v. Seneca, S. & R. Mut. F. Ins. Co.* (1919) 170 Wis. 116, 174 N. W. 558.

And in *Barlow v. Farmers' Mut. F. Ins. Co.* (1906) 128 Ill. App. 580, it was held that no contract to insure in a mutual company was shown, where there was evidence that the plaintiff had a telephone conversation with the defendant's agent, but that the agent did not state that the property would be insured, but said that he would look the building over and fix the matter up, but did not do so before a loss occurred.

And in *Live Stock Ins. Asso. v. Stickler* (1917) 64 Ind. App. 191, 115 N. E. 691, it was held that a valid oral contract was not shown where the plaintiff applied to a mutual company for insurance on his horse, and shortly afterward was notified that his application had not been rejected by the board of directors, and the premium paid was retained by the company, it being held that these facts did not show an approval of the application.

In *Posey County F. Asso. v. Hogan* (1906) 37 Ind. App. 573, 77 N. E. 670, with the exception of a definite allegation as to the premium to be paid, a valid contract of insurance in a mutual company was held to be stated by a complaint alleging an application for insurance; description of property to be insured; title to the property; the amount of insurance; the insurer's agreement to insure the property for a fixed and definite period in consideration of the plaintiff's agreement to pay the amounts assessed against her; and the insurer's agreement to deliver a written policy within a reasonable time, in the usual form. It was stated that while it was not specifically averred that members holding policies in the company were assessed in case of loss, yet that it might be assumed that this was true, in view of the allegation that the defendant agreed to insure the plaintiff's property in consideration of her paying the amount assessed against her in proportion to the amount of her insurance on her

property for the benefit of any member of said association who should sustain a loss, and the complaint was held valid.

IV. Effect of Statute of Frauds.

See also Georgia cases under I. c. and *Croghan v. Underwriters' Agency* (1874) 53 Ga. 109, under II. c.

In the following cases, without specifying any particular section of the statute, it was held that there is nothing in the Statute of Frauds which prevents oral contracts of insurance: *Commercial F. Ins. Co. v. Morris* (1894) 105 Ala. 498, 18 So. 34; *King v. Cox* (1896) 63 Ark. 204, 37 S. W. 877; *Peoria M. & F. Ins. Co. v. Walser* (1864) 22 Ind. 73, dicta; *MASSACHUSETTS BONDING & INS. CO. v. VANCE* (reported herewith) ante, 981; *Croft v. Hanover F. Ins. Co.* (1895) 40 W. Va. 508, 52 Am. St. Rep. 902, 21 S. E. 854.

And it is held that an oral contract to insure, or of insurance, is not within the provision of the Statute of Frauds, requiring agreements not to be performed within a year to be in writing, where such agreements might be performed within a year. *Springfield F. & M. Ins. Co. v. De Jarnett* (1895) 111 Ala. 248, 19 So. 995; *Security F. Ins. Co. v. Kentucky M. & F. Ins. Co.* (1870) 7 Bush (Ky.) 81, 3 Am. Rep. 301; *Phoenix Ins. Co. v. Spiers* (1888) 87 Ky. 285, 8 S. W. 453; *Springfield F. & M. Ins. Co. v. Snowden* (1917) 173 Ky. 664, 191 S. W. 439; *Fidelity & C. Co. v. Ballard* (1899) 105 Ky. 253, 48 S. W. 1074; *Walker v. Metropolitan Ins. Co.* (1868) 56 Me. 371; *Sanborn v. Fireman's Ins. Co.* (1860) 16 Gray (Mass.) 448, 77 Am. Dec. 419; *Sanford v. Orient Ins. Co.* (1899) 174 Mass. 416, 75 Am. St. Rep. 358, 54 N. E. 883; *Wiebeler v. Milwaukee Mechanics' Mut. Ins. Co.* (1883) 30 Minn. 464, 16 N. W. 363; *International Ferry Co. v. American Fidelity Co.* (1913) 207 N. Y. 350, 101 N. E. 160; *Van Loan v. Farmer's Mut. F. Ins. Co.* (1881) 24 Hun (N. Y.) 132, affirmed in (1882) 90 N. Y. 280.

And it has been held that an agreement to renew a policy from year to year is not within the Statute of Frauds on the ground that, by its

terms, it is not to be performed within one year from the mailing. *First Baptist Church v. Brooklyn F. Ins. Co.* (1859) 19 N. Y. 305. The court said: "It is not the meaning of the statute that the contract must be performed within a year. If it can be so performed consistently with the language in which the parties have expressed themselves,—in other words, if the obligation of the contract is not, by its very terms or necessary construction, to endure for a longer period than one year,—it is a valid agreement, although it may be capable of an indefinite continuance. An agreement which either party can terminate at any time by a notice to the other may be binding so long as the notice is not given, but it is not within the language or policy of the statute."

And the same conclusion was reached in *Phoenix Ins. Co. v. Ireland* (1899) 9 Kan. App. 644, 58 Pac. 1024, and *Struzewski v. Farmers' F. Ins. Co.* (1917) 179 App. Div. 318, 166 N. Y. Supp. 362, reversed on other grounds in (1919) 226 N. Y. 338, 123 N. E. 661.

But it has been held that an agreement with an agent that he would renew a policy on a certain date, and, until otherwise directed, renew it on the same date each year thereafter, is, so far as it involves a renewal more than a year after the making of the agreement, within the provisions of the Statute of Frauds that no action shall be brought to charge any person "upon any agreement which is not to be performed within one year from the making thereof," unless it is in

writing. *Klein v. Liverpool & L. & G. Ins. Co.* (1900) 22 Ky. L. Rep. 301, 57 S. W. 250.

And in *Ætna Ins. Co. v. Richey* (1918) — Tex. Civ. App. —, 206 S. W. 383, it was held that a parol agreement to renew insurance, made upon the issuance of a policy for three years, was invalid, as it violated the provision of the Statute of Frauds that no action shall be brought upon any agreement which is not to be performed within one year from the making thereof, unless it is in writing.

And in *Harrower v. Insurance Co. of N. A.* (1920) 144 Ark. 279, 22 S. W. 39, it was held that an oral contract, made when a policy was obtained, that other policies should be issued from year to year, during three years, was a contract not to be performed within a year, and within the Statute of Frauds.

It has been held that an oral contract of fidelity insurance is a special promise to answer for the debt, default, or doings of another, within the Statute of Frauds. *Wainwright Trust Co. v. United States Fidelity & G. Co.* (1916) 63 Ind. App. 309, 114 N. E. 470; *Quinn-Shepherdson Co. v. United States Fidelity & G. Co.* (1919) 142 Minn. 428, 172 N. W. 693.

But an oral agreement to insure goods in possession of a carrier for transportation against loss by fire has been held not invalid, as being an undertaking to answer for the default or miscarriage of another. *Mobile Marine Dock & Mut. Ins. Co. v. McMillan* (1858) 31 Ala. 711. J. T. W.

LOYD BRADLEY, Admr., etc., of W. H. Fraley, Deceased, Plff. in
Certiorari,

v.

FEDERAL LIFE INSURANCE COMPANY.

Illinois Supreme Court — December 21, 1920.

(295 Ill. 381, 129 N. E. 171.)

Insurance — delay in passing on application — effect.

1. Mere delay in passing upon an application for accident insurance cannot be construed into an acceptance by the insurer.

[See note on this question beginning on page 1026.]

— action for failure to execute policy.

2. No cause of action against an insurance company for delay in issuing the policy accrues to the administrator of the applicant upon the latter's instant death by accident before the policy is issued.

[See 14 R. C. L. 896.]

Pleading — in bar — waiver.

3. Pleading in bar to a declaration claiming damages for failure to issue an insurance policy before death of the applicant does not waive the objection that no right of action accrued to the administrator.

CERTIORARI to the Appellate Court, Fourth District, to review a judgment reversing a judgment of the Circuit Court for Jackson County (Butler, J.) in favor of plaintiff in an action brought to recover damages for alleged negligence of defendant in failing to pass upon an application for accident insurance. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Charles E. Feirich, Otis F. Glenn, Loyd Bradley, and Lawrence A. Glenn, for plaintiff in certiorari:

Each count of the declaration stated a good cause of action. The general demurrers thereto were properly overruled.

Duffie v. Bankers' Life Asso. 160 Iowa, 19, 46 L.R.A.(N.S.) 25, 139 N. W. 1087; *Boyer v. State Farmers' Mut. Hail Ins. Co.* 86 Kan. 442, 40 L.R.A.(N.S.) 164, 121 Pac. 329, Ann. Cas. 1915A, 671; *Wilken v. Capital Fire Ins. Co.* 99 Neb. 828, 157 N. W. 1021; *Northwestern Mut. L. Ins. Co. v. Neafus*, 145 Ky. 563, 36 L.R.A.(N.S.) 1211, 140 S. W. 1026; *Stearns v. Merchants' Life & Casualty Co.* 38 N. D. 524, 165 N. W. 568; 14 R. C. L. 896; *Johnson v. Farmers' Ins. Co.* 184 Iowa, 630, 163 N. W. 264; *Wallace v. Hartford Fire Ins. Co.* 31 Idaho, 481, 174 Pac. 1009; *Pfister v. Missouri State L. Ins. Co.* 85 Kan. 97, 116 Pac. 245; *Live Stock Ins. Co. v. Stickler*, 64 Ind. App. 191, 115 N. E. 691.

The administrator is the proper party plaintiff.

Duffie v. Bankers' Life Asso. supra; *Schmidt v. Northern Life Asso.* 112 Iowa, 41, 51 L.R.A. 141, 84 Am. St. Rep. 323, 83 N. W. 800.

The notation of the receipt, "Applicants will please notify the company, at Chicago, Illinois, should the policy not be received within ten days from date hereof," is a request, and not a condition, and failure to give such notice is no defense.

Stearns v. Merchants' Life & Casualty Co. 38 N. D. 524, 165 N. W. 568; *Duffie v. Bankers' Life Asso.* supra.

Not having attempted to make it a condition that applicant notify the company if the policy was not received with-

in ten days, such notation is not a condition precedent which must be complied with before liability attaches.

14 R. C. L. § 103, note 9; *Manufacturers & M. Mut. Ins. Co. v. Zeitinger*, 168 Ill. 292, 61 Am. St. Rep. 105, 48 N. E. 179; *Central Acci. Ins. Co. v. Rembe*, 220 Ill. 151, 5 L.R.A.(N.S.) 936, 110 Am. St. Rep. 235, 77 N. E. 123, 5 Ann. Cas. 155; *Anson v. New York L. Ins. Co.* 252 Ill. 369, 37 L.R.A.(N.S.) 555, 96 N. E. 846; *Travelers' Ins. Co. v. Ayers*, 217 Ill. 390, 2 L.R.A.(N.S.) 168, 75 N. E. 506; 1 *Cooley, Briefs on Ins.* 632.

Messrs. C. A. Atkinson, John M. Herbert, and L. R. Stewart, for defendant in certiorari:

Where there is no duty or obligation there can be no liability for negligence.

Chicago & A. R. Co. v. Clausen, 173 Ill. 100, 50 N. E. 680; *Ayers v. Chicago*, 111 Ill. 406; *Milauskis v. Terminal R. Asso.* 286 Ill. 547, 122 N. E. 78; *Chicago Union Traction Co. v. Giese*, 229 Ill. 260, 82 N. E. 232; *Illinois C. R. Co. v. O'Connor*, 189 Ill. 559, 59 N. E. 1098; *Williams v. Chicago & A. R. Co.* 135 Ill. 491, 11 L.R.A. 352, 25 Am. St. Rep. 397, 26 N. E. 661; *Eakins v. Chicago, R. I. & P. R. Co.* 126 Iowa, 324, 102 N. W. 104; *Schueler v. Mueller*, 193 Ill. 402, 61 N. E. 1044; *National Union Fire Ins. Co. v. School Dist.* 122 Ark. 179, L.R.A.1916D, 239, 182 S. W. 547; *Meyer v. Central States L. Ins. Co.* 103 Neb. 640, 173 N. W. 578, 19 N. C. C. A. 700; *Drury v. East St. Louis Light & P. Co.* 194 Ill. App. 121, 2 N. C. C. A. 346; *Royal Ins. Co. v. Beatty*, 119 Pa. 6, 4 Am. St. Rep. 622, 12 Atl. 607; *Daugherty v. Herzog*, 145 Ind. 255, 32 L.R.A. 837, 57 Am. St. Rep. 204, 44 N. E. 457.

An application for insurance is but a proposal, and defendant was under no obligation to do or say anything con-

cerning a proposition which it did not choose to accept.

Covenant Mut. Ben. Assn. v. Conway, 10 Ill. App. 348; *More v. New York Bowery F. Ins. Co.* 130 N. Y. 537, 29 N. E. 757; *McLendon v. Woodmen of World*, 106 Tenn. 695, 52 L.R.A. 444, 64 S. W. 36; *McGivern v. Parkhill*, 195 Ill. App. 343.

There can be no recovery, where damages could have been prevented or avoided by reasonable care and effort on the part of the party claiming to have been damaged.

Cedar Rapids & I. C. R. & Light Co. v. Sprague Electric Co. 280 Ill. 386, L.R.A.1918B, 200, 117 N. E. 461; *Sutherland, Damages*, § 88; *Brant v. Gallup*, 111 Ill. 487, 53 Am. Rep. 638; *Scherrer v. Baltzer*, 84 Ill. App. 126; *Jorgenson v. Johnson Chair Co.* 169 Ill. 429, 48 N. E. 822; *Alabama Gold L. Ins. Co. v. Mayes*, 61 Ala. 163; *Cooley, Torts*, 3d ed. p. 1478; 8 Am. & Eng. Enc. Law, 2d ed. p. 605; 16 Cyc. 770.

There are no averments of facts in either count of the declaration showing a legal duty devolving upon defendant either to issue a policy, or, if it rejected the application, to notify W. H. Fraley at any time of such rejection.

Chicago & A. R. Co. v. Clausen, 173 Ill. 100, 50 N. E. 680; *Ayers v. Chicago*, 111 Ill. 406; *Milauskis v. Terminal R. Assn.* 286 Ill. 547, 122 N. E. 78; *Chicago Union Traction Co. v. Giese*, 229 Ill. 260, 82 N. E. 232; *Illinois C. R. Co. v. O'Connor*, 189 Ill. 559, 59 N. E. 1098; *Williams v. Chicago & A. R. Co.* 135 Ill. 491, 11 L.R.A. 352, 25 Am. St. Rep. 397, 26 N. E. 661; *Eakins v. Chicago, R. I. & P. R. Co.* 126 Iowa, 324, 102 N. W. 104; *Schueler v. Mueller*, 193 Ill. 402, 61 N. E. 1044; *National Union F. Ins. Co. v. School Dist.* 122 Ark. 179, L.R.A.1916D, 238, 182 S. W. 547; *Meyer v. Central States L. Ins. Co.* 103 Neb. 640, 173 N. W. 578, 19 N. C. C. A. 700; *Drury v. East St. Louis Light & P. Co.* 194 Ill. App. 121, 12 N. C. C. A. 346; *Royal Ins. Co. v. Beatty*, 119 Pa. 6, 4 Am. St. Rep. 622, 12 Atl. 607.

Farmer, J., delivered the opinion of the court:

This suit was an action on the case, begun in the circuit court of Jackson county by plaintiff, Loyd Bradley, as administrator of the estate of W. H. Fraley, deceased, against the defendant, the Federal Life Insurance Company. The declaration consisted of two counts. The

cause of action alleged in the first count is that defendant, a corporation, is engaged in the business of insuring persons against accidental injuries and death resulting from such injuries, and employs agents to solicit and receive applications; that on May 2, 1917, F. G. Farnham, a duly authorized agent, solicited Fraley to make application for an accident policy with defendant; that Fraley did on said day make application for an accident insurance policy in the defendant company; that he signed and executed said application as directed by defendant's agent, Farnham, and paid the first payment, \$7, which was the amount necessary to keep the policy in force three months from its date; that the application was for an accident insurance policy insuring Fraley in the sum of \$5,000 against death from accidental injuries; that the amount to be paid in case of Fraley's death from accidental injuries was \$5,000; that at the time the application was made Fraley was forty-six years old, in good health, and a desirable and acceptable risk; that if the application and first payment had been forwarded to defendant's head office in Chicago, within a reasonable time, by its agent, a policy would have been issued to Fraley insuring him, which would have been in full force and effect at the time of his accidental injury and death; that it was the duty of defendant's agent to Fraley and his estate to promptly forward the application and first payment to defendant's head office, in Chicago, which was distant 308 miles from Carbondale, Illinois, where the application was made and the premium paid, but that said agent neglected and failed to forward the application and payment to defendant's home office, as a result whereof no policy was ever issued to Fraley; that, while walking along the right of way of the Illinois Central Railroad Company in the city of Carbondale, Fraley accidentally slipped and fell under a moving passenger train, and received such injuries that he died June 29, 1917; that his

injuries and death were effected solely, directly, and independently of all other causes, through external, violent, and purely accidental means, and were such injuries as would have been insured against in and by said policy so applied for by Fraley, and upon which he had made the first payment, had the same been forwarded to him by defendant, as was its duty to do. The second count alleges the same facts, and charges that defendant negligently failed to act upon the application within a reasonable time, and either issue a policy or reject the application in sufficient time to enable Fraley to procure other accident insurance.

Defendant filed a general demurrer to the declaration, which was overruled, and it then filed pleas—the general issue and two special pleas. The first special plea was a plea of the tender of \$7. The second special plea set out the receipt given by defendant's agent to Fraley, acknowledging the receipt of the application and the first payment of \$7 to keep the policy in force three months, and agreeing to return to Fraley said payment if defendant declined to issue the policy within ten days. The receipt contained this sentence: "Applicants will please notify the company at Chicago, Illinois, should the policy not be received within ten days from date hereof."

The plea then averred that Fraley negligently failed to notify defendant within ten days that he had not received the policy, and further averred that, had Fraley so notified defendant, it would have notified him within a reasonable time of the acceptance or rejection of his application.

Demurrers were sustained to both special pleas, and the cause was heard and submitted to the jury on the declaration and plea of general issue. A motion by defendant to direct a verdict in its favor was overruled, and the jury returned a verdict for plaintiff for \$5,000. Defendant entered a motion, after verdict, to dismiss the suit for want of juris-

diction, which the court overruled. It also entered motions for a new trial and in arrest of judgment, which motions the court overruled, and rendered judgment on the verdict for plaintiff. On appeal to the appellate court for the fourth district, that court reversed the judgment, and did not remand the cause. This court granted a petition for a writ of certiorari to review the judgment of the appellate court.

It is to be observed that the action is not on a contract of insurance, for no policy was issued. The suit is in tort for the alleged negligence of defendant in failing to issue the policy within a reasonable time after its agent received Fraley's application and his first payment of premium. The theory contended for by plaintiff is that the declaration sets up facts showing neglect of defendant to perform a legal duty, which entitles plaintiff to recover in this action. Similar cases have been adjudicated in some other states, but the question here involved has not been heretofore decided in this state. The appellate court disposed of the case upon the ground that no right of action survived on the death of Fraley, and did, as we understand the opinion, hold that no cause of action accrued to anyone on account of the accidental death of Fraley, who was instantly killed by a passenger train.

Counsel for plaintiff say, in their brief, the declaration discloses that no cause of action accrued until the death of Fraley; that neither he nor his estate sustained any injury until his death, which was instantaneous. If the death was caused by the wrongful act or negligence of a person or corporation, an action accrued under our Injuries Statute to the personal representatives of the deceased, against the wrongdoer, for the benefit of the widow and next of kin, but that statute, of course, has no application to the cause of action here alleged, which was not for the causing of the death of Fraley, but for damages to his estate for failing to pass on his application for insur-

ance before his death occurred. The question presented is not whether a cause of action accrued to Fraley, and on his death survived to his administrator, for it is admitted no cause of action accrued to him. If no cause of action accrued to him, then to sustain the action it would be necessary to hold that the action accrued to the administrator. There is no statute under which it can be claimed the cause of action here sued on accrued to Fraley's administrator on his death. Neither under our statute on abatement, nor under any other statute, is it provided that a cause of action which never accrued to a person in his lifetime may survive to his administrator. 1 C. J. § 325.

Plaintiff relies on *Duffie v. Bankers' Life Asso.* 160 Iowa, 19, 46 L.R.A.(N.S.) 25, 139 N. W. 1087, and *Boyer v. State Farmers' Mut. Hail Ins. Co.* 86 Kan. 442, 40 L.R.A.(N.S.) 164, 121 Pac. 329, Ann. Cas. 1915A, 671, as being directly in point as supporting plaintiff's position, and cites some other cases as approving those decisions. In the *Duffie* Case the action was brought by the wife of Joseph M. Duffie, who died July 9, 1911. A month before his death he applied to the insurance company for life insurance, signed an application naming his wife as beneficiary, and took the medical examination required, which he successfully passed. The application and report of the medical examiner were not forwarded to the insurance company's office until Duffie's death. The insurance company refused to pay the claim made, and the action was brought by his wife to recover it. The complaint alleged that defendant's agent carelessly and negligently failed to send the application to the home office of the defendant, after Duffie had been examined by its physician, in consequence of which negligence no policy of life insurance was issued; that, if the application had been forwarded as soon as the applicant was examined by the company's physician, a policy would have been issued to him and

would have been in force at the time of his death, which occurred one month after he made the application. The question of the action accruing or surviving to the plaintiff does not appear to have been raised. The trial court directed a verdict for the defendant, and on appeal the supreme court of Iowa reversed the judgment. In the opinion, which it must be admitted supports plaintiff's position, will be found cited other decisions relied on by plaintiff, and which are not here specifically mentioned. In some, at least, of them, while the court used language which appears to be in harmony with the *Duffie* Case, the question was not involved for decision, for the action was on contract, and it is not and cannot be denied that the overwhelming weight of authority is that mere delay in passing upon an application for insurance cannot be construed into an acceptance by the insurer.

Insurance—
delay in passing
on application—
effect.

In the *Boyer* Case, on July 7 Boyer applied for insurance on a growing crop of corn against damage by hail, and gave his note in payment of the premium. The agent of the insurance company did not forward the application and note to the company until the night of July 10, and it was not received at the company's office till July 12, and a policy was issued that day. On July 11 a hail destroyed the crop, and the company refused to pay the loss. The court in its opinion stated that the suit was not on a contract of insurance, but was based on the negligence of the insurance company's agent in not forwarding the application and premium until too late to be of any benefit to the insured, and that the agent's negligence was the negligence of the company. The insurance company was held liable. The difference between that case and the *Duffie* Case, and the case under consideration here, is that, if any action accrued to anyone, it accrued to Boyer in his lifetime, and the suit was

prosecuted by him. *Northwestern Mut. L. Ins. Co. v. Neafus*, 145 Ky. 563, 36 L.R.A.(N.S.) 1211, 140 S. W. 1026, was an action on an alleged contract of insurance, and we do not consider some things that were said in the opinion as pertinent to the question involved. In *Wilken v. Capital Fire Ins. Co.* 99 Neb. 828, 157 N. W. 1021, the court followed the decision in the *Duffie Case*, three justices dissenting, and in the later case of *Meyer v. Central States L. Ins. Co.* 103 Neb. 640, 173 N. W. 578, 19 N. C. C. A. 700, the same court declined to follow the *Wilken Case*, and held that an action of tort would not lie for a refusal to make a contract. In *National Union F. Ins. Co. v. School Dist.* 122 Ark. 179, L.R.A.1916D, 238, 182 S. W. 547, the supreme court held a cause of action for negligence could not be predicated upon mere delay in passing upon an application for insurance.

Whether Fraley, if he had not been instantly killed, but had survived his injuries, would have had a cause of

action for accidental injury under other provisions of the policy he applied for, is not here involved; but in our view, under ^{—action for failure to execute policy.} sound legal principles, no cause of action survived or accrued to his administrator on the facts alleged in the declaration.

Plaintiff contends that defendant should have raised the question of the right of plaintiff to maintain the suit by pleading in abatement, and that, by pleading in bar after demurrer overruled, the question was waived. If, as we hold, it appears on the face of the declaration that no cause of action accrued to Fraley, the question was not whether an action abated, but whether a right of action accrued to his administrator. The objection might properly be raised ^{Pleading—in bar—waiver.} on motion in arrest of judgment. We think the question was not waived.

The judgment of the Appellate Court is affirmed.

ANNOTATION.

Rights and remedies arising out of delay in passing upon application for insurance.

- I. Liability as upon contract, 1026.
- II. Liability ex delicto, 1029.

Oral contracts are the subject of the annotation following *Massachusetts Bonding & Ins. Co. v. Vance*, ante, 981.

I. Liability as upon contract.

It is a well-settled rule, established by the great weight of authority, that mere delay in passing upon an application for insurance cannot be construed as an acceptance thereof by the insurer which will support an action ex contractu.

United States.—*Kohen v. Mutual Reserve Fund Life Asso.* (1886) 28 Fed. 705; *Misselhorn v. Mutual Reserve Fund Life Asso.* (1887) 30 Fed. 545; *Equitable Life Assur. Soc. v. McElroy* (1897) 28 C. C. A. 365, 49 U. S. App. 548, 83 Fed. 631.

Alabama.—*Alabama Gold L. Ins. Co. v. Mayes* (1878) 61 Ala. 163.

Georgia.—*New York L. Ins. Co. v. Babcock* (1898) 104 Ga. 67, 42 L.R.A. 88, 69 Am. St. Rep. 134, 30 S. E. 273.

Idaho.—*Easley v. New Zealand Ins. Co.* (1897) 5 Idaho, 593, 51 Pac. 418.

Illinois.—*Winneshiek Ins. Co. v. Holzgrafe* (1870) 53 Ill. 516, 5 Am. Rep. 64.

Iowa.—*Winchell v. Iowa State Ins. Co.* (1897) 103 Iowa, 189, 172 N. W. 503.

Kentucky.—*Northwestern Mut. L. Ins. Co. v. Neafus* (1911) 145 Ky. 563, 36 L.R.A.(N.S.) 1211, 140 S. W. 1026.

Maryland.—*Harp v. Grangers' Mut. F. Ins. Co.* (1878) 49 Md. 307.

Minnesota.—*Heiman v. Phoenix Mut. L. Ins. Co.* (1871) 17 Minn. 153, 10 Am. Rep. 154, Gil. 127.

Nebraska.—*St. Paul F. & M. Ins. Co. v. Kelley* (1902) 2 Neb. (Unof.) 720, 89 N. W. 997; *Handler v. Knights of Columbus* (1921) — Neb. —, 183 N. W. 800.

New York. — *More v. New York Bowery F. Ins. Co.* (1892) 130 N. Y. 538, 29 N. E. 757, reversing (1890) 55 Hun, 540, 10 N. Y. Supp. 44.

North Carolina.—*Ross v. New York L. Ins. Co.* (1899) 124 N. C. 395, 32 S. E. 733.

Oklahoma.—*Van Arsdale v. Young* (1908) 21 Okla. 151, 95 Pac. 778; *Dorman v. Connecticut F. Ins. Co.* (1914) 41 Okla. 509, 51 L.R.A.(N.S.) 873, 139 Pac. 262; *Shawnee Mut. F. Ins. Co. v. McClure* (1913) 39 Okla. 535, 49 L.R.A.(N.S.) 1054, 135 Pac. 1150.

Pennsylvania. — *New York Union Mut. Ins. Co. v. Johnson* (1854) 23 Pa. 72; *Ryan v. Prudential Ins. Co.* (1907) 33 Pa. Super. Ct. 364; *Ripker v. Mut. F. Ins. Co.* (1908) 36 Pa. Super. Ct. 517; *Somerset County Mut. F. Ins. Co. v. May* (1875) 2 W. N. C. 43.

South Dakota.—*Brink v. Merchant's & F. United Mut. Ins. Asso.* (1903) 17 S. D. 235, 95 N. W. 929.

Tennessee.—*Richmond v. Travelers' Ins. Co.* (1910) 123 Tenn. 307, 30 L.R.A.(N.S.) 954, 130 S. W. 790.

Texas.—*Connecticut Mut. L. Ins. Co. v. Rudolph* (1876) 45 Tex. 454.

Virginia.—*Haskin v. Agricultural F. Ins. Co.* (1884) 78 Va. 700; *Haden v. Farmers & M. Fire Asso.* (1885) 80 Va. 683.

In *New York Union Mut. Ins. Co. v. Johnson* (Pa.) *supra*, where the failure for six months to refund the amount paid as a premium and give notice that the application had been rejected was held not to constitute an acceptance, the court said: "But it is said that the loss did not take place for nearly six months after the application, and that during all that time the defendants neglected to refund the money, and to notify the plaintiffs that their proposal was rejected. And this is thought to be such negligence on the part of the defendants below as justifies and requires the inference that they had approved or accepted the proposal, and here is the root of the error of the court below. A principal is bound by the authorized acts of his agent, whether notified of them or not, and therefore the defendants are chargeable with having received this proposal; but that does not help the

plaintiffs, for receiving it is not an acceptance of it. A principal is also bound by the unauthorized acts of his agent, if, on being notified, he does not disavow them; but neither does this help the plaintiffs, for the agent made no contract to insure, and, even if he did, no notice of such contract is proved. What is the true effect of the delay? It cannot of itself make a contract. A proposal cannot become a contract by delay in rejecting or answering it. A delay in paying \$25 cannot make a man liable for \$2,500. A neglect or delay that has properly a tendency to mislead another, and which is incompatible with honesty, may be charged as a ground of liability; as where one knows that another is acting as his agent in a particular matter, without or beyond his authority, and does not promptly disavow his acts. But in this case the plaintiffs had in their own hands the power of correcting the delay; for undue delay in accepting a proposal may be, and ought to be, treated as a rejection of it, and the proposer may refuse to be bound by a tardy acceptance. A proposal not answered remains a proposal for a reasonable time, and is then regarded as withdrawn. Both parties are interested in its acceptance, and both are expected to attend to it with reasonable diligence."

An insurance company does not, by delaying in passing upon an application presented by an uninsurable risk, assume the obligation of an insurer, upon the theory that its conduct prevents the securing of insurance elsewhere and creates a legal presumption of acceptance. *Northwestern Mut. L. Ins. Co. v. Neafus* (1911) 145 Ky. 563, 36 L.R.A.(N.S.) 1211, 140 S. W. 1026.

And where a soliciting agent of limited authority did not mail an application and the premium for fire insurance until four days after he received them, and an investigation of the risk was being made by the insurer, and the property was burned two days after the application was forwarded, the court stated that it could not be contended that the insurer held the application and premium so long, or otherwise conducted itself in such a

way in reference thereto, as to be tantamount to an acceptance, remarking that it was not necessary to cite the many cases holding that mere delay in accepting an application does not raise a presumption of acceptance. *Shawnee Mut. F. Ins. Co. v. McClure* (1918) 39 Okla. 535, 49 L.R.A.(N.S.) 1054, 135 Pac. 1150.

And in a case where the constitution and by-laws of a benefit order provided that the local order might receive applications for benefit certificates, to be forwarded to the grand lodge, whose grand medical examiner had the authority to reject the applicant altogether, it was held that a delay on the part of the local lodge in forwarding the application to the grand lodge would not create a contract of insurance. *Home Forum Benefit Order v. Jones* (1897) 5 Okla. 598, 50 Pac. 165.

And a like result was reached in *Handler v. Knights of Columbus* (1921) — Neb. —, 183 N. W. 300, on similar facts.

And an unaccepted application for insurance, accompanied by the premium, although retained without notice of rejection for five days after its date, and until the applicant had suffered the loss against which he desired the insurance, does not constitute a contract of insurance. *Dorman v. Connecticut F. Ins. Co.* (1914) 41 Okla. 509, 51 L.R.A.(N.S.) 873, 139 Pac. 262.

And in *Goldberg v. Seneca, S. & R. Mut. F. Ins. Co.* (1919) — Wis. —, 174 N. W. 558, the applicant, who had other insurance in the defendant mutual company, was held chargeable with knowledge of a by-law providing that, as soon as the application was received by the secretary, the company should be liable for all losses sustained until the application was refused and placed in the postoffice directed to the applicant; and it was held essential that the application should at least have been received by the secretary before any liability could be fastened upon the company for a loss occurring subsequently to the date of the application; and this was held although the application was not received from the insurer's agent for about two weeks after it was made,

and until the day after the property had been destroyed by fire.

And in *McLendon v. Woodmen of World* (1900) 106 Tenn. 695, 52 L.R.A. 444, 64 S. W. 86, it was held that a mere delay in delivering and executing a benefit certificate, during which the applicant died, did not give any right of recovery on the certificate, where the terms of the contract prevented it from taking effect until its delivery to the applicant in good health, and the delay was not unreasonable, or caused by bad faith, and there was no time prescribed within which the delivery should be made. The court said: "It is said there was unreasonable delay in returning the certificate, and that it, having been actually signed and issued from the Sovereign Camp December 31, should be held to take effect at a prior date. It is only necessary to state that there does not appear to have been any delay arising out of bad faith on the part of the company. Neither the application, nor the constitution and rules of the order, prescribe any limit within which the certificate shall be returned and the contract completed. Before the certificate was signed, the applicant had become sick. Before it was ready for delivery, he was dead. There does not appear to have been any unnecessary or unreasonable delay, but only such as was required to perfect the application and examination."

But in *Indiana National L. Ins. Co. v. Maines* (1921) — Ky. —, 230 S. W. 54, it was held that while mere delay in acting upon an application for a policy of life insurance, which, when acted upon, would be rejected, does not fix liability upon the company from its date, where the application is subject to the company's approval, and it is expressly provided that the insurance shall not relate back unless the application is accepted, yet an insurance company will not be allowed to reject an application for insurance for the sole reason that the applicant had died or a loss had occurred before action was taken thereon, where it is shown that, but for the death or loss,

the application would have been accepted and the policy issued.

And it has been held that, where an application for insurance had been made, and the premium duly paid by the applicant to a general agent, and the company had delayed the issuance of the policy merely for the purpose of effecting a settlement with the agent, the retention of the premium and the application should be construed as an acceptance of the latter, and the making of the insurance contract. Preferred Acci. Ins. Co. v. Stone (1899) 61 Kan. 48, 53 Pac. 986.

And from the language used in Pickett v. German F. Ins. Co. (1888) 39 Kan. 697, 18 Pac. 903, it would seem that the court was of the opinion that delay on the part of the insured in passing upon an application might make a contract of insurance, since, in affirming the overruling of a demurrer to a petition on the policy of insurance, it used the following language: "The petition contains no averment that the application had been approved, or that it had been retained by the defendant for such a period as would raise a presumption of approval."

And in Atkinson v. Hawkeye Ins. Co. (1887) 71 Iowa, 340, 32 N. W. 371, where the application was never received by the insurer, there is a statement that if the insurer "had received the application and premium, and retained the same, and remained silent, it may be that it should be held to have approved the application."

And in Robinson v. United States Benev. Soc. (1903) 132 Mich. 695, 102 Am. St. Rep. 436, 94 N. W. 211, where the application expressly provided that the contract of insurance should be complete the moment that the application was received at the insurance company's office and accepted by its secretary, it was held that the application and acceptance formed a contract until the certificate, or policy, was issued and received in its stead, and the court said: "In insurance contracts of this character it is the duty of the company to act with reasonable promptness. Failing to reject within a reasonable time, the law implies an acceptance."

In Phoenix Ins. Co. v. Hale (1900) 67 Ark. 433, 55 S. W. 486, an insurance company was held to be liable on its policy of insurance, where the holder made an application for renewal thereof, and paid the premium to the agent, and received from him a binding receipt, and the insurer declined to renew the policy, but failed to notify the insured or to return the premium.

In Wanberg v. National Union F. Ins. Co. (1920) — N. D. —, 179 N. W. 666, a statute providing that every insurance company engaged in the hail insurance business should be bound, and the insurance take effect, twenty-four hours after the day and hour the application therefor had been taken by the authorized agent of the company, and that, if the latter should decline to write the insurance, it should notify the agent and applicant by telegram, was held to cover all applications for hail insurance, although they include insurance against losses from other causes. In this case, a judgment was affirmed for an applicant who had filed an application for hail insurance, and whose crop was destroyed by hail the following day, it appearing that the insurance company had not rejected the risk within twenty-four hours, nor until four days after the application was made.

II. Liability ex delicto.

In a class of comparatively recent cases, a right of recovery in an action of tort against insurers has been upheld, on the ground of negligence in failing to act upon an application, and there was a subsequent loss not covered by insurance. The right to maintain such an action was recognized in the following cases: Duffie v. Bankers' Life Asso. (1913) 160 Iowa, 19, 46 L.R.A.(N.S.) 25, 139 N. W. 1087; Johnson v. Farmers Ins. Co. (1918) 184 Iowa, 630, 168 N. W. 264; Boyer v. State Farmers' Mut. Hail Ins. Co. (1912) 86 Kan. 442, 40 L.R.A.(N.S.) 164, 121 Pac. 329, Ann. Cas. 1915A, 671; Wilken v. Capital F. Ins. Co. (1916) 99 Neb. 828, 157 N. W. 1021.

But the cases are not unanimous upon this point. National Union F. Ins. Co. v. School Dist. (1916) 122 Ark. 179,

L.R.A.1916D, 238, 182 S. W. 547; Interstate Business Men's Asso. v. Nichols (1920) 143 Ark. 369, 220 S. W. 477.

In *Duffie v. Bankers' Life Asso.* (1913) 160 Iowa, 19, 46 L.R.A.(N.S.) 25, 139 N. W. 1087, holding that an insurance company acting under a state franchise was liable in an action of tort for damages for losses caused by its failure promptly to act upon an application for life insurance, received upon its own solicitation and accompanied by the requisite premium. The court said: "But it is said that a certificate or policy of insurance is simply a contract like any other, as between individuals, and that there is no such thing as negligence of a party in the matter of delay in entering into a contract. This view overlooks the fact that the defendant holds and is acting under a franchise from the state. The legislative policy, in granting this, proceeds on the theory that chartering such association is in the interest of the public, to the end that indemnity on specific contingencies shall be provided those who are eligible and desire it, and for their protection the state regulates, inspects, and supervises their business. Having solicited applications for insurance, and having so obtained them, and received payment of the fees or premiums exacted, they are bound either to furnish the indemnity the state has authorized them to furnish, or decline so to do within such reasonable time as will enable them to act intelligently and advisedly thereon, or suffer the consequences flowing from their neglect so to do. Otherwise the applicant is unduly delayed in obtaining the insurance he desires, and for which the law has afforded the opportunity, and which the insurer impliedly has promised, if conditions are satisfactory. Moreover, policies or certificates of insurance ordinarily are dated as of the day the application is signed, and, aside from other considerations, the insurer should not be permitted to unduly prolong the period for which it is exacting the payment of premium, without incurring risk."

It was further held in the above case

that the jury would have been justified in finding that, but for the insurer's negligence, a certificate of insurance would have been issued, where there was evidence that the applicant was young, his character good, his occupation not hazardous, and that he had passed a satisfactory examination and been recommended by the examining physician. And it was also decided that one who has applied for insurance and passed a satisfactory examination, upon the assurance that insurance will be in force from the time of the medical examination, is not per se in fault in failing to make inquiry in case the policy is not promptly issued.

In the *Duffie Case* (Iowa) *supra*, the question whether the insurer, in the exercise of ordinary diligence, should have passed on the application prior to the applicant's death, was held to be for the jury, it appearing that the agent, in violation of his duty promptly to forward the application, allowed it to lie on the examining physician's desk a month lacking a day, and that the insurance company, with knowledge of the application, did nothing during the twenty-seven days intervening prior to the applicant's death by drowning, although another application, taken about the same time and in the same vicinity, was acted upon, and a certificate issued within nineteen days.

The *Duffie Case* (Iowa) *supra*, was relied upon in *Wilken v. Capital F. Ins. Co.* (1916) 99 Neb. 828, 157 N. W. 1021, holding that the question of the insurer's responsibility for failure duly to act upon the application was for the jury, where an authorized agent of the insurer sent an application for a specified amount of insurance upon certain property to a bank, to be executed by the owners, who signed the application and left it with the bank to be returned to the agent, but the bank, through some oversight, failed to return the application for more than ten days, and during that time the property was destroyed by fire, the insurer having refused to pay the loss solely because the application had not been received and approved and the policy issued before the fire,

the delay of the bank in forwarding the application being considered the act of the agent, for which the insurer was responsible.

And in *Boyer v. State Farmers' Mut. Hail Ins. Co.* (1912) 86 Kan. 442, 40 L.R.A.(N.S.) 164, 121 Pac. 329, Ann. Cas. 1915A, 671, a hail insurance company which issued a policy on a crop of growing corn the day after it was destroyed by a hailstorm was held liable, in an action of negligence, for the amount of insurance which would have been in force before the storm, had its soliciting agent not delayed for five days to forward the application, it appearing that the application was made at the danger period of the corn-growing season. The court said: "There was sufficient danger to the plaintiff to be apprehended from delay in closing the transaction, that a reasonably prudent business man, guided by the considerations which ordinarily regulate conduct, would have acted with diligence. If the agent only be considered, it is clear enough that he would be liable if his negligent retention of the application prevented its timely acceptance. Since he was merely the arm of the defendant, the obligation resting upon him was the obligation of the defendant. Therefore, the duty of the defendant to secure prompt transmission of the application from the solicitor's field to the central office is quite apparent. Whether or not the delay in this case was unreasonable was a question of fact for the trier of the facts, and, as it is presented here, is not one of law for this court."

And in *Johnson v. Farmers' Ins. Co.* (1918) 184 Iowa, 630, 168 N. W. 264, it was held that if the authority actually given the insurer's agent, or the authority which it apparently permitted him to exercise, was such as to justify an applicant for fire insurance in agreeing with him upon the terms of insurance, paying him the premium, and relying upon him to report the same to the company, either orally or in an application made by himself, and obtain a policy embodying the agreement, and he failed and neglected to report such agreement to the

company, or transmit the premium collected to it, and failed to notify the applicant of the true situation, and the latter, as a person of ordinary care and prudence, was led to believe, and did believe, that the insurance for which an application had been filed and premium paid had been duly effected, the negligence of the agent was chargeable to the company, and that the applicant might recover damages. It was argued in this case that the agent's agreement to receive and hold the policy on deposit in his safe for the applicant was not within the scope of his authority as the insurer's agent, and that in that respect he must be considered as the applicant's agent, and that his failure to give notice that no policy had been issued was negligence only with respect to his agency for the applicant, and not with respect to his agency for the company. The court said that for the purposes of the case the contention might be admitted, but that the conclusion that the insurer was not liable did not follow; that the duty to notify the applicant, if the insurer refused to issue the policy for which a premium had been paid, was one which the company or its agent was bound to perform with reasonable promptness, and without any reference whatever to the agreement to hold the policy for the applicant; that neither the agent, nor the company for which he acted, could take the money in payment of the agreed premium, without notice of a failure to insure, and without offer to return the money, and escape liability merely because the applicant did not appear and demand action on their part before the loss occurred.

In *Walker v. Farmers' Ins. Co.* (1879) 51 Iowa, 679, 2 N. W. 583, the trial court instructed the jury that if they found that the person who received the application for insurance was an agent with limited and restricted authority, having power only to receive and forward applications to the company for its approval or rejection, then, as such, he would be held to the use of ordinary diligence, and the company would be liable for

his negligence in the performance of such duty; and if he neglected to forward the application within a reasonable time, considering all the circumstances, the company would be liable for any loss occasioned by such neglect. This instruction was held erroneous in that case, on the ground that no issue of negligence was raised by the pleading, the court saying: "It may be—but the point we do not decide—that defendant is liable for the neglect of its agent as contemplated in this instruction, but in order to recover for such negligence the action must be based thereon, and the petition must so declare. The petition in this case declares upon a contract for insurance. This instruction contemplates liability of defendant on account of the negligence of defendant's agent in not forwarding to defendant the application and other papers. No issue as to negligence was raised by the pleadings. The court therefore erred in submitting to the jury, by this instruction, the question of the agent's negligence."

In *Meyer v. Central States L. Ins. Co.* (1919) 103 Neb. 640, 173 N. W. 578, 19 N. C. C. A. 700, an action for damages by the administrator of the applicant against a life insurance company, for alleged negligence in delaying action on an application which designated the estate as beneficiary, the evidence was held insufficient to sustain a verdict in favor of the plaintiff, there being testimony that, the examining physician having erroneously indicated that the applicant had an excessive blood pressure, the insurer wrote him several times, without avail, for a re-examination of the blood pressure, and that twenty days after the application was made the agent was advised of the delay, but gave the applicant no notice, and that the stipulated period of sixty days for investigation of the risk had not expired at the time of the accident, notwithstanding that the applicant was a good risk, and that a policy written nineteen days after the application was made would eventually have been delivered to him, had he not been accidentally killed. Although the deci-

sion in this case was against a recovery on the evidence, the majority opinion apparently assumes that an action might be maintained on the theory of negligence, upon a proper showing. In a concurring opinion, however, Cornish, J., expressed his own view that, in the absence of contract, the defendant owed the deceased no duty to furnish him insurance, and that a failure to do so would not be a basis for an action in tort.

In *National Union F. Ins. Co. v. School Dist.* (1916) 122 Ark. 179, L.R.A. 1916D, 238, 182 S. W. 547, an insurance company was held not liable for the negligence of its agent in failing to forward an application, accompanied by payment of premium, the property having been subsequently destroyed without insurance, where he had only authority to solicit applications, deliver policies, and receipt for initial premiums, and the application stipulated that there should be no contract until the issuance and delivery of a policy. The court said: "The only issue presented by this appeal is whether or not an insurance company is liable for the negligence of its agent in failing to send to the company an application for insurance, where the only authority of the agent is to solicit applications for insurance, to deliver policies when issued, and to receive and receipt for initial premiums. When an agent acts within the scope of his authority, the principal is bound. *St. Louis & S. F. R. Co. v. Ryan* (1892) 56 Ark. 247, 19 S. W. 839. Now, in the written application of appellee for a policy of insurance, it is stated: 'It is understood and agreed that this application shall not be construed as a contract of insurance against said company until same shall be approved by the officers of said company, which approval shall be evidenced by the issuance and delivery of its policy.' Under the express terms of this proposal on the part of appellee for insurance, it is stipulated that there shall be no contract of insurance until the company shall approve the application, and evidence its approval by the issuance of a policy. Under this stipulation of

appellee, even if the soliciting agent had promptly forwarded the application to the company, the latter was under no legal obligation to issue the policy to appellee. The authority of the soliciting agent to receive and forward the application, if strictly followed, did not impose upon the appellant any legal duty. If the application had been promptly transmitted and received, appellant would not have been liable until the policy was actually issued. *Cooksey v. Mutual L. Ins. Co.* (1904) 73 Ark. 117, 108 Am. St. Rep. 26, 83 S. W. 317; *People's Mut. L. Acci. & Health Ins. Co. v. Powell* (1911) 98 Ark. 166, 135 S. W. 823. Negligence, and liability therefor, cannot be predicated upon a state of facts that does not impose any legal duty. The better reason and the decided weight of authority support the doctrine that mere delay in passing upon an application for insurance cannot be construed as accepting such application, and consenting to be bound for the insurance sought by it, nor can a cause of action for negligence be grounded upon such delay. *Alabama Gold L. Ins. Co. v. Mayes* (1878) 61 Ala. 163, and other cases cited in appellant's brief. The soliciting agent, with only the limited authority shown by the undisputed evidence, could not bind the company by stating that a policy would be issued. *American Ins. Co. v. Hornbarger* (1908) 85 Ark. 337, 108 S. W. 213. Appellee could not assume or presume that the special agent, with only limited authority, could bind his principal by any statements he made concerning his own authority. Appellee must be held, under the undisputed evidence, to have known the extent and nature of the authority of appellant's special agent." The trial court in this case instructed the jury that if the agent had authority as such to receive and forward applications, and to receive payment of premiums thereon, and neglected for an unreasonable length of time to forward the application in question, and if the company would have issued a policy if the application had been forwarded, and if, by reason of such neg-

lect on the part of the agent, the plaintiff suffered the loss complained of, they should find in plaintiff's favor. It would seem that, if recovery is ever to be permitted on the ground of negligence, it should be upon the carefully guarded hypothesis of that instruction. The judgment for the plaintiff, however, was reversed.

Relying upon *National Union F. Ins. Co. v. School Dist.* (1916) 122 Ark. 179, L.R.A.1916D, 238, 182 S. W. 547, supra, the court, in *Interstate Business Men's Acci. Asso. v. Nichols* (1920) 143 Ark. 369, 220 S. W. 477, where, according to the undisputed evidence, the soliciting agent was a special agent, with limited authority to solicit applications and forward them, it was held that his representations that the policy would be issued and effective from the date of the application were not binding on the insurer, and that no recovery could be had on the ground of negligent delay in connection with the transmission of the application, the approval thereof, and the issuance of the policy.

It will be observed that in the reported case (*BRADLEY v. FEDERAL LIFE INS. CO.* ante, 1021), the court did not pass upon the question whether the applicant, if he had not been killed, but had survived his injuries, would have had a cause of action against the insurer, but that it was there held that no cause of action accrued to his administrator against the insurer, for negligence in failing to issue a policy within a reasonable time, where the applicant was instantly killed by accident before a policy was issued.

In *Duffre v. Bankers' Life Asso.* (1913) 160 Iowa, 19, 46 L.R.A.(N.S.) 25, 139 N. W. 1087, it was held that the administrator, and not the beneficiary named in the application, had the right of action for neglect of the insurer to act upon an application for life insurance within a reasonable time, so that the opportunity to obtain insurance was cut off by the death of the applicant. The court said: "The application named plaintiff as his beneficiary, and, had the certificate issued, likely she would have been named therein as such.

But there was no contract, and the negligence, if any, was that of failing to discharge a duty owing the deceased. Had the certificate issued, whether plaintiff or someone else were beneficiary would have been optional with the insured, and as the injury, if any, was to him, his representative alone can maintain the action for resulting damages."

It has been held, in an action for the failure of an insurance agent to transmit an application within a reasonable time, that the applicant is entitled only to the actual value of the property destroyed, and not to the entire amount of the contemplated insurance. *Johnson v. Farmers' Ins. Co.* (1918) 184 Iowa, 630, 168 N. W. 264.

J. T. W.

ANNIE WEBB et al., Appts.,

v.

STATE OF TENNESSEE.

Tennessee Supreme Court — June 1, 1918.

(140 Tenn. 205, 203 S. W. 955.)

Appeal — failure to instruct on circumstantial evidence — error.

1. In a prosecution for murder it is reversible error to fail to instruct upon the nature of circumstantial evidence and upon the general rules of law governing it, although no request is made for such instruction, where the only incriminating evidence is of that character.

[See note on this question beginning on page 1049.]

Evidence — circumstantial — what is.

2. Circumstantial evidence consists of proof of collateral facts and circumstances, from which the existence of

the main facts may be deduced according to reason and common experience of mankind.

[See 8 R. C. L. 180.]

APPEAL by defendants from a judgment of the Circuit Court for Gibson County (Harwood, J.) convicting them of murder. *Reversed as to defendant Webb.*

Messrs. Clark & Landrum, for appellant Webb:

The trial court erred as a matter of law in failing to charge the jury the law applicable to a case wherein it is sought to convict defendant on circumstantial evidence.

Phipps v. State, 3 Coldw. 348; *Nelson v. State*, 2 Swan, 237; *Chappel v. State*, 7 Coldw. 93; *Hackett v. Brown*, 2 Heisk. 264; *Underhill*, *Crim. Ev.* § 6, p. 10; *Gilmore v. State*, 99 Ala. 154, 13 So. 536; *Jones v. State*, 105 Ga. 649, 31 S. E. 574; *State v. Cohen*, 108 Iowa, 208, 75 Am. St. Rep. 213, 78 N. W. 857; 1 *Greenl. Ev.* p. 24; 12 *Cyc.* 633; *Beason v. State*, 43 *Tex. Crim. Rep.* 442, 69 *L.R.A.* 193, 67 S. W. 96; *Hanks v. State*, — *Tex. Crim. Rep.* —, 56 S. W. 922; *Wallace v. State*, — *Tex. Crim. Rep.* —, 66 S. W. 1102; *Beason v. State*,

— *Tex. Crim. Rep.* —, 63 S. W. 633; *Riley v. State*, 20 *Tex. App.* 100; *State v. Brady*, — *Iowa*, —, 91 N. W. 801, 14 *Am. Crim. Rep.* 150; *Frazier v. State*, 117 *Tenn.* 455, 100 S. W. 94; *Grigsby v. Moffat*, 2 *Humph.* 488; *Arismendis v. State*, 41 *Tex. Crim. Rep.* 374, 54 S. W. 599; *Taylor v. State*, 27 *Tex. App.* 463, 11 S. W. 462; *York v. State*, 42 *Tex. Crim. Rep.* 528, 61 S. W. 129; *Crowell v. State*, 24 *Tex. App.* 404, 6 S. W. 318.

Messrs. L. H. Tyree and W. W. Herron for other appellants.

Mr. W. H. Swiggart, Jr., Assistant Attorney General, for the State.

Williams, J., delivered the opinion of the court:

In the prosecution of a murder case, where the only incriminating

evidence against the accused is circumstantial, is it reversible error for the trial judge to fail to instruct the jury upon the nature of circumstantial evidence and upon the general rules of law governing it, no special request being tendered by defendant? Yes.

Principle: In such a case the main fact—the *factum probandum*—is the fatal stroke, and if there be no direct testimony connecting the accused with the main fact, as the slayer, and the sole evidence is circumstantial, it is error not to instruct the jury as to the rules applicable to that kind of evidence. The error is of a class denominated fundamental. It goes essentially to the basis of the accused's theory for defense.

"Circumstantial evidence" differs from direct evidence, and consists of proof of collateral facts and circumstances, from which the existence of the main fact may be deduced according to reason and common experience of mankind.

Evidence—
circumstantial
—what is.

The force and the weight of such proof have well-defined recognition in rules of law, and judges should not deny the accused their safeguard.

Precedent: As to the fundamental character of such evidence,

fair analogy is found in cases involving failure to charge on reasonable doubt, in which event, without request made, there is reversible error. *Frazier v. State*, 117 Tenn. 430, 455, 100 S. W. 94.

In *Smith v. State*, 2 Shannon, Cas. 621, it was held that in such case, if an additional instruction upon circumstantial evidence be requested, it is reversible error to refuse it; and in *Barnard v. State*, 88 Tenn. 183, 236, 12 S. W. 431, the rule we declare was recognized, the charge upon the doctrine of reasonable doubt not superseding the necessity of giving to the jury the rules applicable to circumstantial evidence. However, the direct question here involved was not presented in either of those cases; but it has been solved, as above indicated, by several text-writers and in many decisions. *Michie, Homicide*, 1398; *Underhill, Crim. Ev.* § 6; 12 Cyc. 633, and cases cited.

Reversed as to appellant Annie Webb, with remand for a new trial.

NOTE.

The duty of the court in a criminal case, in the absence of a request, to charge with respect to circumstantial evidence, is the subject of the annotation following *GARDNER v. STATE*, post, 1049.

STATE OF MISSOURI, Respt.,
v.
EVERETT BAIRD, Appt.

Missouri Supreme Court (Division No. 2)—May 26, 1921.

(— Mo. —, 231 S. W. 625.)

Criminal law — trial — instruction — circumstantial evidence.

1. The jury must be instructed in regard to circumstantial evidence where the guilt of accused is established wholly by such evidence.

[See note on this question beginning on page 1049.]

— instruction not necessary.

2. An instruction on circumstantial evidence is not necessary in a murder

case where accused admits the killing, and the only question for the jury to determine from circumstances is, who

was the aggressor, and whether or not there was justification for the act, or facts which would mitigate the crime.

[See 13 R. C. L. 933.]

Witness — impeachment — quarrelsome character.

3. The state cannot impeach an accused as a witness by showing that he was of bad character as a quarrelsome, turbulent citizen.

[See 28 R. C. L. 620, 621.]

Criminal law — instruction — on character.

4. Testimony of state's witnesses, in an attempt to show that the character

of one accused of murder was bad, that it was not bad, is substantial evidence of good character, requiring an instruction upon character, where the statute requires such instruction whenever necessary.

Trial — instruction — right to raise question.

5. The state cannot, after attacking the character of an accused and producing witnesses whose evidence showed good character, claim that character was not in issue so as to require an instruction upon it

APPEAL by defendant from a judgment of the Circuit Court for Pemiscot County (McCarty, J.) convicting him of murder in the second degree. *Reversed.*

The facts are stated in the Commissioner's opinion.

Messrs. Mayes & Gossom, for appellant:

The court erred in failing to instruct the jury as to the good character of the defendant, upon his request so to do.

State v. Anslinger, 171 Mo. 600, 71 S. W. 1041; State v. O'Connor, 31 Mo. 389; State v. Cook, — Mo. —, 207 S. W. 833; State v. Fenter, — Mo. App. —, 204 S. W. 735; State v. Byrd, 278 Mo. 426, 213 S. W. 37.

And it makes no difference whether the evidence of good character was adduced by the state or the defendant.

State v. Bidstrup, 237 Mo. 273, 140 S. W. 904.

It was error to refuse defendant's request to instruct the jury on all questions of law necessary for their information in arriving at a just verdict, and especially in refusing the request of the defendant to instruct the jury on circumstantial evidence.

State v. Barton, 214 Mo. 316, 113 S. W. 1111; State v. Bobbitt, 215 Mo. 10, 114 S. W. 511; State v. Massey, 274 Mo. 578, 204 S. W. 543; State v. Donnelly, 130 Mo. 643, 32 S. W. 1124; State v. Francis, 199 Mo. 671, 98 S. W. 11.

A verdict cannot stand that rests solely upon conjecture and suspicion.

State v. Glahn, 97 Mo. 679, 11 S. W. 260; State v. Nesenhenner, 164 Mo. 461, 65 S. W. 230; State v. Francis, *supra*; State v. Gordon, 199 Mo. 561, 98 S. W. 39.

Messrs. Jesse W. Barrett, Attorney General, and J. Henry Caruthers, Special Assistant Attorney General, for the State:

No substantial evidence of good character was adduced.

State v. Byrd, 278 Mo. 426, 213 S. W. 37; State v. Gartrell, 171 Mo. 519, 71 S. W. 1045; State v. Anslinger, 171 Mo. 606, 71 S. W. 1041; State v. Cook, — Mo. —, 207 S. W. 833; State v. Hopper, 71 Mo. 430.

The state did not seek to convict defendant upon circumstantial evidence alone; hence the refusal of the court to give such instruction is not error.

State v. Bobbitt, 215 Mo. 43, 114 S. W. 511; State v. Donnelly, 130 Mo. 649, 32 S. W. 1124; State v. Fairlamb, 121 Mo. 147, 25 S. W. 895; State v. Gartrell, 171 Mo. 519, 71 S. W. 1045; State v. Robinson, 117 Mo. 663, 23 S. W. 1066; State v. Massey, 274 Mo. 578, 204 S. W. 543; State v. Crone, 209 Mo. 330, 108 S. W. 555.

The verdict is supported by substantial evidence, and this court will not interfere.

State v. Fields, 234 Mo. 615, 138 S. W. 518; State v. Sharp, 233 Mo. 298, 135 S. W. 488; State v. Cannon, 232 Mo. 215, 134 S. W. 513; State v. Bidstrup, 237 Mo. 283, 140 S. W. 904.

The court is not limited to the testimony offered by the adverse party, but will consider all the evidence in the case, passing upon the sufficiency of the evidence to sustain the verdict.

State v. Meagher, 49 Mo. App. 576; State v. Martin, 230 Mo. 700, 132 S. W. 595; State v. Lackey, 230 Mo. 707, 132 S. W. 602.

Defendant submits no proof, by affidavit or otherwise, showing that the verdict was the result of bias and pre-

justice, and the verdict will not be disturbed on that ground.

State v. Gonce, 87 Mo. 630; State v. Howell, 117 Mo. 342, 23 S. W. 263; State v. McBrien, 265 Mo. 607, 178 S. W. 489.

Defendant, having offered no objection at the time, cannot now be heard to complain of the court's action in permitting the state to ask witnesses about his general certain reputation as being a violent and turbulent man.

Hannibal & St. J. R. Co. v. Moore, 37 Mo. 342; State v. Mills, 88 Mo. 417; State v. Bell, 212 Mo. 122, 111 S. W. 24; State v. Page, 212 Mo. 237, 110 S. W. 1057.

White, C., filed the following opinion:

The appellant, March 23, 1920, in the circuit court of Pemiscot county, was convicted of murder in the second degree, and his punishment fixed at imprisonment in the penitentiary for a term of fifteen years. He was charged with having killed one Will Jenkins on the 10th day of August, 1919.

Jenkins and Baird were farmers, and lived near each other, their two houses being about 100 yards apart. It seems that Jenkins was making a crop on the shares for Baird. The two men had had some difficulty; the evidence showed that each had made violent threats against the other. The houses of the two men fronted east, and it appears that a division fence, somewhere near midway between the two houses, separated their respective inclosures, Baird's house being on the south. To the rear, and a little to the north of Baird's house, was his barn. North of the barn, across the fence, was Jenkins's cornfield. There was no witness to the homicide, except the defendant himself. Jenkins's body, a few moments after he was shot, was found a few feet from the division fence, inside his cornfield, among the cornstalks. The state attempted to show the shot which killed Jenkins was fired from a window in the loft of Baird's crib, which window was about 18 or 20 feet south of where Jenkins's body lay. He was killed with a shotgun, and, according to the testimony, the

wounds ranged downward, indicating that he was shot from an elevation. Baird admitted he killed Jenkins with a shotgun, and explained to several persons who testified for the state how it occurred. It is claimed by the state that those explanations were inconsistent.

According to the evidence offered by the defendant, on the morning before the tragedy, about 8:30 in the morning, Baird went away from home to a little town called Netherlands. While he was gone, his wife and Jenkins's wife had a quarrel about vegetables in the garden. It seems that the gardens of the two were inclosed together. A short time afterwards Jenkins appeared at the milk house in Baird's yard where Mrs. Baird was, and abused her violently, threatening to kill the defendant. He had a shotgun at the time, and went off through the field. Mrs. Baird thought, hunting for her husband. Mrs. Baird then brought out her husband's shotgun, and when he returned from town she told him of the altercation. Soon afterwards Jenkins appeared with his gun, apparently "stalking" the defendant, peeping around his barn, as if to discover where he was. After watching for a time, the defendant stepped out in the open, and after a few remarks and gestures, from which appellant claimed he thought Jenkins was about to shoot him, he fired the fatal shot. Eleven shot took effect in Jenkins's head, killing him instantly. Evidence was offered by defendant to prove that Jenkins was a violent, turbulent, quarrelsome character. Evidence also was offered by the state as to the defendant's character, which will be noted later in the opinion.

The evidence indicates that Jenkins fell where he lay, about 18 or 20 feet north of the window in the loft of the defendant's barn, and about 5 feet north of the division fence. The stalks of corn near the body showed the marks of a shot. With the view we take of the case, it is unnecessary to set out the evidence at greater length.

I. The appellant assigns error to the failure of the court fully to instruct the jury on all the questions of law involved in the case. He claimed the court should have instructed in regard to circumstantial evidence. The court must instruct the jury in regard to it, where the guilt of the defendant is established wholly by circumstantial evidence.

**Criminal law—
trial—instruction
—circumstantial
evidence.**

Where the fact of the homicide by the defendant depends upon circumstances, such an instruction is necessary, but not where the only resort to circumstantial evidence is for the purpose of showing the manner in which the homicide took place. *State v. Gartrell*, 171 Mo. loc. cit. 519, 71 S. W. 1045; *State v. Crone*, 209 Mo. 316, loc. cit. 331, 108 S. W. 555; *State v. Bobbitt*, 215 Mo. loc. cit. 43, 114 S. W. 511; *State v. Massey*, 274 Mo. 578, 204 S. W. loc. cit. 543.

In this case the defendant admitted that he killed Jenkins; nothing was left for the jury to determine from circumstances except as to who was the aggressor, and whether there was justification for the act, or facts which would mitigate the crime. Such instruction in this case was not necessary.

**—instruction not
necessary.**

II. Error is further claimed in the failure of the court to instruct on the good character of the defendant. The statute (Rev. Stat. 1919, § 4025) requires the trial court, whether requested or not, to instruct the jury upon all questions of law arising in a criminal case, which instructions must include, "whenever necessary, the subjects of good character and reasonable doubt."

The defendant did not put his character in issue—offered no evidence as to good character. He took the stand in his own behalf, and the state had the right to impeach him "as any other witness." See § 4036, Rev. Stat. 1919. The state, in rebuttal, recalled three witnesses, B. F. Allen, William Foley, and C. L. Lefler.

Allen testified as follows, without objection:

Q. How long have you known Everett Baird?

A. Known Everett Baird as far as I remember. I got acquainted with Everett Baird about 1906 or 1907, as well as I remember.

Q. Ask if you are acquainted with his general reputation for truth and veracity in the neighborhood in which he has lived?

A. Never heard that discussed.

Q. Ask whether or not you are acquainted with his general reputation as to being a dangerous, quarrelsome, and turbulent character?

A. Yes, sir; I am acquainted with it.

Q. Is that good or bad?

A. It is not bad for quarreling—(Interrupted).

Q. Dangerous?

A. —and dangerous.

Q. The full question?

A. Not dangerous for quarreling and fighting, unless you impose on him.

By the court: You say it is not bad for that?

Witness: No, sir; it is not bad.

Foley testified that he did not know the defendant's general reputation in the neighborhood in which he lived for being a dangerous, quarrelsome, and turbulent character.

Lefler testified without objection, as follows:

Q. Mr. Lefler, I will ask whether or not you are acquainted with the general reputation of the defendant in this case for being a dangerous, quarrelsome, and turbulent character?

A. Yes, sir.

Q. Is that good or bad?

A. Well, it is not so bad.

Q. Is it good or bad?

A. Well, lately he has been a pretty good man; used to be, when he got whisky in him, of course, he didn't care much.

Q. Since whisky gone out, he's done pretty well?

A. Different man before whisky went out.

By the court: How long back, do you say?

Witness: I guess for a year or two.

The state had a right to show that defendant had a bad reputation for truth and veracity, and that his general reputation for morality was bad; but it had no

Witness—
impeachment—
quarrelsome
character.

right, for the purpose of impeaching him as a witness, to show that he was of bad character as a quarrelsome, turbulent citizen. State v. Beckner, 194 Mo. 281, loc. cit. 294-296, 3 L.R.A. (N.S.) 535, 91 S. W. 892; State v. Shuster, 263 Mo. loc. cit. 602, 173 S. W. 1049; State v. Edmundson, — Mo. —, 218 S. W. loc. cit. 865. Such evidence did not tend to impeach the defendant in his character as a witness, but was an assault upon his character as a defendant. State v. Beckner, supra. It was an attempt to show he possessed the very qualities which would affect his tendency to commit the crime of which he was charged.

It is claimed by the state that this evidence is not sufficient to warrant an instruction upon good character, because it is not substantial evidence of good character. This court has held that "whenever necessary," as used in the section of the statute quoted, means "whenever there is any substantial evidence of general reputation of such character offered in evidence." State v. Cook, — Mo. —, 207 S. W. loc. cit. 833; State v. Byrd, 278 Mo. 426, 213 S. W. 37. The case of State v. Anslinger, 171 Mo. loc. cit. 608, 609, 71 S. W. 1041, is cited by the state in support of the propriety of the court's refusal to give such instruction. In that case a witness was charged with illegal and fraudulent voting. The character witness testified that the defendant was a hard-working and industrious man, and the court held (171 Mo. loc. cit. 609, 71 S. W. 1041) that there was not the slightest evidence upon the trait of character involved in the charge which rendered it necessary, for the

information of the jury, to instruct upon the subject of good character; that a man might be a hard-working man, and still be dishonest; it would not affect the trait of character which would lead him to vote illegally.

In this case the questions were addressed to the very trait of character involved in the commission of the crime charged, whether the defendant was turbulent and dangerous. Allen testified that he was acquainted with Baird's reputation; that it was not bad for quarreling and fighting. Lefler testified that he once had a bad reputation when he could get liquor, but that of late his reputation for being quarrelsome was not bad. This evidence was brought out by the state; it was not objected to by the defendant, and was proper for the jury's consideration; that is, the state made an assault upon the defendant's character as a defendant, and the evidence tended to show the reverse of what was intended. We are unable to say that there was no substantial evidence that the defendant had a good character in that respect.

Criminal law—
instruction—on
character.

Further, having deliberately attacked the character of the defendant, treating the matter as being in issue, having made the attack with the expectation of proving a bad character, and having produced evidence tending to show the contrary, the state is not in position to say that that the issue was not before the jury. "Whenever necessary," as used in the statute, is not limited to cases where the defendant himself has offered evidence of his good character, but it must include any case where his character is put in issue and there is sufficient evidence to warrant a finding by the jury that his character is good.

Trial—instruction—right to
raise question.

The position of the state in this respect is like that of a party to a suit who offers evidence as if an issue had been tendered by the plead-

ing in the case, when in fact the pleading tendered no such issue. He cannot, therefore, claim there was error in submitting such issue to the jury; the court would err if it failed to submit the issue to the jury. *Chouquette v. Southern Electric R. Co.* 152 Mo. loc. cit. 263, 264, 53 S. W. 897; *Fisher & Co. Real Estate Co. v. Steed Realty Co.* 159 Mo. loc. cit. 567, 62 S. W. 443. Parties to litigation necessarily are held bound to positions they assume therein. *Green v. St. Louis*, 106 Mo. 454, loc. cit. 458, 17 S. W. 496. We see no reason why this rule should not be applied to the state in a criminal proceeding. We therefore are of the opinion that the court erred in refusing to instruct the jury on the question of defendant's character.

Other errors are assigned which

we deem it unnecessary to consider, because like circumstances probably will not occur in another trial.

The judgment is reversed, and the cause remanded.

Railey and Mozley, CC., concur.

Per Curiam:

The foregoing opinion by White, C., is adopted as the opinion of the court.

All concur.

NOTE.

The duty of the court in a criminal case, in the absence of a request, to charge with respect to circumstantial evidence, is the subject of the annotation following *GARDNER v. STATE*, post, 1049.

LEE GARDNER, Plff. in Err.,

v.

STATE OF WYOMING.

Wyoming Supreme Court—April 4, 1921.

(— Wyo. —, 196 Pac. 750.)

Trial — duty to charge on circumstantial evidence.

1. The court should instruct on the law of circumstantial evidence where such evidence is alone relied on for conviction, although the instruction requested by accused is erroneous, and he requests no other instruction upon the subject, and takes no exception to the court's failure to give one where the statute requires the court to charge the jury.

[See note on this question beginning on page 1049.]

Criminal law — sufficiency of circumstantial evidence.

2. To convict on circumstantial evidence, the circumstances must all concur to show that the prisoner committed the crime and must all be inconsistent with any other rational conclusion.

[See 8 R. C. L. 225.]

— requiring evidence to point unerringly to guilt.

3. A requested instruction on circumstantial evidence that it must point unerringly to guilt, and be irreconcilable with innocence, is properly refused as requiring absolute certainty.

[See 8 R. C. L. 227.]

Evidence — larceny — failure to connect accused with taking.

4. One cannot be convicted of larceny where the evidence fails to connect him with the taking.

[See 17 R. C. L. 64.]

Appeal — failure to instruct — non-prejudicial error.

5. Failure to charge on circumstantial evidence is not reversible error, where it appears that there was otherwise a fair trial and such error is not found to have been prejudicial.

[See 2 R. C. L. 261; 17 R. C. L. 80.]

ERROR to the District Court for Laramie County (Mentzer, J.) to review a judgment convicting defendant of larceny. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Kinkead & Henderson, for plaintiff in error:

The test in every criminal case, in which the state relies upon circumstantial evidence for conviction, is that such evidence must point unmistakably to defendant's guilt, and must be irreconcilable with any other rational hypothesis.

12 Cyc. 488; State v. Sieff, 54 Mont. 165, 168 Pac. 524; State v. Postal Teleg.-Cable Co. 53 Mont. 104, 161 Pac. 953; State v. Chevigny, 48 Mont. 382, 138 Pac. 257; State v. Suitor, 43 Mont. 31, 114 Pac. 112, Ann. Cas. 1912C, 230; State v. Asbell, 57 Kan. 398, 46 Pac. 770; Bryant v. State, 116 Ala. 445, 23 So. 40.

Such proof must not only be sufficient to authorize belief in the guilt of the accused, but it must also be sufficient to exclude every other reasonable hypothesis.

State v. Mullins, 55 Mont. 95, 173 Pac. 788; People v. Sapp, 282 Ill. 51, 118 N. E. 416; State v. Robinson, 7 Boyce (Del.) 106, 103 Atl. 657; Fudge v. State, 75 Fla. 441, 78 So. 510; State v. McCarthy, 36 Mont. 226, 92 Pac. 521; State v. Taylor, 51 Mont. 387, 153 Pac. 275; Burton v. Com. 122 Va. 847, 94 S. E. 923; People v. Manganaro, 218 N. Y. 9, 112 N. E. 436; Arnold v. State, 5 Wyo. 439, 40 Pac. 967.

In order that the state may have the benefit of whatever presumption arises from the unexplained possession by the defendant of recently stolen property, it must show that the possession of defendant was exclusive, and that he was conscious of having the same in his possession.

People v. Hurley, 60 Cal. 74, 44 Am. Rep. 55; McNeally v. State, 5 Wyo. 59, 36 Pac. 824.

Where evidence is purely circumstantial, refusal of the court to instruct as to the weight and effect to be given such evidence is prejudicial error.

Territory v. Lermo, 8 N. M. 566, 46 Pac. 16; Renfro v. State, 82 Tex. Crim. Rep. 197, 198 S. W. 957; Winn v. State, 82 Tex. Crim. Rep. 316, 198 S. W. 965; Love v. State, 82 Tex. Crim. Rep. 411, 199 S. W. 623; Turner v. State, 4 Lea, 206; Dossett v. United States, 3 Okla. 591, 41 Pac. 608; Com. v. Webster, 5 Cush. 317, 52 Am. Dec. 71; Graves v. People, 18 Colo. 170, 32 Pac. 63; People v. Murray, 41 Cal. 66; People v. Phipps, 15 A.L.R.—66.

39 Cal. 326; Arnold v. State, 5 Wyo. 439, 40 Pac. 967; Struckman v. State, 7 Tex. App. 581; State v. Brady, — Iowa, —, 91 N. W. 801, 14 Am. Crim. Rep. 150.

Mr. W. L. Walls, Attorney General, for the State.

Blydenburgh, J., delivered the opinion of the court:

The plaintiff in error, Lee Gardner, was informed against jointly with one Charles Netterfield in the district court of Laramie county for the larceny of 50 bushels of macaroni wheat and 4 sacks of grain screenings, of the total value of \$100, the property of George F. Chappell. The plaintiff in error, having demanded a separate trial, was separately tried by a jury, which rendered a verdict of guilty. A motion for a new trial was filed, argued, and denied, an exception to the ruling being duly taken and preserved, and the plaintiff in error sentenced to a term in the penitentiary. Nothing appears in the record to show what became of the case against the joint defendant, Charles Netterfield.

The petition in error filed in this court assigns as error only the denying of the motion for a new trial and the rendering of the judgment. The reasons stated in the motion for new trial are as follows:

(1) That the verdict of said jury is not sustained by sufficient evidence.

(2) That said verdict is contrary to law and the instructions of the court.

(3) For errors of law occurring at the trial as follows:

(a) The court erred in overruling the defendant's motion for a directed verdict made on the close of the state's evidence.

(b) The court erred in overruling the motion made by defendant at the close of the defendant's case and before the case was submitted to the jury. To the overruling of said mo-

tions, and each of them, the defendant duly excepted at the time.

(c) The court erred in overruling the motion made by defendant after the close of the case, and before the jury was instructed, for the court to instruct the jury upon the effect of possession or lack of possession of alleged stolen personal property, and with reference to the necessity of the proof where the evidence is wholly circumstantial, said motion being as follows, to wit: "The defendant now moves the court to instruct the jury specifically on the question as to the importance of the question of possession or lack of possession of said property in defendant, and to instruct the jury that, unless they shall find that the defendant was in possession of the property, that his possession was exclusive and conscious, that there could be no conviction."

(d) The court erred in refusing to give instruction No. 15 asked by the defendant, exception to which refusal was duly taken by the defendant, said instruction No. 15 being as follows, to wit: "In order to convict the defendant in this case it will be essential for you to find from the evidence beyond a reasonable doubt that the defendant did steal, take, and carry away the grain of said George F. Chappell in the manner as set forth in the information herein. It is not sufficient that he might have been guilty of the crime, nor could you convict him if you merely found that he was probably guilty thereof. The evidence must point unerringly to his guilt, and must be irreconcilable with innocence. If under the evidence in this case any other person might have been guilty of the crime instead of the defendant, you must acquit the defendant, and, unless the entire chain of circumstantial evidence is so connected, complete, and compelling as to satisfy your minds of defendant's guilt beyond a reasonable doubt, then you should acquit him."

It will be seen from the foregoing that, although the motion for a new trial alleged error in the court's

"overruling the motion made by defendant after the close of the case, and before the jury was instructed, for the court to instruct the jury upon the effect of possession or lack of possession of alleged stolen personal property, and with reference to the necessity of the proof where the evidence is wholly circumstantial," the motion as set out in the motion for new trial makes no mention of the matter of circumstantial evidence other than the possession or lack of possession of the property. The errors alleged, therefore, are that the court erred in refusing to give instruction No. 15 as set out in the motion for new trial, and that the evidence is insufficient to convict the defendant Gardner of the larceny, and that the court therefore erred in not granting the motion for a directed verdict of acquittal, although a large portion of the brief of defendant in error is directed to the question of circumstantial evidence.

The evidence in the case at bar was wholly circumstantial, and was of such a character as to authorize the jury in finding beyond a reasonable doubt that the wheat in question had been stolen from George F. Chappell and transported to the ranch or farm owned or occupied by Mrs. Sadie Netterfield, and was there found in a wagon on the morning after the theft, whose tracks had been followed from the Chappell place to the Netterfield place. The court not only refused to give the requested instruction No. 15, but did not give any instruction on the law governing circumstantial evidence. It is held by the best and weight of authority that the law of circumstantial evidence in criminal cases is that—

"In order to convict on circumstantial evidence, it is held necessary, not only that the circumstances all concur to show that the prisoner committed the crime, but that they all be inconsistent with any other rational conclusion. . . . Again,

*Criminal law—
sufficiency of
circumstantial
evidence.*

if the circumstances, no matter how strong, can be reasonably reconciled with the theory that some other person may have done the act, the defendant should not be convicted, and a verdict of guilty will be set aside as contrary to law. . . . While the evidence must lead to the conclusion so clearly and strongly, where the evidence is purely circumstantial, as to exclude every reasonable hypothesis consistent with innocence, still it is not necessary that the evidence should produce absolute certainty in the minds of the jurors, or that it should dissipate mere conjectures and speculative doubts,—for metaphysical and demonstrative certainty is not essential to proof by circumstances. It is sufficient if the evidence produce moral certainty, to the exclusion of every reasonable doubt." 8 R. C. L. p. 225.

"While absolute certainty is not essential, yet the evidence must be of such a character as to satisfy the jury of defendant's guilt, and to exclude every other hypothesis to a moral certainty beyond a reasonable doubt; evidence creating a mere probability of guilt is not sufficient; much less is evidence which gives rise to a mere suspicion or conjecture of guilt." 16 C. J. 766.

In Davis v. State — Okla. Crim. Rep. —, 193 Pac. 746, the court said: "It is a well-established rule of law that, where circumstantial evidence alone is relied upon, the circumstances, when considered together, must point clearly and conclusively to the guilt of defendant and exclude every reasonable hypothesis other than that of guilt."

And see Dossett v. United States, 3 Okla. 591, 41 Pac. 608.

And in Horn v. State, 12 Wyo. on page 157, 73 Pac. on page 725, the following instruction was approved: "To authorize a conviction upon circumstantial evidence alone, the circumstances must not only all be in harmony with the guilt of the accused, but they must be of such a character that they cannot reasonably be true in the ordinary nature of things and the defendant be innocent."

The jury must be convinced beyond all reasonable doubt, but not beyond all possible doubt. "While the evidence must lead to the conclusion so clearly and strongly, where the evidence is purely circumstantial, as to exclude every reasonable hypothesis consistent with innocence, still, it is not necessary that the evidence should produce absolute certainty in the minds of the jurors, or that it should dissipate mere conjectures and speculative doubts,—for metaphysical and demonstrative certainty is not essential to proof by circumstances. It is sufficient if the evidence produce moral certainty, to the exclusion of every reasonable doubt." 8 R. C. L. p. 227.

In Cornish v. Territory, 3 Wyo. 95, on page 97, 3 Pac. 795, where an instruction contained the words "must be absolutely incompatible with the innocence of the accused," they were said to be equivalent to that the defendant's guilt must be established beyond the possibility of a doubt, and declared that was not the law, but quoted with approval from the case of Poole v. People, 80 N. Y. 646: "Such a degree of certainty is rarely attainable in the administration of justice. It is sufficient that all the material circumstances point to guilt, and that they are inexplicable upon the theory of innocence. The guilt must be established beyond a reasonable, not beyond a possible, doubt."

While the requested instruction No. 15, the refusal to give which is claimed as error in this case, is, in the main, a correct statement of the law as regards circumstantial evidence, the use of the words, "The evidence must point unerringly to his guilt, and must be irreconcilable with innocence," is equivalent to absolute certainty, and renders the requested instruction ^{—requiring evidence to point unerringly to guilt.} erroneous. The dictionary defines "unerring" as "incapable of error or failure; certain; sure;" and the synonym for "unerringly" is given as "infallible." It is not incumbent upon the court to give an instruction which states an

erroneous statement of the law, and "a reversal will not be directed because of the refusal to give an instruction unless it is strictly and entirely accurate." The court, therefore, did not err in refusing to give requested instruction No. 15. The other errors alleged in the motion for a new trial relate to the sufficiency of the evidence to convict and the failure to grant the motion for a directed verdict, which involves the same thing.

We are convinced, after a careful examination of the evidence, that the case must be reversed on these grounds. This is not a case of conflicting evidence where the jury have decided the conflict, and the supreme court will not disturb the findings, but, although there is sufficient evidence to prove the theft, there is

**Evidence—
larceny—failure
to connect
accused with
taking.**

absolutely no evidence to connect the defendant in error therewith. The only facts in the case that can even throw suspicion on this defendant, if that can be called a suspicious circumstance, is that he was employed as a farm hand by Mrs. Netterfield, at whose place the stolen wheat was found. It was in evidence that a footprint was seen in the bin at the Chappell place that was larger than Chappell's foot, and that there was a small heel track as if made by a small-heeled cowboy boot, where the driver of the wagon in which the wheat was taken had gone and gotten some gasoline from a truck that was in the road on the way to the Netterfield place. But there is nothing in the evidence to show the size of defendant's foot, or that he wore or was seen wearing any such boots, or to connect him with this evidence in any way. There is nothing in the evidence to show that he left the Netterfield ranch on the night of the theft, or that he knew what was in the wagon in which the stolen wheat was found at the Netterfield place the next morning. No conversation or remarks by the defendant that were even suspicious were

proven, and no suspicious acts on his part are in evidence. When seen the next morning, he was attending to his regular occupation, and later in the morning when arrested for this offense he was in the field working. No conference or attempted conversation with Charles Netterfield, who was joined with him in the information, no claim by defendant in error to the stolen wheat, and no reason or object shown why he should have taken it.

Where circumstantial evidence is relied upon for conviction, it must be of such a character that it leads to but one fair and reasonable conclusion, pointing to the defendant to the exclusion of all others as the guilty person. 16 C. J. 774. In *State v. Sieff*, 54 Mont. 165, 168 Pac. 524, it is said: "By the widest stretch of the imagination these facts cannot be so arrayed that it can be said they point unmistakably to defendant's guilt, and are altogether irreconcilable with any other rational hypothesis; and this is the test in this state applicable to every criminal case in the trial of which the state relies, as in this instance, upon circumstantial evidence. . . . At most, it does not do more than cast a suspicion upon the defendant, and mere suspicions or probabilities, however strong, are not sufficient basis for a conviction."

In *McLaughlin v. State*, — Okla. Crim. Rep. —, 193 Pac. 1010, it is said: "If the evidence introduced by the state fails to incriminate the defendant, or as a matter of law is insufficient to show that he is guilty of the offense charged, it is not only the right but the duty of the trial court to advise the jury to return a verdict of acquittal. . . . It is unquestionably the law that crime may be established by circumstantial evidence, otherwise society would be at the mercy of the criminal classes; but it is also uniformly held that the circumstantial evidence must go beyond mere suspicion and conjecture; and where circumstantial evidence solely is relied on for a conviction the circumstances tending to show

guilt must be consistent, the one with the other, and point so strongly to the guilt of the defendant as to exclude every other reasonable hypothesis except that of guilt. Can it reasonably be said that the fact that this defendant was riding in the stolen car with one who was confessedly the thief was sufficient to show his complicity in the crime charged? It seems to us clearly that it was not, and, for this reason, when the state closed its case in chief, the instruction asked by the defendant directing the jury to return a verdict of acquittal should have been given at that time."

See also *State v. Mullins*, 55 Mont. 95, 173 Pac. 788; *State v. Suitor*, 43 Mont. 31, 114 Pac. 112, Ann. Cas. 1912C, 230; *State v. Johnson*, 19 Iowa, 230.

The court should have granted the motion for a directed verdict made at the close of the evidence for the prosecution, and for the error in denying said motion and the insufficiency of the evidence the case must be reversed, and a new trial granted.

There is another question to which a large portion of the brief of defendant in error is devoted, and that is the failure of the court to instruct at all on the law of circumstantial evidence, and, as the case must be sent back for new trial, this matter ought to be considered. The court did not, anywhere in the instructions given, inform the jury of the character or sufficiency or effect of this character of evidence, although this was a case on which the prosecution relied wholly upon circumstantial evidence. The defendant, however, did not except or object to the charge on this ground, or request any other instruction in writing, except in regard to instruction No. 15, above considered, and it is held in *Smith v. State*, 17 Wyo. on page 489, 101 Pac. 849, "that it is not enough to merely state to the court that the party desires the court to instruct on a certain point; but he must present to the court what he claims to be the law."

It is generally held that "where

the prosecution relies wholly or substantially upon circumstantial evidence, or conviction may be had on such evidence alone, the court should instruct upon the law relating to such evidence." 16 C. J. 1008.

"Where all the evidence is circumstantial, the court should instruct that the circumstances, to warrant a conviction, must be consistent with each other, must tend to prove guilt, and not only must be consistent with the hypothesis of defendant's guilt, but must be inconsistent with every other reasonable hypothesis, including the hypothesis of his innocence." 16 C. J. 1011.

"Where the evidence is entirely circumstantial, the court should instruct that in order to convict the circumstances must be so strong as to exclude every reasonable hypothesis except defendant's guilt. Defendant is entitled to an instruction on circumstantial evidence where the state relies solely on recent unexplained possession, . . . where the case rests merely upon circumstances." 25 Cyc. 150.

In *Territory v. Lermo*, 8 N. M. 566, 46 Pac. 16, it is said: "The facts in the case being purely circumstantial, it was the duty of the court to instruct the jury fully on the law of circumstantial evidence. This the record shows the trial court did not do, and, by reason of such failure, manifest error, prejudicial to the rights of the defendant, has intervened, and the case must be reversed. Counsel for appellant requested the court to give the following instruction, to wit: 'The court instructs the jury that, where circumstances alone are relied upon by the prosecution for a conviction, the circumstances must be such as to apply exclusively to the defendant, and such as are reconcilable with no other hypothesis than the defendant's guilt, and they must satisfy the minds of the jury of the guilt of the defendant beyond a reasonable doubt.' This instruction fairly stated the law and the weight to be given to circumstantial evidence where there is no direct evidence;

and to exclude it from the jury was error, especially where there is no other instruction given substantially covering the same subject. The history and experience of criminal jurisprudence establishes that two essential elements in the case must be proved, first, the identity of the corpus delicti, and, second, the identity of the accused, before a conviction in any grade is warranted. 3 Greenl. Ev. 30. And, while these essential facts may be proved by circumstantial evidence, yet it is a well-established principle that it is necessary to caution the jury, in a proper instruction, as to the weight and effect to be given the circumstances detailed by the witnesses to establish these first and most important elements tending to establish the crime as charged. *Turner v. State*, 4 Lea, 206; *Dossett v. United States*, 3 Okla. 591, 41 Pac. 608; *Com. v. Webster*, 5 Cush. 317, 52 Am. Dec. 71; *Graves v. People*, 18 Colo. 170, 32 Pac. 63; *People v. Murray*, 41 Cal. 66. 'We are further of the opinion that, inasmuch as the evidence in the case was wholly circumstantial, the jury should have been instructed as to the nature and conclusiveness of that character of testimony to warrant a conviction upon it.' *Struckman v. State*, 7 Tex. App. 581; *People v. Phipps*, 39 Cal. 326."

See *Turner v. State*, 4 Lea, 206.

It is generally considered that it is the duty of the court to instruct the jury on the essential law of the case and of such matters of law without which the defendant will not receive a fair trial, or without which a jury of laymen would be apt to go wrong. Our statute governing instructions in criminal cases is subdivision 6 of § 7532, Comp. Stat. 1920, and is as follows: "Before the argument of the case is begun, the court shall immediately, and before proceeding with other business, charge the jury, which charge shall be reduced to writing by the court, if either party request it, and such charge or charges, or any other charge or instruction provided for in this section, when so written or

given, shall in no case be orally qualified, modified, or in any manner explained to the jury by the court, and all written charges and instructions shall be taken by the jury in their retirement and returned with their verdict into court, and shall remain on file with the papers of the case."

It will be seen that it is mandatory upon the court to "charge the jury" and can mean nothing less than that the court shall instruct the jury as to the essential law of the case, although, unless requested to do so by either party, the judge is not compelled to reduce the charge to writing; but it has become the uniform practice in this state to do so, and we believe it to be the better practice to have all of the courts charge in writing. While it is generally considered that a request for instruction should be made and an exception to a refusal taken, in order for a defendant to avail himself of the error in the supreme court, this is not the universal rule, and there are exceptions to it, especially where the matter is fundamental and goes to the gist of the case. The rule is stated in *Thompson on Trials*, § 2341, that mere nondirection, partial or total, is not ground for a new trial unless specific instructions, good in point of law and appropriate to the evidence, are requested and refused. This rule, however, has been referred to in two opinions in this court. In the case of *Union P. R. Co. v. Jarvi*, 3 Wyo. 376, 23 Pac. 398, it was said in the opinion by Judge Corn, and concurred in by Chief Justice Van Devanter, in referring to this rule from *Thompson*: "But the rule as stated by *Thompson*, even if applicable to this case, is not the rule in this jurisdiction. Subdivision 6, § 2553, Rev. Stat. Wyo., provides that in civil cases, 'before the argument of the case is begun, the court shall give such instructions upon the law to the jury as may be necessary;' and his duty to do this is not excused by the failure of counsel to request 'specific instructions, good in

point of law, and appropriate to the evidence.' "

In the case of Hay v. Peterson, 6 Wyo. 419, on page 441, 34 L.R.A. 581, 45 Pac. 1079, Chief Justice Groesbeck stated this rule of Thompson with approval; but, as no reference is made to the Jarvi Case, where this rule is disapproved, we must assume that that case was not called to the court's attention when considering the Hay Case. However, having the two cases in this court holding diametrically opposite to each other in regard to this rule, we would be inclined to follow the holding of Judges Corn and Van Devanter in the Jarvi Case rather than the mere statement of the rule from Thompson in the Hay v. Peterson Case. This court, in Parker v. State, 24 Wyo. 491, on page 500, 161 Pac. 554, said: "However, if it clearly appears from the record that such fundamental and prejudicial error has been committed as to amount to a denial of substantial justice, or to deprive the defendant of a fair trial, the court should not hesitate to reverse the judgment and grant a new trial, although proper exceptions were not taken at the time."

And in the case of Ohama v. State, 24 Wyo. 513, 161 Pac. 558, where no exceptions were taken, this court reversed the case for fundamental errors preventing the defendant from having a fair trial. It has been considered in a number of jurisdictions that the failure to instruct on the law of circumstantial evidence when the case was one wholly dependent on such evidence was fundamental error, so as to require a reversal, even when no exception is taken to such failure of the trial court. In Utah the statute governing instructions in criminal cases is subdivision 6, § 5033, vol. 2, Compiled Laws of Utah, and is as follows: "The judge may then charge the jury, and must do so on any points pertinent to the issue if requested by either party; and he may state the testimony and declare the law; and in each case he shall inform the jury that they are the sole judges

of the credibility of the witnesses, of the weight of the evidence, and of the facts. If the charge be not given in writing, it must be taken down by the phonographic reporter."

This can hardly be said to be as strong as our statute, but the supreme court of Utah in People v. Scott, 10 Utah, 217 on page 222, 37 Pac. 336, said: "When the testimony in a criminal case is entirely of a circumstantial character, as it was in this case, and a request is made to charge upon the subject of circumstantial evidence, but such request is erroneous, it is still the duty of the court to give the law upon the subject. Comp. Laws, § 5033, subd. 6; People v. Murray, 72 Mich. 10, 40 N. W. 29; Ward v. State, 10 Tex. App. 293; Crowell v. State, 24 Tex. App. 404, 6 S. W. 318; Willard v. State, 26 Tex. App. 126, 9 S. W. 358; Crowley v. State, 26 Tex. App. 578, 10 S. W. 217; Barr v. State, 10 Tex. App. 507. In a criminal case the court should see that the case goes to the jury in a clear and intelligent manner, so that they may have a correct understanding of what it is that they are to decide, and it should state to them fully the law applicable to the case. It is to the court that the accused has a right to look to see that he has a fair trial. Circumstantial evidence may be quite as conclusive as direct evidence, but it is incumbent upon the prosecution, not only to show by a preponderance of evidence that an offense was committed, and that the alleged facts and circumstances are true, but they must also be such facts and circumstances as are incompatible, upon any reasonable hypothesis, with the innocence of the accused, and incapable of explanation upon any reasonable hypothesis other than the defendant's guilt. The chain of circumstances must be complete and unbroken. A jury of inexperienced laymen could hardly be expected to apply the rules applicable to this class of testimony without some assistance from the court." And again, in State v. Romeo, 42 Utah, on page 66, 128

Pac. 538, it is said: "The rule obtains in this jurisdiction that in a criminal case, when the evidence on the part of the prosecution is alone of a circumstantial character, it is the duty of the court to state to the jury the rules applicable to that kind of evidence. *People v. Scott*, 10 Utah, 217, 37 Pac. 335; *State v. Brown*, 39 Utah, 140, 115 Pac. 996, Ann. Cas. 1913E, 1. This for the reason that a jury of inexperienced laymen without assistance from the court could hardly be expected to properly apply the rules applicable to that kind of evidence, and, if not so instructed and warned, there is danger of incorrect inferences and illogical conclusions from jurors."

In the note to *Beason v. State*, 69 L.R.A. on page 212, in reference to the necessity for such instructions, it is said: "The rule would appear to be that a failure so to instruct the jury, whether requested or not, is material error, with the exception of a single case,"—citing *Hamilton v. State*, 96 Ga. 301, 22 S. E. 528; *Hunt v. State*, 7 Tex. App. 212; *Barr v. State*, 10 Tex. App. 507; *Ward v. State*, 10 Tex. App. 293; *Ray v. State*, 13 Tex. App. 51; *Leftwich v. State*, 34 Tex. Crim. Rep. 489, 31 S. W. 385; *People v. Scott*, 10 Utah, 217, 37 Pac. 335; *Polanka v. State*, 33 Tex. Crim. Rep. 634, 28 S. W. 541.

In 97 Am. St. Rep., in a note to *State v. Hudson*, on page 790, it is said: "In order to secure justice it is the duty of the trial judge, even without request, to instruct the jury as to this kind of evidence, where the case is based entirely thereon (*Hamilton v. State*, 96 Ga. 301, 22 S. W. 528; *State v. Elsham*, 70 Iowa, 531, 31 N. W. 66; *State v. Brady*, — Iowa, —, 91 N. W. 801, 14 Am. Crim. Rep. 150; *McDowell v. Com.* 4 Ky. L. Rep. 353; *Territory v. Lerma*, 8 N. M. 566, 46 Pac. 16; *Struckman v. State*, 7 Tex. App. 581; *Barr v. State*, 10 Tex. App. 507); and a failure to charge thereon is reversible error (*Polanka v. State*, 33 Tex. Crim. Rep. 634, 28 S. W. 541; *Willard v. State*, 26 Tex.

App. 126, 9 S. W. 358; *Hanks v. State*, — Tex. Crim. Rep. —, 56 S. W. 922), whether excepted to at the proper time or not (*Conner v. State*, 17 Tex. App. 1)."

In *State v. Brady*, — Iowa, —, 91 N. W. 801, 14 Am. Crim. Rep. 150, the court said on page 806: "In submitting a case in which the question of guilt depends entirely upon circumstantial evidence, the jury should not be given loose rein, but should have careful direction as to the quantum of proof which will justify a conviction. *State v. Johnson*, 19 Iowa, 230; *People v. Cunningham*, 6 Park. Crim. Rep. 398; *Dreessen v. State*, 38 Neb. 375, 56 N. W. 1024."

In *State v. Miller*, 84 Kan. 667, 114 Pac. 855, the court said: "Although the particular instruction requested was faulty, as pointed out in the former opinion, it was, as said in a recent case, 'sufficient at least to challenge the court's attention to the only defense upon which [appellant] relied' (*State v. Turner*, 83 Kan. 183, 109 Pac. 983), and in support of which there was some substantial evidence offered. As no instruction was given which in any manner stated the law in reference to the appellant's sole defense, the error must be regarded as prejudicial."

In *Willard v. State*, 26 Tex. App. 130, 9 S. W. 359, it is said: "This conviction is based wholly upon circumstantial evidence; and the court, having failed to instruct the jury with regard to that character of evidence, committed error, for which the conviction must be set aside."

In *Crowley v. State*, 26 Tex. App. 578, 10 S. W. 217, the court said: "There is no evidence, not circumstantial, which connects him with the original taking of the animal. Such being the character of the evidence, the trial court committed a material error in failing to charge the jury with reference to circumstantial evidence, and for this error alone the judgment is reversed, and the cause remanded."

In *Crowell v. State*, 24 Tex. App. 410, 6 S. W. 319, the court said: "It is only proved circumstantially, and the case is therefore one resting solely upon circumstantial evidence. This being the character of the case, it was material error to omit to charge the jury upon the rules relating to circumstantial evidence."

In a recent case in Tennessee, in connection with a discussion of the necessity of an instruction as to the weight to be given to a dying declaration in a homicide case, although not requested, the court referred to the rule in that state requiring an instruction upon circumstantial evidence by saying: "It has been held by this court to be error not to instruct the jury with respect to circumstantial evidence, where the case is dependent entirely upon circumstances." *Pearson v. State*, 143 Tenn. 385, 226 S. W. 538.

This case is reversed for lack of evidence to connect the defendant with the taking or asportation of the wheat, but we give our views on the question of instructions regard-

ing circumstantial evidence where such evidence is wholly relied upon for conviction, as a guide in case of a new trial of this case and in other such cases in the state; and we believe that the courts should, in such cases, instruct on the law regarding circumstantial evidence, whether requested to or not, as being fundamental to the defendant's having a fair trial, such as the Constitution and laws guarantee to him.

But to justify a reversal for an absolute failure to give such an instruction, where it appears that there was otherwise a fair trial, it should be found to have been prejudicial, and, as a general rule, there should be an exception properly presenting the question.

Reversed and remanded for new trial.

Potter, Ch. J., and Kimball, J., concur.

Trial—duty to charge on circumstantial evidence.

Appeal—failure to instruct—nonprejudicial error.

ANNOTATION.

Duty of court in criminal case, in absence of request, to charge with respect to circumstantial evidence.

I. View that duty exists in absence of direct evidence:

- a. Rule stated, 1049.
- b. Application of rule generally:
 1. Where evidence is wholly circumstantial, 1051.
 2. Where evidence is partly circumstantial, 1053.
- c. Effect of confession, 1055.
- d. Effect of instruction as to reasonable doubt, 1056.
- e. Exceptions to rule, 1058.

II. View that duty does not exist, 1059.

I. View that duty exists in absence of direct evidence.

a. Rule stated.

In a number of jurisdictions the lack of any direct incriminatory evidence is ordinarily made the test of the duty of the trial judge, without a request therefor, to give a charge as to the probative value of circumstan-

tial evidence in a criminal case. In these jurisdictions, if the state relies wholly on circumstantial evidence for a conviction, an omission to give such an instruction, even in the absence of a request, is ordinarily a sufficient ground for a new trial; but if there is direct incriminatory evidence to support a conviction, the failure of the court to charge on its own motion as to circumstantial evidence is not error.

Florida.—See *Ford v. State* (1920) — Fla. —, 86 So. 715.

Georgia.—*Hamilton v. State* (1895) 96 Ga. 301, 22 S. E. 528; *Griner v. State* (1904) 121 Ga. 614, 49 S. E. 700; *McElroy v. State* (1906) 125 Ga. 37, 53 S. E. 759; *Smith v. State* (1906) 125 Ga. 296, 54 S. E. 127; *Day v. State* (1909) 133 Ga. 434, 66 S. E. 250;

Weaver v. State (1910) 135 Ga. 317, 69 S. E. 488; Brannon v. State (1918) 140 Ga. 787, 80 S. E. 7; Clark v. State (1914) 142 Ga. 601, 83 S. E. 223; Andrews v. State (1916) 145 Ga. 14, 88 S. E. 194; Crawley v. State (1920) 150 Ga. 586, 104 S. E. 410; Mitchell v. State (1921) — Ga. —, 107 S. E. 43; Riley v. State (1907) 1 Ga. App. 651, 57 S. E. 1031; White v. State (1908) 4 Ga. App. 72, 60 S. E. 803; Middleton v. State (1909) 7 Ga. App. 1, 66 S. E. 22; Harvey v. State (1910) 8 Ga. App. 660, 70 S. E. 141; Twilley v. State (1911) 9 Ga. App. 435, 71 S. E. 587; Jordan v. State (1911) 9 Ga. App. 578, 71 S. E. 875; Love v. State (1911) 9 Ga. App. 874, 72 S. E. 433; Tyus v. State (1911) 10 Ga. App. 23, 72 S. E. 509; Fuller v. State (1911) 10 Ga. App. 34, 72 S. E. 515; Bailey v. State (1912) 10 Ga. App. 829, 74 S. E. 285; Smith v. State (1912) 11 Ga. App. 89, 74 S. E. 711; Reddick v. State (1912) 11 Ga. App. 150, 74 S. E. 901; Young v. State (1912) 12 Ga. App. 86, 76 S. E. 753; Barron v. State (1912) 12 Ga. App. 342, 77 S. E. 214; Harden v. State (1913) 13 Ga. App. 34, 78 S. E. 681; Weatherby v. State (1913) 13 Ga. App. 170, 78 S. E. 1014; Allen v. State (1913) 14 Ga. App. 115, 80 S. E. 215; Everett v. State (1914) 15 Ga. App. 390, 83 S. E. 428; Braxley v. State (1915) 17 Ga. App. 196, 86 S. E. 425; Leonard v. State (1915) 17 Ga. App. 267, 86 S. E. 463; Jackson v. State (1915) 17 Ga. App. 269, 86 S. E. 459; Wells v. State (1915) 17 Ga. App. 301, 86 S. E. 650; Martin v. State (1916) 17 Ga. App. 516, 87 S. E. 715; Teal v. State (1916) 17 Ga. App. 556, 87 S. E. 830; Sutton v. State (1916) 17 Ga. App. 713, 88 S. E. 122, 587; Butler v. State (1916) 17 Ga. App. 769, 88 S. E. 593; Thomas v. State (1916) 18 Ga. App. 101, 88 S. E. 917; Coney v. State (1916) 18 Ga. App. 112, 88 S. E. 918; Gantz v. State (1916) 18 Ga. App. 154, 88 S. E. 993; Harris v. State (1916) 18 Ga. App. 710, 90 S. E. 370; Kinard v. State (1917) 19 Ga. App. 624, 91 S. E. 941; Kelley v. State (1917) 20 Ga. App. 821, 93 S. E. 497; Horton v. State (1917) 21 Ga. App. 120, 93 S. E. 112;

Bloodworth v. State (1918) 22 Ga. App. 132, 95 S. E. 582; Reynolds v. State (1919) 23 Ga. App. 369, 98 S. E. 246; Amason v. State (1919) 23 Ga. App. 784, 99 S. E. 681; Etter v. State (1919) 24 Ga. App. 275, 100 S. E. 453; Bracey v. State (1920) 24 Ga. App. 805, 102 S. E. 377; Mitchell v. State (1920) — Ga. App. —, 103 S. E. 180; Melton v. State (1920) — Ga. App. —, 105 S. E. 247; Davis v. State (1921) — Ga. App. —, 106 S. E. 317; Howard v. State (1921) — Ga. App. —, 107 S. E. 629. See also Hegwood v. State (1912) 138 Ga. 274, 75 S. E. 138. Compare Barrow v. State (1895) 80 Ga. 191, 5 S. E. 64; Toler v. State (1899) 107 Ga. 682, 33 S. E. 629.

Missouri.—*STATE v. BAIRD* (reported herewith) ante, 1035; *State v. Donnelly* (1895) 130 Mo. 642, 32 S. W. 1124.

Montana.—See *State v. Francis* (1920) 58 Mont. 659, 194 Pac. 304.

Tennessee.—*Barnard v. State* (1889) 88 Tenn. 183, 12 S. W. 431; *WEBB v. STATE* (reported herewith) ante, 1034; *Pearson v. State* (1920) 143 Tenn. 385, 226 S. W. 538, dictum.

Texas.—*Hunt v. State* (1879) 7 Tex. App. 212; *Ward v. State* (1881) 10 Tex. App. 293; *Barr v. State* (1881) 10 Tex. App. 507; *Ray v. State* (1882) 13 Tex. App. 51; *Conner v. State* (1884) 17 Tex. App. 1; *Stone v. State* (1886) 22 Tex. App. 185, 2 S. W. 585; *Heard v. State* (1887) 24 Tex. App. 103, 5 S. W. 846; *Crowell v. State* (1887) 24 Tex. App. 404, 6 S. W. 319; *Willard v. State* (1888) 26 Tex. App. 126, 9 S. W. 358; *Crowley v. State* (1888) 26 Tex. App. 578, 10 S. W. 217; *Polanka v. State* (1894) 33 Tex. Crim. Rep. 634, 28 S. W. 541; *White v. State* (1899) 40 Tex. Crim. Rep. 366, 50 S. W. 705; *Bennett v. State* (1899) — Tex. Crim. Rep. —, 50 S. W. 945; *Garner v. State* (1902) — Tex. Crim. Rep. —, 70 S. W. 213. See also *Struckman v. State* (1880) 7 Tex. App. 581. Compare *Howard v. State* (1880) 8 Tex. App. 612; *Dovalina v. State* (1883) 14 Tex. App. 312.

Utah.—*People v. Scott* (1894) 10 Utah, 217, 37 Pac. 335.

Wyoming.—See *GARDNER v. STATE* (reported herewith) ante, 1040.

A case is said to rest wholly on circumstantial evidence so as to require an instruction on evidence of that character whether it is requested or not, if the main fact in issue is not directly attested by any eyewitness, but is proven inferentially by testimony as to other facts. *Crowell v. State* (1887) 24 Tex. App. 404, 6 S. W. 319, wherein the court said: "In this case the evidence shows that, before the alleged stolen animal was killed by the defendant, and before he is shown to have had any possession thereof, or connection therewith, it had been taken from its accustomed range, carried into the field of one Moss, and there tied to a tree. It is evident, therefore, that the theft of the animal by some person had been completed at the time defendant was first seen to have possession of it. But no witness testified to having seen the taking of the animal from its range. The fact of such taking is only proved as a matter of inference from other facts in evidence. It is only proved circumstantially, and the case is therefore one resting wholly upon circumstantial evidence. This being the character of the case, it was material error to omit to charge the jury upon the rules relating to circumstantial evidence. We do not think the statements made by the defendant in regard to the animal killed by him can be regarded as confessions proving that he took the animal from its range, or, in other words, proving that he committed the original theft of the animal. They may have the effect to connect him with the animal after it had been tied to the tree in Moss's field, and thus connect him inferentially with the original taking, but they do not afford direct evidence of the original taking, and make this a case not wholly dependent upon circumstantial evidence." See also *infra*, I. b, 2.

b. Application of rule generally.

1. Where evidence is wholly circumstantial.

Homicide.

In *Weaver v. State* (1910) 135 Ga.

317, 69 S. E. 488, a conviction of murder was reversed on the ground that no instruction was given as to the law relating to circumstantial evidence though the evidence against the defendants was wholly circumstantial. Lumpkin, J., dissented on the ground that there was direct evidence of a statement by one of the defendants amounting to a confession. See *infra*, I. c.

In *WEBB v. STATE* (reported herewith) ante, 1034, a prosecution for homicide, the court said: "In the prosecution of a murder case, where the only incriminating evidence against the accused is circumstantial, is it reversible error for the trial judge to fail to instruct the jury upon the nature of circumstantial evidence and upon the general rules of law governing it, no special request being tendered by defendant? In such a case the main fact—the *factum probandum*—is the fatal stroke, and if there be no direct testimony connecting the accused with the main fact, as the slayer, and the sole evidence is circumstantial, it is error not to instruct the jury as to the rules applicable to that kind of evidence. The error is of a class denominated fundamental. It goes essentially to the basis of the accused's theory for defense." See to the same effect, *Dovalina v. State* (1883) 14 Tex. App. 312.

Forgery.

In *Davis v. State* (1921) — Ga. App. —, 106 S. E. 317, a prosecution for uttering a forged instrument, the state relied for a conviction solely on circumstantial evidence, consisting mainly of testimony by handwriting experts. In reversing a judgment against the defendant, the court said: "In such a case, the trial judge must, whether so requested or not, instruct the jury that, to warrant a conviction on circumstantial evidence, the proved facts must not only be consistent with the hypothesis of guilty, but must exclude every other reasonable hypothesis than that of the guilt of the accused. In this case the learned trial judge failed, perhaps by mere oversight, so to charge the jury; but, that failure being assigned as one

of the grounds of the motion for a new trial, both the lower court and this court are bound, as matter of law, to sustain the motion."

Larceny.

In *Ward v. State* (1881) 10 Tex. App. 293, a prosecution for larceny, the court said: "This is a case of purely circumstantial evidence, and it was the duty of the court below, whether asked or not, to give in charge the law applicable to such a case."

So, in *Gantz v. State* (1916) 18 Ga. App. 154, 88 S. E. 993, wherein the defendant was prosecuted for larceny the court said: "Where, as in the present case, the hypothesis of the defendant's guilt rests wholly upon proof of various circumstances, each of which merely points in that direction, it is the duty of the trial judge, even without a request, to instruct the jury that, if the proved facts are consistent with the innocence of the defendant, he is entitled to an acquittal. This rule is embodied in the Code, in recognition of the fact that the tendency to act upon mere suspicion is one of the most common frailties of humankind; and, as a consequence, the law deems it necessary in a criminal case, where the guilt or innocence of a citizen is to be ascertained by the construction which may be given to circumstances indicating his guilt, and from inferences drawn from facts which only indirectly point thereto, to require that the jury be given a warning against yielding to the well-nigh universal tendency to which we have referred. The language of the Code section is so sweeping and exhaustive as to indicate the importance of the mandate. The omission to warn the jury against the danger of acting on suspicion, by failing to give the substance of § 1010 of the Penal Code, has uniformly been held to be an error so presumptively prejudicial as to require the granting of a new trial, where the conviction rests exclusively on circumstantial evidence."

See to the same effect, *Kinard v. State* (1917) 19 Ga. App. 624, 91 S. E. 1011; *Butler v. State* (1916) 17 Ga.

App. 769, 88 S. E. 593; *Crowell v. State* (1887) 24 Tex. App. 404, 6 S. W. 319.

See also *Riley v. State* (1907) 1 Ga. App. 651, 57 S. E. 1031, which is apparently to the same effect, though the report of the case does not make it certain that an instruction on the weight and sufficiency of circumstantial evidence was not requested.

In *Polanka v. State* (1894) 33 Tex. Crim. Rep. 634, 28 S. W. 541, the court stated the facts and its holding as follows: "This conviction was for hog theft. The statement of facts incorporated in the record constitutes this a conviction depending wholly upon circumstantial evidence. It was therefore incumbent upon the trial court to instruct the jury in regard to the law applicable to such testimony. This is the settled rule in this state by an unbroken line of decisions, and a failure to comply with it requires a reversal of the judgment, though exception be not reserved."

In a syllabus by the court in *Harden v. State* (1913) 13 Ga. App. 34, 78 S. E. 681, a prosecution for the theft of a hog, the rule was stated as follows: "Where the proof of guilt of one accused of crime depends wholly upon circumstantial evidence, it is error for the trial judge to fail to instruct the jury that, to warrant a conviction on circumstantial evidence, the proof not only must be consistent with the hypothesis of guilt, but must exclude every other reasonable hypothesis than that of the guilt of the accused (Penal Code, § 1010). It is his duty so to instruct the jury even though there be no request to that effect."

In *GARDNER v. STATE* (reported herewith) ante, 1040, a prosecution for larceny, there was a request for an incorrect instruction as to circumstantial evidence; but the court, reversing on other grounds, lays down a general rule for guidance in future cases, that where the evidence is purely circumstantial the trial court should "instruct on the law regarding circumstantial evidence, whether requested to or not, as being fundamental to the defendant's having a fair trial,

such as the Constitution and laws guarantee to him."

Other offenses.

The rule that there must be an instruction on circumstantial evidence where the evidence is wholly circumstantial, even in the absence of a request, has been applied in prosecutions for other offenses as follows:

—burglary, *Struckman v. State* (1880) 7 Tex. App. 581;

—keeping a house of ill fame, *Bailey v. State* (1912) 10 Ga. App. 829, 74 S. E. 285;

—aiding the escape of a prisoner, *Harvey v. State* (1910) 8 Ga. App. 660, 70 S. E. 141;

—arson, *People v. Scott* (1894) 10 Utah, 217, 37 Pac. 335 (dictum);

—illegal sale of liquor, *Allen v. State* (1913) 14 Ga. App. 115, 80 S. E. 215.

See also the following cases, the reports of which do not state the nature of the prosecution, but in each of which it was held to be error, even in the absence of a request, to fail to give an instruction on the probative value of circumstantial evidence: *Andrews v. State* (1916) 145 Ga. 14, 88 S. E. 194; *White v. State* (1908) 4 Ga. App. 72, 60 S. E. 803; *Martin v. State* (1916) 17 Ga. App. 516, 87 S. E. 715; *Coney v. State* (1916) 18 Ga. App. 112, 88 S. E. 918; *Kelley v. State* (1917) 20 Ga. App. 821, 93 S. E. 497; *Amason v. State* (1919) 23 Ga. App. 784, 99 S. E. 631.

2. Where evidence is partly circumstantial.

Homicide.

In *State v. Donnelly* (1895) 130 Mo. 642, 32 S. W. 1124, wherein the defendant was convicted of murder in the first degree, the court said: "It is insisted that the prosecution relied upon circumstantial evidence to convict the defendant, and that the court should have instructed the jury with reference to the weight and conclusiveness of such evidence. Such an instruction would not have been applicable to the facts of the case, for the reason that there was direct and positive evidence that defendant committed the homicide, and it is only

when conviction is sought on circumstantial evidence alone that such an instruction becomes necessary."

See, to the same effect, *Day v. State* (1909) 133 Ga. 434, 66 S. E. 250; *Brannon v. State* (1913) 140 Ga. 787, 80 S. E. 7; *Clark v. State* (1914) 142 Ga. 601, 83 S. E. 223; *Barnards v. State* (1889) 88 Tenn. 183, 12 S. W. 431.

So, in *STATE v. BAIRD* (reported herewith) ante, 1035, a prosecution for murder, wherein the defendant admitted the killing, and the only issue to be determined on circumstantial evidence was whether he acted in self-defense, it was held that it was not necessary to charge on circumstantial evidence.

In *Crawley v. State* (1920) 150 Ga. 586, 104 S. E. 410, it appeared that the homicide was committed by one of the defendants, but it was not clear which defendant fired the shot which caused the death. There was direct evidence as to the shooting, but only circumstantial evidence of a conspiracy among the defendants. It was urged that under such circumstances it was reversible error for the trial court, even in the absence of a request, not to charge the jury as to the required certainty of circumstantial evidence to warrant a conviction. On this point the court said: "One ground of the motion for a new trial is as follows: 'Because the court erred in failing to charge the law of circumstantial evidence, as contained in § 1010 of the Penal Code; to wit, "to warrant a conviction on circumstantial evidence the proved facts must not only be consistent with the hypothesis of guilt, but must exclude every other hypothesis save that of the guilt of the accused."' Defendants contend that under the evidence three of the defendants necessarily could not have been convicted, except upon the theory that a conspiracy existed between all of the parties, and that the proof of conspiracy necessarily rested upon circumstantial evidence, there being absolutely no direct evidence that any conspiracy did exist; and the court, having charged the law applicable to a conspiracy, should have charged also the law of

circumstantial evidence.' As to this ground the opinion of the majority is as follows: The four defendants were tried jointly. The evidence is directly to the effect that the four defendants were at the house at the time of the homicide, and that two of them shot the deceased, one of them inflicting upon the deceased a mortal wound. Another of the defendants was, at the time of the homicide, engaged in a struggle with the sheriff, the companion of the deceased, while the fourth defendant was actively interfering with the sheriff in his attempt to open a door leading into the room where the shooting occurred, and to go to the rescue of the deceased. There was no request to give in charge the provisions of § 1010 of the Penal Code, quoted above. The case against the defendants is not dependent solely upon circumstantial evidence; and, under the repeated rulings of this court, the failure to give in charge the rule relating to circumstantial evidence was not error. If the jury believed beyond a reasonable doubt that one or more of the defendants shot and killed the deceased without justification, and if they believed that the other defendants were present aiding and abetting the slayer or slayers in the commission of the homicide, they would have been authorized to convict such defendants. The case against neither of the defendants depended entirely on circumstantial evidence. Even if the state depended upon circumstantial evidence to establish an essential fact, to wit, the conspiracy, in order to connect one or more of the defendants with the commission of the homicide, the mere failure to charge the rule above stated, in the absence of a request so to do, was not error, requiring the grant of a new trial."

Larceny.

In an action for larceny it has been held in several cases that where a part of the evidence is direct, no instruction as to circumstantial evidence is required in the absence of a request. *Love v. State* (1911) 9 Ga. App. 874, 72 S. E. 483; *Reddick v. State* (1912) 11 Ga. App. 150, 74 S. E.

901; *Everett v. State* (1914) 15 Ga. App. 390, 83 S. E. 428; *State v. Francis* (1920) 58 Mont. 659, 194 Pac. 304.

The lack of direct evidence merely as to the intent with which property is taken is clearly not sufficient, in a prosecution for larceny, to require an instruction on the law relating to circumstantial evidence, where no request is made for a charge on that branch of the law. *Love v. State* (Ga.) supra; *Reddick v. State* (1912) 11 Ga. App. 150, 74 S. E. 901. In the case first cited the court said: "The only feature of the case left to inference was whether there was an intent to steal. Intent, in practically all cases, must be shown by the inference arising from the facts shown. We do not think that, from a practical standpoint, it is correct to say that it is 'a conviction on circumstantial evidence,' where all the salient facts of the case (including the facts on which the inference itself rests) are directly proved, and only the intent with which proved acts were committed is a matter of inference. If so, it would be proper to speak of a conviction for homicide as being 'a conviction on circumstantial evidence,' where eyewitnesses see the killing, but the jury must infer the malice or heat of passion, as the case may be, from circumstances surrounding the transaction."

Other offenses.

The rule that a trial court is not under a duty to give voluntarily an instruction on circumstantial evidence where a part of the evidence relied on for a conviction is direct has been applied in prosecutions for other offenses as follows:

—forgery, *Barron v. State* (1913) 12 Ga. App. 342, 77 S. E. 214;

—robbery, *Jackson v. State* (1915) 17 Ga. App. 269, 86 S. E. 459;

—burglary, *Braxley v. State* (1915) 17 Ga. App. 196, 86 S. E. 425;

—assault and battery, *Middleton v. State* (1909) 7 Ga. App. 1, 66 S. E. 22;

—violation of the liquor laws, *Smith v. State* (1912) 11 Ga. App. 89, 74 S. E. 711; *Mitchell v. State* (1920) — Ga. App. —, 103 S. E. 180.

Though proof of drunkenness is ordinarily based on the conduct and appearance of the person accused of the misdemeanor, it has been held that, where a witness testified directly that the defendant was drunk, and others stated in detail the various acts and utterances of the defendant, it was not error, in the absence of a request, to omit to charge the jury with respect to circumstantial evidence. *Teal v. State* (1916) 17 Ga. App. 556, 87 S. E. 830.

In *Smith v. State* (1906) 125 Ga. 296, 54 S. E. 127, the defendant urged as a ground for a new trial that the trial court did not give an instruction that, if for any reason the jury should not believe the direct evidence, the circumstantial evidence, to warrant a conviction, would have to be so strong as to exclude every reasonable hypothesis except that of the defendant's guilt. In denying that the defendant was entitled to a new trial on that ground the supreme court said: "Nor was it erroneous for the court, in the absence of such request, to omit to charge the law of circumstantial evidence, to be applied in the event the jury should not believe that a confession had been made. The confession was sufficiently corroborated to justify the conviction of the accused." As to the effect of a confession generally, see *infra*, I. c.

c. Effect of confession.

Ordinarily if a confession of the defendant is proved the evidence to support a conviction cannot be regarded as wholly circumstantial, so as to require the trial court, of its own motion to give an instruction on the probative value of circumstantial evidence. *Griner v. State* (1905) 121 Ga. 614, 49 S. E. 700; *McElroy v. State* (1906) 125 Ga. 37, 53 S. E. 759; *Smith v. State* (1906) 125 Ga. 296, 54 S. E. 127; *Jordan v. State* (1911) 9 Ga. App. 578, 71 S. E. 875; *Weatherby v. State* (1913) 13 Ga. App. 170, 78 S. E. 1014; *Wells v. State* (1915) 17 Ga. App. 301, 86 S. E. 650; *Sutton v. State* (1916) 17 Ga. App. 713, 88 S. E. 122, 587; *Thomas v. State* (1916) 18 Ga. App. 101, 88 S. E. 917; *Horton v. State* (1917) 21 Ga.

App. 120, 93 S. E. 1012; *Bloodworth v. State* (1918) 22 Ga. App. 132, 95 S. E. 532; *Heard v. State* (1887) 24 Tex. App. 103, 5 S. W. 846; *Willard v. State* (1888) 26 Tex. App. 126, 9 S. W. 358; *White v. State* (1899) 40 Tex. Crim. Rep. 366, 50 S. W. 705. Compare *Conner v. State* (1884) 17 Tex. App. 1.

The rule that a confession is direct evidence, which will relieve the trial court of giving a charge without a request therefor on the weight and sufficiency of circumstantial evidence, has been applied even to cases where in the defendant was convicted of murder in the first degree. *Heard v. State* (1887) 24 Tex. App. 103, 5 S. W. 846; *White v. State* (1899) (Tex.) *supra*.

In *Smith v. State* (1906) 125 Ga. 296, 54 S. E. 127, testimony was introduced as to a confession by the defendant that he committed the crime of arson. The state also established a strong case against him by circumstantial evidence. As to the necessity of a charge on the law of circumstantial evidence, the court said: "The jury was authorized from the evidence to believe that such a confession had been made. The confession being direct evidence, the conviction did not depend exclusively upon circumstantial evidence; and therefore, in the absence of an appropriate request, it was not erroneous for the court to omit to charge the law of circumstantial evidence." See to the same effect *Sutton v. State* (1916) 17 Ga. App. 713, 88 S. E. 122, 587.

In *Thomas v. State* (1916) 18 Ga. App. 101, 88 S. E. 917, a prosecution for burglary, it was said in a syllabus by the court: "There being evidence as to a confession by the accused, the conviction did not depend exclusively upon circumstantial evidence, since a confession is direct evidence; and, in the absence of an appropriate request, it would not have been erroneous for the court to omit to charge the law of circumstantial evidence altogether."

And where the defendant in an action for larceny from a building admitted that he took the property from the building, but denied that he did

so with the intent to steal it, it was held not to be error to fail to give an instruction as to the law of circumstantial evidence if such instruction was not requested. *Jordan v. State* (1911) 9 Ga. App. 578, 71 S. E. 875.

See, to the same effect, *Willard v. State* (1888) 26 Tex. App. 126, 9 S. W. 358, wherein, however, it was held that a promise by the defendant to pay for a cow after being accused of its theft was not a confession of the offense.

In *Bloodworth v. State* (1918) 22 Ga. App. 132, 95 S. E. 532, a prosecution for manufacturing intoxicating liquor, it appeared that, with the exception of a confession by the defendant, the evidence was circumstantial. In a syllabus by the court it was said: "The state having introduced direct evidence, that is, a confession as well as circumstantial evidence of the defendant's guilt, the court did not err, in the absence of a timely written request, in failing to charge the jury the law of circumstantial evidence as embodied in Penal Code 1910, § 1010. *Horton v. State* (1917) 21 Ga. App. 120, 93 S. E. 1013, and cases therein cited."

Testimony that the defendant remained silent when accused of the crime for which he was indicted has been held, in a case where the other evidence was circumstantial, to be direct evidence, which relieved the trial court from the obligation of giving an instruction, without a request, on the law of circumstantial evidence. *McElroy v. State* (1906) 125 Ga. 37, 53 S. E. 759. In that case the court said: "Where the evidence relied on consists solely of proof of the burglary and the recent and unexplained possession of goods taken from the house at the time of the burglarious entry, the court should always instruct the jury, without formal request, under what circumstances a conviction upon circumstantial evidence is warranted. But when there is evidence tending to show an implied admission by the accused of his guilt, and the jury are properly instructed as to the weight they are authorized to give to his explanation of his recent possession of

the stolen goods, and as to the law touching reasonable doubt in a criminal prosecution, a new trial will not be ordered merely because of the failure of the judge to charge as to what weight the law attaches to evidence of a purely circumstantial nature." A contrary view was apparently taken in *Conner v. State* (1884) 17 Tex. App. 1, wherein the statements made in the presence of the accused were incriminating but did not amount to a direct and explicit statement of guilt.

d. Effect of instruction as to reasonable doubt.

It seems that the fact that a proper charge in respect to reasonable doubt is given is not sufficient to prevent reversible error, where the state relies wholly on circumstantial evidence, and the trial court omits, even without a request, to give an instruction as to the required certainty of such evidence to warrant a conviction. *Hamilton v. State* (1895) 96 Ga. 301, 22 S. E. 528; *Twilley v. State* (1911) 9 Ga. App. 435, 71 S. E. 587; *Tyus v. State* (1911) 10 Ga. App. 23, 72 S. E. 509; *Harris v. State* (1916) 18 Ga. App. 710, 90 S. E. 370; *Hunt v. State* (1879) 7 Tex. App. 212; *Barr v. State* (1881) 10 Tex. App. 507. Compare *Barrow v. State* (1888) 80 Ga. 191, 5 S. E. 64; *Toler v. State* (1899) 107 Ga. 682, 33 S. E. 629.

In *Hamilton v. State* (Ga.) *supra*, the court said: "It can hardly be doubted that in every criminal case it is the duty of the judge, even without a request, to charge concerning the law of reasonable doubt. There was no complaint that this was not done in the present case; but we think it equally clear that in a case where the state depended for conviction upon circumstantial evidence alone, it was likewise the duty of the judge, whether so requested or not, to instruct the jury, in substance, that to authorize a verdict of guilty the evidence must connect the accused with the perpetration of the alleged offense, and must not only be entirely consistent with his guilt, but inconsistent with every other reasonable hypothesis. The failure to give some

such instruction, in a close and doubtful case like the present, will entitle the accused to a new trial. The law upon this subject is very concisely and aptly stated in 12 Am. & Eng. Enc. Law, 879, from which we make the following quotation: "Where the prosecution relies solely upon circumstantial evidence to secure a conviction, it is incumbent on the trial court to instruct the jury as to the law applicable to such proof. No particular form of language is required; if the ideas conveyed are correct and so expressed as to meet the comprehension of the jury, it is sufficient." "

So, in *Twilley v. State* (1911) 9 Ga. App. 435, 71 S. E. 587, the court said: "The evidence, however, was entirely circumstantial. Even the incriminatory statement only inferentially indicates guilt. In such case it is well settled, by the repeated rulings of the supreme court, that it is the duty of the trial judge, even in the absence of a request, to charge the jury the law defining the probative value of circumstantial evidence, as laid down in § 1010 of the Penal Code (1910). The writer confesses his inability to see any practical difference between the universal rule of 'reasonable doubt,' applicable in all criminal cases, and the special rule of 'reasonable hypothesis,' applicable to cases of circumstantial evidence. Whether dependent upon direct or circumstantial evidence, a conviction is unauthorized unless the jury believe that guilt is proved beyond a reasonable doubt; and so long as there is a reasonable hypothesis of innocence, a reasonable doubt of guilt exists. And where a jury is instructed that a verdict of guilty cannot be legally found unless the evidence proves guilt beyond a reasonable doubt, this would seem to be tantamount to telling the jury that they could not legally convict unless the evidence excluded 'every other reasonable hypothesis save that of the guilt of the accused.' But the law has made a difference between 'reasonable doubt' and 'reasonable hypothesis,' and the supreme court has many times declared that, when a conviction is based alone on circumstantial

evidence, it is reversible error for the trial judge to fail to instruct the jury that the evidence must exclude every reasonable hypothesis save that of guilt, although he has clearly charged that a conviction would be unauthorized unless the evidence proved the guilt of the accused beyond a reasonable doubt." See to the same effect, and decided on the authority of the preceding case, without a separate opinion. *Tyus v. State* (1911) 10 Ga. App. 23, 72 S. E. 509.

In holding that an instruction as to reasonable doubt will not take the place of an instruction as to the probative value of circumstantial evidence, where the evidence relied on for a conviction is wholly circumstantial, the court said in *Harris v. State* (1916) 18 Ga. App. 710, 90 S. E. 370: "The evidence in this case satisfied the mind and the conscience of the jury beyond a reasonable doubt; and yet the law required that the judge should give instructions on the weight, force, and credit to be given to circumstantial evidence. Regardless of the opinion of the writer, judges should always bear in mind, *judex est custos, non conditor, juris judicia exercere potuit, facere leges non potest.*"

A different view, however, as to the effect of an instruction on reasonable doubt was taken in *Barrow v. State* (1888) 80 Ga. 191, 5 S. E. 64, wherein the court said: "It is perhaps proper to remark that it is not clear that the testimony was entirely circumstantial. While no witness actually saw the defendant stab the deceased, several witnesses saw them fighting, giving each other violent blows, and when the fight ended, deceased was found with a mortal stab in her breast, blood upon her garments, and very soon died. But on the assumption that it was a case in which it would have been proper to instruct the jury specifically as to the law of circumstantial evidence, we are of the opinion that, in the absence of such a request, the court did substantially give the jury all necessary instructions as to the amount and character of proof required to justify a conviction."

tion. He charged fully the law of reasonable doubt; warned the jury not to convict unless morally satisfied of her guilt; impressed this upon them by repeated statements to this effect; informed them that if, after an honest and impartial investigation, they were uncertain as to her guilt, they ought to acquit; instructed them they had the right to believe her statement in preference to the sworn testimony offered by the state; and concluded by saying, She entered the trial with the presumption of innocence in her favor, that this presumption remained until the state rebutted it by proof, and that if the state had failed to do so she should be acquitted." That case was cited with approval and quoted from in *Toler v. State* (1899) 107 Ga. 682, 33 S. E. 629, though the decision in the latter case appears to have been based chiefly on the ground that the circumstantial evidence was too convincing to warrant a new trial for a failure to give an instruction as to the probative value of circumstantial evidence. See *infra*, I. e.

e. Exceptions to rule.

In Georgia, although it is ordinarily the duty of the trial court, even without a request, to give an instruction as to circumstantial evidence where the state relies on such evidence exclusively, yet where the circumstantial evidence is not contradicted and clearly shows the guilt of the accused, the failure of the trial court to give an instruction of its own motion on the matter is not a ground for a new trial. *Richards v. State* (1897) 102 Ga. 569, 27 S. E. 726; *Jones v. State* (1898) 105 Ga. 649, 31 S. E. 574; *Toler v. State* (1899) 107 Ga. 682, 33 S. E. 629. In *Jones v. State* (Ga.) *supra*, the court said: "We agree with counsel for plaintiff in error that the court should have instructed the jury in relation to the law applicable to the recent possession of stolen property. As we have seen, such possession is but a circumstance, and the jury should have been so told, and further properly charged that the weight to be given to this circumstance depended upon the nature of the prop-

erty, how recently it had been stolen, and such other principles of law as illustrate the value of the evidence. The fact of recent possession being a circumstance which the state relied on to convict the accused of burglary, the court should have given, in charge to the jury, the law as to what amount and character of proof is necessary to warrant a conviction on circumstantial evidence. Penal Code, § 984. We are asked, however, to award a new trial in this case, because of the failure of the court to so charge. This we cannot do. We desire it understood, however, that if it were a doubtful case,—indeed, if there were any evidence tending to rebut this almost conclusive presumption of guilt; if there were even a plausible explanation as to how the possession was acquired,—the failure to charge as indicated would demand at our hands a reversal of the judgment." And in *Toler v. State* (Ga.) *supra*, Lumpkin, P. J., said: "The record discloses that the evidence upon which the conviction was had was entirely circumstantial. This court, in *Hamilton v. State*, 96 Ga. 301, held that in cases of this character it was the duty of the judge, whether so requested or not, to state to the jury the law with regard to circumstantial evidence. In the opinion it was said that a failure to do this would, in a close or doubtful case, entitle the accused to a new trial. It by no means follows, however, that such failure will require a new trial where the guilt of the accused is clearly and convincingly proved, and where the charge of the court as to the amount and character of proof requisite to a lawful conviction is such as to leave no room for doubt that the verdict would have been the same even if the court had in terms stated to the jury the technical rule relating to circumstantial evidence."

In Texas, though the evidence is wholly circumstantial, it is not error for the trial court, in a misdemeanor case, to omit a charge on circumstantial evidence if none is requested. *Howard v. State* (1880) 8 Tex. App. 612; *Ross v. State* (1880) 9 Tex. App.

275. See also *Bennett v. State* (1899) — *Tex. Crim. Rep.* —, 50 S. W. 945; *Garner v. State* (1902) — *Tex. Crim. Rep.* —, 70 S. W. 213. Thus in *Ross v. State* (1880) 9 *Tex. App.* 275, the court said: "It is a part of the law of every case where a conviction is dependent solely upon circumstantial evidence, that the jury trying it shall be properly informed as to the nature and character of the testimony in order to [base] a conviction upon it. In the application of this rule this distinction must be observed,—if the case on trial be a misdemeanor (as is the present case), a failure to give the proper instruction will not be cause of reversal unless the instruction be requested on the trial, whilst in cases of felony the omission would be fatal to a conviction whether the charge was asked or not."

In *Dovalina v. State* (1883) 14 *Tex. App.* 312, the court refused to consider the failure to give an instruction as to circumstantial evidence, where no request was made in the lower court, and its omission was not relied on in the motion for a new trial. See also *GARDNER v. STATE* (reported herewith) ante, 1040.

II. *View that duty does not exist.*

In several jurisdictions it is held that a trial court, in a criminal case, is never bound to give of its own motion an instruction as to the weight of circumstantial evidence, or as to the degree of certainty arising from such evidence which will warrant a conviction.

United States.—*Hughes v. United States* (1916) 145 C. C. A. 238, 231 *Fed.* 50, writ of certiorari denied in (1916) 242 U. S. 640, 61 L. ed. 541, 37 *Sup. Ct. Rep.* 112. See also *Robinson v. United States* (1909) 96 C. C. A. 307, 172 *Fed.* 105.

California.—*People v. Balkwell* (1904) 143 *Cal.* 259, 76 *Pac.* 1017. See also *People v. Hiltel* (1901) 181 *Cal.* 577, 63 *Pac.* 919.

Colorado.—*Reagan v. People* (1910) 49 *Colo.* 316, 112 *Pac.* 785.

Iowa.—*State v. Bartlett* (1905) 128 *Iowa*, 518, 105 N. W. 59; *State v. Hayward* (1911) 153 *Iowa*, 265, 133 N.

W. 667. See also *State v. Hart* (1908) 140 *Iowa*, 456, 118 N. W. 784.

Kansas.—*State v. Ingram* (1876) 16 *Kan.* 14; *State v. Kennedy* (1919) 105 *Kan.* 347, 184 *Pac.* 734; *State v. Woods* (1919) 105 *Kan.* 554, 185 *Pac.* 21; *State v. Davis* (1920) 106 *Kan.* 527, 188 *Pac.* 231.

North Carolina.—See *State v. Wiloughby* (1920) 180 N. C. 676, 103 S. E. 903.

South Dakota.—*State v. Colvin* (1910) 24 S. D. 567, 124 N. W. 749; *State v. Millard* (1912) 30 S. D. 169, 138 N. W. 366.

Thus, in *State v. Bartlett* (Iowa) supra, the court said: "The testimony relied upon by the state to sustain a conviction as to some of the defendants, at least, is wholly circumstantial. The trial court did not define circumstantial evidence to the jury, or give to them the usual instruction that, in order to justify a conviction upon such evidence, the array of incriminating circumstances must be inconsistent with any reasonable theory of defendant's innocence of the crime charged. This failure is assigned as error. It is without doubt the proper and the better practice for the trial court to instruct the jury upon this subject in all cases depending upon circumstantial evidence, even though not specially requested to do so by the accused; but, in the absence of such request, we are of the opinion that its omission is not ordinarily a ground for reversal."

So, in *Hughes v. United States* (1916) 145 C. C. A. 238, 231 *Fed.* 50, writ of certiorari denied in (1916) 242 U. S. 640, 61 L. ed. 541, 37 *Sup. Ct. Rep.* 112, the court said: "The defendants Allen, Marable, Parlan, and Corl assign as error that the court failed to charge the jury upon the effect of circumstantial evidence and upon other questions of law pertinent to the issue. No exception was taken to the general charge on this or any ground, and no request was made by the defendants of the court to charge on any other questions than those covered by it. The court cannot be put in error for failing to charge a legal principle, in the absence of a re-

quest to do so, or exception based on the omission. This is the rule in the Federal courts."

Similarly, in *State v. Willoughby* (N. C.) *supra*, an incomplete charge as to the probative value of circumstantial evidence was held not to be a ground for a new trial, where no request was made for a fuller instruction.

The rule that it is not reversible error for the trial court not to give of its motion an instruction as to circumstantial evidence has been applied even in homicide cases. *Reagan v. People* (Colo.) *supra* (murder in first degree); *People v. Balkwell* (Cal.) *supra* (murder in second degree for death resulting from criminal abortion).

In *State v. Woods* (1919) 105 Kan. 554, 185 Pac. 21, the decision was based chiefly on an earlier case, *State v. Winters* (1909) 81 Kan. 414, 105 Pac. 516, wherein the court had held that, in the absence of any request whatever, it was not ordinarily a reversible error to omit a charge on lesser offenses embraced in the principal crime charged in the information. After quoting from that case the court said: "An instruction on circumstantial evidence would have been very appropriate in this case, and should have been given. All the evidence upon which the state relied for conviction was circumstantial. But even in a case where the entire testimony of the state is of that character, the failure to instruct upon circumstantial evidence cannot be said to be nearly as indispensable to protect the rights of the defendant as an instruction on lesser degrees embraced in the principal crime charged, where there is evidence that the crime may have been of a lower grade than the one charged. It follows, therefore, that an instruction upon circumstantial evidence in such a case is not indispensable in the sense that it cannot be waived by the defendant. The present case falls squarely within the general rule that a failure to make request waives the error in failing to instruct, and, having in mind the other statutory rule, that in this court

judgment must be given without regard to technical errors or exceptions which do not affect substantial rights (Crim. Code, § 293; Gen. Stat. 1915, § 8215), we have no hesitation in holding that the defendant can neither avail himself of the failure to instruct on circumstantial evidence nor with respect to the defense of an alibi."

Even under a statute requiring that the court in charging the jury "must state to them all matters of law which are necessary for their information in giving their verdict," it has been held that a defendant convicted on evidence wholly circumstantial is not entitled to a new trial for the failure of the trial court to give an instruction as to the degree of certainty of such evidence to warrant a conviction, where no request has been made for the instruction. *State v. Woods* (Kan.) *supra*.

Similarly, under a statute requiring a trial court in charging a jury to state to them "all matters of law which it thinks necessary for their information in giving their verdict," it has been held not to be a ground for reversing a conviction that the trial court, without request, did not give a charge as to circumstantial evidence, though all of the evidence relied on for a conviction was circumstantial. *State v. Colvin* (1910) 24 S. D. 567, 124 N. W. 749. See to the same effect, *State v. Millard* (1912) 30 S. D. 169, 138 N. W. 366.

In the absence of a request the failure of a court to define circumstantial evidence has been held not to be error. *People v. Hiltel* (1901) 131 Cal. 577, 63 Pac. 919, wherein the court said: "The court instructed the jury as to what constituted direct or positive evidence, and that there is another kind of evidence called circumstantial. The court did not undertake to define this latter kind of evidence, but the court said that it 'is where it is sought to convict a person by a chain of circumstances which are sufficient in themselves to establish the guilt of the party, to the satisfaction of the jury beyond all reasonable doubt. Both of these classes of testimony are proper and upon either the

jury may convict, providing they are sufficient to satisfy their minds beyond all reasonable doubt of the guilt of the party.' It is complained that the instruction 'left the jury to judge for themselves' as to what constituted circumstantial evidence. It would have been proper enough for the court to give to the jury a definition of circumstantial evidence, but it was not error to fail to do so. The court was not asked to define this class of evidence."

In jurisdictions wherein the court need not charge of its own motion on circumstantial evidence, even where such evidence is wholly relied on, of course no such charge need be given without a request, where there is some direct evidence.

Thus, in *State v. Kennedy* (1919) 105 Kan. 347, 184 Pac. 734, the court said: "There was no error in failing to instruct upon circumstantial evidence. There was no request by appellant for any particular instruction upon this character of evidence, and, moreover, most of the evidence was positive instead of circumstantial." Similarly, in *State v. Davis* (1920) 106 Kan. 527, 188 Pac. 231, the court said: "It is further contended that the court erred in not instructing the jury concerning circumstantial evidence. No instruction on that question was asked by the defendant. That waived the error, if any was committed. While there was some circumstantial evidence in the case, yet there was direct evidence which tended to show that the defendant did set fire to the house and attempt to burn the goods. Unless the defendant specifically requested an instruction concerning circumstantial evidence, it was not re-

versible error for the court to omit to instruct the jury concerning this character of evidence." So, in *State v. Ingram* (1876) 16 Kan. 14, it was held not to be ground for a new trial that an instruction as to circumstantial evidence was brief, expressed no need of extra caution, and stated no rules for weighing and determining such evidence, where the court afterward, at the instance of the defendant, enlarged on the matter, and gave all the instructions on the point asked for by the defendant. It appeared that the evidence relied on for a conviction was mainly circumstantial, but that there was also testimony of a confession. Likewise, in *State v. Hart* (1908) 140 Iowa, 456, 118 N. W. 784, it was held that, in the absence of a request, it was not error for the trial court, in a prosecution for passing a forged note, to omit to give an instruction as to the probative value of circumstantial evidence, where it appeared that there was direct evidence as to the passing of the paper, and the fact that it was a forgery, though not as to the identity of the person passing it.

In *State v. Hayward* (1911) 153 Iowa, 265, 133 N. W. 667, a prosecution for larceny, it was held not to be error for the trial court, in the absence of a request, to fail to give a special instruction as to circumstantial evidence, where it appeared that the only circumstances before the jury tending to show the defendant's guilt were his presence at the scene of the theft and his possession of the stolen property, and the court gave a full instruction as to the effect of evidence of the last-mentioned kind. W. S. R.

CHARLES A. WOODS, Respt.,

v.

T. E. THROWER, Trading as Thrower Automobile Company, Appt.

South Carolina Supreme Court—May 5, 1921.

(— S. C. —, 107 S. E. 250.)

Witnesses — supporting character of stranger.

1. The character of a witness who is a stranger at the place of trial may be supported by evidence before he has been impeached.

[See note on this question beginning on page 1065.]

Appeal — admission of evidence — nonprejudicial error.

2. In the absence of a showing of prejudicial error, a judgment for plaintiff for return of a car held by a mechanic for a repair bill will not be reversed because of admission of testi-

mony of plaintiff's agent, who left the car for repair, that he would not have done so had the price named by the mechanic for the repairs been what he now claims to be due.

[See 2 R. C. L. 247 et seq.]

APPEAL by defendant from a judgment of the Richland County Court (Whaley, J.) in favor of plaintiff in an action brought to recover possession of an automobile, and for damages, actual and punitive, for its wrongful detention. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Tompkins, Barnett, & McDonald, for appellant:

Credibility of a witness is always open to legitimate attack; but, having been attacked, the door is not thus opened to testimony showing the reputation of the witness for truth and veracity. It is otherwise when the character of a witness is impeached. Then testimony may be competent to show the reputation of the witness.

Chapman v. Cooley, 46 S. C. L. (12 Rich.) 654; State v. Jones, 29 S. C. 230, 7 S. E. 296; State v. Stukes, 73 S. C. 392, 53 S. E. 643; Werts v. Spearman, 22 S. C. 219; State v. Rice, 49 S. C. 420, 61 Am. St. Rep. 816, 27 S. E. 452; Bedenbaugh v. Southern R. Co. 69 S. C. 1, 48 S. E. 53; State v. Gibson, 83 S. C. 36, 64 S. E. 607, 916; Dennis v. Columbia Electric Street R. Co. 93 S. C. 296, 76 S. E. 711; First Nat. Bank v. Blakeman, 19 Okla. 106, 12 L.R.A. (N.S.) 364, 91 Pac. 868; 10 R. C. L. 947.

The court was in error in permitting witness to testify as to what he would have done as agent of plaintiff, had defendant's offer to repair the car been different from what he (the witness) claimed.

Griskell v. Southern R. Co. 81 S. C.

193, 62 S. E. 205; Welch v. Clifton Mfg. Co. 55 S. C. 579, 33 S. E. 739.

Messrs. Barron, McKay, Frierson, & McCants, for respondent:

Testimony of witnesses as to the reputation of Marshall Wallace for truth and veracity was admissible.

Werts v. Spearman, 22 S. C. 219; First Nat. Bank v. Blakeman, 19 Okla. 106, 12 L.R.A. (N.S.) 364, 91 Pac. 868; State v. Knox, 98 S. C. 114, 82 S. E. 278.

If the general rule as to character evidence is so construed that witnesses in civil cases cannot introduce evidence tending to show good reputation for veracity unless such reputation is attacked by the opposing side, it is one that should be enforced only in accordance with the justice of each particular case.

Merriam v. Hartford & N. H. R. Co. 20 Conn. 354, 52 Am. Dec. 344; Dennis v. Columbia Electric Street R. & P. Co. 93 S. C. 295, 76 S. E. 711; Investor v. Fowler, 109 S. C. 424, 96 S. E. 154.

It was proper for Wallace to state that if the cost of the repairs to the car had been represented to him as being substantially more than \$100, he would not have authorized them with-

out further authority from his principal.

Patterson v. Home Bank, 102 S. C. 434, 86 S. E. 815; *Gilkerson v. Atlantic Coast Line R. Co.* 105 S. C. 132, 89 S. E. 549; *Western U. Teleg. Co. v. Mitchell*, 91 Tex. 454, 40 L.R.A. 209, 66 Am. St. Rep. 906, 44 S. W. 274; *Wallingford v. Western U. Teleg. Co.* 60 S. C. 201, 38 S. E. 443, 629; *Willis v. Western U. Teleg. Co.* 69 S. C. 531, 104 Am. St. Rep. 828, 48 S. E. 538, 2 Ann. Cas. 52.

Gary, Ch. J., delivered the opinion of the court:

The facts are thus stated in the record:

"This is an action in claim and delivery to recover possession of a Premier automobile.

"Summons and complaint was served on the 28th day of January, 1920. Plaintiff, who resides at Marion, South Carolina, through his agent, Marshall Wallace, sent his automobile to defendant's shop at Columbia, South Carolina, for certain repairs. The contention of plaintiff is that the defendant agreed to complete such repairs for the sum of \$100. Defendant, on the other hand, contended that plaintiff agreed to pay the reasonable cost of such repairs, including new parts furnished, and that the only statement he made to plaintiff's agent as to the cost of same was that the labor on the car, exclusive of parts, would amount to approximately \$100. He accordingly, after completing the repairs, rendered a bill to plaintiff in the sum of \$230. Plaintiff's agent refused to pay this sum, but tendered defendant \$100 and demanded the automobile. Defendant, claiming a lien for repairs, refused to surrender the car unless his bill for \$230 was paid. Hence this action.

"The plaintiff seized the car under delivery proceedings, and the defendant put up bond and retook same.

"The entire transaction on the part of the plaintiff was handled by the overseer of plaintiff's plantation, Marshall Wallace; plaintiff himself at the time being engaged

in his official duties in Richmond, Virginia.

"The issues were tried before his Honor Judge Whaley, and resulted in a verdict for the plaintiff. Defendant made a motion for a new trial, which was overruled, and in due time an appeal was taken to this court."

The exceptions raise two questions, the first of which is whether his Honor the presiding judge erred in admitting, over defendant's objection, testimony to show the reputation of the witness Marshall Wallace for truth and veracity and fair dealing.

After the witness Marshall Wallace had testified in behalf of the plaintiff, another witness, J. C. Gasque, testified as follows, over the objection of the defendant's attorneys:

By Mr. McKay: Q. Mr. Gasque, I will ask the question over again. Do you know what Mr. Wallace's reputation is for truth and veracity and fair dealing in the community in which he lives?

A. I have known Mr. Wallace, sir, for twelve or fifteen years in Marion, and always known him to be an upright honest person around the community, sir. He bears a very good reputation, a very esteemed reputation, around the community.

Mr. McKay: Your Honor, Mr. E. W. Mullins of this bar would testify to the same effect. They admit that.

Mr. McDonald: And we wish to interpose the same objection, your Honor, to Mr. Mullins's testimony.

The record shows that the witness Marshall Wallace was a resident of Marion, and not of Richmond, county, in which the action was tried.

The principal authority upon which the appellant's attorney rely is the case of *Chapman v. Cooley*, 46 S. C. L. (12 Rich.) 654, in which it was decided that the character of a witness cannot be defended by evidence, unless it has been attacked directly by evidence. The

reasons assigned by the court in that case for its conclusion are thus stated: "The consumption of the limited time which can be appropriated to the administration of justice and of the money of parties and witnesses required by the trial of collateral issues as to character is a great and growing mischief. In this very case, involving in pecuniary interest the value of a cotton screw and seven bags of cotton, the judge reports that three days of a former session were occupied, with no other fruit than mistrial by cessation of the term, and that at the trial which resulted in a verdict, notwithstanding his ruling to exclude such evidence as to the principal witness of the plaintiff, fifty-six witnesses were examined as to character. Great delay, expense, and exasperation necessarily follow such a course. Instead of trying the issue in the action, the procedure, in many cases, is a trial of the witnesses, and every witness is expected to bring in his train a host of compurgators who will swear to their faith in him when he contradicts himself or is contradicted by others. These collateral issues as to character are practically and sometimes justly applied not only to the witnesses as to the facts in controversy, but also as to the witnesses as to character themselves, and really are unlimited and illimitable. In a large majority of cases those collateral investigations are altogether sterile, either because the testimony of the witness assailed is immaterial, or because the number is nearly equal of those attacking and those defending his character. It is frequently a mere contest as to the number of the compurgators and the vilifiers, and in the muster the vicinage is canvassed and disquieted. In many cases witnesses as to character have no character themselves, and in nine out of ten instances they testify as to their impressions from the conduct of him in question coming under their actual observation, without any conception that character depends on the belief of the larger part of those

competent to form an opinion concerning the principles and reputation of an individual founded on his conduct, namely, the belief of the community, and not of the individual testifying."

The question decided in *Chapman v. Cooley*, *supra*, is quite different from the one now under consideration. The reasons assigned by the court in that case fully justify its conclusion. The question now under consideration, however, is whether the rule heretofore announced is applicable, when the witness is a stranger in the vicinage from which the jury is drawn.

In the case of *State v. Jacob*, 30 S. C. 131, 14 Am. St. Rep. 897, 8 S. E. 698, it was held that the jury have the right to take into consideration their personal knowledge as to the character of the witnesses, and that it is not error for the presiding judge to charge the jury to that effect. The ground of appeal in that case was based upon the following language in the circuit judge's charge: "There is one thing outside the record that you are presumed to know, and that is, the character of the witnesses who have testified. You have been drawn from the vicinage for the reason that you are supposed to know the witnesses who testify."

This court said: "This, it is argued, was erroneous, because in violation of the rule that the jury must draw their conclusions from the testimony adduced in the case, and not from facts known to them, or any one or more of them. While it is undoubtedly true that a jury is not at liberty to consider any fact pertinent to the issue which they are called upon to try, unless it is found in the testimony adduced, even though such fact may be known to someone, or all, of the jury; yet this rule does not, and cannot, from the very nature of things, forbid a juror, in weighing the credibility of the testimony, from taking into consideration his own knowledge of the character of the witness delivering such testimony. . . . We suppose that it rarely, if ever, happens that

the character of at least some of the witnesses is not known to some or all of the jurors, and we do not see how any rule of law can prevent such knowledge from having its weight."

In *Merriam v. Hartford & N. H. R. Co.* 20 Conn. 354, 52 Am. Dec. 344, the following rule is stated: "The general rule is that a witness cannot be supported by evidence of his general character for truth, excepting after a general impeachment of it; but we have adopted an exception to it where the witness is in the situation of a stranger, in which case we allow him to be supported by evidence of his general good character for veracity, without such impeachment,"—citing *Rogers v. Moore*, 10 Conn. 13.

Cook tells us that "reason is the life of the law;" and one of Bacon's maxims is, "that not the decision, but the reason of it, should be regarded." The reasons for the decision in *Chapman v. Cooley*, *supra*, are

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stranger.

not applicable when the witness is a stranger; nor have the reasons giving rise to the rule announced in *State v. Jacob*, *supra*, any application, unless the witness comes from the vicinage. The reason why an exception should be made to the general rule stated in the case of *Chapman v. Cooley*, *supra*, is that a party to the action whose witness comes from the vicinage has an advantage over his opponent whose witness is a stranger, as the good character of a witness known to the jurors may be taken into consideration by the

jury. The rights of the parties are equalized, as far as possible, by allowing testimony as to the good character of the witness who is a stranger, to be shown before it is attacked.

The next question to be determined is whether there was error on the part of his Honor the presiding judge in admitting testimony of the witness Marshall Wallace as to what he would have done as agent of plaintiff if the offer of defendant had been different from what he Wallace claimed it was.

The appellant's attorneys have failed to satisfy this court that there was prejudicial error.

Affirmed.

Watts, J., concurs.

Fraser, J.:

The rule above stated, that a witness who is a stranger to the jury may show his good character, is a just, and the only just, rule.

Cothran, J., concurring:

I concur, but prefer to place my concurrence as to the second ground of appeal discussed in the opinion upon this ground: In an issue as to the agreed price at which certain work is to be done, the testimony of a party to the effect that he would not have had the work done at all at the price contended for by the artificer is generally inadmissible, but, if admitted, I think that it would be so faintly corroborative of the contention of the party testifying as not to warrant the reversal of a judgment which, in my opinion, meets the justice of the case.

ANNOTATION.

Admissibility of evidence of good reputation for truth and veracity of witness who has not been impeached.

I. Scope, 1066.

II. Statement of rules:

a. In general, 1066.

b. Witness who is also a party to the action, 1070.

c. Witness who is a negro or of foreign descent, 1071.

d. Witness who is a stranger, 1071.

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e. Witness who is deaf and dumb, 1074.

f. Consideration of convenience of nonresident character witness, 1074.

III. Erroneous admission of evidence of witness's good reputation for truth as ground for reversal, 1075.

I. Scope.

The question whether testimony tending to show that a party or witness has made contradictory statements is a ground for evidence as to his truth and veracity is treated in annotation following *Colvin v. Wilson*, 6 A.L.R. 862.

In general, only cases are included in the note which discuss or directly consider the question which is indicated in the above title. The annotation does, however, include some cases in which the court considered the question whether a witness had been impeached, so that evidence was admissible as to his good reputation for truth and veracity, and reached a negative conclusion on this point; since these cases indirectly support the general rule subsequently stated. But no attempt is made to cover this class of cases.

It may be observed, also, that the annotation purports to cover only cases in which the evidence which it is sought to introduce to sustain the testimony of a witness relates to his reputation for truth and veracity. Cases on such questions as to whether he is of good moral character, is a peaceable, law-abiding citizen, or has made corroborating statements, are beyond the scope of the note. Cases are included, however, where the evidence related to the general good character of the witness, and it is not clear but that the court meant by those terms to refer to his reputation for truth and veracity as well as possibly to other good qualities.

An exception to the rule in the class of cases under consideration has been considered as arising in the case of a deceased witness to a will. See, for example, statements in *Atwood v. Dearborn* (1861) 1 Allen (Mass.) 483, 79 Am. Dec. 755, and *Braddee v. Brownfield* (1839) 9 Watts. (Pa.) 124. Cases of this class are not within the scope of the annotation.

*II. Statement of rules.**a. In general.*

The general rule, subject, as will subsequently be seen, to possible exceptions in the case of a witness who is a stranger or who is deaf and dumb,

is well settled that evidence of the good reputation of a witness for truth and veracity is inadmissible for the purpose of supporting, or, as it is frequently stated, of "bolstering up" his testimony, unless he has been impeached or his character assailed. (General good character is sometimes indicated where it is not clear that the court referred specifically to good reputation for truth and veracity.)

United States.—*Spurr v. United States* (1898) 31 C. C. A. 202, 59 U. S. App. 663, 87 Fed. 701, reversed on other grounds in (1899) 174 U. S. 728, 43 L. ed. 1150, 19 Sup. Ct. Rep. 812; *Woey Ho v. United States* (1901) 48 C. C. A. 705, 109 Fed. 888; *Central Coal & Coke Co. v. Penny*, appeal dismissed for want of jurisdiction in (1903) 191 U. S. 558, 48 L. ed. 301, 24 Sup. Ct. Rep. 844; (1909) 97 C. C. A. 600, 173 Fed. 340; *Quinalty v. Temple* (1910) 27 L.R.A.(N.S.) 1114, 99 C. C. A. 375, 176 Fed. 67 (rule approved); *Vandeventer v. Traders' Nat. Bank* (1917) 154 C. C. A. 360, 241 Fed. 584. See also *Central Vermont R. Co. v. Cauble* (1915) 143 C. C. A. 274, 228 Fed. 876.

Alabama.—*Baucum v. George* (1880) 65 Ala. 259; *Funderberg v. State* (1893) 100 Ala. 36, 14 So. 877; *Bell v. State* (1899) 124 Ala. 94, 27 So. 414; *Birmingham R. & Electric Co. v. Ellard* (1902) 135 Ala. 433, 33 So. 276 (general character); *Carter v. State* (1906) 145 Ala. 679, 40 So. 82; *McCullars v. Jacksonville Oil Mill Co.* (1910) 169 Ala. 582, 53 So. 1025 (general good character); *Hodges v. Davis* (1917) 199 Ala. 685, 75 So. 300 (same); *Hancock v. Hullett* (1919) 203 Ala. 272, 82 So. 522 (same); *Charley v. State* (1920) 204 Ala. 687, 87 So. 177; *Earle v. State* (1911) 1 Ala. App. 183, 56 So. 32; *Chappell v. State* (1916) 15 Ala. App. 227, 73 So. 134; *Jimmerson v. State* (1920) 17 Ala. App. 552, 86 So. 153. See also *Moon v. Crowder* (1882) 72 Ala. 79; *Hays v. State* (1896) 110 Ala. 60, 20 So. 322; *McGuire v. State* (1911) 2 Ala. App. 218, 57 So. 57 (general good character).

Arizona.—*Baumgartner v. State* (1919) 20 Ariz. 157, 178 Pac. 30.

Arkansas.—See also *Lockett v. State* (1918) 136 Ark. 473, 207 S. W. 55 (good character).

California.—*People v. Bush* (1884) 65 Cal. 129, 3 Pac. 590, 5 Am. Crim. Rep. 459 (statute); *People v. Cowgill* (1892) 93 Cal. 596, 29 Pac. 228; *Title Ins. & T. Co. v. Ingersoll* (1908) 153 Cal. 1, 94 Pac. 94; *Van Horn v. Van Horn* (1907) 5 Cal. App. 719, 91 Pac. 260 (good character); *Fernandez v. Watt* (1914) 26 Cal. App. 86, 146 Pac. 47 (recognizing rule); *People v. Barkdoll* (1918) 36 Cal. App. 25, 171 Pac. 440.

Connecticut.—*Rogers v. Moore* (1833) 10 Conn. 13 (general character); *Merriam v. Hartford & N. H. R. Co.* (1850) 20 Conn. 354, 52 Am. Dec. 344 (recognizing rule); *State v. Ward* (1881) 49 Conn. 429.

Georgia.—*Hamilton v. Conyers* (1859) 28 Ga. 276; *Travelers Ins. Co. v. Sheppard* (1890) 85 Ga. 751, 12 S. E. 18; *Anderson v. Southern R. Co.* (1899) 107 Ga. 500, 33 S. E. 644; *Holland v. State* (1915) 17 Ga. App. 311, 86 S. E. 739 (general good character). See also *Smith v. State* (1917) 147 Ga. 689, ante, 490, 95 S. E. 281 (good character).

Indiana.—*Pruitt v. Cox* (1863) 21 Ind. 15; *Johnson v. State* (1863) 21 Ind. 329; *Clackner v. State* (1870) 33 Ind. 412 (rule recognized); *Brann v. Campbell* (1882) 86 Ind. 516; *Fitzgerald v. Goff* (1884) 99 Ind. 28. See also *Presser v. State* (1881) 77 Ind. 274, and *Diffenderfer v. Scott* (1892) 5 Ind. App. 243, 32 N. E. 87.

Iowa.—*State v. Archer* (1887) 73 Iowa, 320, 35 N. W. 241; *State v. Owens* (1899) 109 Iowa, 1, 79 N. W. 462.

Kentucky.—See *Shields v. Conway* (1909) 133 Ky. 35, 117 S. W. 340 (statute).

Louisiana.—*State v. Rogers* (1916) 138 La. 867, 70 So. 863.

Massachusetts.—*Russell v. Coffin* (1829) 8 Pick. 143 (general character); *Harrington v. Lincoln* (1855) 4 Gray, 563, 64 Am. Dec. 95; *Atwood v. Dearborn* (1861) 1 Allen, 483, 79 Am. Dec. 755.

Mississippi.—*Brewer v. Mullins* (1910) 97 Miss. 353, 52 So. 257. See also *Berry v. Jones* (1913) 106 Miss. 115, 63 So. 341.

Missouri.—*State v. Cooper* (1880) 71 Mo. 436; *State v. Thomas* (1883) 78 Mo. 327 (good character); *State v. Fogg* (1907) 206 Mo. 696, 105 S. W. 618; *Milan Bank v. Richmond* (1911) 235 Mo. 532, 139 S. W. 352; *Thomas v. Thomas* (1916) — Mo. —, 186 S. W. 993; *Orris v. Chicago, R. I. & P. R. Co.* (1919) 279 Mo. 1, 214 S. W. 124; *Alkire Grocer Co. v. Tagart* (1899) 78 Mo. App. 166. See also *State v. Grant* (1888) 79 Mo. 133, 49 Am. Rep. 218.

New York.—*People v. Hulse* (1842) 3 Hill, 809; *People v. Gay* (1852) 7 N. Y. 378; *Adams v. Greenwich Ins. Co.* (1875) 70 N. Y. 166 (recognizing rule); *Frost v. McCargar* (1859) 29 Barb. 617; *Starks v. People* (1847) 5 Denio, 106 (good character); *People v. Van Houter* (1885) 38 Hun, 168 (general character); *Derrick v. Wallace* (1914) 160 App. Div. 681, 145 N. Y. Supp. 585 (same). See also *Jackson ex dem. People v. Etz* (1826) 5 Cow. 314.

Oklahoma.—*First Nat. Bank v. Blakeman* (1907) 19 Okla. 106, 12 L.R.A.(N.S.) 364, 91 Pac. 868.

Oregon.—*Osmun v. Winters* (1894) 25 Or. 260, 35 Pac. 250; *First Nat. Bank v. Commercial Assur. Co.* (1898) 33 Or. 43, 52 Pac. 1050; *State v. Louie Hing* (1915) 77 Or. 462, 151 Pac. 706 (statute). See also *Sheppard v. Yocum* (1882) 10 Or. 402.

Pennsylvania.—*Braddee v. Brownfield* (1839) 9 Watts, 124 (general good character); *Wertz v. May* (1853) 21 Pa. 274; *Costello v. Long* (1915) 62 Pa. Super. Ct. 13.

South Carolina.—*Chapman v. Cooley* (1860) 46 S. C. L. (12 Rich.) 654 (general good character); *State v. Rice* (1897) 49 S. C. 418, 61 Am. St. Rep. 816, 27 S. E. 452 (same).

Texas.—*Ricks v. State* (1885) 19 Tex. App. 308; *Rushing v. State* (1888) 25 Tex. App. 607, 8 S. W. 807; *Green v. State* (1889) — Tex. App. —, 12 S. W. 872; *McGrath v. State* (1896) 35 Tex. Crim. Rep. 413, 34 S. W. 127, 941; *Morrison v. State* (1897) 37 Tex. Crim. Rep. 601, 40 S. W. 591;

Murphy v. State (1897) — Tex. Crim. Rep. —, 40 S. W. 978; *Harris v. State* (1898) — Tex. Crim. Rep. —, 45 S. W. 714; *Jacobs v. State* (1900) 42 Tex. Crim. Rep. 353, 59 S. W. 1111; *Zysman v. State* (1901) 42 Tex. Crim. Rep. 432, 60 S. W. 669; *Bass v. State* (1901) — Tex. Crim. Rep. —, 65 S. W. 919; *Fox v. Robbins* (1902) — Tex. Civ. App. —, 70 S. W. 597; *Kipper v. State* (1903) 45 Tex. Crim. Rep. 377, 77 S. W. 611; *Casey v. State* (1906) 50 Tex. Crim. Rep. 392, 97 S. W. 496; *Warren v. State* (1907) 51 Tex. Crim. Rep. 598, 103 S. W. 888; *Jones v. State* (1907) 52 Tex. Crim. Rep. 206, 106 S. W. 126 (good character); *Hill v. State* (1907) 52 Tex. Crim. Rep. 246, 106 S. W. 145; *Pratt v. State* (1908) 53 Tex. Crim. Rep. 281, 109 S. W. 188; *Graham v. State* (1909) 57 Tex. Crim. Rep. 104, 123 S. W. 691; *Houston Electric Co. v. Jones* (1910) 61 Tex. Civ. App. 281, 129 S. W. 863; *Missouri, K. & T. R. Co. v. Williams* (1911) — Tex. Civ. App. —, 133 S. W. 499; *Downing v. State* (1911) 61 Tex. Crim. Rep. 519, 136 S. W. 471; *Lacy v. State* (1911) 63 Tex. Crim. Rep. 189, 140 S. W. 461; *Allen v. State* (1912) 64 Tex. Crim. Rep. 225, 141 S. W. 983; *Williams v. State* (1912) 67 Tex. Crim. Rep. 287, 148 S. W. 763; *Pettis v. State* (1912) 68 Tex. Crim. Rep. 221, 150 S. W. 790; *Wisnoski v. State* (1913) 68 Tex. Crim. Rep. 382, 153 S. W. 316; *Wells, F. & Co. v. Benjamin* (1914) — Tex. Civ. App. —, 165 S. W. 120 (recognizing rule); *Jones v. State* (1914) 74 Tex. Crim. Rep. 205, 167 S. W. 1110; *McCue v. State* (1914) 75 Tex. Crim. Rep. 137, 170 S. W. 280, Ann. Cas. 1918C, 674; *Clay v. State* (1915) 78 Tex. Crim. Rep. 141, 180 S. W. 277; *Matthews v. State* (1916) 80 Tex. Crim. Rep. 177, 189 S. W. 491. See also *Wilmot v. Fore* (1914) — Tex. Civ. App. —, 163 S. W. 1014.

Vermont.—*Stevenson v. Gunning* (1892) 64 Vt. 601, 25 Atl. 697.

Virginia.—See *George v. Pilcher* (1877) 28 Gratt. 299, 26 Am. Rep. 350 (recognizing rule).

Washington.—*Bennett v. Seattle Electric Co.* (1909) 56 Wash. 407, 105 Pac. 825 (rule recognized as to general good reputation); *State v. Schuman*

(1915) 89 Wash. 9, 153 Pac. 1084, Ann. Cas. 1918A, 633.

Wisconsin.—*Johnson v. State* (1906) 129 Wis. 146, 5 L.R.A.(N.S.) 809, 108 N. W. 55, 9 Ann. Cas. 923.

It may be observed that the above rule is apparently assumed in other cases which are cited in the annotation in 6 A.L.R. p. 878, as supporting the doctrine that the questioning of the credibility of a witness by showing that he has made inconsistent statements is not an impeachment of his truthfulness so as to justify the admission of evidence of his good reputation for truth and veracity.

The statute under which *People v. Bush* (1884) 65 Cal. 129, 3 Pac. 590, 5 Am. Crim. Rep. 459, and other California cases cited supra, was decided, provided that "evidence of the good character of a party is not admissible in a civil action, nor of a witness in any action, unless the character of such party or witness has been impeached, or unless the issue involves his character." The court said that it is only in cases where the witness's character is attacked by evidence that his reputation for truth, honesty, and integrity is bad, that evidence on the other side is admissible.

In *Shields v. Conway* (1909) 133 Ky. 35, 117 S. W. 340, supra, the statute provided that "evidence of the good character of a witness is inadmissible until his general reputation has been impeached."

And the Oregon statute cited in *State v. Louie Hing* (1915) 77 Or. 462, 151 Pac. 706, supra, provided that evidence of the good character of a witness is not admissible in any action until the character of such witness has been impeached. The statute, the court said, was only declaratory of the rule prevailing previously under the common law.

The above statement of the rule should not be construed as implying that an attack on the character of a witness or an attempt at impeachment will necessarily warrant the admission of evidence as to his good reputation for truth and veracity. As before stated, the annotation does not deal with the question as to what consti-

tutes sufficient impeachment for this purpose.

The above general rule has been held to be proper in view of the presumption of the good character of a witness who has not been attacked. Thus, that evidence to support the reputation for integrity of a witness who has not been impeached is unnecessary, since the law presumed the general character of a witness to be good until it is impeached, see, among other cases, *Rogers v. Moore* (1833) 10 Conn. 13; *Johnson v. State* (1863) 21 Ind. 329; *First Nat. Bank v. Commercial Assur. Co.* (1898) 33 Or. 43, 52 Pac. 1050; *Braddee v. Brownfield* (1839) 9 Watts (Pa.) 124; *Wertz v. May* (1853) 21 Pa. 274; *Houston Electric Co. v. Jones* (1910) 61 Tex. Civ. App. 281, 129 S. W. 863; *Johnson v. State* (1906) 129 Wis. 146, 5 L.R.A. (N.S.) 809, 108 N. W. 55, 9 Ann. Cas. 923.

In *Johnson v. State* (Wis.) *supra*, the court said: "It was conceded, as of course the fact is, that it is quite elementary that a witness is not to be supported by proof of his having a good reputation for truth and veracity, till his reputation in that regard shall have been directly attacked. . . . That rule is the logical result of the other one, that the law presumes every person to be reputed truthful till evidence shall have been produced to the contrary, and therefore, for one to take the initiative in establishing that which so needs no support, other than the legal presumption, is useless."

The rule has also been regarded as justifiable in view of the unreasonable introduction of collateral issues in case any other rule were adopted. Thus, in *Pruitt v. Cox* (1863) 21 Ind. 15, the court said: "If, in the multiplicity of contradictions daily occurring, each witness was permitted to bring in other witnesses to sustain his general character, and they, contradicting each other, should be permitted to bring in others, the whole time of our courts would be taken up in hearing these side questions, until the matters originally in litigation would be almost lost sight of, to the great detriment of suitors." See also *McCue*

v. State (1914) 75 Tex. Crim. Rep. 137, 170 S. W. 280, Ann. Cas. 1918C, 674, under II. d, *infra*.

In *Quinalty v. Temple* (1910) 27 L.R.A. (N.S.) 1114, 99 C. C. A. 375, 176 Fed. 67, the court said it was well settled that evidence of the good character of a witness, whose character has not been impeached, is not admissible, the character of a witness not being in question until an attack is made upon it. And, by analogy, the court held that evidence of the character of a grantor is not admissible in support of a recital in his deed that he had received a conveyance from the original patentee of the land, where no other evidence of such conveyance is produced.

As representative of that class of cases where the evidence offered was not as to the good reputation for truth and veracity of the witness, see *United States v. Holmes* (1858) 1 Cliff. 98, Fed. Cas. No. 15,382, in which the court said: "No principle in the law of evidence is better settled than the one enunciated in the rule that testimony in chief of any kind, tending merely to support the credit of the witness, is not to be heard except in reply to some matter previously given in evidence by the opposite party to impeach it."

There are two North Carolina cases,—*Isler v. Dewey* (1874) 71 N. C. 14, and *Coltraine v. Brown* (1874) 71 N. C. 19,—which it seems difficult to harmonize with the general rule, although they may possibly be explained on the ground that the court regarded the character of the witness as sufficiently impeached to warrant the admission of evidence of general good character. The headnote in the *Coltraine Case* reads: "The rule obtaining in some of the English and American courts, that evidence in support of good character is not admissible until the character of the witness has been attacked by an impeaching witness, is not the rule in this state." The court did not discuss the question, but relied on *Isler v. Dewey* (N. C.) *supra*, where evidence as to the good character of a witness who had made conflicting and contra-

dictory statements in his testimony was held admissible on the ground, apparently, that under the circumstances his character was necessarily impeached, and he therefore had the right to prove a good character if he could do so; although the court said, also, that "as a general rule, the character of all witnesses is open to attack, and it would seem but reasonable and fair that they should always have the privilege of showing a good character." It was said, also, that in the very nature of things, the presumption of law, that the character of a witness is good until it is shown to be otherwise, cannot impress a jury as forcibly and favorably as would the proof of the fact.

b. Witness who is also a party to the action.

The rule appears to be the same whether the witness is or is not a party to the suit; in other words, where a party to the action becomes a witness, he stands in the same situation with respect to the rule as any other witness. Without attempting to collect at this point, perhaps, all the cases which might be cited where the witness was one of the parties to the suit, the citation of the following authorities will be sufficient to show that the rule is applicable to witnesses who are also parties, and that evidence, offered for the purpose of supporting them as witnesses, of their good reputation for truth and veracity, is inadmissible, if they have not been impeached.

United States.—*Spurr v. United States* (1898) 31 C. C. A. 202, 59 U. S. App. 663, 87 Fed. 701, reversed on other grounds in (1899) 174 U. S. 728, 43 L. ed. 1150, 19 Sup. Ct. Rep. 812; *Vandeventer v. Traders' Nat. Bank* (1917) 154 C. C. A. 360, 241 Fed. 584.

Alabama.—*Funderberg v. State* (1893) 100 Ala. 36, 14 So. 877; *Carter v. State* (1906) 145 Ala. 679, 40 So. 82; *McCullars v. Jacksonville Oil Mill. Co.* (1910) 169 Ala. 582, 53 So. 1025; *Hodges v. Davis* (1917) 199 Ala. 685, 75 So. 300 (good character); *Hancock v. Hullett* (1919) 203 Ala. 272, 82 So. 522 (same); *Charley v. State* (1920) 204 Ala. 687, 87 So. 177; *Hays v. State*

(1896) 110 Ala. 60, 20 So. 322; *McGuire v. State* (1911) 2 Ala. App. 218, 57 So. 57 (general good character); *Chappell v. State* (1916) 15 Ala. App. 227, 73 So. 134.

Arizona.—*Baumgartner v. State* (1919) 20 Ariz. 157, 178 Pac. 30.

California.—*People v. Cowgill* (1892) 93 Cal. 596, 29 Pac. 228; *Title Ins. & T. Co. v. Ingersoll* (1908) 153 Cal. 1, 94 Pac. 94; *People v. Barkdoll* (1918) 36 Cal. App. 25, 171 Pac. 440.

Georgia.—*Travelers' Ins. Co. v. Sheppard* (1890) 85 Ga. 751, 12 S. E. 18.

Indiana.—*Pruitt v. Cox* (1863) 21 Ind. 15.

Louisiana.—*State v. Rogers* (1916) 138 La. 867, 70 So. 863.

Mississippi.—*Brewer v. Mullins* (1910) 97 Miss. 353, 52 So. 257. See also *Berry v. Jones* (1913) 106 Miss. 115, 63 So. 341.

Missouri.—*State v. Cooper* (1880) 71 Mo. 436; *State v. Fogg* (1907) 206 Mo. 696, 105 S. W. 618; *Alkire Grocer Co. v. Tagart* (1899) 78 Mo. App. 166.

Oklahoma.—*First Nat. Bank v. Blakeman* (1907) 19 Okla. 106, 12 L.R.A. (N.S.) 364, 91 Pac. 868.

Oregon.—*Osmun v. Winters* (1894) 25 Or. 260, 35 Pac. 250.

Texas.—*Bass v. State* (1901) — Tex. Crim. Rep. —, 65 S. W. 919; *Lacy v. State* (1911) 63 Tex. Crim. Rep. 189, 140 S. W. 461; *Allen v. State* (1912) 64 Tex. Crim. Rep. 225, 141 S. W. 983; *Williams v. State* (1912) 67 Tex. Crim. Rep. 287, 148 S. W. 763; *Pettis v. State* (1912) 68 Tex. Crim. Rep. 221, 150 S. W. 790; *Wisnoski v. State* (1913) 68 Tex. Crim. Rep. 382, 153 S. W. 316; *Jones v. State* (1914) 74 Tex. Crim. Rep. 205, 167 S. W. 1110; *Matthews v. State* (1916) 80 Tex. Crim. Rep. 177, 189 S. W. 491.

Washington.—*State v. Schuman* (1915) 89 Wash. 9, 153 Pac. 1084, Ann. Cas. No. 1918A, 633.

It was held in *Spurr v. United States* (1898) 31 C. C. A. 202, 59 U. S. App. 663, 87 Fed. 701, that where no attempt was made to impeach the defendant as a witness, the court properly excluded evidence of his

general reputation for truthfulness; it being said that in his character as a witness the defendant was not entitled to any privilege not extended to other witnesses. The decision is reversed on other grounds in (1899) 174 U. S. 728, 43 L. ed. 1150, 19 Sup. Ct. Rep. 812.

So, in *Bass v. State* (1901) — Tex. Crim. Rep. —, 65 S. W. 919, it was said: "When defendant became a witness for himself, he became such as any other witness; and, until there had been evidence introduced tending to impeach him, he could not prove his general reputation for truth and veracity."

And in *State v. Rogers* (1916) 188 La. 867, 70 So. 863, the court said that as a witness the defendant stood upon the same plane as other witnesses.

c. Witness who is a negro or of foreign descent.

It was held in *Houston Electric Co. v. Jones* (1910) 61 Tex. Civ. App. 281, 129 S. W. 863, that evidence of the good general reputation of the plaintiff for truth and veracity, where she was a witness, was inadmissible, although she was a negress. The court said that it could not, on account of her color or previous condition of servitude, presume that her testimony was weak, in order to permit the introduction of evidence of her good reputation; that the presumption in favor of her good character, if unassailed, was as strong as it was in favor of one of any other race.

In *Woey Ho v. United States* (1901) 48 C. C. A. 705, 109 Fed. 888, it was held not erroneous for the court to refuse to permit a party to show by other witnesses the credibility and standing of his own witnesses, who were Chinese, where no attempt had been made to impeach them. The court said that the general rule was that a party is not entitled to give evidence of the general good character of his own witnesses unless their character has been drawn in question by the opposite side; and that, in any event, this is a matter within the sound discretion of the court. An appeal was dismissed for want of jurisdiction in

(1903) 191 U. S. 558, 48 L. ed. 301, 24 Sup. Ct. Rep. 844.

d. Witness who is a stranger.

WOODS v. THROWER (reported herewith) ante, 1062, is an important decision to the effect that the character of a witness who is a stranger at the place of trial may be supported by evidence before he has been impeached. The only other decision which appears directly to support this exception in favor of a stranger is that of the Connecticut court in *Merriam v. Hartford & N. H. R. Co.* (1850) 20 Conn. 354, 52 Am. Dec. 344, where evidence of the general good character for veracity of a witness who resided in another state and was a stranger at the place of trial was held admissible, although he had not been impeached. The court said: "The general rule is that a witness cannot be supported by evidence of his general character for truth, excepting after a general impeachment of it; but we have adopted an exception to it, where the witness is in the situation of a stranger; in which case we allow him to be supported by evidence of his general good character for veracity, without such impeachment." See in this connection the decision of the Connecticut court in *State v. DeWolf* (Conn.) under II. e, *infra*.

In *State v. Owens* (1899) 109 Iowa, 1, 79 N. W. 462, the court referred to the "somewhat singular rule" adopted in Connecticut with respect to a witness who is a stranger; but in this case the witness was not a stranger, and it was unnecessary to pass upon that aspect of the question.

And in *Diffenderfer v. Scott* (1892) 5 Ind. App. 243, 32 N. E. 87, it was said that in *Merriam v. Hartford & N. H. R. Co.* (Conn.) *supra*, an exception was made in favor of a witness who was a stranger to the court and jury, allowing such witness to be supported by evidence of good character when he is simply contradicted by other evidence; but that this case is without support in precedent, and that the rule announced is obviously impracticable.

There are some Texas cases which seem to make an exception in favor of a stranger, to the extent, at least, of

holding that this fact may affect the nature of the evidence required for impeachment of the witness.

Thus, in *Phillips v. State* (1885) 19 Tex. App. 158, *supra*, where a witness was a stranger in the county in which the case was tried, and, on cross-examination, was asked many questions tending indirectly to attack his character and to throw discredit on his testimony, the court held that the party offering him as a witness might show by other witnesses, who had known him for years, that his reputation for truth and veracity was good where he resided. The court said: "In this instance the witness's character had not been impeached, nor were contradictory statements shown. It was, however, shown that he was a stranger, testifying to isolated facts, and the cross-examination to which he was subjected tended strongly to discredit his statements. Discussing the extent to which sustaining witnesses are allowed, Mr. Wharton says: 'It is further held that such evidence may be admitted on particular discrediting facts being developed against the witness in his cross-examination, especially when he is in the situation of a stranger testifying to isolated facts.' (Wharton, *Crim. Ev.* 8th ed. § 491.) Under this rule we are of opinion defendant should have been allowed to introduce the testimony of his sustaining witnesses."

Other Texas decisions make a point of the fact that the witness was a stranger, in determining whether evidence should be admitted as to his good reputation for truth.

In *Crook v. State* (1889) 27 Tex. App. 198, 11 S. W. 444, it was held not erroneous to admit evidence of the good general reputation of a witness for truth and veracity, where he was a stranger in the county of the trial, and his credibility had been attacked by attempting to show that he had made statements contradictory to his testimony on the trial.

And in *Goode v. State* (1909) 57 Tex. Crim. Rep. 220, 123 S. W. 597, the court alluded to the fact that a witness was a stranger in the county in which the case was tried, in holding

that evidence was admissible to prove his good reputation for truth and veracity; but this is not apparently made the ground of the decision, there being sufficient indirect impeachment apparently to warrant admission of the evidence.

So, in *Wells F. & Co. v. Benjamin* (1914) — Tex. Civ. App. —, 165 S. W. 120, the court mentioned the fact that the plaintiff, who was a witness, was a stranger, as a possible ground for sustaining evidence of his good reputation for truth and veracity, although this point was unnecessary to the decision.

In *Jeffreys v. State* (1907) 51 Tex. Crim. Rep. 566, 103 S. W. 886, the court cited authorities in that state as laying down the rule that where a witness who is a stranger is attacked in such a manner as to discredit him before the jury in regard to his standing as a witness, supporting testimony is admissible as to his good reputation for truth and veracity. But the question, it was held, was not properly presented in this case.

After holding that testimony of the good reputation of a witness for truth and veracity is not admissible merely because of the nature of the cross-examination, the court, in *Warren v. State* (1897) 51 Tex. Crim. Rep. 598, 103 S. W. 888, said: "The exception to this rule, where, upon a rigid cross-examination, which is intended to attack the credibility of the witness and show that he is lying, is in regard to strangers when used as witnesses."

And the doctrine that one who is a stranger at the place of trial stands in an exceptional position respecting the right to the admission of evidence of his good reputation for truth is implied in *Kipper v. State* (1903) 45 Tex. Crim. Rep. 377, 77 S. W. 611, where the court held that the fact that a witness was contradicted by other witnesses would not of itself authorize the admission of evidence of his good reputation for truth, unless it appeared that he was a stranger in the locality.

However, the decisions in *Phillips v. State* and *Crook v. State* (Tex.) *supra*, were cited as unsatisfactory

and doubtful, in *Payne v. State* (1899) 40 Tex. Crim. Rep. 290, 50 S. W. 363.

And the court in *McCue v. State* (1914) 75 Tex. Crim. Rep. 137, 170 S. W. 280, Ann. Cas. 1918C, 674, rejected the view that the mere fact that a witness is a stranger at the place of trial is sufficient to warrant the admission of evidence of his good reputation for truth and veracity, where he has not been impeached; and rejected also the doctrine that such corroborating evidence, where the witness is a stranger, may be introduced if there is a conflict in the testimony. The court took the view that the only exception recognized under the decisions in that state in the case of a stranger was where particular discrediting facts developed against the witness in his cross-examination. The court said that the rule of law was that proof of general reputation of witnesses for truth and veracity was not admissible where no attack had been made on the witness, but there was a mere conflict in the testimony offered by the state and the defendant, and that this was all there was in the present case; that a slight limitation had been placed on this general rule where the witness was a stranger in the county in which he testified, and he was assailed on cross-examination by questions attacking his credibility and tending to bring him into disrepute before the jury, under which circumstances he might be sustained by proof of his general reputation for truth and veracity. The court disapproved of the decision by the Connecticut court in *Merriam v. Hartford & N. H. R. Co.* (1850) 20 Conn. 354, 52 Am. Dec. 344, stating that it would open so wide the door that there would be no end to trials; and called attention to the fact that in the case before it, the venue having been changed from one county to another, every witness offered either by the state or the defendant could be supported by proof of reputation, and the trial would become, instead of a trial of whether the defendant was guilty of the crime charged, a trial of which witness had the best reputation

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for truth and veracity, and the real issues would be wholly lost sight of.

So, in *Murphy v. State* (1897) — Tex. Crim. Rep. —, 40 S. W. 978, where the defendant in a criminal case proposed to prove the good character for truth of certain of his witnesses in counties where they lived or had formerly lived other than that in which the case was tried, the court took the view that the evidence was inadmissible without some attack on them by impeachment of their character or by cross-examination showing that they had made different statements, or tending to bring them into disrepute, or a showing that they had been guilty of some criminal offense. It was said: "The most that can be said of the testimony is that there is some contradiction between their testimony and the testimony of some of the witnesses for the state. We do not understand the rule to be, in such case, though the party be a stranger in the county of the trial, that, if merely some contradiction is shown between the testimony of the witness and that of the witnesses for the state, it is permissible to introduce testimony as to the reputation for truth of the witness in the community in which he may have lived."

And in *Texas & P. R. Co. v. Raney* (1894) 86 Tex. 363, 25 S. W. 11, affirming (1893) — Tex. Civ. App. —, 23 S. W. 340, the Texas supreme court held that the defendant by his cross-examination of the plaintiff, and otherwise, had made an attack upon the character of the plaintiff for truth and honesty; and that the court did not, therefore, err in admitting the sustaining evidence as to the plaintiff's character; but said that the fact that a witness is a stranger, or well known, will not influence the determination of the right to support his evidence when impeached, or attempted to be impeached; that if the fact that the plaintiff was a stranger controlled in the matter, then the defendant could have introduced evidence as to the character of the witnesses whose deposition it took, and thus the case would have been converted into one of investigations

of character, with as many issues as there were witnesses; and that while in *Phillips v. State* (1885) 19 Tex. App. 158, supra, the court had stated that the witness was a stranger, it was also said that the state impeached the witness on a cross-examination, which the court would suppose amounted to an attack upon his character for truth and veracity.

See also *Timmony v. Burns* (1897) — Tex. Civ. App. —, 42 S. W. 133, where the court said that no attack had been made upon the character of the plaintiff for truth and veracity, and that testimony offered by him as to his good character in that respect was properly excluded; that evidence of the character or reputation of the parties is not relevant in civil cases unless the nature of the action is such that general character is involved; and that it had been held in that state that the fact that the party was a stranger in the county did not alter this rule, citing *Texas & P. R. Co. v. Raney* (Tex.) supra.

A decision on the question as to whether an exception should be made in the case of a witness who is a stranger at the place of trial seems to have been unnecessary in *Hill v. State* (1907) 52 Tex. Crim. Rep. 241, 106 S. W. 145, where the defendant excepted to the exclusion of evidence of the good reputation of witnesses for truth and veracity, on the ground that it was shown that they were strangers in the county. It was said: "The bill does not state that the witnesses were strangers in Hamilton county, but that appellant objects to the court refusing the testimony on the ground that they were strangers in Hamilton county. This is not a certificate of the court that they were strangers."

In the case of *Harris v. State* (1906) 49 Tex. Crim. Rep. 338, 94 S. W. 227, it was held that a witness who was a stranger could be supported by proof of general reputation, as many of the questions on cross-examination went directly or indirectly to impugn his character, and show the falsity of his testimony, and to bring him into disrepute before the jury.

e. Witness who is deaf and dumb.

Evidence of the good general reputation of the prosecuting witness in a rape case was held admissible in *State v. DeWolf* (1830) 8 Conn. 93, 20 Am. Dec. 90, where the witness was deaf and dumb, against the objection that it was inadmissible because no impeachment had been attempted. The court reasoned that such evidence was admissible for the same reason that the good character for truth and veracity of a stranger might be shown without impeachment of his testimony. It was said: "By this condition she may fitly be said to be a stranger even in her own neighborhood. Unable to hear or to speak, she is excluded from society, and can be known only to a few of her relatives and companions in affliction. Had the outrage been sworn to, by a stranger, passing transiently through the state, it would certainly be proper for the attorney to prove the character of the witness. And I think, upon similar principles, it was proper to support the character of this witness."

f. Consideration of convenience of non-resident character witness.

The fact that the attendance in court of supporting witnesses is voluntary, and they refuse to wait, has been held not to alter the rule that evidence of character to support the credit of a witness is not receivable before impeaching evidence has been adduced. Thus, in *Travelers Ins. Co. v. Sheppard* (1890) 85 Ga. 751, 12 S. E. 18, where witnesses who were non-residents of the state, and were present to testify as to the good character of a witness for the defendant, threatened to return to their homes unless their testimony was admitted immediately after that of the witnesses concerning whose character they were to testify, and the court denied leave to introduce such evidence on the ground that no impeaching evidence had been offered and therefore supporting evidence was inadmissible, it was held that the ruling was not erroneous. The court said that the rules of law could not be varied to suit the convenience or even the necessity of witnesses, resident or nonresident.

III. Erroneous admission of evidence of witness's good reputation for truth as ground for reversal.

Although it may be improper to admit evidence of the good reputation of a witness for truth and veracity where he has not been impeached, the question may arise whether the error is prejudicial, especially in view of the fact that the evidence merely aids a presumption which would arise in any event. And in some cases it has been held that the error did not constitute ground for reversal.

Thus, in *Green v. State* (1889) — Tex. App. —, 12 S. W. 872, the court held that even if evidence was erroneously admitted of the general good reputation of a witness for truth and veracity where he had not been impeached, such error was not ground for reversal. It was said: "Conceding that the credibility of the witness Jasper Graey had not been attacked, and that it was error, therefore, to admit testimony on behalf of the state that his general reputation for truth and veracity was good, . . . we do not think this error alone should reverse the conviction, because it is not an error calculated to injure the rights of defendant. It is a presumption indulged by the law that a witness unimpeached is credible; that it could not, therefore, injure the rights of the defendant to prove that which the law presumed. We apprehend that no case can be found where-in it has been held that for such error alone a conviction should be set aside."

And, although it was held that evidence as to the good reputation of the plaintiff, who was a witness, for truth and veracity, was properly admitted on the ground that there had been sufficient impeachment, the court in *Wells, F. & Co. v. Benjamin* (1914) — Tex. Civ. App. —, 165 S. W. 120, stated that even though it should be held that there was no evidence tending to impeach the witness, and no legal basis furnished for the introduction of sustaining evidence, it would not feel disposed to reverse the judgment solely upon the ground that the testimony was admitted.

Where, in a criminal case, the state was permitted to introduce witnesses to show the good reputation of a state's witness for truth and veracity, before the credibility of the witness had been attacked, it was held in *Harris v. State* (1906) 49 Tex. Crim. Rep. 338, 94 S. W. 227, that the error was rendered harmless by the subsequent introduction for the defense of testimony which made a serious attack upon the standing of the witness.

But that the erroneous admission of evidence as to the good reputation for truth and veracity of a witness who has not been impeached unjustifiably emphasizes his testimony, and tends to strengthen it, and may in a close case constitute ground for reversal, is shown by the following cases, in which this error was apparently considered a sufficient ground to reverse the judgment:

Alabama.—*Bell v. State* (1899) 124 Ala. 94, 27 So. 414.

California.—*Title Ins. & T. Co. v. Ingersoll* (1908) 153 Cal. 1, 94 Pac. 94.

Indiana.—*Brann v. Campbell* (1882) 86 Ind. 516.

Mississippi.—*Brewer v. Mullins* (1910) 97 Miss. 353, 52 So. 257.

Missouri.—*State v. Thomas* (1883) 78 Mo. 327; *Alkire Grocer Co. v. Tagart* (1899) 78 Mo. App. 166.

Oklahoma.—*First Nat. Bank v. Blakeman* (1907) 19 Okla. 106, 12 L.R.A. (N.S.) 364, 91 Pac. 868.

Pennsylvania.—*Braddee v. Brownfield* (1839) 9 Watts, 124.

Texas.—*Zysman v. State* (1901) 42 Tex. Crim. Rep. 432, 60 S. W. 669; see also *Clay v. State* (1915) 78 Tex. Crim. Rep. 141, 180 S. W. 277.

In *Bell v. State* (1899) 124 Ala. 94, 27 So. 414, *supra*, it was held reversible error for the court in a bastardy proceeding to admit evidence of the good character of the prosecuting witness for truth and veracity, where impeaching evidence on this point had not been offered.

And the admission of evidence for the defendant, who was a witness, in support of his character for truth and integrity, over the objection that no attempt had been made to impeach his character, was held prejudicial error

in *Title Ins. & T. Co. v. Ingersoll* (1908) 153 Cal. 1, 94 Pac. 94, *supra*.

And where the evidence on the issues of fact were about evenly balanced, the court in *Brewer v. Mullins* (1910) 97 Miss. 353, 52 So. 257, reversed the judgment because of error in permitting the introduction of testimony to support the character of a witness for truth and veracity where it had not been assailed, on the ground that such testimony probably had influential weight with the jury.

In this connection, although not within the scope of the annotation, attention is called to *Central Vermont R. Co. v. Cauble* (1915) 143 C. C. A. 274, 228 Fed. 876, among possibly other cases of the kind, in which evidence was introduced as to the good reputation in his profession of a

physician called as an expert witness, although neither his professional nor general character had been attacked. The court said that as a general rule evidence is not admissible to sustain the credibility of a witness who has not been impeached; and that if the court had sustained the objection to the evidence no error would have been committed. But, while holding that the propriety of admitting the evidence was doubtful, the court held that no reversible error was committed, stating that the jury saw the physician on the stand, observed him during his direct and cross examination, and that it was not probable that the opinion of another physician as to his standing and ability could have had any undue weight with the jury.
R. E. H.

JOSEPH MOZOROSKY, Appt.,

v.

T. M. HURLBURT, Respt.

Oregon Supreme Court (In Banc) — June 3, 1921.

(— Or. —, 198 Pac. 556.)

Bail — jurisdiction to take — habeas corpus proceeding.

1. A court having jurisdiction of a habeas corpus proceeding has authority to admit petitioner to bail pending the determination of the proceeding.

[See note on this question beginning on page 1079.]

Habeas corpus — aid of bail.

2. The writ of habeas corpus is an appropriate and proper remedy in aid of bail.

[See 3 R. C. L. 27; 12 R. C. L. 1185.]

Appeal — authority to admit to bail.

3. The appellate court has jurisdiction to admit to bail in a habeas corpus

proceeding to release one from custody under arrest in a civil proceeding in which bail has been denied, where the Constitution provides for bail for all offenses except murder or treason, although there is no constitutional or statutory provision for bail in civil cases.

APPEAL by plaintiff from a judgment of the Circuit Court for Multnomah County (Stapleton, J.) in favor of defendant in a habeas corpus proceeding to secure plaintiff's release from custody to which he had been committed for debt. *Plaintiff allowed to give bail on condition.*

Statement by Bean, J.:

Sol Swire obtained a judgment against plaintiff, Joseph Mozorosky, for the sum of \$1,600, under the provisions of § 8264, Or. Laws.

The brief states that plaintiff appealed from that judgment to this court. After the rendition of the judgment, Swire procured the arrest of Mozorosky under §§ 259 and

218, Or. Laws, claiming that in case of a gambling debt recovered under § 8264, Or. Laws, execution for the body might be issued and the debtor arrested. Plaintiff was arrested on April 16, 1921, and has since been imprisoned. Various efforts have been made to obtain his release. He became a bankrupt on April 22, 1921. Habeas corpus proceedings were instituted in the circuit court. From an adverse judgment plaintiff perfected an appeal to this court, which is now pending. Plaintiff petitioned the circuit court to be allowed to take the poor debtor's oath, which was refused, whereupon he petitioned the circuit court for bail pending the appeal of the habeas corpus proceedings. Bail was denied him. Plaintiff prays this court that he may be admitted to bail pending the proceedings in this cause. Service of this application was made upon the defendant on May 10, 1921. No answer or brief has been filed on his behalf.

Messrs. Thomas Mannix and D. E. Powers, for appellant:

Plaintiff is entitled to be admitted to bail pending the appeal.

State ex rel. Syverson v. Foster, 84 Wash. 58, L.R.A.1915E, 340, 146 Pac. 169; Wright v. Henkel, 190 U. S. 40, 47 L. ed. 948, 22 Sup. Ct. Rep. 781, 12 Am. Crim. Rep. 386.

The case is not one arising out of a penalty, because a penalty is only recoverable either by a common informer or by a person who has received no injury from the alleged wrong.

Staub v. Myers, 16 App. Div. 476, 44 N. Y. Supp. 954; Bones v. Booth, 2 Wm. Bl. 1226, 96 Eng. Reprint, 720; O'Keefe v. Weber, 14 Or. 55, 12 Pac. 74; Meyers v. Dillon, 39 Or. 581, 65 Pac. 867, 66 Pac. 874; 1 Cyc. 732.

The record is determinative of the nature of the action, and the record shows that no matter is set forth warranting the arrest.

Re Level, 81 Or. 298, 159 Pac. 558; Copeland v. Fowler, 151 N. C. 353, 66 S. E. 215; Ledford v. Emerson, 143 N. C. 527, 10 L.R.A.(N.S.) 362, 55 S. E. 969; Norman v. Maneiette, 1 Sawy. 484, Fed. Cas. No. 10,300; Bronson v. Syverson, 88 Wash. 264, L.R.A.1916B, 993, 152 Pac. 1039, Ann. Cas. 1917D, 838.

Messrs. Henry E. McGinn and Edward J. Brazell for respondent.

Bean, J., delivered the opinion of the court:

We are not concerned, in the consideration of this application, with the merits of the case. It is contended upon the part of plaintiff that his arrest is covered by none of the provisions of § 259, Or. Laws, and that the Constitution of Oregon (article 1, § 19) provides that there should be no imprisonment for debt, except in case of fraud or absconding debtors. It is asserted by counsel that there is no provision in our Code for admitting the plaintiff to bail upon an appeal in a habeas corpus proceeding, and we infer this was the reason he was not allowed bail by the trial court. Article 1, § 14, of our Constitution provides thus:

Bail.—“Offenses, except murder and treason, shall be bailable by sufficient sureties. Murder or treason shall not be bailable when the proof is evident or the presumption strong.”

It is said in 3 R. C. L. p. 5, § 2: “In many particulars the rules relating to criminal and civil bail are the same. In either case the principal is considered as being released from the custody of the law and placed in the custody of keepers of his own selection. But a distinction exists in a number of instances, due to the different purpose inherent in the two modes of procedure. The object of bail in civil cases is either directly or indirectly to secure the payment of a debt or other civil duty; while the object of bail in criminal cases is to secure the appearance of the principal before the court, for the purposes of public justice. Payment by the bail in a civil case discharges the obligation of the principal to his creditor, and is only required to the extent of that obligation, whatever may be the penalty of the bond or recognizance; while payment by the bail in criminal cases, though it discharges the bail, does not discharge the obligation of the principal to appear.

in court; that obligation still remains. While the subjects of civil and criminal bail are not here treated separately, the distinction between the rules governing the two species of bail, where material, is pointed out."

At common law and under modern statutes, the sheriff has the right to take bail for the appearance of prisoners arrested in mesne process in civil actions. It is stated

Bail—jurisdiction to take—habeas corpus proceeding.

as a general rule that all judicial officers having the power to hear and

determine cases have the power to take bail. It is undoubtedly a necessary incident to the right to hear and determine a cause. 3 R. C. L. p. 21, § 22; *Vanderford v. Brand*, 9 Ann. Cas. 617, and note (126 Ga. 67, 54 S. E. 822); *Re Alexander*, 59 Mo. 598, 21 Am. Rep. 393.

The power to fix bail has always been regarded as a judicial one, and in its nature essentially belonging to courts. The principle of fixing the amount of bail addresses itself exclusively to the judicial discretion and sense of the court, or magistrate empowered to fix the amount.

The matter of bail on appeal in habeas corpus proceedings is not specifically provided for in our statute. To include in our Code all such particulars would make the volumes too cumbersome. Our Constitution and statute are plain in regard to bail in criminal cases, and it would seem that the lawmakers deemed such provisions a sufficient declaration of the principle that one should not be deprived of freedom, except in the case of the grave crimes mentioned, until final adjudication authorizing and compelling such penalty. It would seem that the greater would include the less in this particular. It is an inherent right in every person that they shall not be restrained of their liberty except by due course of law. To deny bail to the plaintiff might in the end practically deprive him of the privilege of an appeal in the

habeas corpus proceeding. This right of appeal is not questioned.

The matter of bail on appeal in habeas corpus proceedings, arising out of imprisonment on civil process, was in question in the case of *State ex rel. Syverson v. Foster*, 84 Wash. 58, L.R.A.1915E, 340, 146 Pac. 169. The court there declared thus: "One appealing from an order refusing to vacate a body execution, upon the ground that it violates the constitutional provision against imprisonment for debt, is entitled to be admitted to bail pending the appeal [on habeas corpus]."

In a note to the latter case in L.R.A.1915E, 340, it is stated to the purport that a man's right to his liberty, pending an appeal from a judgment upon which a body execution has been issued, should be at least as sacred as his right to his liberty pending an appeal from a conviction on a criminal charge, seems axiomatic.

"Bail in civil cases before trial of the cause was known to the common law (2 Pollock & M. History of English Law p. 592); likewise the writ of habeas corpus (page 593)."

The general rule is that it is within the sound discretion of the court to refuse or to admit the defendant to bail after conviction and pending appeal, unless the discretion is taken from the court by statute. See note to *Re Schriber*, 37 L.R.A. (N.S.) 693.

In *Wright v. Henkel*, 190 U. S. 40, 47 L. ed. 948, at page 956, 23 Sup. Ct. Rep. 781, 12 Am. Crim. Rep. 386, the Supreme Court of the United States recognized the existence of the inherent power in courts to admit to bail in civil cases pending upon appeal. It is there said, at page 63 of 190 U. S.: "We are unwilling to hold that the circuit courts possess no power in respect of admitting to bail other than as specifically vested by statute, or that, while bail should not ordinarily be granted in cases of foreign extradition, those courts may not in any case, and whatever the special circumstances, extend that relief."

In passing upon this question, we again assert that we do not take into consideration, or desire to have any expression herein influence, the merits of this case. The writ of habeas corpus is an appropriate and proper remedy in aid of bail.

In view of the condition of the docket in this court, we consider it essential to a fair administration of justice, and in conformity to the spirit, if not the letter, of our Constitution and laws, that the plaintiff should be admitted to bail until the question of whether or not he can be legally incarcerated for the debt upon which judgment was obtained by Swire is finally determined.

The cases cited and those which we have been able to find, although they are not numerous, indicate that in a civil proceeding an appellate court is not narrowly restricted by forms or procedure. In *Ledford v. Emerson* (143 N. C. 527, 55 S. E. 969) 10 L.R.A.(N.S.) 362, the syllabus reads: "An appellate court may treat a habeas corpus proceeding to secure the release of one in custody under a body execution as a motion to recall the execution and discharge the defendant, a decision upon which would be appealable."

See also *United States v. Griswold* (D. C.) 11 Fed. 807, 810, and *Taylor v. Fleckenstein* (C. C.) 30 Fed. 99. We notice the mode of procedure in criminal cases prescribed in § 1640, Or. Laws, as something of a guide. This section reads thus: "After an indictment found, and upon an appeal, a defendant cannot be admitted to bail except by the court or judge thereof where the action is pending, or in which the judgment appealed from is given."

Plaintiff should be allowed to give bail in the sum of \$2,000, and to go at large upon executing a written bond under seal in favor of the defendant sheriff, with good and sufficient sureties, qualified as for bail upon arrest, to be approved by the circuit court or judge thereof and filed in that court, conditioned that if his imprisonment on execution be adjudged to be lawful upon the appeal, he will surrender himself to the custody of the sheriff of Multnomah county for continuance of such imprisonment, or pay the judgment upon which the execution was issued in the case of Sol Swire against plaintiff, Joseph Mozorosky, but not exceeding the sum of \$2,000.

It is so ordered.

ANNOTATION.

Right to give bail in civil action or proceeding.

The authorities contain little about the right to give bail in a civil action.

It will be seen in the reported case (*MOZOROSKY v. HURLBURT*, ante, 1076) that one imprisoned under an execution against his person in a civil suit, who had sued out a writ of habeas corpus and had appealed from a judgment thereon denying him his liberty, was held entitled to be admitted to bail pending his appeal in the habeas corpus proceedings, the court considering in effect that the state Constitution, providing for bail in all but the

most aggravated criminal cases, was not to be construed as leaving one imprisoned in a civil suit without the right to release on bail.

That the 8th Amendment to the United States Constitution as to bail related only to criminal cases seems clear from its history. That Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Bill of Rights (1689), after stating among its recitals: "(10) And ex-

cessive Bail hath been required of Persons committed in criminal Cases, to elude the Benefit of the Laws made for the Liberty of the Subjects. (11) And excessive Fines have been imposed; and illegal and cruel punishments inflicted,"—declares among other things: "(10) That excessive Bail ought not to be required, nor excessive Fines imposed; nor cruel and unusual Punishments inflicted."

In the civil suit of *People v. Tweed* (1871) 13 Abb. Pr. N. S. (N. Y.) 148, the court said, referring to the provision as to bail in the New York Constitution, which is similar to that in the 8th Amendment to the United States Constitution: "It is not disputed that the provision of the Constitution as to excessive bail applies to criminal actions only."

There are one or two instances, however, where the court, in civil cases, has referred, at least, to the spirit of the provision of the Constitution against excessive bail. Thus in *Parkhurst v. Kinsman* (1847) 3 Woodb. & M. 168, Fed. Cas. No. 10,761, the court said on a motion to reduce bail in a civil suit: "Such is the jealousy in this country against requiring an unreasonable sum, that the constitutions of some states undertake expressly to prohibit it, as does the Constitution of the United States. See Constitution of New Hampshire, art. 33d of Bill of Rights, and Constitution of United States, 8th Amendment. Especially is it improper to require an unreasonable sum in criminal cases." And in *Smith v. Lee* (1882) 13 Fed. 28, the court, in reducing bail in a civil suit, said of the bail which had been required: "It would seem to be directly within the prohibition of the Constitution of the United States that 'excessive bail shall not be required.'" The court had previously said: "In civil actions the sole object of arrest and bail is to secure the presence of the defendant where final process issues. The abolition of statutes which tolerated imprisonment for debt has given a direction to jurisprudence, in all kindred regards, opposed to oppressive measures and enactments. It is now well settled that the court has no right to

fix bail at a sum so large as intentionally to oppress the defendant and prevent his release."

The inherent right of a court to admit to bail was considered in *State ex rel. Syverson v. Foster* (1915) 84 Wash. 58, L.R.A.1915E, 340, 146 Pac. 169, where it was held that the supreme court may issue a writ of habeas corpus to inquire into the legality of a denial of bail pending appeal from an order refusing to vacate a commitment under a body execution, where the right to such execution is disputed because of constitutional provisions, although the denial was by a court of competent jurisdiction; and that one appealing from an order refusing to vacate a body execution, upon the ground that it violates the constitutional provision against imprisonment for debt, is entitled to be admitted to bail pending the appeal. The court said: "While the Constitution (art. 1, § 20) refers in terms to parties charged with crime, we think, nevertheless, that there is an inherent power in the courts, sustained by reference to the doctrines of the common law and the guaranties of the Bill of Rights (art. 1 of our Constitution), to grant bail in all proceedings pending a final hearing and determination of the merit of the controversy. The Constitution (art. 1, § 22) guarantees the right of appeal. That guaranty includes every incident and every privilege attending the right. While there seem to be no cases in point having established the principle, it is not difficult to follow it into the adjudged cases. We will not pursue it further than to refer to the case of *Packenhams v. Reed* (1905) 37 Wash. 258, 79 Pac. 786. In that case there was an original application for a writ of habeas corpus to admit to bail. The petitioner had been committed to the reform school of the state of Washington until he should attain the age of eighteen years, or until he should otherwise be regularly discharged therefrom. Thereafter, he gave notice of appeal. Bail was denied pending the hearing on appeal. The principal contention of the respondent, the superintendent of the reform school, was

that there was no law or statute authorizing bail pending an appeal in such cases. After noting the fact that this court had always given a liberal construction to statutes granting a stay of proceedings on judgments pending appeals, the court said that it had no doubt that an infant has a right of appeal when committed to the reform school, and incidentally a right to be admitted to bail pending such appeal. "The writ may be had for the purpose of admitting a prisoner to bail in civil and criminal actions." Rem. & Bal. Code, § 1077. The court found this section to be declaratory of the common law, and that habeas corpus is an appropriate remedy under it. In answering the contention that there was no statute authorizing bail, the court said: "So far as our investigations have led us, we have found no case where jurisdiction to admit to bail by habeas corpus has been denied, in the absence of a statute limiting the power of the court in that regard." If it be said that an infant committed to the state training school is held under criminal process, and has a right to be admitted to bail without reference to the statute, under article 1, § 20, of the Constitution, the answer is that the law under which infants are detained and confined in reform schools and houses of correction are not criminal statutes."

The case of *Packenhams v. Reed* (Wash.) supra, is sufficiently set forth in the foregoing quotation.

In *Re Cazin* (1883) 56 Vt. 297, a defendant sued in libel for \$30,000 and arrested, was on habeas corpus ordered to be admitted to bail, under the local habeas corpus act, although that act, as the court pointed out, did not provide in terms for relief in case of excessive bail in civil actions, as, it stated, was the case in Massachusetts and in some of the other states. The court stated, also, that the Habeas Corpus Act of 31 Car. II. chap. 2, extended only to criminal matters and that "all other cases of unjust imprisonment were left to the habeas corpus at common law, which was found defective, and the 56 Geo. III. chap. 100, was passed, extending and

regulating the remedy of the writ. Whether at common law the writ was grantable to admit to bail in civil actions, we have not inquired."

It has been suggested in this connection that a man's right to his liberty is a different question from his right to maintain a particular proceeding to gain his liberty. For example, in the civil court the defendant, on an appeal, might be entitled to a supersedeas or a stay of execution on application and offer of surety, etc. If such proceedings are provided and specially adapted to secure the object of the statute under which the debt is being collected, while not unduly depriving the debtor of his liberty, has the debtor the right to his liberty if he ignores them? Some such question as this seems to have been in the mind of the court in *Ex parte Wilson* (1810) 6 Cranch (U. S.) 52, 3 L. ed. 149, where it was held that habeas corpus is not the proper remedy in a case of arrest under a civil process. The application was for a writ of habeas corpus and a certiorari to bring up the record of a civil cause in which judgment had been rendered against the defendant, "upon which a ca. sa. had issued, by which he was taken and was now in confinement within the prison bounds."

The Statute of 23 Henry VI.

(This statute is headed in the English Statutes at Large, ed. of 1769, as "Cap. IX." It is usually referred to in the older authorities as "c. 10.")

In the year 1444, 23 Hen. VI., there was enacted a statute entitled, "No Sheriff shall let to ferm his County or any Bailiwick. The Sheriffs and Bailiffs' Fees and Duties in several Cases." By this statute it was, among other things, provided: "(5) And that the said Sheriffs, and all other Officers and Ministers aforesaid, shall let out of Prison all Manner of Persons by them or any of them arrested, or being in their Custody, by force of any Writ, Bill, or Warrant in any Action Personal, or by Cause of Indictment of Trespass, upon reasonable Sureties of sufficient Persons, having sufficient within the Counties where such Persons be so let to Bail or Mainprise, to

keep their Days in such Place as the said Writs, Bills, or Warrants shall require. (6) Such Person or Persons which be or shall be in their Ward by Condemnation, Execution, Capias Utlagat' or Excommunicatum, Surety of the Peace, and all such Persons which be or shall be committed to Ward by special Commandment of any Justice, and Vagabonds refusing to serve according to the Form of the Statute of Labourers only except." And provided for damages and penalties.

The right of the sheriff to take bail for the appearance of defendants to answer writ or process is said, in *Dive v. Maningham* [1550] 1 Plowd. 60, 75 Eng. Reprint, 96, to have existed before the statute at common law, although this is denied in *Beawfage's Case* (1612) 10 Coke, 99b, 77 Eng. Reprint, 1076. In the *Dive Case* *Montague, Ch. J.* said: "For the common law has been always so before, for the common law, which is common reason, did ever allow that such persons as were taken by writ, bill, or warrant in any action personal, or indictment for trespass, might be let at large upon sureties, for it stands indifferent in a manner whether they are guilty or not, and then if they are not guilty, and should be restrained of their liberty, it would be a great inconvenience, which the common law will never suffer; and therefore as to this first branch, it was made in affirmance of the common law. The second branch, viz., the exception, was also made in affirmance of the common law, for such persons as were in by condemnation, execution, capias ut lagatum, and such other causes contained in the exception, were not bailable before, as anyone may easily judge by the inconvenience that would follow from it."

In 1 *Tidd's Practice* (1828 ed.) 212, it is said: "Before the Statute 23 Hen. VI. chap. 9, the sheriff was not obliged to bail a defendant, arrested upon mesne process, unless he sued out a writ of mainprise; though he might have taken bail of his own accord."

So, in *Stewart v. M'Clure* (1804) 3 S. C. L. (1 Brev.) 407, it is said: "At common law, the sheriff was not com-

pellable to take bail of any; but by the Stat. 23 Hen. IV. chap. 9, the sheriff is bound to let to bail. This statute has always been considered of force here."

In *Sparhawk v. Bartlet* (1806) 2 Mass. 188, *Sewall, J.*, said: "The right of a party arrested in a civil action to be delivered upon bail, and the duties and restraints incumbent upon officers intrusted with the authority of making such arrests, depend chiefly, in England, upon the Statute 23 Hen. VI. chap. 10. . . . In this state, the right of a party arrested in a civil action to be delivered upon bail depends principally upon the same ancient statute. But the statute of this government, regulating bail in civil actions, has altered the law in several particulars, respecting the mode of taking, and the effect of bail to the sheriff."

Miscellaneous.

In *Kavanagh v. Saunders* (1832) 8 Me. 422, the court said *arguendo*: "When a debtor is restrained of his liberty in due course of law, and offers such security as the statute requires, either as bail, or for the liberties of the gaol yard, the officer is bound to discharge him, and, if he do not, the debtor has ample remedy. If the officer still hold him in custody, and, as a condition to his discharge, require more than the law authorizes, the debtor may then, perhaps, be considered as under duress, and, if so, whatever he is compelled to do to procure his release, beyond what the law requires, may be avoided."

It was held in *Richards v. Porter* (1810) 7 Johns. (N. Y.) 137, that the fact that a prisoner was turned over to a new sheriff by the removed former sheriff could not affect his right to be discharged on bail.

In *Wass v. Bartlett* (1858) 10 Gray (Mass.) 490, where a defendant arrested on mesne process was refused the poor debtor's oath, committed to jail, and his offer to give a bail bond refused, he was discharged on habeas corpus, the court saying: "The provision of Stat. 1857, chap. 141, § 21, that a debtor arrested on mesne process, and carried before a magistrate, and by him refused the poor debtor's oath, and committed to jail, shall be 'there

kept until final judgment in the suit in which he was arrested,' is qualified by the subsequent provision, 'Unless he shall' do one of certain acts, one of which is giving a bail bond according to § 22."

It was held in *Bostwick v. Goetzel* (1874) 57 N. Y. 582, that a statute allowing bail to be given to discharge a defendant from arrest at any time before execution referred to an execution against the person, and that bail may be given after execution is issued against property.

In *Ex parte Mason* (1838) 2 Ashm. (Pa.) 239, the plaintiff had issued a *capias ad res.*, the defendant gave bail, judgment was entered against him, the special bail surrendered him, and a *fi. fa.* had been returned *nulla bona*, but no *ca. sa.* had been issued, and the defendant asked to give bond conditioned to appear and take the benefit of the Insolvent Law. But this was refused, as he might renew his bail to the action, as the bond acts would not apply to the defendant till his

arrest on final process. The court said that formally "no power existed to bail such a prisoner in the interval between his arrest on execution and his discharge as an insolvent debtor. The four walls of the prison were his only sureties."

In *Chiswell v. Ellzey* (1838) 24 S. C. L. (1 Rice) 29, O'Neill, J., said: "The Statute 43 Geo. III. chap. 46, § 6, not being of force here, it may well be doubted whether, after surrender by bail, there is any power which can again let the defendant to bail. If there is, it must be upon the defendant's entering into a recognizance of special bail, before some justice of the quorum, or clerk of the court, who, by the Act of 1791 (1 Faust. 167) are constituted commissioners of special bail, and obtaining thereupon a judge's order for his discharge."

It may be noted that a sheriff is under no obligation to travel about with a prisoner arrested in a civil action to enable him to obtain bail. Page v. Staples (1881) 13 R. I. 306. B. B. B.

GEORGE E. WARREN COMPANY

v.

A. L. BLACK COAL COMPANY, Impleaded, etc., Appt.

West Virginia Supreme Court of Appeals—March 2, 1920.

(85 W. Va. 684, 102 S. E. 672.)

Corporation — insolvency — organization to purchase property.

1. The stockholders of an insolvent corporation, whose property is about to be sold in a judicial proceeding against it, may organize a new corporation for the purpose of buying the property, and if their purchase at the judicial sale is fair, and free of fraud or collusion, the new company will take the property relieved of the obligations and contracts of the old company, unless expressly assumed.

[See note on this question beginning on page 1112.]

Specific performance — sale of coal to be mined.

2. Equity will not entertain a suit for the specific enforcement of a contract for the purchase of coal, to be thereafter mined and shipped on the

purchaser's orders, in stated quantities monthly, until the entire quantity purchased has been delivered. The remedy by an action at law for the breach of such contract is adequate.

[See 25 R. C. L. 293.]

Headnotes 1-3 by WILLIAMS, P.

— effect of insolvency.

3. Insolvency of the seller does not confer jurisdiction on a court of equity to enforce such contract; the accident of insolvency does not affect the question of jurisdiction in such case.

[See 25 R. C. L. 231, 232.]

— effect of contract of resale.

4. That one contracting to purchase coal to be mined has, on the strength of his contract, made a contract of re-

sale, does not give equity jurisdiction to enforce specific performance of the original contract.

— contracts requiring mechanical oversight.

5. Courts of equity do not ordinarily undertake the performance of contracts requiring the exercise of mechanical skill and continuous oversight.

[See 25 R. C. L. 303.]

APPEAL by defendant Black Coal Company from orders of the Circuit Court for Monongalia County refusing to dissolve an injunction and appointing a receiver, in a suit brought to compel specific performance of a contract for the purchase of coal. *Reversed.*

The facts are stated in the President's opinion.

Messrs. Moreland & Guy and Hoffheimer & Templeman, for appellant:

The Black Coal Company, having purchased the property of the Serepi Company at judicial sale, as the result of adverse proceedings, acquired the property free from any claims of the plaintiff, and free from any obligation to perform the contract between the plaintiff and the Serepi Company.

7 Fletcher, Corp. §§ 4988, 4990; 4 Cook, Corp. 7th ed. §§ 860, 890; 1 Thomp. Corp. § 263; National Foundry & Pipe Works v. Oconto City Water Supply Co. 105 Wis. 48, 81 N. W. 125; Wiggins Ferry Co. v. Ohio & M. R. Co. 142 U. S. 396, 35 L. ed. 1055, 12 Sup. Ct. Rep. 188; Hoard v. Chesapeake & O. R. Co. 123 U. S. 222, 31 L. ed. 130, 8 Sup. Ct. Rep. 74; Moyer v. Ft. Wayne, C. & L. R. Co. 132 Ind. 88, 31 N. E. 567; Cook v. Detroit, G. H. & M. R. Co. 43 Mich. 349, 5 N. W. 390; Menasha v. Milwaukee & N. R. Co. 52 Wis. 414, 9 N. W. 396; Gulf, C. & S. F. R. Co. v. Newell, 73 Tex. 334, 15 Am. St. Rep. 788, 11 S. W. 342; Hukle v. Atchison, T. & S. F. R. Co. 71 Kan. 251, 80 Pac. 603, 6 Ann. Cas. 83; Bigham Bros. v. Port Arthur Canal & Dock Co. 59 Tex. Civ. App. 367, 126 S. W. 524; Hurd v. New York & Commercial Steam Laundry Co. 167 N. Y. 95, 60 N. E. 327; Altoona v. Richardson Gas & Oil Co. 81 Kan. 717, 26 L.R.A. (N.S.) 651, 106 Pac. 1025; Vance v. McNabb Coal & Coke Co. 92 Tenn. 47, 20 S. W. 424; McIver v. Young Hardware Co. 144 N. C. 478, 119 Am. St. Rep. 970, 57 S. E. 169; Luedecke v. Des Moines Cabinet Co. 140 Iowa, 223, 32 L.R.A. (N.S.) 616, 118 N. W. 456; Jennings, N. & Co. v. Crystal Ice Co. 128 Tenn. 231, 47 L.R.A. (N.S.) 1058, 159 S. W.

1088; Hibernia Ins. Co. v. St. Louis & N. O. Transp. Co. 10 Fed. 596, 13 Fed. 516; Memphis Water Co. v. Magens, 15 Lea, 37; Allen v. North Des Moines M. E. Church, 127 Iowa, 96, 69 L.R.A. 255, 109 Am. St. Rep. 366, 102 N. W. 808, 4 Ann. Cas. 257; Equitable Trust Co. v. United Box Board & Paper Co. 220 Fed. 714; 2 Clark & M. Priv. Corp. § 342; Billmyer Lumber Co. v. Merchants Coal Co. 66 W. Va. 696, 26 L.R.A. (N.S.) 1101, 66 S. E. 1073; Lowther v. Lowther-Kaufmann Oil & Coal Co. 75 W. Va. 171, 83 S. E. 49; Grenell v. Detroit Gas Co. 112 Mich. 70, 70 N. W. 413.

The nature of the contract is such that specific performance cannot be enforced, either affirmatively, or negatively by injunction.

4 Pom. Eq. Jur. 3d ed. § 1341; 2 High, Inj. 4th ed. § 1109; 14 R. C. L. 383; Shepherd v. Groff, 34 W. Va. 125, 11 S. E. 997; Connell v. Yost, 62 W. Va. 71, 57 S. E. 299; United Fuel Gas Co. v. West Virginia Paving & Pressed Brick Co. 74 W. Va. 486, 82 S. E. 329; Lanston Monotype Mach. Co. v. Times-Dispatch Co. 115 Va. 797, 80 S. E. 736; Texas & P. R. Co. v. Marshall, 136 U. S. 393, 34 L. ed. 385, 10 Sup. Ct. Rep. 846; Berliner Gramophone Co. v. Seaman, 49 C. C. A. 99, 110 Fed. 30; South Chicago City R. Co. v. Calumet Electric Street R. Co. 171 Ill. 393, 49 N. E. 576; Dills v. Doeblar, 62 Conn. 366, 20 L.R.A. 432, 36 Am. St. Rep. 345, 26 Atl. 398; Meyers Bros. v. Harman Bros. 78 W. Va. 460, 89 S. E. 146; Rainey v. Freeport Smokeless Coal & Coking Co. 58 W. Va. 424, 52 S. E. 528; Baltimore Bargain House v. St. Clair, 58 W. Va. 565, 52 S. E. 660; Ward v. Hotel Randolph Co. 65 W. Va. 721, 63

S. E. 613; *Wilson v. Hawker Lumber Co.* 74 W. Va. 65, 81 S. E. 568; *Burke v. Parke*, 5 W. Va. 122; *Hissam v. Parrish*, 41 W. Va. 686, 56 Am. St. Rep. 892, 24 S. E. 600; *Powhatan Coal & Coke Co. v. Ritz*, 60 W. Va. 395, 9 L.R.A. (N.S.) 1225, 56 S. E. 257; *Johnson v. Johnson*, 83 W. Va. 497, 92 S. E. 795; *McCullough v. Clarke*, 81 W. Va. 743, 95 S. E. 787; 25 R. C. L. 226, 280, 303; *Martin v. South Bluefield Land Co.* 81 W. Va. 62, 94 S. E. 493; *Rutland Marble Co. v. Ripley*, 10 Wall. 339, 358, 19 L. ed. 955, 961, 3 Mor. Min. Rep. 291; *Wollensak v. Briggs*, 119 Ill. 453, 10 N. E. 23; *Ross v. Union P. R. Co. Woolw.* 26, Fed. Cas. No. 12,080; *Lone Star Salt Co. v. Texas Short Line R. Co.* 99 Tex. 434, 3 L.R.A. (N.S.) 828, 90 S. W. 863; *Ward v. Newbold*, 115 Md. 689, 81 Atl. 793, Ann. Cas. 1913A, 919; 36 Cyc. 584, 585; *Campbell v. Rust*, 85 Va. 653, 8 S. E. 664; *Clarno v. Grayson*, 30 Or. 111, 46 Pac. 426; *Stanton v. Singleton*, 126 Cal. 657, 47 L.R.A. 334, 59 Pac. 146; *Wilhite v. Skelton*, 5 Ind. Terr. 621, 82 S. W. 932; *Booth v. Pollard*, 4 Young & Co. 61, 160 Eng. Reprint, 920, 13 Mor. Min. Rep. 322; *Flint v. Brandon*, 8 Ves. Jr. 159, 32 Eng. Reprint, 314, 13 Mor. Min. Rep. 308; *Black Diamond Coal Min. Co. v. Jones Coal Co.* 200 Ala. 276, 76 So. 42; *Grape Creek Coal Co. v. Spellman*, 39 Ill. App. 630; *Consolidated Fuel Co. v. St. Louis South Western R. Co.* 162 C. C. A. 465, 250 Fed. 395; *Pollard v. Clayton*, 1 Kay & J. 462, 69 Eng. Reprint, 540, 1 Jur. N. S. 342, 3 Week. Rep. 349, 13 Mor. Min. Rep. 334; *Fothergill v. Rowland*, L. R. 17 Eq. 132, 43 L. J. Ch. N. S. 252, 29 L. T. N. S. 414, 22 Week. Rep. 42; *Dominion Coal Co. v. Dominion Iron & Steel Co.* [1909] A. C. 293, 78 L. J. P. C. N. S. 115, 100 L. T. N. S. 245, 25 Times L. R. 309; *Javierre v. Central Altagracia*, 217 U. S. 502, 54 L. ed. 859, 30 Sup. Ct. Rep. 598; *Moore v. Fitz Randolph*, 6 Leigh, 175, 29 Am. Dec. 208; *Bumgardner v. Leavitt*, 35 W. Va. 194, 12 L.R.A. 776, 13 S. E. 67; *Shubert v. Woodward*, 92 C. C. A. 509, 167 Fed. 47; *Buck v. Smith*, 29 Mich. 166, 18 Am. Rep. 84; *Levin v. Dietz*, 194 N. Y. 376, 20 L.R.A. (N.S.) 251, 87 N. E. 454; *Iron Age Pub. Co. v. Western U. Teleg. Co.* 83 Ala. 498, 3 Am. St. Rep. 758, 3 So. 449; *Ulrey v. Keith*, 237 Ill. 284, 86 N. E. 696; *Bluestone Coal Co. v. Bell*, 38 W. Va. 297, 18 S. E. 493; *Powell v. Berry*, 91 Va. 568, 22 S. E. 365; *Grubb v. Moore*, 108 Va. 72, 60 S. E. 757.

Equitable jurisdiction, on a ground

other than the remedy of specific performance, could not justify the injunction or the directions to the receiver, but there was no equitable jurisdiction on any other ground.

Consolidated Fuel Co. v. St. Louis South Western R. Co. 162 C. C. A. 465, 250 Fed. 395; *Lewis v. Hall*, 64 W. Va. 147, 61 S. E. 317; *Smith v. Ft. Scott*, H. & W. R. Co. 99 U. S. 398, 25 L. ed. 437; *Hollins v. Brierfield Coal & I. Co.* 150 U. S. 371, 385, 386, 37 L. ed. 1113, 1117, 1118, 14 Sup. Ct. Rep. 127; *Waggy v. Jane Lew Lumber Co.* 69 W. Va. 670, 72 S. E. 778; *High, Receivers*, 4th ed. § 18; 1 High, Inj. 4th ed. § 18; *Knott v. Shepherdstown Mfg. Co.* 30 W. Va. 790, 5 S. E. 266; *Shepherd v. Groff*, 34 W. Va. 123, 11 S. E. 997; *Heilman v. Union Canal Co.* 37 Pa. 100; *Livesley v. Johnston*, 45 Or. 30, 65 L.R.A. 783, 106 Am. St. Rep. 647, 76 Pac. 13, 946; *Gillett v. Warren*, 10 N. M. 523, 62 Pac. 975; *Dills v. Doeblor*, 62 Conn. 366, 20 L.R.A. 432, 36 Am. St. Rep. 345, 26 Atl. 398; *McLaughlin v. Piatti*, 27 Cal. 452; *Leonard v. Plum Bayou Levee Dist.* 79 Ark. 42, 94 S. W. 922, 9 Ann. Cas. 159; *Martin v. South Bluefield Land Co.* 81 W. Va. 62, 94 S. E. 493; 4 Pom. Eq. Jur. 3d ed. 1343; *Roquemore v. Mitchell Bros.* 167 Ala. 475, 140 Am. St. Rep. 52, 52 So. 423; *Richmond v. Dubuque & S. C. R. Co.* 33 Iowa, 422; *General Electric Co. v. Westinghouse Electric & Mfg. Co.* 144 Fed. 458; *Hicks v. Penn Mut. L. Ins. Co.* 210 Fed. 464; *Gulf Compress Co. v. Harris, C. & Co.* 158 Ala. 343, 24 L.R.A. (N.S.) 399, 48 So. 477; *Headrick v. Larson*, 81 C. C. A. 378, 152 Fed. 93; *National Tube Co. v. Smith*, 57 W. Va. 210, 1 L.R.A. (N.S.) 195, 110 Am. St. Rep. 771, 50 S. E. 717; *Deepwater R. Co. v. Motter*, 60 W. Va. 57, 116 Am. St. Rep. 873, 53 S. E. 705; *Crawford v. Bosworth*, 72 W. Va. 543, 78 S. E. 623; *United Cigarette Mach. Co. v. Winston Cigarette Mach. Co.* 114 C. C. A. 583, 194 Fed. 947; *Boisé Artesian Hot & Cold Water Co. v. Boisé City*, 213 U. S. 276, 286, 53 L. ed. 796, 29 Sup. Ct. Rep. 426.

The appointment of the receiver was erroneous.

Kerr v. Hill, 27 W. Va. 576; *Wilson v. Maddox*, 46 W. Va. 641, 33 S. E. 775; *Thompson v. Adams*, 60 W. Va. 463, 55 S. E. 668; *Rainey v. Freeport Smokeless Coal & Coking Co.* 58 W. Va. 424, 52 S. E. 528; *Sult v. A. Hochstetter Oil Co.* 63 W. Va. 317, 61 S. E. 307; *Wilson v. Hawker Lumber Co.* 74 W. Va. 65, 81 S. E. 568; *Meyers Bros. v.*

Harman Bros. 78 W. Va. 460, 89 S. E. 146; Kanawha Coal Co. v. Ballard & W. Coal Co. 43 W. Va. 721, 29 S. E. 514; Ward v. Hotel Randolph Co. 65 W. Va. 721, 63 S. E. 613; Freer v. Davis, 52 W. Va. 35, 94 Am. St. Rep. 910, 43 S. E. 172; Thompson v. Adams, 60 W. Va. 463, 55 S. E. 668; 34 Cyc. 22; Fosdick v. Schall, 99 U. S. 235, 25 L. ed. 341; Powhatan Coal & Coke Co. v. Ritz, 60 W. Va. 395, 9 L.R.A.(N.S.) 1225, 56 S. E. 257; Crossland v. Crossland, 53 W. Va. 108, 44 S. E. 424; Cincinnati, S. & C. R. Co. v. Sloan, 31 Ohio St. 1; Vila v. Grand Island Electric Light, Ice & Cold Storage Co. 68 Neb. 222, 63 L.R.A. 791, 110 Am. St. Rep. 400, 94 N. W. 136, 97 N. W. 613, 4 Ann. Cas. 59; Beverley v. Brooke, 4 Gratt. 187; Aldrich v. Union Bag & Paper Co. 81 N. J. Eq. 244, 87 Atl. 65; Hickey v. Parrot Silver & Copper Co. 25 Mont. 164, 64 Pac. 330; Bigbee v. Summerour, 101 Ga. 201, 28 S. E. 642.

Messrs. Glasscock & Glasscock for appellee.

Williams, P., delivered the opinion of the court:

This suit was brought by the George E. Warren Company, a corporation, against the Serepi Coal Company and A. L. Black Coal Company, also corporations, and others, to compel specific performance of a contract made on the 1st of May, 1919, whereby the Serepi Coal Company sold to the George E. Warren Company 50,000 tons of coal at the price of \$1.75 per ton, f. o. b. the mine, to be shipped at such times and in such quantities as the buyer should designate, the shipments to be as nearly in equal quantities per month as practicable. The coal was to be run of mine produced at the Serepi Company's mine No. 1, located at Maidsville, Monongalia county, and was to be delivered in quantities of 4,550 tons per month. Payment was to be made not later than the 25th of each month for all shipments made pursuant to the buyer's orders during the preceding calendar month. The buyer resold the coal to the New York Central Railroad Company, and the seller carried out its agreement for only a short time and then failed in its contract,

and hence this suit. The Serepi Company was seriously embarrassed financially at the time of the contract with plaintiff, and suits were then pending against it. Its property was sold under a decree in those suits, and purchased by the codefendant, the A. L. Black Coal Company. Learning that the seller was making deliveries of coal to other purchasers, plaintiff presented its bill to the judge in vacation, and obtained an injunction restraining the aforesaid companies, their officers, agents, and servants, from selling and shipping coal from the aforesaid Serepi mine No. 1, until they shall have first shipped to plaintiff's order at least 4,550 tons in any month during the continuance of the contract, provided they should mine so much as that quantity, and in the event they should mine less than that quantity, they were enjoined from shipping any portion of it otherwise than to the plaintiff's order. The injunction was awarded on the 31st of October, 1919, and an injunction bond in the penalty of \$500 required. On the 18th day of November, 1919, the A. L. Black Coal Company moved the judge in vacation to require an increase in the amount of the injunction bond sufficient to cover any loss or damage which defendant might suffer in case the injunction should be dissolved, which motion plaintiff by counsel resisted and the judge overruled. The A. L. Black Company then demurred and answered, and plaintiff was given leave thereafter to file in the clerk's office its general and special replication thereto. The A. L. Black Coal Company thereupon, on the 21st of November, renewed its motion, made on the 18th, to dissolve the injunction, and leave was given to both plaintiff and defendant to file affidavits and take depositions respecting said motion. In support of its motion, defendant filed the affidavits of Ben Green, Max Dalinsky, and Ben Oppenheimer, officers and stockholders in both companies, and leave was given

plaintiff's counsel to cross-examine them, which was done. Whereupon defendant's motion was overruled, "for the present," and the order suspended for twenty days to give defendant an opportunity to apply to this court for an appeal. On the 24th of November on plaintiff's motion, and pursuant to notice, the judge in vacation appointed a receiver to take charge of and operate the coal mine, known as Serepi mine No. 1, lately owned by the Serepi Coal Company, and authorized him to employ servants to mine the coal therefrom, and to ship the same to the orders of the plaintiff in quantities of 4,550 tons per month until the minimum amount provided for by the contract between said Serepi Company and plaintiff shall be delivered according to the terms thereof, and required the receiver to make semi-monthly reports to the court from the date of his appointment and qualification, and required him to execute a bond in the penalty of \$25,000, and any coal mined during any month, in excess of the quantity purchased by plaintiff, was directed to be sold at the highest price obtainable and the proceeds thereof to be applied to the existing debts of the A. L. Black Coal Company. From the decrees, refusing to dissolve the injunction and appointing a receiver, defendant has appealed.

In order to ascertain whether or not the judge properly overruled defendant's motion to dissolve the injunction, it is necessary first to determine whether the contract sued on is one which can be specifically enforced by a court of equity. Ordinarily, courts of equity will not enforce contracts for the purchase

Specific performance—sale of coal to be mined.

or the sale of personal property to be used for purely commercial purposes, the remedy at law for damages for a breach of such contracts being regarded generally as complete and adequate. There is hardly any article of commerce that is more easily obtained in the open

market than coal. It is true plaintiff alleges that it made diligent effort to buy other coal of similar quality to that contracted for, and had not been able to do so; but this is denied in the answer, and the abundance of the product itself discounts the averment. That plaintiff may not have been able to buy coal from the producers to whom it applied does not show that it cannot do so in a reasonable time by applying to others. The coal contracted for is not shown to be of peculiar quality and different from coal produced from other mines in the same vicinity. Coal is abundant, and if plaintiff is willing to pay the price it can get it. That it may have rendered itself liable to an action for damages by contracting to sell the same coal to the

New York Central Railroad, on the —effect of contract of resale.

strength of its contract for the delivery thereof by the Serepi Coal Company, does not give equity jurisdiction; neither does the alleged insolvency of the Serepi Coal Company and of the purchaser of its property at the judicial sale, the A. L. Black Coal Com-

—effect of insolvency.

pany, confer jurisdiction. It is true some courts have held that insolvency is a consideration in determining whether or not a contract should be enforced; but, on the contrary, other courts have held that insolvency furnishes an additional reason for denying jurisdiction, for the reason that performance of his contract by an insolvent defendant would enable a plaintiff to obtain a preference over the defendant's other creditors. Although equity jurisdiction to compel performance of contracts is not confined to those relating to real estate, still, before it will enforce contracts relating to the sale or purchase of personal property, there must exist reasons clearly showing that the remedy at law for a breach thereof is inadequate; such, for instance, as that the article cannot be obtained on the open market, or is affected with a

pretium affectionis, or that the injury to plaintiff is not compensable in damages. But coal is a commodity of such universal use and great abundance, and is of such vital necessity to the industries of the country and the comfort of the people, that the government in its wisdom has seen fit to regulate its price for a time. All the coal capable of being produced by the numerous coal mines in the vast coal region in the northern part of this state certainly was not sold, so that the amount of 50,000 tons could not have been obtained by plaintiff to take the place of that it had contracted for, between May 1st when the contract was made, and October 31st when this suit was brought. A case where a plaintiff's damages for a breach of contract can be ascertained more certainly and definitely than in the case here presented can scarcely be imagined. Equity jurisdiction is not affected by the accident of defendant's insolvency. If the contract is not of that class which equity will enforce, defendant's insolvency will not aid the jurisdiction; it must exist independently of that fact. Pom. Spec. Perf. 2d ed. § 26; Knott v. Shepherdstown Mfg. Co. 30 W. Va. 790, 5 S. E. 266; Dills v. Doebler, 62 Conn. 366, 20 L.R.A. 432, 36 Am. St. Rep. 345, 26 Atl. 398; Gillett v. Warren, 10 N. M. 523, 62 Pac. 975; Heilman v. Union Canal Co. 37 Pa. 100; Crawford v. Bradford, 23 Fla. 404, 2 So. 782; McLaughlin v. Piatti, 27 Cal. 451; United New Jersey R. & Canal Co. v. Hoppock, 28 N. J. Eq. 261.

That compensation in damages furnishes a complete and satisfactory remedy for the breach of the contract in this case denies equity jurisdiction. Hissam v. Parrish, 41 W. Va. 686, 56 Am. St. Rep. 892, 24 S. E. 600; United Fuel Gas Co. v. West Virginia Paving & Pressed Brick Co. 74 W. Va. 484, 82 S. E. 329; Black Diamond Coal Min. Co. v. Jones Coal Co. 200 Ala. 276, 76 So. 42; Javierre v. Central Alt-gracia, 217 U. S. 502, 54 L. ed. 859,

30 Sup. Ct. Rep. 598. Mutuality is the well-recognized principle of specific performance, and it cannot be doubted for a moment that, if plaintiff had failed to carry out its obligation with defendant, defendant's remedy in an action for damages at law would have been adequate. This is merely an additional argument to show that equity does not have jurisdiction to enforce the contract.

Another reason why equity does not have jurisdiction in this case is because the contract involves the service of skilled engineers in conducting coal-mining operations, requiring time for its performance, and courts of equity do not ordinarily undertake the performance of contracts requiring the exercise of mechanical skill and continuous oversight. Martin v. South Bluefield Land Co. 81 W. Va. 62, 94 S. E. 493; Grape Creek Coal Co. v. Spellman, 39 Ill. App. 630.

The bill alleges that the A. L. Black Coal Company was conceived and formed for the purpose of taking over the property of the Serepi Company; that the officers and stockholders of the two companies are made up principally of the same individuals; and that the officers of the A. L. Black Company had knowledge, at the time they purchased the property at the judicial sale, of the existence of the unfulfilled contract between plaintiff and the Serepi Company. It also appears that on the 1st of May, the date of the contract sued on, the Serepi Company was largely indebted, and that certain vendor's lien suits had been brought against it and were then pending—one brought by Darla Layton to enforce a vendor's lien on 55 acres of coal, one portion of defendant's property, and another brought by the Cass Coal Company to enforce a vendor's lien against both pieces of coal property owned by defendant, and later a third vendor's lien suit was brought by David H. Courtney

—contracts
requiring
mechanical
oversight.

against it; that the two first-named suits were heard together on the 24th of May, 1919, and a sale ordered of defendant's property and commissioners appointed and authorized to make sale thereof; that they did sell it to the defendant, the A. L. Black Coal Company, at public auction, it being the highest bidder, at the price of \$70,000, of which amount it paid in cash a one-third part, and executed its two purchase-money notes for the residue, payable on January 24, 1920 and 1921, respectively; and that this sale was confirmed on the 10th day of October, 1919. The bill does not allege that these suits were collusive, nor that there was any fraud in procuring the sale to be made, nor that the A. L. Black Company purchased the property with assets belonging to the Serepi Company. In fact, the bill alleges that both the Serepi Coal Company and the A. L. Black Company are insolvent. The contention seems to be that, because the new company is formed of the same stockholders and directors that formed the old company, and purchased with knowledge of plaintiff's

Corporation—
insolvency—
organization to
purchase
property.

contract, it is merely the successor to the old company, and is bound to fulfill its contract.

This can hardly be the law. A corporation is liable only to the extent of its assets, and for aught that appears in the record it took all the proceeds from the sale of the Serepi Company's property to pay off the debts against it. If the sale was fair and free from fraud, and there is no averment or showing to the contrary, the purchaser would take it discharged of the debtor's obligations. In addition to the debts for which suits had been brought against it, the bill avers that trusted liens on the Serepi Company's property, aggregating more than \$19,000, existed in favor of Dalinsky, Green, and Oppenheimer, and were created before the date of plaintiff's contract. Furthermore, the bill alleges that, on the 6th of

15 A.L.R.—69.

October, before the sale of its property, the Serepi Company confessed judgments in favor of the aforesaid parties, severally, and one in favor of the Long Powder & Supply Company, aggregating more than \$8,500. It is not alleged that these debts were fraudulent, or that the judgments were fraudulently obtained; but, on the contrary, it is alleged that the Serepi Company owed other debts besides these, and was insolvent. There is no pretense that any of the stockholders in the new company were indebted to the old company for stock in it, at the time of the formation of the new company. On what theory, then, can the new company be held liable for the obligations of the old one? Certainly not for the simple reason that it is composed principally of the same officers and stockholders. The stockholders of the old company, if they acted in good faith,—and there is no averment that they did not,—had a right to organize a new corporation to buy the property of the insolvent one; and when the new company purchased at the judicial sale, it took the property free from the obligation of plaintiff's contract. 7 Fletcher, Corp. § 4988; 4 Cook, Corp. §§ 460 and 490; National Foundry & Pipe Works v. Oconto City Water Supply Co. 105 Wis. 49, 81 N. W. 125; Hukle v. Atchison, T. & S. F. R. Co. 71 Kan. 251, 80 Pac. 603, 6 Ann. Cas. 83; Allen v. North Des Moines M. E. Church, 127 Iowa, 96, 69 L.R.A. 255, 109 Am. St. Rep. 306, 102 N. W. 808, 4 Ann. Cas. 257; Moyer v. Ft. Wayne, C. & L. R. Co. 132 Ind. 88, 31 N. E. 567; and Equitable Trust Co. v. United Box Board & Paper Co. (D. C.) 220 Fed. 714.

The facts that the sale of the Serepi Company's property was an involuntary one, and that no fraud is alleged on the part of the purchaser, the A. L. Black Company, render the authorities cited by appellee's counsel inapplicable.

Equity being without jurisdiction to entertain the suit, it follows that the judge had no right to grant the

injunction, which was only for the purpose of compelling compliance with its contract by the defendant, and likewise no jurisdiction to appoint a receiver to take charge and operate defendant's property. Even if the court had had jurisdiction to entertain the suit, it was improper to appoint a receiver and invest him with power to mine the coal and deliver it to plaintiff's order, not to exceed the quantity provided by the contract to be delivered monthly, in advance of the final hearing of the case upon its merits. The effect was to give final relief to the plaintiff in advance of the hearing, and gave it a decided advantage over defendant. The status quo of the parties should be preserved, as nearly as possible, until the final hearing upon the merits. The prime object of a receivership is to preserve the subject-matter until the suit is finally determined. *Rainey v. Freeport Smokeless Coal*

& Coking Co. 58 W. Va. 424, 52 S. E. 528; *Krohn v. Weinberger*, 47 W. Va. 127, 84 S. E. 746.

The decrees appealed from will be reversed, the injunction dissolved, and the cause remanded, with instructions to the lower court to discharge the receiver after he has made proper settlement of his accounts.

NOTE.

The question discussed in the reported case, as to the liability of a corporation organized by the stockholders of an insolvent company for the purpose of acquiring its property at a judicial sale, for the liabilities of the old company, is discussed in the annotation appended to the case of *SKIRVIN OPERATING CO. v. SOUTHWESTERN ELECTRIC CO.* ante, 1112, on "Liability of corporation for the debts of predecessor."

W. P. MCALISTER

v.

AMERICAN RAILWAY EXPRESS COMPANY, Impleaded, etc., Appt.

North Carolina Supreme Court—May 19, 1920.

(179 N. C. 556, 103 S. E. 129.)

Corporations — liability of American Express Company for debts of constituent companies.

1. The American Railway Express Company is not liable for claims arising out of breaches of contracts by the corporations which united in forming it, which occurred prior to its formation.

[See note on this question beginning on page 1112.]

— liability for debts of constituent companies.

2. The rule with respect to liability for debts of the constituent members of a consolidated corporation, where there is a merger or consolidation so that the original companies become extinct, has no application where there is merely a sale of property by one corporation to another.

[See 7 R. C. L. 183.]

— when merger effected.

3. No merger or consolidation was

effected in the sale, by the various express companies doing business in the United States, of their properties to the American Express Company when the railroads were taken over by the government as a war measure.

— sale of property — liability of purchaser for debts.

4. Fraud is necessary to charge the new corporation with the debts of the old, where one corporation transfers a portion of its property to another, but

does not terminate its corporate existence or cease to do business under its charter.

[See 7 R. C. L. 183.]

Express companies — failure to settle claims — liability for penalty.

5. An express company taking over

the business of another cannot be directly charged with the statutory penalty for the failure of the latter to settle a claim which accrued before it took over the property, but if it is liable for the debt growing out of such failure, the debt may include the penalty.

APPEAL by defendant American Railway Express Company from a judgment of the Superior Court for Robeson County (Calvert, J.) denying a motion for nonsuit of an action brought to recover damages for alleged negligent failure to transport and deliver certain merchandise. *Reversed.*

Statement by Walker, J.:

Plaintiff shipped by the Southern Express Company a package of paint from Lumberton to Hendersonville, in this state, to his own order, and paid the freight charges thereon. The paint was shipped on March 22, 1918, and, not being delivered, on May 2, 1918, he filed a written claim with the Southern Express Company for the negligent failure to transport and deliver the same, claiming damages in the sum of \$16 for the paint and freight paid, and \$50 for the penalty. The Southern Express Company was not served with process, and no judgment was entered against it. The court submitted issues to the jury, which, with the answers thereto, are as follows:

(1) In what sum, if any, is the defendant Southern Express Company indebted to the plaintiff on account of the loss of merchandise as alleged in the complaint?

Answer. Sixteen dollars, with interest from May 5, 1918.

(2) In what sum, if any, is the defendant American Railway Express Company indebted to the plaintiff on account of loss of merchandise, as alleged in the complaint?

Answer. Sixteen dollars, with interest from May 5, 1918.

(3) Did the plaintiff file claim in writing with the agent of the defendant Southern Express Company within the time provided by law, for the sum of \$16?

Answer. Yes; claim filed May 5, 1918.

(4) Did the defendants, or either

of them, pay said claim within three months after the filing of the same, as provided by statute?

Answer. No.

(5) In what sum is the defendant Southern Express Company indebted to the plaintiff on account of the penalty for failure to pay said claim within the time provided by law?

Answer. Fifty dollars and interest from January 1, 1919.

(6) In what sum is the American Railway Express Company indebted to the plaintiff on account of failure to pay said claim within the time provided by law?

Answer. Fifty dollars and interest from January 1, 1918.

(7) Does the defendant Southern Express Company maintain a process agent, or own any property within the state of North Carolina?

Answer. No, not since June 30, 1918.

The plaintiff introduced evidence as to his claim and rested.

The defendant introduced an agreed statement of the facts in the case as follows: Stipulation of facts as to the transfer of property, Southern Express Company to American Railway Express Company:

(1) The Southern Express Company is a corporation organized under the laws of the state of Georgia, and conducted the principal express business in the southeastern states for a long number of years.

(2) When the railroads were taken over by the United States government, under proclamation of the

President dated the 26th day of December, 1917, the Southern Express Company and other express companies doing business in the United States had no contracts under which they might operate. It was stated to them by the Director General of Railroads that, if they would transfer to a new company their properties used in the express transportation business, the Director General would make a contract with that new company to conduct the express transportation business of the company, or, rather, roads under government control.

(3) An agreement was reached, and the tangible properties used by the Southern Express Company and the Adams Express Company, the American Express Company, and the Wells Fargo & Company's Express, were transferred to the American Railway Express Company, effective July 1, 1918.

(4) The American Railway Express Company was incorporated under the laws of the state of Delaware, with an authorized capital stock of \$40,000,000, with an actual capital stock of \$33,000,000. Thirty million dollars of this actual capital stock was paid in by the transfer of the tangible property of the above-mentioned old express companies, upon the basis of the cost of those properties, less their depreciation. The old companies did not transfer money, notes, and accounts, nor did they transfer any property not used in the express transportation, which means that they did not transfer any of the assets used in the conduct of any other business than a transportation business. They did not convey any of their investments, such as stocks, bonds, notes, and accounts, or real estate, or other personal property not used in transportation business.

(5) No one of the old companies ceased to have corporate life. Each of the old companies continued to own a part of the properties which it had previously owned, consisting of moneys, notes, and accounts, and other property not used in the ex-

press transportation business, and in addition thereto those companies owned the stock of the American Railway Express Company, which they had acquired by the transfer of their properties, which amounted in the aggregate for the several companies to \$30,000,000, and they owned \$3,000,000 more of that stock, which they paid for in cash in order to furnish the new company with working capital.

(6) The Southern Express Company acquired about \$1,600,000 of the stock of the American Railway Express Company in the manner above stated.

(7) The Southern Express Company continued to own and now owns certain real estate, stocks, and bonds not included in the property transferred to the American Railway Express Company. The American Railway Express Company did not assume the debts of any of the old companies, including the Southern Express Company. The Southern Express Company is continuing its corporate existence with a president, treasurer, a claim department, counsel, and board of directors. Its business is being conducted at 51 Broad street, New York.

The defendant rested. The plaintiff was then permitted to offer the following evidence:

R. E. Lewis, being duly sworn, testified: "I am sheriff of Robeson county, and since July 1, 1918, I had an execution in my hands issued against the Southern Express Company, and was unable to find any property belonging to this company in my county."

By consent of the defendant, the plaintiff offered a telegram from the corporation commission, stating that it was advised by the general counsel for the Southern Express Company that said express company had no property within the state of North Carolina since June 30, 1918.

The defendant in due time and proper manner moved to nonsuit, and the motion was denied.

Judgment was entered upon the

verdict, and defendant American Railway Express Company appealed.

Messrs. R. C. Alston and McLean, Varsar, McLean, & Stacy, for appellant:

There was no assumption of the debts of the Southern Express Company by the American Railway Express Company.

5 Thomp. Corp. 2d ed. § 6090.

If the transaction was not a reorganization and was not a merger or consolidation, it must clearly have been a sale, and, in order for the plaintiff to hold the American Railway Express Company liable on account of this sale, it must be shown that the sale was of such a nature that plaintiff may follow the property into the hands of the purchaser, and subject it, at least, to the payment of his debt.

Kentucky Distilleries & Warehouse Co. v. Webb, 181 Ky. 90, 203 S. W. 870; Evans v. Unity Invest. Co. — Mo. App. —, 196 S. W. 49; Moore v. Boise Land & Orchard Co. 31 Idaho, 390, 173 Pac. 117; Cooper v. Utah Light & R. Co. 35 Utah, 570, 136 Am. St. Rep. 1075, 102 Pac. 202; Colorado Springs Rapid Transit Co. v. Albrecht, 22 Colo. App. 201, 123 Pac. 957; Koch v. Speedwell Motor Car Co. 24 Cal. App. 123, 140 Pac. 598, 600; Atkinson v. Western Development Syndicate, 170 Cal. 503, 150 Pac. 360; Ezzard v. State Nat. Bank, 57 Okla. 371, 157 Pac. 127; Union Coal Co. v. Wooley, 54 Okla. 391, — A.L.R. —, 154 Pac. 62; 10 Cyc. 308; Louisville & N. R. Co. v. Hughes, 134 Ga. 75, 67 S. E. 542; Atlanta, B. & A. R. Co. v. Atlantic Coast Line R. Co. 138 Ga. 353, 75 S. E. 468; Vicksburg & Y. City Teleph. Co. v. Citizens' Teleph. Co. 79 Miss. 341, 89 Am. St. Rep. 656, 30 So. 725; Donnally v. Hearndon, 41 W. Va. 519, 23 S. E. 646.

Messrs. Johnson & Johnson, for appellee:

The consolidation of the five express companies named in the contract under the new name, American Railway Express Company, to all intents and purposes, constituted them the same corporation operating under a new name.

Friedenwald v. Asheville Tobacco Works, 117 N. C. 555, 23 S. E. 490; National Bank v. Hollingsworth, 135 N. C. 575, 47 S. E. 618; Cook, Corp. § 673; Hibernia Ins. Co. v. St. Louis & N. O. Transp. Co. 4 McCrary, 432, 13 Fed. 516; Taylor, Corp. 655; Beach, Priv. Corp. § 360; Andres v. Morgan,

62 Ohio St. 236, 78 Am. St. Rep. 712, 56 N. E. 875; Broadfoot v. Fayetteville, 124 N. C. 478, 70 Am. St. Rep. 610, 32 S. E. 804; Marshall v. Western North Carolina R. Co. 92 N. C. 322.

Walker, J., delivered the opinion of the court:

We cannot bring our minds to the conclusion that the defendant is liable for the debts of the Southern Express Company upon the material facts of this case.

**Corporations—
liability of
American Ex-
press company
for debts of
constituent
companies.**

The cases which hold that a new corporation must pay the debts of the original one are those where there was a reorganization, consolidation, amalgamation, or union, and the new company is subjected to liability for the debts and torts of the old company upon the ground of an implied assumpsit, or of fraud, or under the trust-fund doctrine, or because, by reason of the facts and circumstances,—the complete absorption of the old company and its assets, including its franchise, being the leading and controlling one,—it is completely substituted in its place and thereby becomes the debtor to its creditors. It would be manifestly unfair, unjust, and contrary to equity that it should thus acquire all of the assets of the other corporation, and its franchise both to be and to do, leaving no one to be sued by its creditors, and no property to satisfy its debts and other liabilities, and not itself become responsible for such debts and other liabilities. If it takes the benefit, it must, as has so often been said, take the burden which equitably attaches with it.

But this case bears no resemblance to the ones just stated. There has been no reincorporation, reorganization, consolidation, merger, or anything else done. The Southern Express Company is still a live and going concern. It is exercising both its franchise to be, and to operate, and to conduct its business, and it is not even insolvent, but has enormous assets apart from the property assigned, for

commensurate and adequate value, to the Delaware corporation, which is the defendant here. It is contended that the Southern Express Company has had no process agent in the state since June 30, 1918, which means nothing more than this—that the said company retired from the express transportation business, having sold its property used in that department to the defendant for the consideration of so much stock of that company of equal value, and that therefore it required no officer or agent to transact that kind of business upon whom process could be served under Revisal, § 440, as it no longer required the employment of such officer and agent in this state, and it does not refer to a person who acts in its behalf only for the purpose of receiving the service of process, as in the case of some other corporations. It never had any such agent. It may here be said that the Southern Express Company has ample assets to pay the claim of the plaintiff, and he may still resort to them for its satisfaction. We have so far principally discussed the facts of the case. We will now turn to the law, and refer to a few well-settled principles, and apply these facts to them. It has

—liability for
debts of
constituent
companies.

been held, for instance, that the rule which applies when there is a merger or consolidation, so that the original company becomes extinct, has no application when there is merely a sale of property by one corporation to another—no more than it would apply when there is a sale to an individual.

"It seems that the foregoing rule is not applicable to a bona fide sale by one corporation to another of all its properties for a good consideration, but that in such a case the purchasing corporation would hold the assets discharged of any obligation towards the creditors of the selling corporation." 10 Cyc. 308.

"Where there has been neither a consolidation nor a merger, but a

mere sale by one corporation of its property to another, that sale, if permitted by the Constitution and the laws as not being against public policy or otherwise illegal, and if made for a valuable consideration, in good faith, will pass the property of the selling corporation to the purchasing corporation, free from claims of mere simple contract creditors. In every such case the same rule obtains as obtains in the case of a sale by an individual to another individual." *Vicksburg & Y. City Teleph. Co. v. Citizens' Teleph. Co.* 79 Miss. 341, 89 Am. St. Rep. 656, 30 So. 725.

"If one corporation purchases the property of another, it is not liable to the other's creditors for its debts." *Kentucky Distilleries & Warehouse Co. v. Webb*, 181 Ky. 90, 203 S. W. 870.

"As a general rule, the mere purchase of the assets and franchises of one corporation by another will not imply a promise on the part of the new to pay or satisfy the debts and obligations of the old." 5 *Thomp. Corp.* 2d ed. § 6090.

"A bona fide purchaser of the assets of a corporation is not, nor is the property conveyed, liable for its debts, except such as are contracted or incurred in the operation, use, or enjoyment of its franchise, in the absence of an agreement to that effect, unless the purchaser is a reorganization of the vendor, or unless, by merger or otherwise, the one is a continuation of the other." *Moore v. Boise Land & Orchard Co.* 31 Idaho, 390, 173 Pac. 117.

It is held in *Evans v. Unity Invest. Co.* — Mo. App. —, 196 S. W. 49, that, where there is no intent to defraud creditors, "the mere transfer of the assets of a corporation, even in a failing condition, to another corporation, does not ipso facto render the latter liable for the former's debts. The transfer was not made without consideration to the old company, neither was it made in order to defraud its creditors, but in order that they might be paid."

"Where one corporation conveys its property to another, this alone does not destroy the corporate existence of the grantor, or constitute a merger of the two corporations." Louisville & N. R. Co. v. Hughes, 134 Ga. 75, 67 S. E. 542.

"When a new corporation, with different stockholders, is formed, it cannot be sued by the creditors, or be held liable for the debts of the old corporation, except upon some special ground, such as having received the assets of the old corporation without giving value therefor." Donnally v. Hearndon, 41 W. Va. 519, 23 S. E. 646.

There has been no merger, or consolidation, of the Southern Express Company by the defendant, as they both imply an extinction of the old corporation, which is not the fact in this case, as the former is much alive, and an actively going concern, with its franchise and a large part, if not the largest part, of its property, retained. The defendant's stockholders are altogether different from those of the Southern Express Company, they being the four express companies, while the stockholders of the others are individuals, none of the stockholders of the four companies being a stockholder in the defendant company. So that the formation of the American Railway Express Company lacks certain elements which are essential in order to charge it with the antecedent debts or torts of the other companies.

We may as well, at this point, advert to the object contemplated and to be attained in the formation of the American Railway Express Company. The United States government had taken possession of the railroads of this country for the purpose of more effectively prosecuting the war against Germany and her allies. At the time this was done, the express companies had contracts with the railroad companies for the transportation of goods over their lines in the general conduct of the express business. These contracts were virtually an-

nulled by the action of the government in respect to the railroads; and, in order to restore this traffic, negotiations between the two parties, the express companies and the government, were entered upon for this purpose. It was suggested by Mr. McAdoo, Director General of Railroads, that, for convenience in the transaction of the express transportation business, it would be best to form a new corporation, to which the express companies should convey all their property used in their transportation business, and each of them receive, in consideration thereof, so much of the stock of the new company as would be equal, at its par value, to the value of the property sold by it to the said company. This suggestion was at once accepted and carried out. The company was incorporated under the laws of Delaware, and the transfer and issue of stock were made accordingly. The government wanted to buy the property, as it was exactly suited to its purpose, and in the situation thus confronting them the express companies were anxious to sell, as they, of course, would otherwise have no use for the property, and, besides, without such an adjustment, it would become greatly depreciated in value, as there was no chance of restoring the status quo ante bellum, or any hope of replacing the old system with any system of transportation of similar usefulness and efficiency. So, both parties being accommodated in their wishes and purposes, the Director General's suggestion was adopted. The great advantage such an arrangement would be to the government in coping with the immensely increased traffic during the war period was an additional consideration in bringing about the agreement. There was absolutely no fraudulent purpose, because fraud could not possibly be predicated of such a transaction, but, on the contrary, it was based upon a good and valuable consideration, the stock of the company presumably being at its par value, and it

was underlaid with the highest and most patriotic motive, to better prepare the government for meeting and overcoming its adversaries. So that this takes from the arrangement every element which would expose it to successful attack. It was nothing but a sale of part of its property by each of the four express companies. There was no semblance of merger, consolidation, reincorporation, or anything else which required the surrender of its franchise on the part of any one of the express companies and its extinction as a corporation. The Southern Express Company did not, and could not, act in dual capacities,—that is, sell its franchises and at the same time retain them,—nor could it maintain its separate corporate existence as a going concern, and at the same time part with it by becoming merged or consolidated with the other companies into the defendant company. The two positions are inconsistent with each other, as a merger or consolidation presupposes the surrender of its franchise, or right to be, and not that it still exists and continues to

—when merger
effected.

operate, as it does upon the facts before us. There has been, therefore, as we have before said, no merger or consolidation, but simply a sale of property, which carries with it no liability for the debts of the seller.

In this case the defendant is not the owner of the franchise of the Southern Express Company, but has merely purchased some of its property, which it is now using in its business, not under the franchise of the old company, but under its own, as a corporation of Delaware, organized under a charter granted by that state to it. This is illustrated by the case of Seaboard Air-Line R. Co. v. Leader, 115 Ga. 702, 42 S. E. 38, where it was held that, in order to render a railroad company liable on the contracts of, or for torts committed by, its predecessor in title, it must appear that it had assumed the liability of its

predecessor, or that the law charged it with such liability. The court further held that, under Georgia Civil Code 1895, § 1863, providing that any corporation in the state operating the franchise of another corporation is subject to its burdens, and can be sued when and where and for like causes for which suits could have been maintained against such other corporation were it in possession of the franchise so acquired, there is nothing which renders a corporation purchasing the line of railway of another corporation liable, either on its contracts or for its torts.

That a railway company is operating a railway which formerly belonged to another company does not render the company so in possession liable for damages growing out of a breach of contract which had been entered into by the other company. It will be seen, therefore, that the defendant was acquitted in that case, of any liability, even under the statute mentioned, which is very broadly worded, and upon the ground that there was no surrender of its charter, but only a simple sale of its property. That case is a direct authority for the defendant's position that there is no liability here. The facts of the two cases are substantially the same, as the plaintiff sued in the Georgia case for the loss of goods valued at \$29.50. He was successful in the justice's court and in the superior court, the judgment being reversed in the supreme court, and for the reason that the transaction was a sale of the Georgia & Alabama Railway, but not of its franchise, to the Seaboard Air-Line Railway Company. The court said, in concluding: "Nothing in that decision [Alabama G. S. R. Co. v. Fulghum, 87 Ga. 263, 13 S. E. 649], or in the section of the Code construed in the light of that decision, would render a railroad company which purchased the line of another company liable for the breach of a contract of its predecessor in title, or for damages growing out of a tort committed by it, in the

absence of an agreement on its part to pay such claims against its predecessor in title."

A simple perusal of the opinion in the Leader Case will reveal how closely the facts of that case and this one are allied, and, if there is any difference, it is entirely favorable to the defendant in this case. The distinction between a merger and a sale is clearly shown in *Atlanta, B. & A. R. Co. v. Atlantic Coast Line R. Co.* 138 Ga. 353, 75 S. E. 468, and there a merger or consolidation is thus defined: "Where two corporations effect a consolidation [or merger], and one of them goes entirely out of existence, and no arrangements are made respecting its liabilities, the resulting consolidated [or merged], corporation will, as a general rule, be entitled to all the property and answerable for all the liabilities of the corporation thus absorbed."

But, says the court in that case, where a railroad company sells its property, the buyer is not responsible for more than the purchase money. Page 357 of 138 Ga.

To the same effect is the case of *Pennison v. Chicago, M. & St. P. R. Co.* 93 Wis. 344, 67 N. W. 702, where it was held: "In an action against a railroad company a complaint alleging that defendant 'purchased and had assigned to itself the railroad, franchises, immunities, stocks, bonds, and all property and appurtenances' of another company, shows merely a succession, and not a consolidation such as would render defendant responsible for a tort previously committed by its vendor. A railroad company's franchise to be a corporation is entirely distinct from its franchises to construct and operate its road, and is not the subject of sale or transfer unless by virtue of some positive statutory provision."

The court, in the course of its opinion, said: "Cases cited declaring and illustrating the effect of consolidation in respect to the debts and liabilities of the companies of which the consolidated company is

composed are not material to the present inquiry. The complaint shows simply that what is called in some of the books a 'succession' has taken place, and that the property . . . of a corporation has been purchased at private sale, which differs from a consolidation in this respect: That the purchaser thus acquiring the property . . . of the selling corporation does not become responsible for its liabilities already accrued. This is quite well settled, and we have not been referred to any well-considered case to the contrary"—citing for this position *Taylor, Priv. Corp.* § 415; *Wright v. Milwaukee & St. P. R. Co.* 25 Wis. 46, and other cases.

Referring to the *Wright Case*, supra, it said: "The allegations relied on to charge the defendant company were, in substance, the same as in the present case, and extended there, as here, to a sale of the franchises; but it was held that this averment should be interpreted as extending only to the franchise of operating the road sold, and *Paine, J.*, states tersely that 'the distinction between the franchise of constructing and operating a railroad, and the franchise of being a corporation and of contracting, suing, and being sued as such, is well established,' and that upon such allegations it was only the former that passed to the purchaser. In the absence of a contract or of a statute imposing the liability contended for, it does not exist."

The law with reference to the liability of one corporation for the debts and torts of another, when there has been merger or consolidation, under a purchase of its franchise of both kinds, and also its property or assets, and its nonliability for such debts and torts when there is only a sale, is fully considered and the authorities cited, in a note to *Atlantic & B. R. Co. v. Johnson*, 11 L.R.A. (N.S.) 1119.

"Where a corporation transfers all its assets to another corporation and does not agree to assume the liabilities of the selling corporation,

and both corporations maintain a separate existence, then, in the absence of fraud, the purchasing corporation will not be answerable for any debts of the selling corporation." 10 Cyc. 1268.

The transfer of some of its property by the old company did not close its business, nor destroy its identity, or its corporate existence, but it continued to do business under its charter, and there was no fraud in the transaction; it being necessary under the circumstances,

to show fraud in order to charge the new company with the payment of the old company's debts and liabilities. *Metropolitan Nat. Bank v. Claggett*, 141 U. S. 520, 35 L. ed. 841, 12 Sup. Ct. Rep. 60; *Goldmark v. Magnolia Metal Co.* 44 App. Div. 35, 60 N. Y. Supp. 425.

After this review of the authorities, it will not be useless repetition to restate the fact that the sale in this case extended to only a part of the property of the Southern Express Company, and that its primary franchise was not included in the sale.

While we decide with the defendant, we do not agree with its view that the plaintiff is seeking to impose directly upon the defendant the penalty of our statute mentioned in the complaint. It only seeks to recover the penalty, if entitled to it, as a part of the debt or liability of

the Southern Express Company to him. He could not recover the \$50 simply as a penalty imposed on the defendant by the state for its delinquency, because it was not in the possession of the Southern Express Company's property when the penalty accrued, but, if defendant were at all indebted to plaintiff, the liability would include the penalty as a part of the sum due the plaintiff from the Southern Express Company.

Express companies—failure to settle claims—liability for penalty.

The court erred in its instructions upon the issues, and in refusing a nonsuit. The opinion will be certified, with directions to reverse the judgment and dismiss the action.

NOTE

The liability of a corporation for the debts of its predecessor is discussed in the annotation appended to the case of *SKIEVIN OPERATING CO. v. SOUTHWESTERN ELECTRIC CO.* (reported herewith) post, 1112. It should be noted that a conclusion opposed to that in *MCALISTER v. AMERICAN R. EXP. CO.* (reported herewith) ante, 1090, has been reached by the Kentucky court of appeals in *American R. Exp. Co. v. Com.* (1920) 190 Ky. 636, 228 S. W. 433, which has been carried to the Supreme Court of the United States.

FRANCIS SHERWOOD MALE, Trustee, etc., Appt.,

v.

ATCHISON, TOPEKA, & SANTA FE RAILWAY COMPANY, Resp't.

New York Court of Appeals—December 10, 1920.

(230 N. Y. 153, 129 N. E. 458.)

Corporation — purchase of other corporation — liability for debts.

1. The mere fact that one railroad company acquires the property of another by foreclosure of its first-mortgage bonds does not render it liable to the creditors or stockholders of the latter.

[See note on this question beginning on page 1112.]

Pleading — complaint — conclusion.

2. Allegations of a complaint stating mere conclusions, or declarations, or admissions in regard to facts will not be considered.

[See 21 R. C. L. 441, 508.]

Bonds — liability of operating road for railroad bonds.

3. The mere facts that a railroad was built, equipped, and operated under control of another road, and that the latter owned a majority of the stock of the former, do not make the holders of the bonds of the former, the proceeds of which were used to finance the operation, and were not diverted to the use of the latter, creditors, either legally or equitably of the latter.

Corporation — consolidation — holding majority stock.

4. No consolidation of two railroad companies is effected by the fact that one holds a large majority of the stock of the other.

[See 7 R. C. L. 157.]

Bonds — release of guaranty.

5. No purchase from or agreement with the holder of first-mortgage bonds of a railroad company, which had been held as security for a guaranty by another corporation of other bonds of the road, and subsequently sold, would release such other company from its liability on its guaranty to holders of such other bonds.

Pledge — sale of collateral — liability of vendor.

6. A railroad company holding first-mortgage bonds of another railroad company as collateral for its guaranty of other bonds of such company is not liable upon the bonds held as collateral when they are sold and passed into the hands of third persons.

Mortgage — foreclosure — inadequacy of price — effect in collateral proceeding.

7. In the absence of fraud or conspiracy a large discrepancy between the value of a railroad and the price at which it was sold in a proceeding to foreclose first-mortgage bonds thereon is immaterial, in a collateral proceeding to hold the purchaser liable upon other securities of the mortgagor.

Corporation — reorganization — cancellation of debts.

8. No reorganization of a corporation can be effected which will transfer to the stockholders of the old corporation the stock of the new one, unburdened by the debts of the old one.

[See 7 R. C. L. 157, 181.]

— acquisition of property — liability for debts.

9. A corporation which acquires the property of another by foreclosure of a first mortgage upon it does not, although it holds a majority of the stock of the mortgagor, become liable for the outstanding debts of the mortgagor.

[See 7 R. C. L. 183.]

APPEAL by plaintiff from a judgment of the Appellate Division of the Supreme Court, First Department, affirming a judgment of a Special Term, Part III., for New York County (Hotchkiss, J.), sustaining a demurrer to and dismissing the amended complaint in an action brought to recover the amount alleged to be due on certain income bonds. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Wood, Cooke, & Seitz, for appellant:

The old Atchison made itself liable for the principal and interest of the income bonds, and the respondent, under the reorganization, succeeded to that liability.

Quaid v. Ratkowsky, 183 App. Div. 433, 170 N. Y. Supp. 812; Westinghouse Electric & Mfg. Co. v. Allis-Chalmers Co. 100 C. C. A. 408, 176 Fed. 363; Southern P. Terminal Co. v. Interstate Commerce Commission, 219 U. S. 523, 55 L. ed. 319, 81 Sup. Ct. Rep. 279; Searchlight Horn Co. v. American Graphophone Co. 240 Fed. 745; C. S.

Goss & Co. v. Goss, 147 App. Div. 702, 132 N. Y. Supp. 76, affirmed in 207 N. Y. 742, 101 N. E. 1099; Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co. 110 U. S. 667, 28 L. ed. 291, 4 Sup. Ct. Rep. 185; Bartlett v. Drew, 57 N. Y. 587; Hurd v. New York & C. Steam Laundry Co. 167 N. Y. 95, 60 N. E. 327; Hazard v. Wight, 201 N. Y. 399, 94 N. E. 855; Jackson v. Ludeling, 21 Wall. 616, 22 L. ed. 492; Farmers' Loan & T. Co. v. New York & N. R. Co. 150 N. Y. 429, 34 L.R.A. 76, 55 Am. St. Rep. 689, 44 N. E. 1043; Chicago, M. & St. P. R. Co. v. Third Nat. Bank, 134 U. S. 276,

33 L. ed. 900, 10 Sup. Ct. Rep. 550; *Kansas City S. R. Co. v. Guardian Trust Co.* 240 U. S. 166, 60 L. ed. 579, 36 Sup. Ct. Rep. 334.

Irrespective of the old Atchison's liability, the unsecured creditors of the Atlantic Company were entitled to participate in the reorganization, and the new corporation is liable for the claims of such of those creditors as were ignored in that proceeding.

Kansas City S. R. Co. v. Guardian Trust Co. supra; *Louisville Trust Co. v. Louisville, N. A. & C. R. Co.* 174 U. S. 674, 43 L. ed. 1130, 19 Sup. Ct. Rep. 827; *Central Improv. Co. v. Cambria Steel Co.* 127 C. C. A. 184, 210 Fed. 696, 120 C. C. A. 121, 201 Fed. 811.

The judicial sale through which respondent obtained possession of the western division was a nullity; and that property is subject to levy and sale for the satisfaction of such judgment as the plaintiff may recover against the Atlantic Company upon the bonds in suit.

National Tradesmen's Bank v. Wetmore, 124 N. Y. 241, 26 N. E. 548; *Patchen v. Rofkar*, 52 App. Div. 367, 65 N. Y. Supp. 122; *Northern P. R. Co. v. Boyd*, 228 U. S. 482, 57 L. ed. 931, 33 Sup. Ct. Rep. 554; *Acer v. Hotchkiss*, 97 N. Y. 395; *Arnold v. Green*, 116 N. Y. 572, 23 N. E. 1; *Dunlop v. James*, 174 N. Y. 416, 67 N. E. 60; *Schmitt v. Henneberry*, 48 Ill. App. 322; *Budd v. Oliver*, 148 Pa. 194, 23 Atl. 1105.

Mr. S. T. Bledsoe, with Mr. A. S. H. Bristow, for respondent:

The old Atchison was not liable upon the ground that the bonds were issued for its exclusive use and benefit.

Briggs v. Partridge, 64 N. Y. 357, 21 Am. Rep. 617; *Schaefer v. Henkel*, 75 N. Y. 378; *Henricus v. Englert*, 137 N. Y. 488, 33 N. E. 550; *Case v. Case*, 203 N. Y. 263, 96 N. E. 440, Ann. Cas. 1913B, 311; *Farrar v. Lee*, 10 App. Div. 130, 41 N. Y. Supp. 672; *Stone v. Cleveland, C. C. & St. L. R. Co.* 202 N. Y. 352, 35 L.R.A.(N.S.) 770, 95 N. E. 816; *Pullman's Palace Car Co. v. Missouri P. R. Co.* 115 U. S. 587, 29 L. ed. 499, 6 Sup. Ct. Rep. 194; *Pennsylvania R. Co. v. Jones*, 155 U. S. 333, 39 L. ed. 176, 15 Sup. Ct. Rep. 136; *Peterson v. Chicago, R. I. & P. R. Co.* 205 U. S. 364, 51 L. ed. 841, 27 Sup. Ct. Rep. 513; *Senior v. New York City R. Co.* 111 App. Div. 39, 97 N. Y. Supp. 645, affirmed without opinion in 187 N. Y. 559, 80 N. E. 1120.

The sale under foreclosure of the Atlantic Company's property was not

void as against the income bondholders, and defendant acquired the property so sold free from the claims of such bondholders.

People v. O'Brien, 209 N. Y. 366, 103 N. E. 710; *Knowles v. New York*, 176 N. Y. 430, 68 N. E. 860; *Riddle v. Bank of Montreal*, 145 App. Div. 207, 130 N. Y. Supp. 15; *Fogg v. Blair*, 139 U. S. 118, 35 L. ed. 104, 11 Sup. Ct. Rep. 476; *Kent v. Lake Superior Ship Canal R. & Iron Co.* 144 U. S. 91, 36 L. ed. 358, 12 Sup. Ct. Rep. 615; *Ward v. Southfield*, 102 N. Y. 287, 6 N. E. 660; *Smith v. Nelson*, 62 N. Y. 286; *Ross v. Wood*, 70 N. Y. 10; *Colorado & S. R. Co. v. Blair*, 214 N. Y. 497, 108 N. E. 840, Ann. Cas. 1916D, 1177; *Richter v. Jerome*, 123 U. S. 233, 31 L. ed. 132, 8 Sup. Ct. Rep. 106.

Plaintiff is not entitled to bring this action upon the theory of reaching equitable assets, because he has not exhausted his remedy at law, by means of a judgment and execution thereon returned unsatisfied, as against the Atlantic & Pacific Company.

Adee v. Bigler, 81 N. Y. 349; *Harvey v. Brisbin*, 143 N. Y. 151, 38 N. E. 108; *Trotter v. Lisman*, 199 N. Y. 497, 92 N. E. 1052; *National Tradesmen's Bank v. Wetmore*, 124 N. Y. 241, 26 N. E. 548; *Trotter v. Lisman*, 209 N. Y. 174, 102 N. E. 575; *Kraemer v. Williams*, 131 App. Div. 236, 115 N. Y. Supp. 721; *Dittmar v. Gould*, 60 App. Div. 94, 69 N. Y. Supp. 708.

Bondholders must show that the trustee has refused or neglected to bring suit, in order to entitle the bondholders to maintain the same in their own name.

Western R. Co. v. Nolan, 48 N. Y. 513; *O'Beirne v. Allegheny & K. R. Co.* 151 N. Y. 372, 45 N. E. 873; *Belden v. Burke*, 72 Hun, 51, 25 N. Y. Supp. 601; *Van Benthuyssen v. Central N. E. & W. R. Co.* 45 N. Y. S. R. 16, 17 N. Y. Supp. 709; *Davies v. New York Concert Co.* 41 Hun, 492; *Weetjen v. Vibbard*, 5 Hun, 265; *Morgan v. Kansas P. R. Co.* 21 Blatchf. 134, 15 Fed. 55; *General Electric Co. v. La Grand Edison Electric Co.* 31 C. C. A. 118, 59 U. S. App. 473, 87 Fed. 590; *Needham v. Wilson*, 47 Fed. 97; *Consolidated Water Co. v. San Diego*, 89 Fed. 272.

Andrews, J., delivered the opinion of the court:

The plaintiff owns \$120,000 of the income bonds of the Atlantic & Pacific Railroad Company. Because of certain facts alleged in his

amended complaint he claims that the defendant is liable for this sum. A demurrer was interposed to this complaint and sustained. The question before us is whether such action was right.

At the outset it should be noticed that certain allegations of the complaint need not be considered. They either state conclusions of law, or are immaterial in that, instead of

pleading the facts, they state what someone said or admitted in regard to them. Apart from them, however, it appears that the Atlantic & Pacific Railroad Company was authorized to build a railroad from Springfield, Missouri, to the Pacific passing through Albuquerque. In fact, but a few miles had been built in Missouri, and the company was insolvent. It did have, however, under its act of incorporation, certain land grants in New Mexico and Arizona—valueless until a railroad passed through them. The St. Louis & San Francisco Railway Company had a line in Missouri and Indian Territory, with a branch which was to run to Wichita and there connect with the road of the Atchison, Topeka, & Santa Fé Railroad Company. The lines of the latter company ran from the east to Albuquerque. It desired to extend thence to the Pacific, but had no available route. The Atchison and the St. Louis each owned slightly less than half of the stock of the Atlantic & Pacific.

With affairs in this condition, a contract between the three companies was made in 1880. It was agreed that the line of the Atlantic & Pacific should be built by the parties from Albuquerque to California. The purpose of this construction, it is said, was to furnish the Atchison an outlet to the Pacific Coast, and was for its exclusive use and benefit. It was to connect with its lines at Albuquerque, and was for thirty years to be operated as a through line for it. All business from the extension was to pass to the east over the Atchison Road.

The construction westward was 581 miles long. It ran through a barren wilderness, and was useless except as furnishing the Atchison an outlet to the Pacific. And in fact the road was built, equipped, and operated under the control and for the benefit of the Atchison, and the debts and obligations incurred in the name of the Atlantic & Pacific were for the benefit of the Atchison.

The construction was to be, and was, financed by bonds of the Atlantic & Pacific. It is not claimed that their proceeds were diverted to the Atchison, or that the proceeds were not received by the Atlantic & Pacific. Under such circumstances the bondholders were not creditors, legally or equitably, of the Atchison. No contractual relation existed between them.

Bonds—liability of operating road for railroad bonds.

The bonds were sealed instruments, and on their face were the obligations of the Atlantic & Pacific. It received the proceeds from them. It used them to build a road, the legal title to which it held. That the Atchison and the St. Louis owned a majority of the Atlantic & Pacific stock is immaterial, unless they fraudulently misused their power. The companies were separate and independent corporations. Even as between them, while the contract may have been improvident, no cause of action is stated against the Atchison.

The bonds so issued by the Atlantic & Pacific consisted of \$16,000,000 first-mortgage bonds, afterwards held as collateral security for \$16,000,000 of bonds guaranteed by the Atchison and the St. Louis, issued as a substitute for them, \$5,600,000 of second-mortgage bonds, and \$12,000,000 of income bonds. These various issues were made between 1880 and 1887. The first-mortgage and income bonds were delivered to and sold by the Atchison and the St. Louis, acting clearly as agents for this purpose of the Atlantic & Pacific. A large majority of the stock of the latter company continued to be held by the

former companies, so that they dominated and controlled the affairs of the Atlantic & Pacific. This is

**Corporation—
consolidation—
holding ma-
jority stock.**

so, as to the majority stockholders of every corporation. No consolidation is so effected. *Pullman's Palace Car Co. v. Missouri P. R. Co.* 115 U. S. 587, 29 L. ed. 499, 6 Sup. Ct. Rep. 194. In 1890, through its acquisition of practically all the stock of the St. Louis, the Atchison became the real and practical owner of seven eighths of the stock of the Atlantic & Pacific.

In 1893, the Atchison and the St. Louis were in financial difficulties. Receivers, the same in both companies, were appointed. Again, the same men were named in proceedings to foreclose trust mortgages. They were directed to operate such other roads as had been operated as part of the Atchison system, and it is said this included the Atlantic & Pacific. Obviously they could not take possession of the latter road. It is not claimed that they did. But they held its second-mortgage bonds, and they caused an action to be begun to foreclose them. In this action they were again made receivers.

In 1895, the holders of the stock and bonds of the Atchison entered into a plan for reorganization. The plan was to allow the foreclosure suit against it to proceed to judgment and the property to be bought in by the reorganization committee. It was then to be conveyed to a new corporation, which should distribute its stock and bonds to the original stock and bondholders. This was done. The new corporation so formed was the defendant known as the Atchison, Topeka, & Santa Fé Railway Company, or briefly as the new Atchison. Under this plan doubtless any nonassenting creditors of the old road would have a claim against the new.

Meanwhile the Atlantic & Pacific had failed to pay interest on its substituted guaranteed bonds for which \$16,000,000 of first-mortgage bonds

were held as collateral. The sale of this collateral was caused by the holders of the guaranteed bonds. The bonds were purchased by outsiders. The amount received on this sale does not appear, nor whether it was enough to pay the trust bonds guaranteed by the Atchison and the St. Louis.

At any rate, the trustee representing the purchasers sued to foreclose these first-mortgage bonds. The suit was bitterly opposed both by the old and by the new Atchison. How or why they were parties does not appear. Probably they acted through the trustee of the second mortgage. At any rate in 1896 a decree of sale was made. And in 1897, before any sale was held, the new Atchison purchased all these bonds. It had a perfect right to do so. Whether it owned or did not still own most of the stock of the Atlantic & Pacific is immaterial. In either event the transaction was clearly a purchase, and not the payment of a debt. These bonds were solely the liability of the Atlantic & Pacific. Upon them no liability attached to the Atchison. Whether the guaranteed bonds or any part of them were outstanding or whether they had been paid by the sale of the collateral we do not know. The complaint says, "by which purchase and payment it was agreed that the new Atchison Company should be, and they were released, from all obligations under the old Atchison Company's guaranty." An agreement with the one who at that time owned these bonds, or a purchase from or a payment to him, could have had no such effect unless he were also the

**Bonds—release
of guaranty.**

owner of the guaranteed bonds. This is not said. If made in good faith and without fraud, and nothing appears to the contrary, the purchase was unobjectionable.

Some claim is made that, as guarantor on the bonds to which the bonds in question were collateral, the Atchison was bound to pay

these first-mortgage bonds. This cannot be so. The Atlantic & Pacific was the primary debtor on the guaranteed bonds. As security, it had given its own further obligations. There is no principle by which the guarantor became liable to pay the guaranteed debt to a purchaser of these collateral securities.

Having acquired the bonds, the new Atchison enforced the judgments of foreclosure and sale. A sale was had, and the Atlantic & Pacific was bought in by the reorganization committee for \$12,000,000, leaving a large deficiency. Only the expenses of the sale were actually paid, but, as the new Atchison owned all the bonds, this is easily understood. The property was then transferred to the new

Mortgage—foreclosure— inadequacy of price—effect in collateral proceeding.

Atchison. In all these transactions there is no charge of facts showing fraud or conspiracy.

This being so, the claim that the property was worth \$100,000,000, instead of \$12,000,000, which it brought on the sale, is immaterial in a collateral action like the present.

The complaint fails to state a cause of action. It is said the plaintiff was a creditor of the Atchison. Upon the reorganization, the new company succeeded to this liability. Were the premise well founded, very possibly the conclusion would follow. But in our opinion the claimed relation of debtor and creditor did not exist. It is said that the reorganization included a purpose to effect the acquisition of the Atlantic & Pacific, and so the new company became liable for its debts. This is to mistake the meaning of the cases to which we are referred.

Corporation—purchase of other corporation—liability for debts.

The mere purpose of the stockholders of one road, or of the road itself, to acquire another,

does not make the company which later does in fact acquire the other

liable to its creditors or stockholders.

It is true that no scheme of reorganization which contemplates the transfer to the original stockholders of stock in the new corporation unburdened by the old debts can be upheld. Such a plan, however effected, cannot be allowed.

No such case is presented to us. In this reorganization

—reorganization—cancellation of debts.

neither the Atchison nor the new Atchison received anything by virtue of their ownership of Atlantic & Pacific stock. No such condition was contemplated. Title to its property was acquired by purchase on a foreclosure sale, with no agreement or understanding that those interested in the

—acquisition of property—liability for debts.

Atlantic & Pacific directly or indirectly by the reorganization. It is said further that the foreclosure of the Atlantic & Pacific mortgage and the sale thereunder were void, because the debt was paid, and that the new Atchison took the property still encumbered by all liens upon it. Again, we cannot agree with the premise. Nor on other grounds may the complaint be sustained. It is not charged that the Atchison, as majority stockholder, so diverted the income of the Atlantic & Pacific as to make it incapable of paying the interest on its bonds, that it might obtain control of its property to the injury of its creditors and minority stockholders, or that it diverted the property of the Atlantic & Pacific into its own treasury. Some or all these conditions exist in such cases as *Northern P. R. Co. v. Boyd*, 228 U. S. 482, 57 L. ed. 931, 33 Sup. Ct. Rep. 554; *Kansas City S. R. Co. v. Guardian Trust Co.* 240 U. S. 166, 60 L. ed. 579, 36 Sup. Ct. Rep. 334, and *Louisville Trust Co. v. Louisville, N. A. & C. R. Co.* 174 U. S. 674, 43 L. ed. 1130, 19 Sup. Ct. Rep. 827.

The judgment appealed from must be affirmed, with costs.

Hiscock, Ch. J., and Hogan, Car-
dozo, Pound, and McLaughlin, JJ.,
concur.

Chase, J., not voting.

NOTE.

The question involved in the re-
ported case (*MALE v. ATCHISON, T. &*

S. F. R. Co. ante, 1098) as to the
liability of a reorganized corporation
for debts of the old company is dis-
cussed in the annotation appended to
the case of *SKIRVIN OPERATING Co. v.*
SOUTHWESTERN ELECTRIC Co. post,
1112, on "Liability of corporation for
debts of predecessor."

SKIRVIN OPERATING COMPANY, Impleaded, etc., Plff. in Err.,

v.

SOUTHWESTERN ELECTRIC COMPANY.

Oklahoma Supreme Court — September 3, 1918.

(— Okla. —, 174 Pac. 1069.)

Corporation — merger — liability for debts.

Where an insolvent corporation is absorbed by and merged into another, and where, in fraud of certain of its creditors, all of its assets are taken over and absorbed by the new corporation, and the business of the insolvent corporation is continued at the same place, with the same property, and by substantially the same officers, and where no provision is made respecting the liabilities of the insolvent corporation, so merged and absorbed by the new corporation, the new corporation will, as a general rule, be answerable for all the liabilities of the corporation thus merged and absorbed.

[See note on this question beginning on page 1112.]

Headnote by TISINGER, J.

ERROR to the District Court for Oklahoma County (Crow, J.) to review a judgment in favor of plaintiff in an action brought to recover from the defendant operating company the amount of a judgment obtained by plaintiff in the county court against the other defendants. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. Warren K. Snyder for plaintiff
in error.

Messrs. Twyford & Smith, for de-
fendant in error:

The trial court having found the is-
sues in favor of the plaintiff, and there
being legal evidence sustaining such
finding, there being no contention that
the weight of the evidence is not with
the judgment, the case should be af-
firmed.

Lynch v. Halsell, 34 Okla. 307, 125
Pac. 724; Enid City R. Co. v. Reynolds,
34 Okla. 405, 126 Pac. 193; Brissey
v. Trotter, 34 Okla. 445, 125 Pac. 1119;
Estee v. Estee, 34 Okla. 305, 125 Pac.
455; McConnell v. Watkins, 42 Okla.

214, 140 Pac. 1167; Palmer-Gregory
Chiropractic College v. Spain, 52 Okla.
590, 153 Pac. 140; Schock v. Fish, 45
Okla. 12, 144 Pac. 584; Wimberly v.
Winstock, 46 Okla. 645, 149 Pac. 238;
Hatcher v. Kinkaid, 48 Okla. 163, 150
Pac. 182; Tucker v. Thraves, 50 Okla.
691, 151 Pac. 598; Johnson v. Perry,
54 Okla. 23, 153 Pac. 289.

The pretended foreclosure is no de-
fense because it was based merely on
an equitable lien, reserved in a lease,
and would have to be foreclosed by
judicial proceedings in a court of com-
petent jurisdiction, and could not be
foreclosed by mere notice.

Marquam v. Sengfelder, 24 Or. 2, 32

Pac. 676; Dalton v. Laudahn, 27 Mich. 529; Swank v. Elwert, 55 Or. 487, 105 Pac. 904.

The Skirvin Operating Company, being promoted and controlled by the same stockholders and officers as the Skirvin Hotel Company, and having come into possession of the entire assets of the latter, and caused its cessation of business and practical dissolution, it has become liable for its debts, and a judgment creditor, by creditor's bill, can follow the assets and hold it liable as the real successor of the original debtor.

Chicago, R. I. & P. R. Co. v. Howard, 7 Wall. 392, 19 L. ed. 117; Friedenwald Co. v. Asheville Tobacco Works, 117 N. C. 544, 23 S. E. 490; Goddard v. Fishel-Schlichten Importing Co. 9 Colo. App. 306, 48 Pac. 279; Central of Georgia R. Co. v. Paul, 35 C. C. A. 639, 93 Fed. 878; Central Improv. Co. v. Cambria Steel Co. 120 C. C. A. 121, 201 Fed. 811; Silver King Coalition Mines Co. v. Silver King Consol. Min. Co. 122 C. C. A. 402, 204 Fed. 166, Ann. Cas. 1918B, 571; Central Improv. Co. v. Cambria Steel Co. 127 C. C. A. 184, 210 Fed. 696.

Tisinger, J., delivered the opinion of the court:

On August 5, 1913, the Southwestern Electric Company, a special copartnership, obtained a judgment in the county court of Oklahoma county, Oklahoma, against W. B. Skirvin, the Skirvin Investment Company, a corporation, and the Skirvin Hotel Company, a corporation. After fruitless efforts to collect its judgment, the Southwestern Electric Company, as plaintiff, on June 1, 1914, began this action in the district court of Oklahoma county, Oklahoma, against the Skirvin Operating Company, a corporation, the Skirvin Investment Company, a corporation, and the Skirvin Hotel Company, a corporation, as defendants, wherein it seeks to recover from the Skirvin Operating Company, the amount of its judgment against W. B. Skirvin, the Skirvin Investment Company, and the Skirvin Hotel Company, obtained in the county court.

Plaintiff based its right of recovery against the defendant, the Skirvin Operating Company, on the 15 A.L.R.—70.

grounds that the Skirvin Operating Company was organized for the purpose of taking over and merging in it all the assets, good will, and business of the Skirvin Hotel Company, with the intent and for the purpose of defrauding plaintiff as a judgment creditor of the Skirvin Hotel Company, which at the time of the merger was insolvent; that the Skirvin Operating Company was a mere continuation of the Skirvin Hotel Company, and that the transaction by which the Skirvin Operating Company took over the assets, good will, and business of the Skirvin Hotel Company was fraudulent, and was done for the purpose of defrauding the creditors of the Skirvin Hotel Company, including the plaintiff.

The answer of the defendant, the Skirvin Operating Company, denied generally the allegations in plaintiff's petition, and alleged that it acquired the personal property of the Skirvin Hotel Company by virtue of the sale thereof under the foreclosure of a chattel mortgage to the Skirvin Investment Company; that one E. Z. Wallower became the purchaser of said personal property at said sale, who thereafter sold and conveyed the same to the defendant, the Skirvin Operating Company. The facts in the case, as developed by the evidence, are as follows:

On June 16, 1911, the Skirvin Investment Company, a corporation, leased to Fred W. Scherubel, the building situated at the northeast corner of Broadway and First streets, in Oklahoma City, Oklahoma, known as the Skirvin Hotel, for a period of fifteen years. Under the terms of the lease the lessor was to pay an agreed rental on the 1st day of every month in advance, and the lessee agreed that he would place and install in the leased premises furniture, fixtures, and appliances, to be fully paid for and unencumbered, of the actual cost to the lessee of the sum of \$75,000, upon which furniture, fixtures, and appliances, and the replacements

thereof and substitutions therefor, the lessor was given a first and prior lien for its rents, which might be foreclosed in the manner prescribed by the laws of Oklahoma for the enforcement and foreclosure of the lien of a chattel mortgage. It was also provided in the lease contract that the lessee might sublet the leased premises to a corporation to be organized under the laws of the state of Oklahoma and known as the Skirvin Hotel Company, which should succeed to all the rights of the lessee under the lease, and be bound by its terms.

On July 20, 1911, the Skirvin Hotel Company was incorporated by Fred W. Scherubel, W. B. Skirvin, and E. Z. Wallower, for the purpose of conducting in Oklahoma City a hotel business, and Fred W. Scherubel was made manager of the Skirvin Hotel. It seems that the Skirvin Hotel Company became involved in financial difficulties, and in April, 1913, the manager of the hotel, Fred W. Scherubel, who was also the original lessee of the hotel building and one of the directors of the Skirvin Hotel Company, committed suicide. The lease contract between the Skirvin Investment Company and Fred W. Scherubel was filed as a chattel mortgage, and default having been made in the payment of rents due to the Skirvin Investment Company by the Skirvin Hotel Company, which, according to the terms of the contract, succeeded to all the rights and liabilities of Scherubel, the original lessee, the Skirvin Investment Company, as mortgagee, on the 26th day of July, 1913, posted in Oklahoma county notices of sale of all the furniture, fixtures, and appliances, the replacements thereof, and substitutions therefor, said sale to be had on the 6th day of August, 1913, in order to collect the past-due and unpaid rent in accordance with the terms of the contract. On said 6th day of August, 1913, the property described was sold to E. Z. Wallower for the sum of \$15,000.

On said 6th day of August, 1913,

a corporation known as the Hotel Operating Company was incorporated, and its articles of incorporation filed with the secretary of state of the state of Oklahoma. C. L. Webb, J. Robbins, and I. M. Camfield were named as directors of this corporation, and the purpose for which it was formed was to conduct and operate hotels. These articles of incorporation were amended on August 12, 1913, in the following respects: The name of the corporation was changed from the Hotel Operating Company to the Skirvin Operating Company, and the names of its directors from C. L. Webb, J. Robbins, and I. M. Camfield, to W. B. Skirvin, C. J. Skirvin, and E. Z. Wallower.

On August 6, 1913, E. Z. Wallower made a bill of sale to the Hotel Operating Company of all the furniture, fixtures, and appliances in the Skirvin Hotel which had been purchased by him on that same day at the sale under the foreclosure of the chattel mortgage in favor of the Skirvin Investment Company against the Skirvin Hotel Company. No consideration is recited in this bill of sale, but on the same day the said E. Z. Wallower made in writing to the Hotel Operating Company a proposition that he would execute to it such a bill of sale, provided the Hotel Operating Company would issue to him, or to any persons whom he might designate, shares of stock in the company of the par value of \$20,000. This proposition was, on the same day, accepted by the directors of the Hotel Operating Company, and the shares of stock were accordingly directed to be issued to him or to whomsoever he might designate. At this same meeting J. Robbins, I. M. Camfield, and C. L. Webb tendered their resignations as directors and officers of the Hotel Operating Company, and C. J. Skirvin, W. B. Skirvin, and E. Z. Wallower were elected as directors in their stead, and W. B. Skirvin was elected president and manager of the corporation, E. Z. Wallower, vice president, and C.

J. Skirvin, secretary. At the same meeting the president of the company stated that he had caused to be prepared amended articles of incorporation for the purpose of changing the name of the company from the Hotel Operating Company to the Skirvin Operating Company, which amendment appears to have been prepared on the same day and filed with the secretary of state August 12, 1913, and is hereinbefore referred to.

It appears that these three corporations had interlocking directorates. W. B. Skirvin was president of the Skirvin Investment Company. He was also a director and officer of the Skirvin Hotel Company, and was a director and president of the Skirvin Operating Company. E. Z. Wallower was also a director and vice president of the last-named company and a director of the Skirvin Hotel Company. The directors and officers of the Skirvin Hotel Company and the Skirvin Operating Company were the same, with the exception of Fred W. Scherubel, who died in April before the Hotel Operating Company was organized in August. It further appears that the only tangible assets of the Skirvin Hotel Company were the furniture, fixtures, and appliances in the Skirvin Hotel, upon which the Skirvin Investment Company held its lien for rent. It also appears that, at the time of the sale of the assets of the Skirvin Hotel Company under the foreclosure of the chattel mortgage held by the Skirvin Investment Company, the Hotel Company was in debt about \$50,000, including its indebtedness for rent, and its circumstances were such that it either had to close up, be reorganized, or sold out.

When the property was sold under the chattel mortgage, E. Z. Wallower bought it for \$15,000. The property at that time was worth something like \$65,000, if the hotel business had been a prosperous one, and it appears that the property bought by Wallower was

all of the property of the Skirvin Hotel Company, which, according to the terms of the lease, cost originally not less than \$75,000. A proposition was made to Wallower by W. B. Skirvin, president of the Skirvin Investment Company, that if he would buy the property at the sale, and furnish money to operate the hotel with, the stockholders of the Skirvin Investment Company would take stock in the new organization, the Skirvin Operating Company, for the rent that was due the Skirvin Investment Company. It appears that this proposition was accepted, and \$5,000 of the \$20,000 worth of stock in the new corporation was issued to E. Z. Wallower, and the \$15,000 worth remaining was issued to the persons designated by Wallower, in accordance with the proposition made to him by W. B. Skirvin, and the proposition made by him to the Hotel Operating Company on August 6th, and accepted by it on the same day. It also appears that Wallower purchased \$10,000 worth of stock of the Skirvin Operating Company, in addition to the stock already issued to him, paying for it in cash, and this sum was used by the Skirvin Operating Company with which to operate the hotel.

It further appears that afterwards, in two suits filed in the district court of Oklahoma county, Oklahoma, wherein the Skirvin Hotel Company, the Skirvin Investment Company, and the Skirvin Operating Company, and W. B. Skirvin, C. J. Skirvin, and E. Z. Wallower were defendants, a decree was agreed on by all the parties in the two cases, consolidated, wherein it is recited that all the parties to the two cases had presented to the court a proposed plan for the reorganization of the Skirvin Hotel Company, and for the adjustment and settlement of the rights of all parties to said cases, as follows:

"(1) That of the \$50,000 authorized capital stock of the Skirvin Operating Company, a corporation,

\$15,000 par value be apportioned to the nominees of the Skirvin Investment Company from Skirvin Hotel Company.

"(2) That, of said \$50,000 authorized capital stock, \$10,000 be apportioned to E. Z. Wallower in consideration of \$10,000 in money heretofore paid into Skirvin Operating Company by the said E. Z. Wallower, a portion of which was used in the payment of the debts of the Skirvin Hotel Company, and the remainder of which was used to carry on the business of the Skirvin Operating Company after its organization.

"(3) That, of the remaining \$25,000 authorized capital stock of the said Skirvin Operating Company, there shall be issued to the creditors of the Skirvin Hotel Company stock of the par value following:

Name.	Amount.
E. Z. Wallower, for other money loaned	\$3,300.00
State National Bank, amount due on note	1,000.00
R. D. Rumsey, loan	400.00
O. S. Picher, loan	1,000.00
Mrs. D. J. Heyser, loan	200.00
Skirvin Investment Company on note	2,000.00
Total	\$8,300.00

"Some of the foregoing indebtedness being evidence by negotiable promissory notes, it is agreed that the above stock shall be issued to the present owners and holders of the notes evidencing such indebtedness, upon the surrender of such notes.

"(4) The remaining \$16,700 authorized capital stock of the Skirvin Operating Company shall be issued and distributed pro rata among the holders of the \$105,000 stock issued in the Skirvin Hotel Company.

"And the court, having considered the aforesaid proposed plan of reorganization, and being well and sufficiently advised in the premises, is of the opinion that the same provides a fair and equitable adjustment and settlement of this litigation and of the rights of all parties

concerned, and does hereby adopt the same as the basis of its decrees in the above-entitled cause. And it appearing to the court that stock of the Skirvin Operating Company of the par value of \$15,000 has already been issued to the nominees of the Skirvin Investment Company in payment of its aforesaid rent claim, which is the amount of stock to which such persons are entitled under the aforesaid reorganization plan, and it further appearing to the court that stock of said Skirvin Operating Company of the par value of \$15,000 has already been issued to E. Z. Wallower, which amount is less than the said E. Z. Wallower is entitled to as a creditor and stockholder of the Skirvin Hotel Company, as aforesaid, it is therefore by the court ordered, adjudged, and decreed: That the aforesaid stock issues already made by the Skirvin Operating Company to E. Z. Wallower and the nominees of the Skirvin Investment Company be and the same are hereby confirmed, and that the remaining authorized capital stock of the Skirvin Operating Company be issued and delivered as follows, to wit: To E. Z. Wallower, \$1,800 of said capital stock, in addition to the \$15,000 of stock already issued to the said E. Z. Wallower, making the total stock of said E. Z. Wallower in said corporation \$16,800; the same being in payment of the \$10,000 mentioned in paragraph numbered 2 of the foregoing reorganization agreement, the \$3,300 owing to the said E. Z. Wallower mentioned in paragraph numbered 3 thereof, and the pro rata share of the said E. Z. Wallower as a stockholder of the Skirvin Hotel Company. To the State National Bank, stock of the par value of \$1,000. To Joe Rumsey, stock of the par value of \$400. To R. D. Rumsey, stock of the par value of \$400. To O. S. Picher, stock of the par value of \$1,000. To Mrs. D. J. Heyser, stock of the par value of \$200. To C. J. Skirvin, the present holder of the note to the

Skirvin Investment Company, mentioned in paragraph numbered 8, stock of the par value of \$2,000: Providing, however, that if the notes evidencing any of the foregoing indebtedness are now held by others than the persons above named, then such stock shall be issued to the present owners thereof. To the holders of the remainder of said \$105,000 of stock issued in the Skirvin Hotel Company there shall be distributed and issued pro rata the remaining \$16,700 par value of stock of the Skirvin Operating Company.

"It is further ordered that the aforesaid stock shall be issued to the persons entitled thereto under the terms of the foregoing agreement and of this decree, upon the surrender to Skirvin Operating Company for cancelation of the stock of the Skirvin Hotel Company and of the promissory notes in payment of which the same is to be issued hereunder. It is further ordered, adjudged, and decreed that all other, further, or different relief demanded by the plaintiffs, or either of them, or by either of the interveners, be and the same is hereby denied, and all claims of defendants in, to, or against Skirvin Hotel Company are decreed to be merged in this decree. And it is ordered, adjudged, and decreed that the costs of this suit be paid by the Skirvin Operating Company, the purpose and intent of this requirement as to costs being that the same shall be equitably shared by the parties to this litigation.

"The clerk of this court is ordered to enter this decree in each of the causes aforesaid."

It is apparent from an examination of this decree, taken in connection with the evidence of W. B. Skirvin, that the decree attempts to carry out the plan of the stockholders of the Hotel Operating Company and the Skirvin Operating Company at the meeting of their stockholders and directors on August 6, 1913. By the terms of this decree \$10,000 worth of stock of the

Skirvin Operating Company was apportioned to E. Z. Wallower in consideration of \$10,000 in money which he had previously paid into the company; \$15,000 worth of stock of the Skirvin Operating Company had already been issued through him to the nominees of the Skirvin Investment Company, in payment of its claim for rent against the Skirvin Hotel Company; and \$8,300 worth of stock of the Skirvin Operating Company was apportioned and ordered issued to E. Z. Wallower and other creditors of the Skirvin Hotel Company. The remainder, after satisfying all these creditors, was to be issued to the stockholders of the Skirvin Hotel Company in proportion to the amount of stock held by each. It will be observed that the stock in the new company was to be issued, under the agreed decree, to stockholders of the Skirvin Hotel Company, only upon surrender to the Skirvin Operating Company for cancelation of all the stock of the Skirvin Hotel Company held by them, and upon surrender for cancelation of promissory notes held by creditors of the Skirvin Hotel Company in order that they might be canceled. It will also be observed that no provision is made by the stockholders and directors of either company at their meeting on August 6, 1913, or by the agreed judgment and decree in the two cases consolidated, in the district court of Oklahoma county, Oklahoma, dated January 12, 1914, for the payment of the claim of the plaintiff in this case, and that its judgment remains an unsatisfied liquidated demand against the Skirvin Hotel Company.

From a careful reading of the record in this case we arrive at the following conclusions: (1) That the Skirvin Operating Company was promoted, incorporated, and controlled by substantially the same stockholders and officers as the Skirvin Hotel Company. (2) That the Skirvin Operating Company came into possession of the entire

assets and business of the Skirvin Hotel Company, without paying any adequate consideration therefor. (3) That the Skirvin Operating Company is in law and in point of fact merely a reincarnation of the Skirvin Hotel Company. (4) That the transfer of the assets of the Skirvin Hotel Company to the Skirvin Operating Company was merely a merger in fact, although the corporate existence of the Skirvin Hotel Company might continue, and that the new corporation was created merely for a continuation of the business of the original one. It appears that the Skirvin Hotel Company engaged in a business which proved to be unprofitable. It owned property of the value of \$65,000 or \$75,000, and this property was, by a scheme of legal legerdemain, transferred to another corporation, to wit, the Skirvin Operating Company, composed substantially of the same persons, which transacted the same business, at the same place, and with the same property. The consideration paid to the stockholders of the corporation which held and foreclosed the chattel mortgage for the personal property sold under the foreclosure was stock in the new company at par value. Certain creditors of the old company were also paid by the new company with stock of the new company at par value, and the remainder of the stock of the new company was then distributed to the stockholders of the old company, in proportion to the amount of their several holdings. By thus taking all the property and business of the old corporation, the new corporation left the other only its corporate shell.

We are of the opinion that such a transaction was unconscionable; that it was, in effect, an effort to defraud the creditors of the old corporation, or that would operate as a fraud against such creditors; that the new corporation is a mere continuation of the old one, under a slightly different name; and that a creditor of the old corporation may

look to the new one for payment of its claim. We are supported in these conclusions by the ablest writers of our textbooks and by decisions of our highest courts. The rule is thus stated in 5 Thompson on Corporations, 2d ed. § 6082: "Succeeding corporations are not infrequently held liable where there may not be strictly a consolidation. Generally, if a new corporation is organized by the stockholders of an old concern and receives the property of the old, the creditors of the old corporation may proceed directly against the new. This rule is applied especially where such arrangement and the transfer of the property are made for the purpose of defrauding the creditors of the old company. Thus, a corporation composed of substantially the same stockholders, receiving without consideration all the property, including a certain contract for the sale of goods, for the purpose and with the intent of defrauding the creditors of such former company, was held liable on a contract of the old company entered into before the transfer of the property. Where the consolidation results in terminating the existence of the constituent companies, and there is no agreement as to liabilities, the consolidated corporation will generally be entitled to all the property and will be answerable for all the liabilities of the old corporation. And if the successor is technically a new corporation, and the old has actually ceased to exist, and all its assets and franchises have passed to the new, and it is a mere continuation of the old, the liability continues. Neither law nor equity will permit one corporation to take all the property of another, deprive it of the means of paying its debts, enable it to dissolve its corporate existence, and place itself practically beyond the reach of creditors, without assuming its liabilities. In order to render a consolidated corporation liable for the debts of a constituent company, it is necessary to show an agreement to pay

such debts, or prove a consolidation, or show that the purchasing corporation was a mere continuation of the selling corporation, or that the transaction was fraudulent in fact."

Also, the same author, at § 6086, says: "The mere change of name will not affect either the identity or the liability of a corporation. Thus, members of an insolvent corporation may reorganize for the purpose of carrying on the business of the old corporation, where they act with a bona fide intention of creating a new corporation; but they cannot by such a new organization, or by a mere change in the name of the corporation, affect the legal status or rights of creditors. So, where the consolidation was under a new name, it was held that it could be sued in such name for debts of the old companies."

See also Ruling Case Law, title "Corporations," vol. 7, §§ 155, 156.

A long line of decisions may be found wherein it is held that when a corporation is merged into or absorbed by another which continues its business, and where there is no substantial change of ownership, nor in the kind of business carried on, then the new corporation is but the successor of the former concern, and is liable as such for its debts. *Austin v. Tecumseh Nat. Bank*, 49 Neb. 412, 35 L.R.A. 444, 59 Am. St. Rep. 543, 68 N. W. 628; *Grenell v. Detroit Gas Co.* 112 Mich. 70, 70 N. W. 413; *Berthold v. Holladay-Klotz Land & Lumber Co.* 91 Mo. App. 233; *Friedenwald Co. v. Asheville Tobacco Works*, 117 N. C. 544, 23 S. E. 490; *Atlantic & B. R. Co. v. Johnson*, 127 Ga. 392, 11 L.R.A.(N.S.) 1119, 56 S. E. 482. In *Montgomery Web Co. v. Dienelt*, 133 Pa. 585, 19 Am. St. Rep. 663, 19 Atl. 428, it was held that, where a new corporation was formed by the stockholders and creditors of the old, stock in the new corporation being issued in lieu of that of the old corporation, and practically all of the assets of the old corporation were transferred to the new in

consideration of the assumption of certain debts, such transfer was fraudulent as to a creditor whose claim was not provided for. The court said: "As already said, a majority of the stockholders in the new company are simply the stockholders of the old company holding as such, and without other consideration. As to these, it has been a mere change of name. As to the other or new stockholders, it appears from the agreed facts that they were creditors of the old company, and hold their present stock solely in consideration of their former claims as creditors. They paid nothing else for it; and they must have known that the new corporation into which they entered in this way was not a new enterprise, in the regular course of business, under the Incorporation Act of 1874, as it professed to be, but a new turn in the old enterprise, all of whose property was being practically handed over, not to them alone in payment, which they might, perhaps, rightfully have accepted, but to them in conjunction with their late debtors. Under such circumstances, they were bound to take notice of the nature of the transaction, and to know that equity would still regard the property as a trust for the payment of existing debts, and would follow it on behalf of creditors until it should get into the hands of innocent purchasers for value. Such purchasers they were not. The old stockholders were not purchasers for value at all; and the new stockholders were not innocent, for they knew, or were bound to take notice, of the taint in their coadventurers' title."

In *Altoona v. Richardson Gas & Oil Co.* 81 Kan. 717, 26 L.R.A.(N.S.) 651, 106 Pac. 1025, the court, in holding a succeeding gas company liable to the city for the fees due it from the franchised company, based its decision upon the general ground that where one corporation becomes practically extinct, transferring all its assets to another, and receiving in return

stock in the other corporation, which succeeds to its business, the new corporation is liable to the extent of the old one. The court in this case said: "Such an arrangement is essentially a merger, and should be attended with the same consequences as a consolidation."

In *Friedenwald Co. v. Asheville Tobacco Works*, 117 N. C. 544, 23 S. E. 490, it was held that, where a new corporation was organized by the officers and stockholders of the old corporation for the purpose of enlarging its business, the shareholders of the old corporation receiving stock in the new, the law would imply a stipulation on the part of the new to pay the debts of the old concern. In *Hibernia Ins. Co. v. St. Louis & N. O. Transp. Co.* 4 McCrary, 432, 13 Fed. 516, it was held that where all the property of one corporation was transferred to another, composed substantially of the same persons, to transact the

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same business at the same place, and with the same property, the consideration to be stock in the new corporation and the assumption of certain debts, the new corporation might be held accountable to creditors of its predecessor.

In *Blair v. St. Louis, H. & K. R. Co.* (C. C.) 22 Fed. 36, and 24 Fed. 148, it was held that the transfer of the assets of one corporation to another, whereby, through a mere change of name, an attempt is made to defraud creditors, or which would operate as a fraud, cannot be upheld as against creditors. In *Central of Georgia R. Co. v. Paul*, 35 C. C. A.

639, 93 Fed. 878, the court says: "Where a plan for reorganization is entered into by the stockholders and secured creditors of an insolvent corporation, and is carried out, pursuant to which all the property of the corporation is sold by foreclosure and otherwise, and transferred to the new corporation, whereby the stockholders of the old corporation retain their interests and rights, and by virtue thereof are either stockholders in the new corporation or are otherwise provided for, this is a fraud on an unsecured creditor of the old corporation, so that she may hold the new corporation for her claim."

In this case the assets of the corporation, which were taken over by the defendant, the Skirvin Operating Company, so far exceed in value the amount of plaintiff's judgment against the defendant that we do not consider it necessary to discuss the question as to whether or not plaintiff was only entitled to the enforcement of an equitable lien against the property so taken over and acquired. The value of the property acquired is many times the amount of plaintiff's judgment. The trial court rendered judgment in favor of the plaintiff against the defendant for the full amount of its judgment obtained in the county court against the Skirvin Hotel Company.

We think that the judgment of the trial court was supported by the evidence, and is authorized by law, and the judgment is therefore affirmed.

ANNOTATION.

Liability of corporation for debts of predecessor.

I. Scope and introduction, 1113.

II. In absence of statute or express agreement imposing liability:

- a. Liability of corporation acquiring the business or assets of another without a technical consolidation, merger, or reorganization:

II. a.—continued.

1. Generally, 1114.
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3. Liability of corporation succeeding to business of partnership or individual, 1126.
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- c. Liability of de jure for debts of de facto corporation, 1132.
- d. Liability as affected by reincorporation, 1132.
- e. Liability of state bank becoming a national bank, or vice versa, 1133.
- f. Liability of corporation obtaining charter in another state, 1133.
- g. Liability of consolidated corporation for claims against constituent companies, 1133.
- h. Liability of corporation into which another has been absorbed or merged, 1137.
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 - 2. Where stockholders in old company retain an interest, 1144.
 - 3. Right to priority over creditors of reorganized company, 1147.
 - 4. Liability of purchaser for debt or liability incurred by trustee for bondholders or receiver, 1147.
- j. Character and extent of liability:
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III. Character of particular transaction, 1152.**I. Scope and introduction.**

It is the purpose of this annotation to bring together the cases involving the liability of a corporation for claims against its predecessor in business, as well under statutes imposing or contracts assuming such liability, as in the absence of the statute or contract. It includes cases in which the corporation was the successor of an individual or partnership, as well as cases in which it was the successor of another corporation; cases in which there has been a "reorganization," and decisions as to the liability of a corporation which has changed its name or form without changing its identity.

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 - b. Existence of agreement, 1181.
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 - 1. Generally, 1183.
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 - 4. Claims arising out of torts, 1188.
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- VI. Waiver or loss of right by creditor, 1192.**

It does not include decisions upon the question whether the successor corporation is bound to perform the executory contracts of its predecessor.

There are two propositions upon which the decisions agree: First, that the mere fact of succession is not sufficient to impose liability for the debts of the predecessor; and, second, that the courts will not tolerate any species of transaction whereby the stockholders in the debtor corporation are permitted, by virtue of their stock ownership, to retain for themselves an interest in the corporate assets until the debts of the corporation shall have been paid. Beyond

these points there is a wide variety of opinion, largely attributable to Justice Story's somewhat unfortunate phrase that the capital stock of a corporation constitutes a trust fund for the payment of its debts.

The "trust fund doctrine," as is said by Field, J., in *Fogg v. Blair* (1890) 183 U. S. 541, 33 L. ed. 724, 10 Sup. Ct. Rep. 338, only means that the property of the corporation must be first appropriated to the payment of its debts before any portion can be distributed to the stockholders, and does not mean that the property is so affected by the indebtedness of the company that it cannot be sold, transferred, or mortgaged to bona fide purchasers for a valuable consideration, except subject to the liability of being appropriated to pay that indebtedness.

Some courts, however, have taken it to mean that the creditors of a corporation stand in the same relationship as cestuis que trust, and may follow its assets into the hands of transferees other than those who have acquired them for value and without knowledge, actual or constructive, of the claims of creditors. But inasmuch as a full discussion of the views of the courts as to the so-called "trust fund doctrine" would involve a review of decisions not within the scope of this annotation, no such discussion will be undertaken.

II. In absence of statute or express agreement imposing liability.

a. Liability of corporation acquiring the business or assets of another without a technical consolidation, merger, or reorganization.

1. Generally.

As to the liability of a corporation which has acquired title to the property of another through a judicial sale, see II. i, *infra*.

The liability of a successor corporation for claims against its predecessor is based sometimes upon the ground that the new corporation is a reincarnation of the old. See especially:

United States.—*Central R. Co. v. Paul* (1899) 35 C. C. A. 639, 93 Fed. 378.

Arkansas.—*Good v. Ferguson & W. Land, Lumber & Handle Co.* (1913) 107 Ark. 118, 153 S. W. 1107, Ann. Cas. 1915A, 544; *Ferguson & W. Land, Lumber & Handle Co. v. Good* (1914) 112 Ark. 260, 165 S. W. 628; *Meeks v. Arkansas Light & P. Co.* (1921) — Ark. —, 227 S. W. 405.

California.—*Blanc v. Paymaster Min. Co.* (1892) 95 Cal. 524, 29 Am. St. Rep. 149, 30 Pac. 765; *Koch v. Speedwell Motor Car Co.* (1914) 24 Cal. App. 123, 140 Pac. 600.

Georgia.—*White v. Atlanta, B. & A. R. Co.* (1908) 5 Ga. App. 308, 63 S. E. 234.

Idaho.—*Seymour v. Boise R. Co.* (1913) 24 Idaho, 7, 132 Pac. 427.

Louisiana.—*W. F. Taylor Co. v. Gulf Land & Lumber Co.* (1907) 119 La. 426, 44 So. 187.

Maine.—*Longley v. Longley Stage Line Co.* (1843) 23 Me. 39.

Massachusetts.—*Episcopal Charitable Soc. v. Episcopal Church* (1823) 1 Pick. 372.

Mississippi.—*Meridian Light & R. Co. v. Catar* (1913) 103 Miss. 616, 60 So. 657.

Missouri.—*Dean v. La Motte Lead Co.* (1875) 59 Mo. 523.

Nebraska. — *Austin v. Tecumseh Nat. Bank* (1896) 49 Neb. 412, 35 L.R.A. 444, 59 Am. St. Rep. 543, 68 N. W. 628; *Douglas Printing Co. v. Over* (1903) 69 Neb. 320, 95 N. W. 656.

North Carolina.—*Friedenwald Co. v. Ashville Tobacco Works* (1895) 117 N. C. 544, 23 S. E. 490.

Tennessee.—*Long v. Fisher Type-writer Co.* (1901) 1 Tenn. Ch. App. 668.

And sometimes such liability is put upon the ground that the transfer of the assets from the old corporation to the new is to be regarded as fraudulent as to creditors. See *Hancock v. Holbrook* (1888) 40 La. Ann. 53, 3 So. 351; *Austin v. Tecumseh Nat. Bank* (1896) 49 Neb. 412, 35 L.R.A. 444, 59 Am. St. Rep. 543, 68 N. W. 628.

A new corporation is not liable for the debts or torts of an old corporation merely because the former was organized to succeed the latter.

United States.—*Bellows v. Hallowell & A. Bank* (1819) 2 Mason, 31, Fed. Cas. No. 1,279; *Armour v. E. Bement's Sons Co.* (1903) 62 C. C. A. 142, 123 Fed. 56.

Arkansas.—*Ferguson & W. Land, Lumber & Handle Co. v. Good* (1914) 97 Ark. 106, 133 S. W. 183; *Good v. Ferguson & W. Land, Lumber & Handle Co.* (1913) 107 Ark. 118, 153 S. W. 1107, Ann. Cas. 1915A, 544; *Little Rock Chamber of Commerce v. Reliable Furniture Co.* (1919) 138 Ark. 403, 211 S. W. 371.

California.—*Walker v. Selma Fruit Co.* (1918) 177 Cal. 525, 171 Pac. 309.

Iowa.—*Hopper v. Moore* (1876) 42 Iowa, 563; *Allen v. North Des Moines M. E. Church* (1905) 127 Iowa, 96, 69 L.R.A. 255, 109 Am. St. Rep. 366, 102 N. W. 808, 4 Ann. Cas. 257.

Kentucky.—*Martin v. Sulfrage* (1914) 159 Ky. 363, 167 S. W. 399.

Massachusetts.—*Wyman v. Hallowell & A. Bank* (1817) 14 Mass. 58, 7 Am. Dec. 194.

Minnesota.—*Swing v. Empire Lumber Co.* (1908) 105 Minn. 356, 117 N. W. 467.

New York.—*Stevenson v. Counting Room Co.* (1886) 2 N. Y. City Ct. Rep. 245.

North Carolina.—*MCALISTER v. AMERICAN R. EXP. CO.* (reported herewith) ante, 1090.

Texas.—*Texas C. R. Co. v. Lyons* (1896) — Tex. Civ. App. —, 34 S. W. 362; *Cattlemen's Trust Co. v. Beck* (1914) — Tex. Civ. App. —, 167 S. W. 753.

Utah.—*Cooper v. Utah Light & R. Co.* (1909) 35 Utah, 570, 136 Am. St. Rep. 1075, 102 Pac. 202.

Washington.—*Huggins v. Milwaukee Brewing Co.* (1895) 10 Wash. 579, 39 Pac. 152.

Or because the old corporation was insolvent. *Island City Sav. Bank v. Sachtleben* (1887) 67 Tex. 420, 3 S. W. 733; *Island City Sav. Bank v. Wales* (1887) 3 Tex. App. Civ. Cas. (Willson) 295.

The organization of a domestic corporation by a foreign corporation, which owns all but two shares of its stock, for the purpose of taking over the business theretofore conducted in

the locality by the agent of such corporation, and the turning over to the new corporation of all of the business and assets of the old corporation in the locality, do not so merge the corporate identity of the foreign corporation in the domestic corporation as to render the latter liable for the debts of the former. *Koch v. Speedwell Motor Car Co.* (1914) 24 Cal. App. 123, 140 Pac. 600.

The fact that persons interested in the old company are also interested in its successor does not of itself render the new corporation chargeable with the claim against the old company. *Anderson v. War Eagle Consol. Min. Co.* (1903) 8 Idaho, 789, 72 Pac. 671; *Martin v. Sulfrage* (1914) 159 Ky. 363, 167 S. W. 399; *Carter Coal Co. v. Clouse* (1915) 163 Ky. 337, 173 S. W. 794; *Sharples Co. v. Harding Creamery Co.* (1907) 78 Neb. 795, 11 L.R.A. (N.S.) 863, 111 N. W. 783.

Nor is it liable because composed of the same, or substantially the same, stockholders.

United States.—*Armour v. E. Bement's Sons* (1903) 62 C. C. A. 142, 123 Fed. 56; *Racine Engine & Machinery Co. v. Confectioner's Machinery & Mfg. Co.* (1916) 148 C. C. A. 474, 234 Fed. 876.

Arkansas.—*Little Rock Chamber of Commerce v. Reliable Furniture Co.* (1919) 138 Ark. 403, 211 S. W. 371.

California.—*Atkinson v. Western Development Syndicate* (1915) 170 Cal. 503, 150 Pac. 360; *Koch v. Speedwell Motor Car Co.* supra.

Iowa.—*Allen v. North Des Moines M. E. Church* (1905) 127 Iowa, 96, 69 L.R.A. 255, 109 Am. St. Rep. 366, 102 N. W. 808, 4 Ann. Cas. 257.

Michigan.—*Chase v. Michigan Teleph. Co.* (1899) 121 Mich. 631, 80 N. W. 717.

Minnesota.—*Swing v. Empire Lumber Co.* (1908) 105 Minn. 356, 117 N. W. 467.

Missouri.—*Sebree v. Casville & W. R. Co.* (1919) — Mo. —, 212 S. W. 11.

Texas.—*Texas State Fair & D. Exposition Asso. v. Caruthers* (1894) 3 Tex. Civ. App. 474, 29 S. W. 48; *Island City Sav. Bank v. Sachtleben* (1887)

67 Tex. 420, 3 S. W. 733; *Island City Sav. Bank v. Wales* (1887) 3 Tex. App. Civ. Cas. (Willson) 295.

West Virginia.—*GEORGE E. WARREN Co. v. A. L. BLACK COAL CO.* (reported herewith) ante, 1083.

Wisconsin.—*Smith v. Chicago & N. W. R. Co.* (1864) 18 Wis. 17.

Fraud will not be presumed from such fact. *Swing v. Empire Lumber Co.* (Minn.) supra.

Such identity, however, may affect the character of the successor as a bona fide purchaser. See *Jones v. Arkansas Mechanical & Agri. Co.* (1881) 38 Ark. 17; *Farnsworth v. Muscatine Produce & Pure Ice Co.* (1916) 177 Iowa, 21, 158 N. W. 741; *Sweeney v. Heap O'Brien Min. Co.* (1916) 194 Mo. App. 140, 186 S. W. 739; *SKIRVIN OPERATING CO. v. SOUTHWESTERN ELECTRIC CO.* (reported herewith) ante, 1104.

And the fact that the new corporation has practically the same stockholders and directors and continues to carry on the same business may be sufficient ground for regarding the new corporation as a continuation of the former corporation. *Stanford Hotel Co. v. M. Schwind Co.* (1919) 180 Cal. 348, 181 Pac. 780.

To subject the new corporation to the implication of fraud or unfair dealing, it should appear that its officers and stockholders had such an interest in the old company that a creditor could assert their identity, that the property was partly theirs under one name and is still theirs under another, so that in fact the transaction was to a certain extent merely a change of name, and the new stockholders were not purchasers for value. *Art Soc. of Pittsburgh v. Leader Pub. Co.* (1915) 60 Pa. Super. Ct. 548.

And it has been held that where a new corporation was organized by the officers and stockholders of an old corporation for the purpose of enlarging its business, the stockholders of the old corporation receiving stock in the new in lieu of that held by them, the law will imply a stipulation on the part of the new to pay the debts of the old concern. *Friedenwald Co. v. Asheville Tobacco Works* (1895) 117 N. C. 544, 23 S. E. 490.

But where the stockholders of a corporation form another corporation and transfer the good will, business, and assets of the old corporation to the new, or permit the new corporation to take possession of them, without paying the just debts of the old corporation, equity will hold the new corporation answerable for such debts,—at least, to the extent of the property so acquired.

United States.—*Blair v. St. Louis, H. & K. R. Co.* (1884) 22 Fed. 36, (1885) 24 Fed. 148; *Okmulgee Window Glass Co. v. Frink* (1919) 171 C. C. A. 195, 260 Fed. 159, writ of certiorari denied in (1920) 251 U. S. 563, 64 L. ed. 415, 40 Sup. Ct. Rep. 342.

Arkansas.—*Ferguson & W. Land, Lumber & Handle Co. v. Good* (1914) 112 Ark. 260, 165 S. W. 628; *Arlington Hotel Co. v. Rector* (1916) 124 Ark. 90, 186 S. W. 622 (obiter).

California.—*San Francisco & N. P. R. Co. v. Bee* (1874) 48 Cal. 398; *Blanc v. Paymaster Min. Co.* (1892) 95 Cal. 524, 29 Am. St. Rep. 149, 30 Pac. 765; *Strahm v. Fraser* (1916) 32 Cal. App. 447, 163 Pac. 680.

District of Columbia.—*Weightman v. Washington Critic Co.* (1894) 4 App. D. C. 136.

Illinois.—*Loughlin v. United States School Furniture Co.* (1915) 118 Ill. App. 36; *Luce Furniture Co. v. Almini Co.* (1915) 192 Ill. App. 386; *Liberty & Co. v. Almini Co.* (1915) 195 Ill. App. 417.

Louisiana.—*Hancock v. Holbrook* (1888) 40 La. Ann. 53; *W. F. Taylor Co. v. Gulf Land & Lumber Co.* (1907) 119 La. 426, 44 So. 187; *Wolff v. Shreveport Gas, E. L. & P. Co.* (1916) 138 La. 743, L.R.A.1916D, 1138, 70 So. 789.

Massachusetts.—*Ewing v. Composite Brake Shoe Co.* (1897) 169 Mass. 72, 47 N. E. 241.

Missouri.—*Sweeney v. Heap O'Brien Min. Co.* (1916) 194 Mo. App. 140, 186 S. W. 739; *Evans v. Unity Invest. Co.* (1917) — Mo. App. —, 196 S. W. 49 (obiter).

New Jersey.—*Parsons Mfg. Co. v. Hamilton Ice Mfg. Co.* (1909) 78 N. J. L. 309, 73 Atl. 254.

New York.—*Clokey v. International Rubber Clothing & General Supply*

Co. (1899) 28 Misc. 326, 59 N. Y. Supp. 878.

Oklahoma.—SKIRVIN OPERATING CO. v. SOUTHWESTERN ELECTRIC CO. (reported herewith) ante, 1104.

Pennsylvania.—Eureka Fire Hose Co. v. Good Will Fire Co. (1897) 7 Del. Co. Rep. 28.

Texas.—Cattlemen's Trust Co. v. Beck (1914) — Tex. Civ. App. —, 167 S. W. 753.

Utah.—Cooper v. Utah Light & R. Co. (1909) 35 Utah, 570, 136 Am. St. Rep. 1075, 102 Pac. 202; Hoggan v. Price River Irrig. Co. (1919) 55 Utah, 170, 184 Pac. 536.

And a corporation organized for the purpose of succeeding another, which transferred all its property to the new corporation, which issued in payment therefor its stock to the stockholders of the old corporation, is usually held to have taken the property subject to the claims of creditors.

United States.—McVicker v. American Opera Co. (1889) 40 Fed. 861; McWilliams v. New York (1904) 134 Fed. 1015; Okmulgee Window Glass Co. v. Frink (1919) 171 C. C. A. 195, 260 Fed. 159, writ of certiorari denied in (1920) 251 U. S. 563, 64 L. ed. 415, 40 Sup. Ct. Rep. 342.

Arizona.—Otis v. Ohio Mines Co. (1913) 15 Ariz. 264, 138 Pac. 777.

Florida.—J. I. Kelly Co. v. Pollock & Bernheimer (1909) 57 Fla. 459, 131 Am. St. Rep. 1101, 49 So. 934.

Idaho.—Seymour v. Boise R. Co. (1913) 24 Idaho, 7, 132 Pac. 427.

Iowa.—Luedecke v. Des Moines Cabinet Co. (1908) 140 Iowa, 223, 32 L.R.A.(N.S.) 616, 118 N. W. 456.

Michigan.—Grenell v. Detroit Gas Co. (1897) 112 Mich. 70, 70 N. W. 413.

Mississippi.—Meridian Light & R. Co. v. Catar (1913) 103 Miss. 616, 60 So. 657.

Missouri.—Slattery v. St. Louis & N. O. Transp. Co. (1886) 91 Mo. 217, 60 Am. Rep. 245, 4 S. W. 79; Zachra v. American Mfg. Co. (1913) 179 Mo. App. 683, 162 S. W. 1077; Quinn v. American Bankers' Assur. Co. (1914) 183 Mo. App. 8, 165 S. W. 823.

New York.—Barclay v. Quicksilver Min. Co. (1870) 9 Abb. Pr. N. S. 283.

Oklahoma.—Collinsville Nat. Bank

v. Esau (1918) — Okla. —, 176 Pac. 514.

Tennessee.—Vance v. McNabb Coal & Coke Co. (1892) 92 Tenn. 47, 20 S. W. 424.

Virginia.—Barksdale v. Finney (1857) 14 Gratt. 338, 14 Mor. Min. Rep. 541.

Washington. — Jones v. Francis (1912) 70 Wash. 676, 127 Pac. 307.

But see *Swing v. Empire Lumber Co.* (1908) 105 Minn. 356, 117 N. W. 467, in which the court held that a complaint alleging the acquisition of all the property and assets of one company, without payment therefor otherwise than by the issuance of stock of the purchasing company to persons who had been stockholders in the other company, failed to state a cause of action against the purchasing company.

The continuance of the first company as a corporation de jure, after it has ceased to exist as one de facto, constitutes no barrier to a suit by creditors to enforce their judgment against its property in the hands of its successor. *American R. Exp. Co. v. Com.* (1920) 190 Ky. 636, 228 S. W. 433; *Berthold v. Holladay-Klotz Land & Lumber Co.* (1901) 91 Mo. App. 233; *Quinn v. American Bankers' Assur. Co.* (1914) 183 Mo. App. 8, 165 S. W. 823; *Sweeney v. Heap O'Brien Min. Co.* (1916) 194 Mo. App. 140, 186 S. W. 739; *SKIRVIN OPERATING CO. v. SOUTHWESTERN ELECTRIC CO.* (reported herewith) ante, 1104.

Where the circumstances attending the creation of a new corporation and its succession to the business and property of an old corporation are of such a character as to warrant the finding that it is a mere continuation of the former, it is liable at common law for the debts of the old corporation. *Austin v. Tecumseh Nat. Bank* (1896) 49 Neb. 412, 35 L.R.A. 444, 59 Am. St. Rep. 543, 68 N. W. 628; *Baker Furniture Co. v. Hall* (1906) 76 Neb. 88, 107 N. W. 117, 111 N. W. 129, 113 N. W. 267; *Good v. Ferguson & W. Land, Lumber & Handle Co.* (1913) 107 Ark. 118, 153 S. W. 1107, Ann. Cas. 1915A, 544; *Ferguson & W. Land, Lumber & Handle Co. v. Good* (1914) 112 Ark. 260, 165 S. W. 628.

But in *Ewing v. Composite Brake Shoe Co.* (1897) 169 Mass. 72, 47 N. E. 241, it was held that the creditors of a corporation which had ceased to do business, and whose assets, except its books, had been taken possession of by a new corporation formed by its stockholders, although having a right to follow such assets in equity, could not maintain an action at law against the new corporation, on the ground that there was no privity of contract.

A new corporation will not be considered as a mere reincarnation of the old, where the old corporation continues in being and is presumably solvent. *Koch v. Speedwell Motor Car Co.* (1914) 24 Cal. App. 123, 140 Pac. 598, 600; *Advance Beneficial Order v. Penn. Safe Deposit & T. Co.* (1900) 195 Pa. 602, 46 Atl. 102.

The transfer of the assets of one corporation to another may amount to a merger in fact, although the corporate existence of the transferor corporation continues. Where such is the case, equity looks past the form, and at the real effect of the transaction, and by an application of the trust fund doctrine holds the transferee liable to the extent of the assets received, as in such case it is not a bona fide purchaser for value.

At the same time, such liability is not necessarily incident upon every transfer of all, or substantially all, of the assets of one corporation to another. Where there is a mere sale for an adequate price, without fraud or attempt to hinder, delay, or defraud creditors, the purchaser is not liable for claims against the seller.

United States.—*Chattanooga, R. & C. R. Co. v. Evans* (1895) 14 C. C. A. 116, 31 U. S. App. 432, 66 Fed. 809; *E. E. Taenzer & Co. v. Chicago, R. I. & P. R. Co.* (1909) 95 C. C. A. 436, 170 Fed. 240; *Equitable Trust Co. v. United Box Board & Paper Co.* (1915) 220 Fed. 714; *Racine Engine & Machinery Co. v. Confectioners' Machinery & Mfg. Co.* (1916) 148 C. C. A. 474, 234 Fed. 876; *Re Amsdell-Kirchner Brewing Co.* (1917) 240 Fed. 492; *Drover's & M. Nat. Bank v. Third Nat. Bank* (1919) 171 C. C. A. 45, 260 Fed. 9.

Arkansas.—*Sappington v. Little Rock, M. R. & T. R. Co.* (1881) 37 Ark. 23; *Spear Min. Co. v. Shinn* (1910) 93 Ark. 346, 124 S. W. 1045 (obiter); *Ferguson & W. Land, Lumber & Handle Co. v. Good* (1910) 97 Ark. 106, 133 S. W. 183; *Little Rock Chamber of Commerce v. Reliable Furniture Co.* (1919) 138 Ark. 403, 211 S. W. 371.

California.—*Atkinson v. Western Development Syndicate* (1915) 170 Cal. 503, 150 Pac. 360.

Colorado.—*Denver & S. F. R. Co. v. Hannegan* (1908) 43 Colo. 122, 16 L.R.A.(N.S.) 874, 127 Am. St. Rep. 100, 95 Pac. 343.

District of Columbia.—*Capital Traction Co. v. Offutt* (1900) 17 App. D. C. 292, 53 L.R.A. 390.

Georgia.—*Hawkins v. Central of Georgia R. Co.* (1903) 119 Ga. 159, 46 S. E. 82; *Louisville & N. R. Co. v. Hughes* (1910) 134 Ga. 75, 67 S. E. 542; *White v. Atlanta, B. & A. R. Co.* (1908) 5 Ga. App. 308, 63 S. E. 234.

Idaho.—*Anderson v. War Eagle Consol. Min. Co.* (1902) 8 Idaho, 789, 72 Pac. 671; *Moore v. Boise Land & Orchard Co.* (1918) 31 Idaho, 390, 173 Pac. 117.

Illinois.—*Bruffett v. Great Western R. Co.* (1861) 25 Ill. 353; *Herndon v. Germania Mut. Sav. Soc.* (1909) 146 Ill. App. 401; *Wheeler v. Acme Harvesting Mach. Co.* (1912) 175 Ill. App. 69.

Iowa.—*Luedecke v. Des Moines Cabinet Co.* (1908) 140 Iowa, 223, 32 L.R.A.(N.S.) 616, 118 N. W. 456.

Kansas.—Compare *Morisette v. Howard* (1901) 62 Kan. 463, 63 Pac. 756 (where the validity of a sale to an individual by a corporation of its business assets was upheld as against creditors of the corporation).

Kentucky.—*Chesapeake, O. & S. W. R. Co. v. Griest* (1887) 85 Ky. 619, 4 S. W. 323; *Louisville & N. R. Co. v. Orr* (1891) 91 Ky. 109, 15 S. W. 8; *Louisville & N. R. Co. v. Zachritz* (1891) 13 Ky. L. Rep. 141; *Carter Coal Co. v. Clouse* (1915) 163 Ky. 337, 173 S. W. 794; *Justice v. Catlettsburg Timber Co.* (1916) 168 Ky. 665, 182 S. W. 831; *Kentucky B. & W. Co. v. Webb* (1918) 181 Ky. 90, 203 S. W. 870 (obiter); *American R. Exp. Co. v.*

Com. (1920) 190 Ky. 636, 228 S. W. 483 (obiter).

Louisiana.—Wolff v. Shreveport Gas, E. L. & P. Co. (1916) 138 La. 743, L.R.A.1916D, 1138, 70 So. 789 (obiter).

Massachusetts.—Whiting v. Malden & M. R. Co. (1909) 202 Mass. 298, 182 Am. St. Rep. 493, 88 N. E. 907.

Michigan. — Chase v. Michigan Teleph. Co. (1899) 121 Mich. 681, 80 N. W. 717.

Minnesota.—Swing v. Empire Lumber Co. (1908) 105 Minn. 356, 117 N. W. 467.

Mississippi.—Vicksburg & Y. City Teleph. Co. v. Citizens' Teleph. Co. (1901) 79 Miss. 341, 89 Am. St. Rep. 656, 30 So. 725; Mahaffey Co. v. Russell & Butler (1911) 100 Miss. 122, 54 So. 807, 945.

Missouri.—Karn v. Illinois Southern R. Co. (1905) 114 Mo. App. 162, 89 S. W. 346; Barrie v. United R. Co. (1907) 125 Mo. App. 96, 102 S. W. 1078; Zimmerman v. Grush Produce Co. (1911) 156 Mo. App. 588, 137 S. W. 642; Graham Paper Co. v. Sheridan Pub. Co. (1913) 172 Mo. App. 495, 158 S. W. 92.

New York.—Goldmark v. Magnolia Metal Co. (1899) 44 App. Div. 35, 60 N. Y. Supp. 425; affirming without opinion in (1902) 170 N. Y. 579, 63 N. E. 1117; Irvine v. New York Edison Co. (1911) 143 App. Div. 344, 128 N. Y. Supp. 297.

North Carolina.—MCALISTER v. AMERICAN R. EXP. CO. (reported herewith) ante, 1090.

Ohio.—Andres v. Morgan (1900) 62 Ohio St. 236, 78 Am. St. Rep. 712, 56 N. E. 875 (obiter).

Oklahoma. — Union Coal Co. v. Wooley (1916) 54 Okla. 391, — A.L.R. —, 154 Pac. 62; Ezzard v. State Nat. Bank (1916) 57 Okla. 371, 157 Pac. 127; Burkholder v. Okmulgee Coal Co. (1921) — Okla. —, 196 Pac. 679.

Pennsylvania.—Advance Beneficial Order v. Penn. Safe Deposit & T. Co. (1900) 195 Pa. 602, 46 Atl. 102; Art. Soc. v. Leader Pub. Co. (1915) 60 Pa. Super. Ct. 548.

Texas.—Houston Ice & Brewing Co. v. Nicolini (1906) — Tex. Civ. App. —, 96 S. W. 84.

West Virginia.—Donnelly v. Hearn

don (1895) 41 W. Va. 519, 23 S. E. 646.

Wisconsin.—Wright v. Milwaukee & St. P. R. Co. (1869) 25 Wis. 46; Pennison v. Chicago, M. & St. P. R. Co. (1896) 93 Wis. 344, 67 N. W. 702.

In Chesapeake, O. & S. W. R. Co. v. Griest (1887) 85 Ky. 619, 4 S. W. 323; it is said: "A creditor of the corporation, whether from an express or implied contract, subjects himself, when dealing with it, to the powers conferred by the charter. If the power to sell is given by the terms of the grant, the purchaser for value holds the property as if it had been an individual transaction. There is no reason for making the distinction, and the rule in individual transactions should apply as between corporations when the power to sell and purchase is conferred by the charter. While a dissolution of a corporation would entitle the creditors to enforce their demands in a court of equity, or, where there is a consolidation, to follow the assets of their debtor in the consolidated company, still where there is a sale of the corporate property it passes the title as to all, in the absence of some reservation in the charter protecting the rights of creditors."

So, a corporation which becomes a purchaser of mortgaged premises does not become liable for the indebtedness of the original mortgagor on the bonds unless it has expressly assumed the debt. Re Amsdell-Kirchner Brewing Co. (1917) 240 Fed. 492.

And a street railway corporation which purchases the property and franchises of another under statutory authority, when no consolidation is intended or sought to be effected, is not charged with the liability of a predecessor in the franchise. Capital Traction Co. v. Offutt (1900) 17 App. D. C. 292, 53 L.R.A. 390.

A corporation which acquires the business assets of another is not liable for its debts, where it appears that there was no fraud in the transfer, and that the old company, which continues to exist, though under another name, is financially responsible.

Advance Beneficial Order v. Penn. Safe Deposit & T. Co. (Pa.) supra.

The fact that the particular debts in question may have been created by a constituent company which originally owned a portion of the property of the consolidated company, which sold it to a third person, will not impose upon the purchaser any liability for such debts. *Wright v. Milwaukee & St. P. R. Co. (Wis.) supra.*

It has been held that the consideration for the sale may be the cancellation of a debt of the transferrer. *Atkinson v. Western Development Syndicate (1915) 170 Cal. 503, 150 Pac. 360; Justice v. Catlettsburg Timber Co. (1916) 168 Ky. 665, 182 S. W. 831.*

But this will hold good only in jurisdictions where such a transfer is not regarded as an unlawful preference. See annotation on "Right of corporation to prefer creditors," which will appear in a later volume of this series.

Subject to the same qualification, the consideration for the transfer may consist either wholly (as in *Warfield, H. & Co. v. Marshall County Canning Co. (1887) 72 Iowa, 666, 2 Am. St. Rep. 263, 34 N. W. 467; Barrie v. United R. Co. (1909) 138 Mo. App. 557, 119 S. W. 1020; Evans v. Unity Invest. Co. (1917) — Mo. App. —, 196 S. W. 49, and Burkholder v. Okmulgee Coal Co. (1921) — Okla. —, 196 Pac. 679, or in part (as in *Clough v. Rocky Mountain Oil Co. (1898) 25 Colo. 520, 55 Pac. 809, and Chesapeake, O. & S. W. R. Co. v. Griest (1887) 85 Ky. 619, 4 S. W. 823*), of the agreement of the transferee to pay certain debts, where the value of the property transferred does not exceed the amount of the consideration.*

So, in jurisdictions in which corporations are permitted to prefer creditors, a successor corporation is not liable where it pays full value for the property transferred to it by the old corporation by undertaking to pay certain debts of the old corporation, though the arrangement may result in a preference of creditors. *Evans v. Unity Invest. Co. (1917) — Mo. App. —, 196 S. W. 49.*

Where the transfer of the assets is only by way of collateral for indebtedness assumed, the transferee is liable only for the excess of value over the amount of the indebtedness. *Overstreet v. Citizens' Bank (1903) 12 Okla. 383, 72 Pac. 379.*

A corporation to which all the property and assets of another are transferred upon a consideration nominal except for an assumption by the vendee of the debts of the vendor, thereby terminating the regular business of the vendor, the transfer being made and accepted with that purpose and intention, is not such a purchaser in good faith and for value as to deprive the creditors of the transferrer of their right to enforce their equitable lien upon the property in the hands of the transferee. *Cole v. Millerton Iron Co. (1892) 138 N. Y. 164, 28 Am. St. Rep. 615, 30 N. E. 847; Montgomery & W. P. R. Co. v. Branch (1877) 59 Ala. 139.* But see, as apparently contra: *Franklyn v. Sprague (1886) 121 U. S. 215, 30 L. ed. 936, 7 Sup. Ct. Rep. 951; Harvey v. Illinois Midland R. Co. (1884) 28 Fed. 169.*

As to the right to enforce such lien as against creditors of the transferee, see *V. f, infra.*

Whether it is necessary, in order to exonerate the transferee from liability to creditors of the transferrer, that the transferrer corporation should itself have received the consideration for the transfer will depend (always assuming that there was no actual purpose to hinder, delay, or defraud creditors) upon the local interpretation of the trust fund doctrine. If, at the time of the transfer, the assets are not a trust fund for the benefit of creditors, the consideration in the hands of the stockholders, and not the assets transferred, constitutes the trust fund. See *Hareman v. Southern Electric R. Co. (1907) 202 Mo. 249, 100 S. W. 1081.*

In *Chicago, S. F. & C. R. Co. v. Ashling (1896) 160 Ill. 373, 43 N. E. 373*, it is held that, in order that the transaction may be regarded as a purchase and sale, the vendor corporation itself, and not its individual stockholders, should receive all the con-

sideration for the property conveyed, so that it will have the equivalent of the property sold with which to meet its obligations and liabilities.

See, also, as supporting the statement that it is essential that the corporation itself should receive the consideration for the transfer, the cases cited supra to the point that a corporation issuing, in payment for the property of another, its stock to the stockholders of the old corporation, takes subject to the claims of creditors, and also the following cases:

United States.—*American Creosote Works v. C. Lembecke & Co.* (1908) 165 Fed. 809; *Central Improv. Co. v. Cambria Steel Co.* (1913) 127 C. C. A. 184, 210 Fed. 696, affirmed in (1916) 240 U. S. 166, 60 L. ed. 579, 36 Sup. Ct. Rep. 334.

Arkansas.—*Wesco Supply Co. v. Eldorado Light & Water Co.* (1913) 107 Ark. 424, 155 S. W. 518.

California.—*San Francisco & N. P. R. Co. v. Bee* (1874) 48 Cal. 398; *Schaake v. Eagle Automatic Can Co.* (1902) 135 Cal. 472, 63 Pac. 1025.

Illinois.—*Chicago & J. Electric Co. v. Ferguson* (1902) 106 Ill. App. 356; *Swing v. American Glucose Co.* (1905) 123 Ill. App. 156.

Indiana.—*Chicago, I. & S. R. Co. v. Taylor* (1915) 183 Ind. 240, 108 N. E. 1.

Kentucky. — *Harbison-Walker Refractories Co. v. McFarland* (1913) 156 Ky. 44, 160 S. W. 798; *Kentucky Distilleries & Warehouse Co. v. Webb* (1918) 181 Ky. 90, 203 S. W. 870.

Michigan.—*Howell v. Lansing & Suburban Traction Co.* (1906) 146 Mich. 450, 108 N. W. 846.

Nebraska.—*Sharples Co. v. Harding Creamery Co.* (1907) 78 Neb. 795, 11 L.R.A.(N.S.) 863, 111 N. W. 783.

New Jersey.—*Couse v. Columbia Power Mfg. Co.* (1895) — N. J. Eq. —, 33 Atl. 297.

New York.—*Hurd v. New York Commercial Steam Laundry* (1901) 167 N. Y. 89, 60 N. E. 327.

North Carolina.—*Friedenwald v. Asheville Tobacco Works* (1895) 117 N. C. 544, 23 S. E. 490.

Ohio.—*Compton v. Wabash, St. L.* 15 A.L.R.—71.

& P. R. Co. (1888) 45 Ohio St. 592, 16 N. E. 110, 18 N. E. 380; *Andres v. Morgan* (1900) 62 Ohio St. 236, 78 Am. St. Rep. 712, 56 N. E. 875.

Utah.—*Cooper v. Utah Light & R. Co.* (1909) 35 Utah, 570, 136 Am. St. Rep. 1075, 102 Pac. 202.

But compare *Hageman v. Southern Electric R. Co.* (1907) 202 Mo. 249, 100 S. W. 1081, which limits the doctrine above stated to cases where the corporation was insolvent or in liquidation.

Opinion seems to differ upon the question whether a consideration consisting of stock in the transferee corporation will give it the status of a bona fide purchaser for value.

That it will do so, see *MCALISTER v. AMERICAN R. EXP. Co.* (reported herewith) ante, 1090, and *Cooper v. Utah Light & R. Co.* (1909) 35 Utah, 570, 136 Am. St. Rep. 1075, 102 Pac. 202, in which it is said that "it may be that a creditor cannot complain when the shares of stock of the purchasing corporation are received and held by the selling corporation as assets of property of the latter, except on the ground that the consideration was not valuable nor adequate, upon the same ground that it might complain of any other consideration."

But see, contra, *Hibernia Ins. Co. v. St. Louis & N. O. Transp. Co.* (1882) 4 McCrary, 432, 13 Fed. 516; *Altoona v. Richardson Gas & Oil Co.* (1910) 81 Kan. 717, 26 L.R.A.(N.S.) 651, 106 Pac. 1025; *McIver v. Young Hardware Co.* (1907) 144 N. C. 478, 119 Am. St. Rep. 970, 57 S. E. 169; *Jennings, N. & Co. v. Crystal Ice Co.* (1913) 128 Tenn. 231, 47 L.R.A.(N.S.) 1058, 159 S. W. 1088; *Hoggan v. Price River Irrig. Co.* (1919) 55 Utah, 170, 184 Pac 536. Compare *Wilson v. Aeolian Co.* (1901) 64 App. Div. 337, 72 N. Y. Supp. 150, affirmed without opinion in (1902) 170 N. Y. 618, 63 N. E. 1123; *Berthold v. Holladay-Klotz Land & Lumber Co.* (1901) 91 Mo. App. 233; *Sweeney v. Heap O'Brien Min. Co.* (1916) 194 Mo. App. 140, 186 S. W. 739.

Thus, a new corporation to which all the property of another has been transferred in consideration of stock

therein is liable for the debts of the transferrer to the extent of the property received, although such conveyance was not void nor fraudulent, nor made for the purpose of hindering or defrauding creditors. *Hoggan v. Price River Irrig. Co.* (1919) 55 Utah, 170, 184 Pac. 536.

This is upon the ground that the transaction is out of the ordinary course of business, and the very circumstances of the case imply full knowledge on the part of the purchasing corporation of all facts necessary to charge the property in its hands with the debts of the selling corporation. *Jennings, N. & Co. v. Crystal Ice Co.* (1913) 128 Tenn. 231, 47 L.R.A.(N.S.) 1058, 159 S. W. 1088.

Ordinarily, it is immaterial that the selling corporation was insolvent. *Chattanooga, R. & C. R. Co. v. Evans* (1895) 114 C. C. A. 116, 31 U. S. App. 432, 66 Fed. 809.

The fact that the purchasing company knew that the vendor was in a failing condition and insolvent does not render the purchase fraudulent, or carry with it notice that the directors of that company will misapply the purchase money. *Union Coal Co. v. Wooley* (1916) 54 Okla. 391, — A.L.R. —, 154 Pac. 62.

But where the purchasing corporation, knowing that it was obtaining all the assets of every kind and character which belonged to an insolvent corporation, entered into an agreement by which a large part of the purchase price was to be placed beyond the reach of creditors of the selling corporation, it is chargeable with knowledge of all that such an inquiry would have disclosed concerning the existence of unsecured creditors. *Chattanooga, R. & C. R. Co. v. Evans* (Fed.) supra; *Tacoma Ledger Co. v. Western Home Bldg. Asso.* (1905) 37 Wash. 467, 79 Pac. 992.

The principle that, where one corporation absorbs all the assets of another, the absorbing corporation becomes liable for the debts of the absorbed corporation, does not apply where only a part of the assets are acquired. *De Shelter v. American Spring Water Supply Co.* (1913) 182 Ill. App. 403; *Austin Co. v. Smith Co.*

(1912) 138 Ga. 651, 75 S. E. 1048, Ann. Cas. 1913E, 1042.

There is no absorption of one corporation by another where the assets of one were transferred to a copartnership which subsequently transferred them to the second corporation. *De Shelter v. American Spring Water Supply Co.* (Ill.) supra.

Where the transaction is, actually or constructively, one in fraud of creditors, the transfer may be set aside, or the property in the hands of the transferee subjected to the payment of claims.

United States.—*Brum v. Merchants Mut. Ins. Co.* (1882) 4 Woods, 156, 16 Fed. 140; *Chattanooga, R. & C. R. Co. v. Evans* (1895) 14 C. C. A. 116, 31 U. S. App. 432, 66 Fed. 809; *Boyd v. Northern P. R. Co.* 170 Fed. 779, affirmed in (1910) 101 C. C. A. 18, 177 Fed. 804, which is affirmed in (1913) 228 U. S. 482, 57 L. ed. 931, 31 Sup. Ct. Rep. 554.

Alabama.—*Ft. Wayne Bank v. Alabama Sanitarium* (1893) 103 Ala. 353, 15 So. 618.

Arkansas.—*Wesco Supply Co. v. El Dorado Light & Water Co.* (1913) 107 Ark. 424, 155 S. W. 518.

Colorado. — *Goddard v. Fishel-Schlichten Importing Co.* (1897) 9 Colo. App. 306, 48 Pac. 279; *Colorado Springs Rapid Transit R. Co. v. Albrecht* (1912) 22 Colo. App. 201, 123 Pac. 957.

Indiana.—*Magic Packing Co. v. Stone-Ordean-Wells Co.* (1901) 158 Ind. 538, 64 N. E. 11; *Chicago, I. & S. R. Co. v. Taylor* (1915) 183 Ind. 240, 108 N. E. 1.

Iowa.—*Ludecke v. Des Moines Cabinet Co.* (1908) 140 Iowa, 223, 32 L.R.A.(N.S.) 616, 118 N. W. 456.

Kansas.—*Crozier v. Menzies Shoe Co.* (1918) 103 Kan. 565, 175 Pac. 376.

Kentucky. — *Carter Coal Co. v. Clouse* (1915) 163 Ky. 337, 173 S. W. 794 (obiter); *Justice v. Catlettsburg Timber Co.* (1916) 168 Ky. 665, 182 S. W. 831 (obiter); *American R. Exp. Co. v. Com.* (1920) 190 Ky. 636, 228 S. W. 433 (obiter).

Louisiana.—*Wolff v. Shreveport Gas, E. L. & P. Co.* (1916) 138 La. 743, L.R.A.1916D, 1138, 70 So. 789.

Mississippi.—*Mahaffey Co. v. Rus-*

sell & Butler (1911) 100 Miss. 122, 54 So. 807, 945.

Missouri.—Barrie v. United R. Co. (1909) 138 Mo. App. 557, 113 S. W. 1020.

Montana.—Pittsmtont Copper Co. v. O'Rourke (1914) 49 Mont. 281, 141 Pac. 849.

Nebraska.—Austin v. Tecumseh Nat. Bank (1896) 49 Neb. 412, 35 L.R.A. 444, 59 Am. St. Rep. 543, 68 N. W. 628; Sharples Co. v. Harding Creamery Co. (1907) 78 Neb. 795, 11 L.R.A.(N.S.) 863, 111 N. W. 783.

New York.—Cole v. Millerton Iron Co. (1892) 133 N. Y. 164, 28 Am. St. Rep. 615, 30 N. E. 847; Hurd v. New York & C. Steam Laundry Co. (1901) 167 N. Y. 89, 60 N. E. 327.

North Carolina.—McIver v. Young Hardware Co. (1907) 144 N. C. 478, 119 Am. St. Rep. 970, 57 S. E. 169.

Ohio.—Auglaize Box Board Co. v. Hinton (1919) 100 Ohio St. 505, 126 N. E. 881.

Oklahoma.—Burkholder v. Okmulgee Coal Co. (1921) — Okla. —, 196 Pac. 679 (obiter).

Pennsylvania.—Pennsylvania Knitting Mills v. Bibb Mfg. Co. (1900) 12 Pa. Super. Ct. 346.

Tennessee.—Jennings, N. & Co. v. Crystal Ice Co. (1913) 128 Tenn. 231, 47 L.R.A.(N.S.) 1058, 159 S. W. 1088.

Texas.—National Bank v. Texas Invest. Co. (1889) 74 Tex. 421, 12 S. W. 101.

This rule operates as well for the benefit of creditors whose claims are unliquidated as for simple contract creditors. Schaake v. Eagle Automatic Can Co. (1902) 135 Cal. 472, 63 Pac. 1025; Standard Distilling & Distributing Co. v. Springfield Coal Min. & Tile Co. (1909) 239 Ill. 600, 88 N. E. 236; Swing v. American Glucose Co. (1905) 123 Ill. App. 156; Altoona v. Richardson Gas & Oil Co. (1910) 81 Kan. 717, 26 L.R.A.(N.S.) 651, 106 Pac. 1025; Harbison-Walker Refractories Co. v. McFarland (1913) 156 Ky. 44, 160 S. W. 798; Vicksburg & Y. City Teleph. Co. v. Citizens' Teleph. Co. (1901) 79 Miss. 341, 89 Am. St. Rep. 656, 30 So. 725; Pittsmtont Copper Co. v. O'Rourke (1914) 49 Mont. 281, 141 Pac. 849.

The fact that, at the time of the

taking over of the property by the one company from the other, plaintiff was a creditor at large, does not debar him of his remedy. Barrie v. United R. Co. (1909) 138 Mo. App. 557, 119 S. W. 1020.

General creditors are not defrauded by the transfer by one corporation of its property to another, where the value of such property is less than the amount of the mortgage indebtedness thereon. Clarke-Woodward Drug Co. v. Hot Lake Sanatorium Co. (1918) 88 Or. 284, 196 Pac. 796; Justice v. Catlettsburg Timber Co. (1916) 168 Ky. 665, 182 S. W. 831; Warfield v. Marshall County Canning Co. (1887) 72 Iowa, 666, 2 Am. St. Rep. 263, 34 N. W. 467. A contrary conclusion, however, was reached in Sweeney v. Heap O'Brien Min. Co. (1916) 194 Mo. App. 140, 186 S. W. 739, in which persons interested in a mining corporation which had become hopelessly insolvent organized a new corporation, which purchased the plant of the mining company in consideration of its fair value in stock of the new company, issued to a trustee in trust for the benefit of (1) the holders of notes secured by mortgage thereon, (2) for the benefit of an unsecured creditor, and (3) in case of the payment of the indebtednesses, for the benefit of the stockholders of the old company generally. It was contended that as the plant was, at the time of the transfer to the new company, mortgaged for its full value, the plaintiff was in no wise prejudiced by the transfer, since the property was not available for the payment of his claim; but the court, after stating that, had the plant been conveyed to the new company subject to the encumbrance of the mortgage, a different situation would be presented, held that it is the property, or its value as it stands in the hands of the purchasing company, that fixes and becomes the measure of its liability, regardless of the status or availability of such property to the creditor while in the hands of the selling company, saying: "When there is such identity between the selling and purchasing companies, the transfer is likened to a mortgagor

purchasing at his own sale, or a land-owner purchasing his land at a tax sale. In such case the amount of the mortgage or tax lien is of no importance."

In *Art Soc. v. Leader Pub. Co.* (1915) 60 Pa. Super. Ct. 548, it is said: "The mere fact that a corporation disposes of all its assets to another corporation of similar name will not of itself raise a presumption of fraud. Especially is this true when it appears that the stockholders are not the same, and all the debts of the old company had been paid, except the one sued on, and it was not known to exist until two years after the new company had been in business. The idea of fraud is further removed where ample assets came into the old corporation from this conveyance to meet this claim. When the similarity of names appears, particularly where the only distinguishing characteristic is the article 'the,' courts will not be slow to seize upon slight evidence of unfair dealing to open up the question of good faith, so that the validity of the conveyance between creditor and purchaser may be determined."

Where a corporation transfers all its assets to a new corporation without paying or making provision for the payment of its debts, the new company is, by virtue of the transaction charged with notice, and if creditors are delayed or defrauded thereby, it is a constructive fraud against them, and the creditor, after exhausting his remedy at law, may bring a creditor's suit to reach such assets. *Williams v. Commercial Nat. Bank* (1907) 49 Or. 492, 11 L.R.A.(N.S.) 857, 90 Pac. 1012, 91 Pac. 443.

Where all the property of one corporation is transferred to another, without other consideration than that growing out of or incidental to the consolidation, the presumption arises either that it was the intention of the parties that the successor corporation would assume the payment of the debts that were equitably a claim upon the property succeeded to, or that the transaction was a fraud on creditors and voidable as to them.

The idea is that a successor corporation receives benefit from such a succession equitably applicable to the payment of the debts of the former proprietor, and therefore, to the extent of such benefits, is liable for such debts. From that, a contract liability is implied which the successor corporation cannot be heard to deny; otherwise it would be allowed to defend on the ground of such wrongdoing as, of itself, would avoid the transaction altogether as to creditors on the ground of fraud. *National Foundry & Pipe Works v. Oconto City Water Supply Co.* (1899) 105 Wis. 48, 81 N. W. 125, affirmed on other grounds in (1901) 183 U. S. 216, 46 L. ed. 157, 22 Sup. Ct. Rep. 111.

A sale has been held constructively fraudulent as to creditors where the effect is to leave the selling corporation without any property in the state. See *American R. Exp. Co. v. Com.* (1920) 190 Ky. 636, 228 S. W. 433 (now pending in the United States Supreme Court).

It is sometimes contended that where all, or nearly all, of the assets of a corporation, have been acquired by another for a consideration consisting of the issuance of stock, a creditor of the old corporation should be required to resort to such stock for the payment of his debt. The answer to this is found in *Hibernia Ins. Co. v. St. Louis & N. O. Transp. Co.* (1882) 4 McCrary, 432, 13 Fed. 516, in which it was said: "Equity will not compel the creditor of a corporation to waive his right to enforce his claim against the visible and tangible property of the corporation, and to run the chances of following and recovering the value of shares of stock after they are placed upon the market." And compare *Luedecke v. Des Moines Cabinet Co.* (1908) 140 Iowa, 223, 32 L.R.A.(N.S.) 616, 118 N. W. 456; *Shadford v. Detroit v. & A. A. R. Co.* (1902) 130 Mich. 300, 89 N. W. 960; *Carstens v. Hofius* (1906) 44 Wash. 456, 87 Pac. 631. So, also, in *McIver v. Young Hardware Co.* (1907) 144 N. C. 478, 119 Am. St. Rep. 970, 57 S. E. 169, it is said: "When he [the creditor] seeks to hold the parties

who have thus stripped the debtor corporation of practically all its available capital, he is told that the stock of the insolvent defendant, the Young Hardware Company, now, of course, worthless,—is his only resort. Can the law permit this, under the circumstances, to be any adequate response to the creditor's reasonable demand for the satisfaction of his claim? We are bound by every principle of equity and fair dealing, and by the uniform precedents in such cases, to answer this question emphatically in the negative." And in *Jennings, N. & Co. v. Crystal Ice Co.* (1913) 128 Tenn. 231, 47 L.R.A.(N.S.) 1058, 159 S. W. 1088, it was said: "Creditors of the old corporation cannot be required to look alone to the stock and bonds which were substituted for the real tangible assets of that corporation. . . The value of securities so substituted is more or less problematical and creditors should not be forced to surrender their claims against available assets and transfer such claims to new securities. Their remedy cannot thus be hindered and impaired for the benefit of stockholders." But in *Baker Furniture Co. v. Hall* (1906) 76 Neb. 98, 111 N. W. 129, in commenting upon the statement above quoted from *Hibernia Ins. Co. v. St. Louis & N. O. Transp. Co.*, the court says: "This possibly might depend upon the circumstances in the case. If the court could do complete equity by impounding the shares of stock . . . there would seem to be no necessity of interfering with the property of the corporation. The corporation itself would, of course, be a proper party to such proceedings in equity, and a court of equity should, in view of all the circumstances in the case, frame its decree so as to do equity to the parties and to make its relief effective."

In *Central Improv. Co. v. Cambria Steel Co.* (1913) 127 C. C. A. 184, 210 Fed. 696, affirmed in (1916) 240 U. S. 166, 60 L. ed. 579, 36 Sup. Ct. Rep. 334, it was said, in reply to the contention that the remedy of the creditor was limited to a pursuit of the stockholders of the old corpora-

tion who exchanged their stock for the stock of the new corporation, that the liability of those stockholders is founded on their relation as trustees for the creditors of the corporation, but that the reorganized corporation, with full notice of their interest, liability, and duties to the creditors of the old corporation, by the exchange of stock, became such a trustee, and since its power over the property of the old company, by the ownership of nearly all its bonds, as well as stock, was greater than that of the former stockholders, its duty to protect the rights and interests of the creditors was higher and more imperative. "It owed them the duty to exercise good faith, care, and diligence to secure and deliver to them their full equitable share of the property, or the value of that share. Any sale or conveyance of the property to itself whereby they were deprived of, and it secured, that share or its value, was a breach of duty and of trust which invoked plenary relief from a court of chancery, and as, by its formal foreclosure sale to itself of the property of the Belt Company [the original corporation], it took to itself and deprived the creditors of their equitable interest in the property and of the value of that interest, it is not less liable in equity for this breach of trust than were the stockholders with whom it exchanged its stock."

But in *Hageman v. Southern Electric R. Co.* (1907) 202 Mo. 249, 112 S. W. 1081, it was held that a corporation which had paid to each of the stockholders of another corporation a sum of money for each and every share of stock, with the understanding and agreement that the company would convey to it, without additional charge, all its rights, franchises, and property of every kind and description, was not liable under the trust fund doctrine to a creditor of the transferor, but that the trust fund which the creditor was entitled to follow was the sums received by the stockholders in consideration of the transfer. The court said: "We have been unable to find a single case supporting the trust fund theory, except

where the corporation was insolvent, or where it had disposed of its property for the purpose of defrauding its creditors, or where a dissolution of the corporation had taken place and the assets placed in the hands of a trustee for the payment of the debts, etc., or where it had no power or authority whatever to make the sale or transfer of its property."

2. Liability of lessee.

A corporation in debt cannot transfer its entire property by lease so as to prevent the application of the property to the satisfaction of its debts. *Chicago, M. & St. P. R. Co. v. Third Nat. Bank* (1890) 134 U. S. 276, 33 L. ed. 900, 10 Sup. Ct. Rep. 550; *Black v. St. Louis & S. F. R. Co.* (1904) 110 Mo. App. 198, 85 S. W. 96; *Missouri P. R. Co. v. Owens* (1883) 1 Tex. Civ. App. Cas. (White & W.) 163. Nor can it so transfer an essential part thereof. *Santa Fe Electric Co. v. Hitchcock* (1897) 9 N. M. 156, 50 Pac. 332.

3. Liability of corporation succeeding to business of partnership or individual.

The decisions on this branch of the question exhibit a variety of conclusions.

The majority view is that the mere fact that a corporation is organized to take over a business formerly conducted by a firm or individual is not of itself sufficient to render it liable for a debt incurred by such firm or individual in conducting such business.

United States.—*Smith v. Bowker-Torrey Co.* (1913) 207 Fed. 967.

Georgia.—*Culberson v. Alabama Constr. Co.* (1907) 127 Ga. 599, 9 L.R.A.(N.S.) 411, 56 S. E. 765, 9 Ann. Cas. 507; *Greenberg-Miller Co. v. Everett Shoe Co.* (1912) 138 Ga. 729, 78 S. E. 1120; *Bludwine Bottling Co. v. Crown Cork & Seal Co.* (1913) 14 Ga. App. 285, 80 S. E. 853.

Illinois.—*Lawrence v. Nyberg Automobile Works* (1911) 162 Ill. App. 348.

Kansas.—*Hart Pioneer Nurseries Co. v. Coryell* (1898) 8 Kan. App. 496, 55 Pac. 514.

Michigan.—*McLellan v. Detroit*

File Works (1885) 56 Mich. 579, 23 N. W. 321.

Missouri.—*Schufeldt v. Smith* (1897) 139 Mo. 367, 40 S. W. 887.

Nebraska.—*Austin v. Tecumseh Nat. Bank* (1886) 49 Neb. 413, 35 L.R.A. 424, 59 Am. St. Rep. 543, 68 N. W. 628; *Baker Furniture Co. v. Hall* (1907) 76 Neb. 93, 107 N. W. 117, 111 N. W. 129; 113 N. W. 267; *Hall v. Baker Furniture Co.* (1910) 86 Neb. 889, 125 N. W. 628.

Nevada.—*Paxton v. Bacon Mill & Min. Co.* (1866) 2 Nev. 257, 3 Mor. Min. Rep. 512.

New York.—*Dingeldein v. Third Ave. R. Co.* (1861) 9 Bosw. 79, reversed on other grounds in (1868) 37 N. Y. 575; *Adams v. Empire Laundry Mach. Co.* (1889) 52 Hun. 610, 22 N. Y. S. R. 271, 4 N. Y. Supp. 738; *Bradley Fertilizer Co. v. South Pub. Co.* (1892) 44 N. Y. S. R. 119, 17 N. Y. Supp. 587; *Shuttleworth, K. & Co. v. Marchiony Bros.* (1920) 179 N. Y. Supp. 586.

North Carolina.—*National Bank v. Hollingsworth* (1904) 135 N. C. 556, 47 S. E. 618.

South Dakota.—*Byrne & H. Dry Goods Co. v. Willis-Dunn Co.* (1909) 23 S. D. 221, 29 L.R.A.(N.S.) 589, 121 N. W. 620.

Wisconsin.—*Ziemer v. C. G. Bretting Mfg. Co.* (1911) 147 Wis. 252, 133 N. W. 139, Ann. Cas. 1912D, 1275.

Wyoming.—*Durlacher v. Frazer* (1898) 8 Wyo. 58, 80 Am. St. Rep. 918, 55 Pac. 306.

It has likewise been held that an action is not maintainable against an incorporated company for a tort of the partnership to whose business it has succeeded (*Stewart v. Mynatt* (1911) 135 Ga. 637, 70 S. E. 325, 2 N. C. C. A. 519); and that the identity of the members of a partnership which has committed a tort with the stockholders of a corporation which has taken over the business of the partnership is not sufficient to authorize a suit and recovery against the corporation, which is a distinct legal entity (*Martin v. Culpepper Supply Co.* (1921) — W. Va. —, 107 S. E. 183).

In some cases, however, it is held that a corporation organized to take

over a business may be considered as bound to discharge its liabilities, even without express assumption of them. *Du Vivier v. Gallice* (1906) 80 C. C. A. 556, 149 Fed. 118; *Re A. C. Crosby Co.* (1912) 199 Fed. 344; *Andres v. Morgan* (1900) 62 Ohio St. 236, 78 Am. St. Rep. 712, 56 N. E. 875; *Haslett v. Wotherspoon* (1847) 20 S. C. Eq. (1 Strobh.) 209; *Texas Loan Agency v. Hunter* (1896) 18 Tex. Civ. App. 402, 35 S. W. 399.

The transfer to the corporation will not, of course, exonerate the property from liability for the debts of the transferrer, where the organization of the corporation is found to be a device resorted to to hinder, delay, and defraud creditors. (*Booth v. Bunce* (1865) 83 N. Y. 139, 88 Am. Dec. 372; *Williams v. Colby* (1889) 24 N. Y. S. R. 793, 6 N. Y. Supp. 459); but the fact that the consideration for the transfer of the business is stock in the new corporation does not render the transaction one in fraud of creditors, since the individual or partners continue liable as before, and with presumably as much property as before, the shares of stock representing the property put into the corporation being liable for the debts of the business, as the property would have been. *McLellan v. Detroit File Works* (1885) 56 Mich. 579, 23 N. W. 321; *National Bank v. Hollingsworth* (1904) 135 N. C. 566, 47 S. E. 618.

Some courts, without going so far as to hold the corporation liable at all events, have attempted to devise some theory upon which the assets received from the individual or partnership may be subjected to the claims of the creditors of such individual or partnership incurred in the conduct of the business. It has accordingly been held in some cases that a presumption arises that the corporation has assumed such debts. See *Curtis, J. & Co. v. Smelter Nat. Bank* (1908) 43 Colo. 391, 96 Pac. 172; *Bremen Sav. Bank v. Branch-Crookes Saw Co.* (1891) 104 Mo. 425, 16 S. W. 209; *Reed Bros. Co. v. First Nat. Bank* (1895) 46 Neb. 168, 64 N. W. 701; *Baker Furniture Co. v. Hall* (1906) 76 Neb. 88, 107 N. W. 117, judgment vacated on rehearing in

(1907) 76 Neb. 93, 111 N. W. 129; *Modern Dairy & Creamery Co. v. Blanke & H. Supply Co.* (1909) — Tex. Civ. App. —, 116 S. W. 153; *Ziemer v. C. G. Bretting Mfg. Co.* (1911) 147 Wis. 252, 133 N. W. 139, Ann. Cas. 1912D, 1275. But see, contra, *McLellan v. Detroit File Works* (1885) 56 Mich. 579, 23 N. W. 321; *Schufeldt v. Smith* (1897) 139 Mo. 367, 40 S. W. 887.

But the presumption so raised is a rebuttable one. *Campbell v. Farmers' & M. Bank* (1896) 49 Neb. 143, 68 N. W. 344.

Others take the view that, where the corporation has received the property for which the indebtedness was incurred, it should be held liable. See *Bludwine Bottling Co. v. Crown Cork & Seal Co.* (1914) 14 Ga. App. 285, 80 S. E. 853; *Parson v. Bacon Mill & Min. Co.* (1866) 2 Nev. 257, 3 Mor. Min. Rep. 512; *Andres v. Morgan* (1900) 62 Ohio St. 236, 78 Am. St. Rep. 712, 56 N. E. 875. But see contra, *Greenberg-Miller Co. v. Everett Shoe Co.* (1912) 138 Ga. 729, 75 S. E. 1120.

In *Andres v. Morgan* (1900) 62 Ohio St. 236, 78 Am. St. Rep. 712, 56 N. E. 875, it was held that a corporation receiving from the members of a copartnership their respective interests in the partnership, in exchange for its capital stock, was liable for the partnership debts, whether it had expressly assumed such indebtedness or not, the court saying: "It is not to be regarded as an ordinary sale of property by one to another. A partnership is a quasi legal entity. It owns property and has liabilities as such. Its creditors have a right to the payment of their claims from the partnership assets in preference to individual creditors, and have in equity a lien on the assets of the firm that may be worked out through the partners. So that, when the partners transferred all the property of the firm to the company, the partnership was dissolved and the rights of its creditors followed the partners and the property into the corporation, and it was bound to discharge the debts of the partnership, having received the property of the partnership on which it had obtained credit. It could not re-

tain the property and repudiate the liability. All that the corporation paid for the property transferred to it was the stock issued in exchange,—simply a metamorphosis of a partnership into a corporation, without any change of individuals,—and, unless it assumed the payment of the debts of the firm, there was no consideration for the transfer of the property, for the stock without the property represented nothing and was worth nothing. That a corporation could be formed and, with its capital, purchase a partnership and its business without being liable for its debts, unless expressly assumed, is not doubted; but this is not such a case."

See also *DuVivier v. Gallice* (1906) 80 C. C. A. 556, 149 Fed. 118, in which it is held that a corporation organized by the same persons who composed a copartnership, for the purpose of carrying on the same business at the same place, and with the same employees, using some of the same books of account, and issuing all its stock to the members of the copartnership or their nominees, must be held liable for the debts of the partnership, even though they were not expressly assumed by the writings transferring the assets to the corporation, and the corporation undertook only to pay the debts of the firm as shown upon their books; and *Re A. G. Crosby Co.* (1912) 199 Fed. 344, which holds that a corporation organized to take over a partnership business may be considered as bound to discharge its liabilities, even without express assumption of them.

But in *Hall v. Baker Furniture Co.* (1910) 86 Neb. 389, 125 N. W. 628, the court distinguishes cases in which the creditors of a corporation have been permitted to follow its assets into the hands of its successor, on the ground that a partnership does not hold its property in trust for its creditors, saying: "The members of a partnership may be sued for its debts, and all of their property not exempt seized to satisfy the judgment; but when corporate assets are dissipated, a judgment against it is valueless."

Review of the decisions.

In *Smith v. Bowker-Torrey Co.* (1913) 207 Fed. 967, it was held that a creditor of a firm which had transferred part of its property to a corporation, in consideration of a specified amount of stock of the corporation, was not entitled to prove his debt as a claim against the corporation's assets in insolvency. The court said: "Looking to the substance of the matter, the agreement between the corporation, all of whose stock was held by the copartners, and the copartners, is primarily a matter of form. Their agreement in the form of a corporation to pay their own debts as copartners, and in the form of a corporation to hold themselves harmless against their copartnership debts, does not seem to give rise to any substantial equities of the copartners against the corporation. In the absence of any allegation of the claimant that he is unable to obtain satisfaction from the copartners by suit at law, or that the copartners who made the note are without assets to pay it, his case is lacking in the elements which are ordinarily essential to a creditor's bill to follow equitable assets. The claimant apparently has no interest in the exoneration of the copartners from the payment of the note, and if there be any sort of equitable claim of the copartnership upon the corporation, which is, to say the least, most doubtful, there appears no reason why this claimant should be permitted to follow such equitable assets of the copartnership, when he may resort to the copartnership real estate or to the individual liability of the copartners."

In *Curtis, J. & Co. v. Smelter Nat. Bank* (1908) 43 Colo. 391, 96 Pac. 172, in which the question was not as to the liability of the successor corporation, but as to the validity of its assumption of the debts of the business, it was held that, as it appeared that the individual who had, before the organization of the corporation, carried on the business, continued, as president, manager, and principal stockholder, to carry on the same business in the corporate name, and

that the books kept in his private business were continued as the books of the company, there was simply a change from doing business in one capacity to that of another, and accordingly that the corporation was at least presumptively liable for debts, incurred by him in his individual capacity, in the business to which it succeeded.

Where nothing appears except the single fact that the partnership was of the same name as the afterwards chartered company, and had the same agent, and was engaged in the same business, and it does not appear that the one is a successor of the other except in name, the corporation is not chargeable with the debts of the partnership. *Georgia Co. v. Castleberry* (1871) 43 Ga. 187.

In *Culberson v. Alabama Constr. Co.* (1907) 127 Ga. 599, 9 L.R.A.(N.S.) 411, 56 S. E. 765, 9 Ann. Cas. 507, it is held that a corporation which was formerly a partnership, and which had acquired all of the partnership property, was not liable for services rendered to the partnership, the court saying: "There was nothing to show that there had been any assumption by the corporation of debts of the partnership, or that it had acquired the partnership's property in fraud of creditors of the firm. A corporation which lawfully acquires the property of a partnership does not thereby become liable for the partnership's debts. Partners own the firm property just as individuals own their property; and 'as the ordinary creditors of an individual have no lien on his property, and cannot prevent him from disposing of it as he pleases, so the ordinary creditors of a firm have no lien on the property of the firm, so as to be able to prevent it from parting with that property to whomsoever it chooses.'"

The fact that an individual, indebted for merchandise, turns over his stock of goods to a corporation in consideration of an issuance of its stock, will not render the corporation liable for the debt. *Greenberg-Miller Co. v. Everett Shoe Co.* (1912) 138 Ga. 729, 75 S. E. 1120.

The fact that the particular corporate name granted to a corporation created by the superior court is identical with the trade-name or device used by one or more persons doing business under that name is not of itself sufficient to support the inference that the corporation in question is liable upon the contract of the individual, or individuals who used the trade-name prior to its incorporation. *Bludwine Bottling Co. v. Crown Cork & Seal Co.* (1914) 14 Ga. App. 285, 80 S. E. 853.

In *McLellan v. Detroit File Works* (1885) 56 Mich. 579, 23 N. W. 321, it was held that a corporation formed to take over the business of a copartnership, all of the shares of stock except two being taken by the partners, and the partnership assets being transferred to the corporation in consideration of the stock issued to the partners, was not liable on a partnership note not assumed by it, the court saying: "The fact that the assets of the partnership went to the corporation has no significance in this controversy. The partners were paid for their interest in the assets with stock of the corporation, and the creditors of the partnership lost nothing by it, for the partners continued liable to them, as before, and with, presumptively, as much property as before." It was further held that the fact that nearly all the shares in the corporation were issued to the partners was no proof of an understanding that the corporation would assume partnership debts, since the corporation, when formed, was not identical with the partnership, and could not be sued for its debts even if there were no other stockholders.

In *Bremen Sav. Bank v. Branch-Crookes Saw Co.* (1891) 104 Mo. 425, 16 S. W. 209, where a person who had carried on business in his own name and also under the name of Branch-Crookes "& Company," and had borrowed money on the credit of both names, afterward transferred the assets of that part of the business carried on under the name of Branch-Crookes & Company to a corporation called Branch-Crooke Saw Company

of which he owned the greater part of the capital stock, it was said that there was a strong inference that such debt was carried with the assets into the corporation.

A corporation formed by the members of a partnership is not identical therewith, although composed of the same members; and the fact that members of the partnership and stockholders of the corporation are the same persons does not imply an assumption of the partnership debts. *Schufeldt v. Smith* (1897) 139 Mo. 867, 40 S. W. 887.

In *Reed Bros. Co. v. First Nat. Bank* (1895) 46 Neb. 168, 64 N. W. 701, where a partnership whose liabilities were about equivalent to its assets was formed into a corporation having as stockholders the members of the partnership and third persons who knew that there were outstanding partnership debts, and the stock of goods was transferred to one of the partners, who, in consideration therefor, guaranteed the payment of the debts of the partnership, and turned the stock over to the corporation, which continued the partnership business, it was held that the facts warranted the conclusion that the partnership became incorporated and received and accepted the transfer of the assets of the partnership, to be appropriated and used in forwarding the object and purposes of the corporation, and that by so doing it assumed the liabilities or debts of the firm.

In the absence of fraud or a special agreement, a newly organized corporation for banking purposes which had succeeded to the business and property of a pre-existing partnership is not liable for the debts of the latter where it is not shown that the stockholders of the corporation were the former partners, or that the corporation was a mere continuance of the former firm. *Austin v. Tecumseh Nat. Bank* (1896) 49 Neb. 413, 35 L.R.A. 444, 59 Am. St. Rep. 543, 68 N. W. 628.

In *Baker Furniture Co. v. Hall* (1906) 76 Neb. 93, 111 N. W. 129, rehearing denied in (1907) 76 Neb. 101,

113 N. W. 267, the members of a partnership which was financially embarrassed proposed to a third person to form a corporation, to be properly financed by him, for the purpose of taking over and conducting the business. The obligations of the partnership consisted of debts to relatives, to a bank, and certain merchandise debts, and it was represented that the relatives would forgive the debts due them, and the bank agreed that, in consideration of a cash payment and the execution of new notes by the members of the co-partnership, secured by a mortgage upon their individual property of one of them, it would forgive the balance of its indebtedness. Thereupon the third person and the bank required a written statement of the indebtedness of the firm, so that provision could be made to liquidate it, and thus start the business, which was to be conducted by the corporation, without debt. This was supposed to have been done, whereupon a corporation was formed, all the capital stock of which, except one share, was issued to the copartners, who immediately transferred a portion thereof to the third person as his share of such capital stock, retaining the remainder in payment for the property which they transferred to the corporation. To induce the third person to join in the enterprise the copartners had entered into a contract with him in writing, guaranteeing him dividends on his stock, he in turn agreeing that they might repurchase his stock at a certain price within three years. The copartners, to secure the fulfilment of this contract, and also as collateral security for individual loans subsequently made to them, pledged to such third person their stock as collateral, which upon their default was subsequently purchased by him upon judicial sale. It was held that under these circumstances it could not be said that the transaction was in fact a continuation of the old partnership, and that the fact that the third person had become the owner of the shares of capital stock issued to the former partners did not render him

liable for their debts, and that such transaction was not fraudulent as to the creditors of the firm.

In *Hall v. Baker Furniture Co.* (1910) 86 Neb. 389, 125 N. W. 628, it was held that a corporation formed by the members of an insolvent partnership and a third person, who, in good faith, put a large amount of money into the new concern, believing that the partnership debts had been satisfied, is not liable, even in equity, to a partnership creditor, but that the partners' interest in the corporation may be reached.

In *Paxton v. Bacon Mill & Min. Co.* (1866) 2 Nev. 257, 3 Mor. Min. Rep. 512, it was held that a corporation whose property was composed partly of that of a pre-existing association, and partly of property of third persons unconnected with such association, was not liable for the debts of the association. The court said: "Had the mill owners all been members of the firm of Fairfax, Doake, & Company at the time the debt sued on was contracted, and had they formed a corporation for the purpose of carrying out the objects of the partnership or association, without taking in strangers, in such case the corporation would, perhaps, be primarily liable in equity for the debts of the association which it succeeded. Under such circumstances the property of no one but those who contracted the debt and were originally liable would be taken or subjected to the payment of it. The same persons continue the same business, with the same property, with no substantial change except in name. In such a case there is no reason why, in equity, the corporation should not be primarily liable for the debts, as it has succeeded to the property of the association. But if the rule contended for by counsel for appellant be the law, the property of a stranger to the contract of indebtedness, who may have had no knowledge of its existence, or even the means of ascertaining it would be subjected to the payment of the liabilities of individuals with whom he may have associated himself in a common enterprise or business. The injustice of such a

rule is so apparent that no subtlety of reason can well disguise it. The general rule of law is that none are liable upon contract except those who are parties to it; but here it is sought to charge an entire stranger to the contract with the responsibility of discharging it. The plaintiffs had no lien upon the mine, the formation of the corporation deprived them of no remedy or security; the interest which the mill owners received in the corporation was doubtless only equal to the value of the property which they put into it; the plaintiffs' right of action against Fairfax, Doake, & Company continued as if no incorporation had taken place, and their interest in the Bacon Mill & Mining Company was as much subject to be taken to satisfy the demand of plaintiffs as the mining ground was before the incorporation; hence, we see no equity to favor the rule contended for by appellants' counsel."

The mere fact that a corporation, the membership of which is not confined to the members of a copartnership, received by transfer the assets of such partnership, does not have the effect to charge it with the payment of the debts of the copartnership. *Adams v. Empire Laundry Mach. Co.* (1889) 52 Hun, 610, 22 N. Y. S. R. 271, 4 N. Y. Supp. 738.

A corporation organized by one who has theretofore been doing business under a corporate name cannot be held liable for a debt incurred by him for the purchase of goods, upon any theory of a purchase of such goods by a *de facto* corporation, there having been no attempt at organization, no use of corporate franchises, and nothing in the nature of corporate proceedings prior to the actual incorporation. *Bradley Fertilizer Co. v. South Pub. Co.* (1892) 44 N. Y. S. R. 119, 17 N. Y. Supp. 587.

A corporation to which an individual has transferred his business and the property employed therein, in exchange for its stock, is not liable for his debts where there was no intent to defraud creditors in making the transfer, the shares of stock representing the property which he

put into the corporation, and being liable for his debts as the property would have been. *National Bank v. Hollingsworth* (1904) 135 N. C. 556, 47 S. E. 618.

Where the members of a joint stock association obtained a charter of incorporation and turned over the property of the association to the new corporation, such corporation is liable for the association's debts. *Haslett v. Wotherspoon* (1847) 20 S. C. Eq. (1 Strobb.) 209.

In *Byrne & Hammer Dry Goods Co. v. Willis-Dunn Co.* (1909) 23 S. D. 221, 29 L.R.A.(N.S.) 589, 121 N. W. 620, it was held that a corporation which continued the business of an insolvent partnership, which received none of the assets of the firm except the proceeds of certain insurance with which the former partners paid for their stock, was not liable for the debts of the partnership.

In *Texas Loan Agency v. Hunter* (1896) 13 Tex. Civ. App. 402, 35 S. W. 399, where a partnership had negotiated a usurious loan, a corporation of which members of the pre-existing partnership were the principal stockholders was held liable for the penalties prescribed for usury.

In *Modern Dairy & Creamery Co. v. Blanke & H. Supply Co.* (1909) — Tex. Civ. App. —, 116 S. W. 153, it was said that if a corporation has been formed by the members of a partnership that had incurred a debt, and the assets of the partnership have been assigned to the corporation for the continuance of the business, it may be presumed that the corporation has assumed the partnership debts, and will be *prima facie* liable therefor.

Where copartners or other joint owners of a solvent going business transformed themselves into a corporation, to which the joint property was transferred in exchange for shares of stock, the new corporation is liable for the debts of the former partnership only where it has assumed them; but such assumption may be implied as well as express. *Ziemer v. C. G. Bretting Mfg. Co.* (1911) 147 Wis. 252, 133 N. W. 139, Ann. Cas. 1912D, 1275.

b. Liability of corporation as affected by change of name.

A mere change of its corporate name will not enable a company to avoid liability. *White v. Atlanta, B. & A. R. Co.* (1908) 5 Ga. App. 308, 63 S. E. 234; *Dean v. La Motte Lead Co.* (1875) 59 Mo. 523; *Armour v. E. Bement's Sons* (1903) 62 C. C. A. 142, 123 Fed. 56 (obiter).

c. Liability of de jure for debts of de facto corporation.

The conversion of a trading company acting as a corporation *de facto* into one *de jure* will not exempt the property held in the latter character from liability to the obligations of the former. *Georgia Ice Co. v. Porter* (1883) 70 Ga. 637.

But a corporation organized by one who has theretofore been doing business under a corporate name cannot be held liable for a debt incurred by him for the purchase of goods upon any theory of a purchase of such goods by a *de facto* corporation, where there has been no attempt at organization, no use of corporate franchises, and nothing in the nature of corporate proceedings prior to the actual incorporation. *Bradley Fertilizer Co. v. South Pub. Co.* (1892) 44 N. Y. S. R. 119, 17 N. Y. Supp. 587.

As to the liability of a *de jure* corporation for the debts of a *de facto* corporation under an agreement to assume its liabilities, see *Calumet Paper Co. v. Stotts Invest. Co.* (1895) 96 Iowa, 147, 59 Am. St. Rep. 362, 64 N. W. 782.

d. Liability as affected by reincorporation.

A mere reincorporation or amendment of the corporate charter will not affect the identity of the corporation, or relieve it from its previous liability. *Broughton v. Pensacola* (1876) 93 U. S. 266, 23 L. ed. 896; *Armour v. E. Bement's Sons* (1903) 62 C. C. A. 142, 123 Fed. 96; *Longley v. Longley Stage Line Co.* (1843) 23 Me. 39; *Episcopal Charitable Soc. v. Episcopal Church* (1823) 1 Pick. (Mass.) 372; *Cushman v. Shepard* (1848) 4 Barb. (N. Y.) 113; *Lea v. American A.*

& P. Canal Co. (1867) 3 Abb. Pr. N. S. (N. Y.) 1.

The giving of a new form to a municipal corporation does not affect its liability for debts theretofore contracted. *University of Ala. v. Moody* (1878) 62 Ala. 389.

In *Bellows v. Hollowell & A. Bank* (1819) 2 Mason, 31, Fed. Cas. No. 1,279, it was held that identity between a banking corporation whose charter had expired and its successor was not established by the fact that the names of both corporations were the same, the officers the same, and the majority of the stockholders the same, and that the business of the old bank was for a time done and its debts paid by the new bank, but that the question of identity must be determined by a construction of the charter.

e. Liability of state bank becoming a national bank, or vice versa.

A bank which, under a Federal statute, becomes organized as a national bank, remains substantially the same institution under another name, neither losing any of its assets nor escaping any of its liabilities by the change. *Coffey v. National Bank* (1870) 46 Mo. 140, 2 Am. Rep. 488; *Thorp v. Wegfarth* (1867) 56 Pa. 82, 93 Am. Dec. 789.

So, in *McCarthy v. Liberty Nat. Bank* (1918) — Okla. —, 7 A.L.R. 137, 175 Pac. 940, it is held that where a state bank is reincorporated as a national bank under a new name, but the personnel, officers, management, and business remain the same, the new bank is liable for usury charged and collected by the old bank.

A state bank organized as a successor to a national bank which went into liquidation is answerable to depositors of its predecessor. *Eans v. Exchange Bank* (1883) 79 Mo. 182.

f. Liability of corporation obtaining charter in another state.

In *Long v. Fisher Typewriter Co.* (1901) 1 Tenn. Ch. App. 668, it was held that where the stockholders of a corporation formed in one state became incorporated under the same

name in another state, and continue business as theretofore, the new corporation is liable for the debts of the old, although nothing is said about assuming them.

In *Quinn v. American Bankers' Assur. Co.* (1914) 183 Mo. App. 8, 165 S. W. 823, where the officers of a corporation desiring to transfer the business to a new corporation to be incorporated under the laws of another state, caused such corporation to be formed, and subscribed for its stock in trust for the stockholders of the old corporation, notifying them that, upon the surrender of their stock in the old corporation, like stock in the new corporation in the same amount, and of the same value would be issued to them instead, and about 90 per cent of the stockholders accepted such proposal, the remainder surrendering their stock upon receiving their pro rata portion of the assets of the company, and all the officers of the old company became the officers succeeding to the same offices in the new company, and all of the assets of the old company were taken over by the new company, and the business continued precisely as before, as if no change whatever had occurred, it was held, that the transaction did not amount to a sale of the business by one corporation to another, but that the new company was a mere continuation of the prior company.

Where the stockholders of a corporation, desiring to remove the business to another state, caused a corporation to be formed in that state, to which they transferred the assets of the old company in exchange for stock, the new company is not a continuation of the old corporation in a sense that will make the latter identical with the former, and the former liable for the latter's debts beyond the value of property received. *Okmulgee Window Glass Co. v. Frink* (1919) 171 C. C. A. 195, 260 Fed. 159, writ of certiorari denied in (1920) 251 U. S. 563, 64 L. ed. 415, 40 Sup. Ct. Rep. 342.

g. Liability of consolidated corporation for claims against constituent companies.

The term "consolidation" is often

loosely applied to all the transactions by which the interests of two corporations become identified. Thus, in *Meyer v. Johnston* (1879) 64 Ala. 603, it is said that the words "consolidate" and "consolidation" have no such fixed meaning as to render them inapplicable to a union of two or more companies in such a way that one of the original corporations only is continued in existence, while the others are merged or absorbed in it.

It is, however, properly applied only to cases where all the constituent companies cease to exist as separate corporations, and a new corporation, to wit, the consolidated corporation, comes into being (see *Vicksburg & Y. City Teleph. Co. v. Citizens' Teleph. Co.* (1901) 79 Mass. 341, 89 Am. St. Rep. 656, 30 So. 725).

In *Collinsville Nat. Bank v. Esau* (1918) — Okla. —, 176 Pac. 514, it is said that a consolidation takes place where two or more existing corporations are united into a single corporation, and the existence of the uniting corporations is terminated, and the organization succeeds in a general way to the franchise and acquires the property and assets, and assumes the debts and obligations, of the constituent companies.

An amalgamation implies such a consolidation as to reduce the companies to a common interest. *Powell v. North Missouri R. Co.* (1867) 42 Mo. 63.

The transfer of the assets of one corporation to another does not establish any legal identity between them (*Tawas & B. C. R. Co. v. Circuit Judge* (1880) 44 Mich. 479, 7 N. W. 65; *Blue Ridge Electric Co. v. American Bank Note Co.* (1916) 150 C. C. A. 509, 237 Fed. 755); nor is the purchase by one corporation of the property and franchises of another at private sale a consolidation which will render the purchaser liable for liabilities of the selling corporation, already accrued (*Pennison v. Chicago, M. & St. P. R. Co.* (1896) 93 Wis. 344, 67 N. W. 702; *Drovers' & M. Nat. Bank v. First Nat. Bank* (1919) 171 C. C. A. 45, 260 Fed. 9).

Where one corporation, in contem-

plation of closing up its business, sells its assets, property, and business to another corporation, and makes arrangements for the liquidation of its liabilities, this does not constitute a consolidation. *Overstreet v. Citizens' Bank* (1903) 12 Okla. 383, 72 Pac. 379.

The acquisition of the good will of a corporation by another corporation having the same stockholders is not a merger or consolidation. *Racine Engine & Machinery Co. v. Confectioners' Machinery & Mfg. Co.* (1916) 148 C. C. A. 474, 234 Fed. 876.

Ownership of the majority of the stock of one corporation by another does not effect a consolidation of the two. *MALE v. ATCHISON, T. & S. F. R. Co.* (reported herewith) ante, 1098.

But in *Capital Traction Co. v. Offutt* (1900) 17 App. D. C. 292, 53 L.R.A. 390, it is said: "There may be actual consolidation to all intents and purposes without its being so designated. There is no magic in the use of the word 'consolidation' to effect that result. If the coming together of two corporations under the authority of law be in fact consolidation, it is of no consequence by what name the act is characterized; nor is it of any consequence by what steps the result has been effected. One of those steps may take the shape of bargain and sale."

A lease by a railroad company of its road to another company is not technically a consolidation of the two companies, though practically it may accomplish and was intended to accomplish, in some respects, the same purposes and results. *Missouri P. R. Co. v. Owens* (1883) 1 Tex. App. Civ. Cas. (White & W.) 163.

Where a consolidation takes place, the resulting corporation is chargeable with the liabilities of its component members.

United States.—*Harrison v. Arkansas Valley R. Co.* (1882) 4 McCrary, 264, 13 Fed. 522.

Alabama.—*Meyer v. Johnston* (1875) 53 Ala. 237.

Arkansas.—*Sappington v. Little Rock, M. R. & T. R. Co.* (1881) 37 Ark. 23 (obiter).

District of Columbia.—*Capital Trac-*

tion Co. v. Offutt (1900) 17 App. D. C. 292, 53 L.R.A. 390.

Florida.—Bloxham v. Florida C. & P. R. Co. (1895) 35 Fla. 625, 17 So. 902.

Georgia.—Atlantic & B. R. Co. v. Johnson (1907) 127 Ga. 392, 11 L.R.A. (N.S.) 1119, 56 S. E. 482.

Illinois.—Columbus, C. & I. C. R. Co. v. Skidmore (1873) 69 Ill. 566; Chicago, R. I. & P. R. Co. v. Moffitt (1874) 75 Ill. 524; Sikes v. Moline Consumers' Co. (1920) 293 Ill. 112, 127 N. E. 342.

Indiana.—Indianapolis, C. & L. R. Co. v. Jones (1868) 29 Ind. 465, 95 Am. Dec. 654; Columbus, C. & I. C. R. Co. v. Powell (1872) 40 Ind. 37, 3 Am. Neg. Rep. 100; Jeffersonville, M. & I. R. Co. v. Hendricks (1872) 41 Ind. 48, 3 Am. Neg. Cas. 106; Louisville, N. A. & C. R. Co. v. Boney (1889) 117 Ind. 501, 3 L.R.A. 430, 20 N. E. 432; Cashman v. Brownlee (1891) 128 Ind. 266, 27 N. E. 560 (obiter); Cleveland, C. C. & St. L. R. Co. v. Prewitt (1893) 134 Ind. 557, 33 N. E. 367; Chicago & I. Coal R. Co. v. Hall (1893) 135 Ind. 91, 28 L.R.A. 231, 34 N. E. 704; Cox v. Baltimore & O. S. W. R. Co. (1913) 180 Ind. 495, 50 L.R.A. (N.S.) 453, 103 N. E. 337; Shipman Coal Min. & Mfg. Co. v. Pfeiffer (1894) 11 Ind. App. 445, 39 N. E. 291; United States Capsule Co. v. Isaacs (1899) 23 Ind. App. 533, 55 N. E. 832.

Iowa.—Luedecke v. Des Moines Cabinet Co. (1908) 140 Iowa, 223, 32 L.R.A. (N.S.) 616, 118 N. W. 456.

Kansas.—Berry v. Kansas City, Ft. S. & M. R. Co. (1894) 52 Kan. 774, 39 Am. St. Rep. 381, 36 Pac. 724.

Kentucky.—Chesapeake, O. & S. W. R. Co. v. Griest (1887) 85 Ky. 619, 4 S. W. 323 (obiter); American R. Exp. Co. v. Com. (1920) 190 Ky. 636, 228 S. W. 433 (obiter).

Maine.—Hamlin v. Jerrard (1881) 72 Me. 62.

Maryland.—State use of Dodson v. Baltimore & L. R. Co. 77 Md. 489, 26 Atl. 865.

Michigan.—Shadford v. Detroit, Y. & A. A. R. Co. (1902) 130 Mich. 300, 89 N. W. 960; Howell v. Lansing & Suburban Traction Co. (1906) 146 Mich. 450, 109 N. W. 846; Green v.

Michigan United R. Co. (1909) 159 Mich. 58, 123 N. W. 607.

Minnesota.—Swing v. Empire Lumber Co. (1908) 105 Minn. 356, 117 N. W. 467.

Mississippi.—Shackleford v. Mississippi C. R. Co. (1876) 52 Miss. 159 (obiter); Morrison v. American Snuff Co. (1901) 79 Miss. 330, 89 Am. St. Rep. 598, 30 So. 723.

Missouri.—Berthold v. Holladay-Klotz Land & Lumber Co. (1901) 91 Mo. App. 233; Palmer v. Chicago & A. R. Co. (1909) 142 Mo. App. 633, 121 S. W. 1087.

New York.—Boardman v. Lake Shore & M. S. R. Co. (1881) 84 N. Y. 157; Re Utica Nat. Brewing Co. (1897) 154 N. Y. 268, 48 N. E. 521; Wilson v. Aeolian Co. (1901) 64 App. Div. 387, 72 N. Y. Supp. 150, affirmed without opinion in (1902) 170 N. Y. 618, 63 N. E. 1123.

Oklahoma.—Burkholder v. Okmulgee Coal Co. (1921) — Okla. —, 196 Pac. 679 (obiter).

Pennsylvania.—Baltimore & O. R. Co. v. Musselman (1856) 2 Grant, Cas. 348.

Tennessee.—Memphis Water Co. v. Magens (1885) 15 Lea, 37 (obiter).

Texas.—Texas & P. R. Co. v. Murphy (1876) 46 Tex. 356, 26 Am. Rep. 272, 6 Am. Neg. Cas. 462; Houston & T. C. R. Co. v. Shirley (1880) 54 Tex. 125; Indianola R. Co. v. Fryer (1882) 56 Tex. 609; Missouri P. R. Co. v. Owens (1883) 1 Tex. App. Civ. Cas. (White & W.) 163; Gulf, C. & S. F. R. Co. v. Hutcheson (1886) 3 Tex. App. Civ. Cas. (Willson) 120; Texas Seed & Floral Co. v. Chicago Set & Seed Co. (1916) — Tex. Civ. App. —, 187 S. W. 747.

Virginia.—Wilson v. Chesapeake & O. R. Co. (1871) 21 Gratt. 654; Langhorne v. Richmond City R. Co. (1894) 1 Va. Dec. 787, 19 S. E. 122; Langhorne v. Richmond R. Co. (1895) 91 Va. 369, 22 S. E. 159 (obiter).

According to the great preponderance of opinion, it is immaterial that such liabilities are unliquidated.

Arkansas. — Sappington v. Little Rock, M. R. & T. R. Co. (1881) 37 Ark. 23 (obiter).

Georgia.—Atlantic & B. R. Co. v.

Johnson (1907) 127 Ga. 392, 11 L.R.A. (N.S.) 1119, 56 S. E. 482.

Illinois.—Chicago, R. I. & P. R. Co. v. Moffitt (1874) 75 Ill. 524; Sikes v. Moline Consumers' Co. (1920) 293 Ill. 112, 127 N. E. 342.

Indiana.—Indianapolis, C. & L. R. Co. v. Jones (1868) 29 Ind. 465, 95 Am. Dec. 654; Columbus, C. & I. C. R. Co. v. Powell (1872) 40 Ind. 37, 3 Am. Neg. Cas. 100; Cleveland, C. C. & St. L. R. Co. v. Prewitt (1893) 134 Ind. 557, 33 N. E. 367.

Kansas.—Berry v. Kansas City, Ft. S. & M. R. Co. (1894) 52 Kan. 774, 39 Am. St. Rep. 881, 36 Pac. 724.

Maryland.—State use of Dodson v. Baltimore & L. R. Co. (1893) 77 Md. 489, 26 Atl. 865.

Virginia.—Wilson v. Chesapeake & O. R. Co. (1871) 21 Gratt. 654.

Contra: Cotzhausen v. H. W. Johns Mfg. Co. (1898) 100 Wis. 473, 76 N. W. 622 (obiter).

There can be no loss of identity of the original companies in their consolidation, to the prejudice of prior creditors, or to the destruction of prior liens. Hamlin v. Jerrard (1881) 72 Me. 62.

The consolidation of one railroad company with another will not discharge a vendor's lien on its property for the unpaid purchase money. Western Div. of Western N. C. R. Co. v. Drew (1879) 3 Woods, 691, Fed. Cas. No. 17,434.

And the holder of income bonds of a railroad company which has become consolidated with another may pursue his lien against such income in the hands of the consolidated company. Rutten v. Union P. R. Co. (1883) 17 Fed. 480.

A consolidated corporation cannot escape liability for a debt of a constituent company on the ground that the debtor was insolvent and therefore that the creditor was not prejudiced by the consolidation or transfer. Shadford v. Detroit, Y. & A. A. R. Co. (1902) 130 Mich. 300, 89 N. W. 960.

Since the purchaser under an execution or deed of trust of the chartered rights and corporate existence and privileges of a corporation is not by reason of such purchase subject to its liabilities, no liability results from a

consolidation with a railroad which has been purchased by another railroad company upon foreclosure. Houston & T. C. R. Co. v. Shirley (1880) 54 Tex. 125.

Where, pending an action against a corporation, it becomes consolidated with another, the consolidated corporation is rightly substituted as the defendant. Louisville E. & St. L. Consol. R. Co. v. Utz (1892) 133 Ind. 265, 32 N. E. 881.

It may assert the rights, equities, and defenses of one of the constituent companies, when sued on a liability existing against it prior to the consolidation. Southern Steel Co. v. Hopkins (1908) 157 Ala. 175, 20 L.R.A. (N.S.) 848, 131 Am. St. Rep. 20, 47 So. 274, 16 Ann. Cas. 690.

The loss of identity of a corporation by consolidation with another will extinguish its liability as a guarantor for such other. Barnes v. American Brake-Beam Co. (1909) 238 Ill. 582, 87 N. E. 291.

A provision in a consolidation agreement that the property and stock of the constituent company should be transferred to the new company, and be owned by it "free and clear from all encumbrances, equities, or debts, and that the said consolidated corporation should at its inception owe no debts for or on account of any of the business or property of the said constituent companies," is inoperative as to creditors who were not parties thereto. Re Utica Nat. Brewing Co. (1897) 154 N. Y. 268, 48 N. E. 521.

A statute permitting railroad companies to consolidate "upon such terms as may be agreed upon" is not to be understood as authorizing an agreement between two companies, the effect of which would be to transfer to one of them all the property and franchises and to invest it with all the rights, privileges, and immunities of the other, free from all the liabilities, duties, and obligations which the latter company owes to private individuals or to the public at large. Thus to allow it to be stripped of all its assets, and even its right to exist, without at the same time making proper provision for the payment of its debts and the performance

of its duties and obligations by the company which succeeded it, would be directly opposed to public policy, as tending utterly to defeat the object for which such corporations are chartered. *Tompkins v. Augusta Southern R. Co.* (1897) 102 Ga. 436, 30 S. E. 992.

Such a statute has reference to the adjustment of the interests of the stockholders and the settlement of the terms on which they shall hold the stock of the new company, and to matters belonging to the organization of the new corporation, and such like things, and does not enable the combining companies, by any contract between themselves, to conclude the rights of persons who have been injured by their tort. *State use of Dodson v. Baltimore & L. R. Co.* (1893) 77 Md. 489, 26 Atl. 865.

The fact that the original corporation may, under the statute, have been kept alive for certain purposes, does not affect the character of a transaction as a consolidation rather than a purchase and sale. *Chicago, S. F. & C. R. Co. v. Ashling* (1896) 160 Ill. 373, 43 N. E. 373.

Thus, the provisions of a statute authorizing the consolidation of one railroad company with another, effected by a transfer of the property of one to the other in consideration of the latter's agreement to pay the debts of the former and to issue its stock to the stockholders of the former, that "the purchase herein provided for or the surrender of the franchise shall in no way affect the rights of the creditors of the company," and continuing the company's separate existence "as to all the rights and remedies of creditors," do not operate to confine such creditors to an action at law against the debtor company, or affect their rights, under the trust fund doctrine, to an equitable lien on the property transferred to the debtor company, which is superior to a mortgage lien thereon created by the consolidated company. *Montgomery & W. P. R. Co. v. Branch* (1877) 59 Ala. 139.

Such a statute does not require an action for personal injuries sustained prior to the consolidation to be brought against the old company; *eo nomine*, the
15 A.L.R.—72.

purpose of the act in preserving the separate existence of the company not being to prescribe the manner in which demands against the company shall be enforced, but to make sure that no remedy for their enforcement shall be lost or impaired by the amalgamation; but, to avoid circuitry of action, the one who is to pay, namely, the new company in whom the act of consolidation vested the assets of the old company, may be directly sued. *Warren v. Mobile & M. R. Co.* (1873) 49 Ala. 582.

A contrary view is, however, adopted in *Joseph v. Southern R. Co.* (1904) 127 Fed. 606, in which it is held that, where it is provided by statute that upon consolidation the respective constituent corporations may be deemed to continue in existence to preserve the rights to creditors, the consolidated company is not subject to a suit for tort committed by one of the constituent companies prior to the consolidation.

As to whether such liability exists where the consolidation is without statutory authority, there is some difference of opinion, some cases holding that the absorbing corporation is not liable in law (*Kavanagh v. Omaha Life Asso.* (1897) 84 Fed. 295; *Whaley v. Bankers' Union* (1905) 39 Tex. Civ. App. 385, 88 S. W. 259), though possibly chargeable in equity, for the amount of the judgment recovered against the absorbed corporation (*Kavanagh v. Omaha Life Asso.* (Fed.) *supra*), and others holding that, if there is in fact a consolidation, the consolidated company cannot deny its liabilities either for contracts or for torts, or its liability resulting from such consolidation, upon the plea that its organization is illegal (*Chicago, S. F. & C. Co. v. Ashling* (1895) 160 Ill. 373, 46 N. E. 373; *Shadford v. Detroit, Y. & A. A. R. Co.* (1902) 130 Mich. 300, 89 N. W. 960; *Green v. Michigan United R. Co.* (1909) 159 Mich. 58, 123 N. W. 607; *Jackson v. Knights & Ladies of Orient* (1917) 101 Kan. 383, 167 Pac. 1046).

h. Liability of corporation into which another has been absorbed or merged.

"A merger, rightly understood, is

not the equivalent of consolidation at all, but exists where one of the constituent companies remains in being, absorbing or merging in itself all the other constituent companies." *Vicksburg & Y. City Teleph. Co. v. Citizens' Teleph. Co.* (1901) 79 Miss. 341, 89 Am. St. Rep. 656, 30 So. 725.

So, also, in *Collinsville Nat. Bank v. Esau* (1918) — Okla. —, 176 Pac. 514, it is said that a merger takes place where one of the constituent corporations remains in existence, absorbing or merging in itself all the other companies, differing from a consolidation wherein all the corporations cease to exist and unite in the interests of the new one.

The term is here used as describing transactions whereby one corporation acquires the stock as well as the business and assets of another. It is to be distinguished in legal effect from a mere acquisition of the property of one corporation by another, as is pointed out in *Blue Ridge Electric Co. v. American Bank Note Co.* (1916) 150 C. C. A. 509, 237 Fed. 755; *Drovers' & M. Nat. Bank v. First Nat. Bank* (1919) 171 C. C. A. 45, 260 Fed. 9; *Koch v. Speedwell Motor Car Co.* (1914) 24 Cal. App. 123, 140 Pac. 598, 600; *Seaboard Air Line R. Co. v. Leader* (1902) 115 Ga. 702, 43 S. E. 38; *Ft. Wayne & W. Valley Traction Co. v. Kendlesparker* (1910) 46 Ind. App. 299, 92 N. E. 228; *Zimmerman v. Grush Produce Co.* (1911) 156 Mo. App. 588, 137 S. W. 642, and *Graham Paper Co. v. Sheridan Pub. Co.* (1913) 172 Mo. App. 495, 158 S. W. 92.

Where a merger takes place, the subsisting corporation is answerable for the liabilities of the corporation which goes out of business. *Hawkins v. Central of Georgia R. Co.* (1903) 119 Ga. 159, 46 S. E. 82; *Atlanta, B. & A. R. Co. v. Atlantic Coast Line R. Co.* (1912) 138 Ga. 353, 75 S. E. 568; *Walker v. Rome* (1909) 6 Ga. App. 59, 64 S. E. 310; *Louisville & N. R. Co. v. Central Kentucky Traction Co.* (1912) 147 Ky. 513, 144 S. W. 739, Ann. Cas. 1915A, 857; *Carter Coal Co. v. Clouse* (1915) 163 Ky. 337, 173 S. W. 794 (obiter); *American R. Exp. Co. v. Com.* (1920) 190 Ky. 636; 228 S. W.

433 (obiter); *Thompson v. Abbott* (1875) 61 Mo. 176; *Palmer v. Chicago & A. R. Co.* (1909) 142 Mo. App. 633, 121 S. W. 1087; *Couse v. Columbia Powder Mfg. Co.* (1895) — N. J. Eq. —, 33 Atl. 297; *Collinsville Nat. Bank v. Esau* (1918) — Okla. —, 176 Pac. 514; *Tacoma Ledger Co. v. Western Home Bldg. Assn.* (1905) 37 Wash. 467, 79 Pac. 992. The absorbing company is liable in equity for claims against the absorbed company, both liquidated (*Camden Interstate R. Co. v. Lee* (1905) 27 Ky. L. Rep. 75, 84 S. W. 332; *Powell v. North Missouri R. Co.* (1867) 42 Mo. 63) and unliquidated (*Coggin v. Central R. Co.* (1879) 62 Ga. 685, 35 Am. Rep. 132; *Tompkins v. Augusta Southern R. Co.* (1897) 102 Ga. 436, 30 S. E. 992; *Ledbetter v. Sunflower State Oil Co.* (1915) 96 Kan. 636, 152 Pac. 763; *Louisville & N. R. Co. v. Biddell* (1902) 112 Ky. 494, 66 S. W. 34 (obiter); *Kentucky D. & W. Co. v. Webb*, 181 Ky. 90, 203 S. W. 870; *Bruce-MacBeth Engine Co. v. J. P. Eustis Mfg. Co.* (1917) 8 Ohio App. 341); and it is no defense that the absorbed company was insolvent (*Camden Interstate R. Co. v. Lee* (1905) 27 Ky. L. Rep. 75, 84 S. W. 332).

The rule is the same in the case of a public as of a private corporation. *Walker v. Rome* (1908) 6 Ga. App. 59, 64 S. E. 310; *Thompson v. Abbott* (1875) 61 Mo. 176 (holding a municipal corporation liable for an obligation for a teacher's salary previously incurred by a township subdistrict, which had been merged into such municipal corporation for school purposes); *School Dist. v. Greenfield* (1886) 64 N. H. 84, 6 Atl. 484 (holding that the debts of an abolished school district, less than the value of its property, are properly to be paid by the district to which the property passes).

So, where a town passes out of existence, and its territory is attached by legislative enactment to another town, without any direction as to the payment of the liabilities of the former, the latter is liable therefor. *Knight v. Ashland* (1884) 61 Wis. 233, 21 N. W. 65.

And where one town is merged in

two others by a legislative act, unless the legislature regulates the rights and duties of the two latter, they succeed to all the public property and immunities of the extinguished municipality, and become liable for all the debts previously contracted by it. *Mt. Pleasant v. Beckwith* (1880) 100 U. S. 514, 25 L. ed. 699.

4. Liability of corporation acquiring title through judicial sale; reorganized corporations.

1. Generally.

The term "reorganization," though sometimes applied to a change in the personnel of the management, and sometimes to a change in the amount of capital stock, effected by charter amendment or by transfer of the business to a newly formed corporation, is here used as describing the mode in which the interests of stockholders and creditors of an unsuccessful corporation are readjusted with a view to putting it on a sounder financial basis. This may be effected by contract, but is more commonly accomplished by forming a new corporation, the stocks and bonds of which are apportioned among the parties interested, to acquire title to the assets of the old corporation through the medium of a judicial sale.

Although, as is said in *People ex rel. Westchester Street R. Co. v. Public Service Commission* (1914) 210 N. Y. 456, 104 N. E. 952, the formation of a new corporation to take over property on foreclosure is not a reorganization of the previous owner, where not in pursuance of a plan or agreement entered into at or previous to the sale for or in anticipation of the readjustment of the respective interests therein of the creditors, mortgagees, stockholders, and others, both classes of cases are included in this subdivision.

It is well settled that a corporation formed by the purchasers of the property and franchises of another upon a judicial sale, or organized for the purpose of bidding in the property on such a sale, is not a continuance of the old corporation, and is, therefore, not liable for the debts of the old company, which are not a prior lien upon the

property unless expressly assumed. See cases cited *infra*.

This is the case whether the corporation is formed by third persons, by bondholders, by stockholders, or by bondholders and stockholders combined; although, as will shortly be explained, the admission of stockholders in the old corporation to membership in the new may render it liable for the debts of the old corporation to the extent to which the interest held by them represents stock in the old company. And it may be liable if there is fraud in the sale.

In *Armour v. E. Bement's Sons* (1903) 62 C. C. A. 142, 123 Fed. 56, it is said: "It is of common occurrence that an insolvent corporation is compelled to go into liquidation. The individuals who compose it seek to save what they can from the wreck by organizing themselves in a new corporation and buying such of the properties of the former corporation as they can profitably use in the new. No principle of law is violated by their forming the new organization; and no right of the creditors of the old organization is injured, provided its assets are lawfully acquired by the new one. If they are not lawfully acquired, the creditors have the same right to pursue the assets as they would have if any other person had unlawfully acquired them; and it is difficult to find any basis for any other equity which they could claim as inuring to them from the transaction. The stockholders of an insolvent corporation are not bound to maintain the corporation in a hopeless struggle. The claims of creditors do not impose such an obligation, and public policy requires that they should be free to engage in new enterprises. They may do this; but they cannot gain profit from the assets of the corporation to the detriment of the lawful rights of creditors, any more than any other person may."

In *Allen v. North Des Moines M. E. Church* (1905) 127 Iowa, 96, 69 L.R.A. 255, 109 Am. St. Rep. 366, 102 N. W. 808, 4 Ann. Cas. 257, it is said: "Among corporations organized for business purposes, it has been and still is a matter of most frequent occur-

rence that in the initial struggle for existence they become hopelessly insolvent. Under such circumstances the organization of a new corporation to build, if possible, a successful business on the ruins of the old, is entirely legitimate, whether considered as a proposition of law or of morals. The fact that the new organization embraces the old membership is immaterial, and in itself affords no reason why it should be held liable for the debts of the old corporation."

The stockholders of an insolvent corporation, whose property is about to be sold in a judicial proceeding against it, may organize a new corporation for the purpose of buying the property, and, if their purchase at the judicial sale is fair and free of fraud or collusion, the new company will take the property relieved of the obligations and contracts of the old company, unless expressly assumed. *GEORGE E. WARREN CO. v. A. L. BLACK COAL CO.* (reported herewith) ante, 1083.

The fact that the bidders for property of a railway corporation on foreclosure were the principal stockholders in such corporation does not render a reorganized corporation to which the property has been transferred liable for the debts of the old company, where such persons made no use of their stock in the purchase of such property, nor in the reorganization plan adopted by them, and received no stock in the new company in exchange for the stock in the old company. *Sebree v. Cassville & W. R. Co.* (1919) — *Mo.* —, 212 S. W. 11.

And see also, to the same effect, *Texas State Fair & D. Exposition Assn. v. Caruthers* (1894) 8 *Tex. Civ. App.* 474, 29 S. W. 48.

The fact that the bondholders and stockholders, or a part of the creditors, unite for the purpose of acquiring the property, is not a fraud upon creditors unprovided for.

Thus, in *Pennsylvania Transp. Co.'s Appeal* (1882) 101 Pa. 576, it appeared that, after the institution of proceedings to foreclose a mortgage on the property and franchises of a railroad company, the bondholders, stockholders, and nearly all the unse-

cured creditors of the company entered into an agreement to unite for the purpose of bidding in the property at the foreclosure sale, and of organizing a new corporation, in which the bondholders of the old company were to receive bonds, the stockholders stock, and the creditors deferred income bonds. By the agreement, the stockholders and creditors were to pay a certain portion into the common treasury for the payment of the expenses of the foreclosure and sale and reorganization of the new company. It was held that such agreement did not operate as a fraud upon a creditor of the old company, who had ample knowledge of the sale and an opportunity of bidding thereat, so as to render the new company answerable for the amount of his claim. The court said: "The property of the corporation was about to be sold at a judicial sale on a mortgage executed by the consolidated company. The sale was to be subject to prior mortgages aggregating more than two and a half millions of dollars. Any small number of those interested in the property might be unable or unwilling to buy property of such value and so encumbered. Why, then, shall the appellees be denied the privilege of uniting in a legal manner to protect their property by buying at an honest and fair sale?"

In *Northern P. R. Co. v. Boyd* (1912) 228 U. S. 482, 57 L. ed. 931, 33 Sup. Ct. Rep. 554, it is said: "The enormous value of corporate property often makes it impossible for one, or a score, or a hundred bondholders to purchase, and equally so for stockholders to protect their interests. A combination is necessary to secure a bidder and to prevent a sacrifice. Co-operation being essential, there is no reason why the stockholders should not unite with the bondholders to buy in the property."

In *St. Louis-San Francisco R. Co. v. McElvain* (1918) 253 Fed. 123, it is said that there is no moral turpitude, nor is there any illegality, in the making and performing of an agreement between the bondholders secured by mortgage, the stockholders, and the unsecured creditors of an insolvent mort-

gagor that there shall be a foreclosure and sale of the mortgaged property to, or for the benefit of, a new corporation in which all the members of the three classes shall be permitted, at the option of each of them, to take bonds or stock in substantial proportion to the respective ranks and equities of the classes, and that a foreclosure decree and sale under such an agreement are neither fraudulent in law nor fraudulent in fact, nor illegal as against either unsecured creditors or stockholders.

The fact that, prior to the sale of the property and franchises of a railway company under a mortgage foreclosure, the bondholders have agreed to the organization of a corporation in which the stockholders of the old company and unsecured creditors shall become stockholders, does not so identify the new corporation with the old as to render it responsible for the latter's debts. *Smith v. Chicago & N. W. R. Co.* (1864) 18 Wis. 17.

As supporting the statement above made that a corporation formed by the purchasers of the property and franchises of another at a judicial sale, or organized for the purpose of becoming the purchaser, is not liable for the debts of the old company, see:

United States.—*Sullivan v. Portland & K. R. Co.* (1877) 94 U. S. 806, 24 L. ed. 324; *Hoard v. Chesapeake & O. R. Co.* (1887) 123 U. S. 222, 31 L. ed. 130, 8 Sup. Ct. Rep. 74; *Wiggins Ferry Co. v. Ohio & M. R. Co.* (1892) 142 U. S. 396, 35 L. ed. 1055, 12 Sup. Ct. Rep. 188; *Armour v. E. Bement's Sons* (1903) 62 C. C. A. 142, 123 Fed. 56; *Blue Ridge Electric Co. v. American Bank Note Co.* (1916) 150 C. C. A. 509, 237 Fed. 755, reversing (1916) 230 Fed. 911.

Illinois.—*Hatcher v. Toledo, W. & W. R. Co.* (1872) 62 Ill. 477.

Indiana.—*Lake Erie & W. R. Co. v. Griffin* (1883) 92 Ind. 487, s. c. on subsequent appeal (1886) 107 Ind. 464, 8 N. E. 451; *Midland R. Co. v. Fisher* (1890) 125 Ind. 19, 8 L.R.A. 604, 21 Am. St. Rep. 189, 24 N. E. 756; *Moyer v. Ft. Wayne, C. & L. R. Co.* (1892) 132 Ind. 88, 31 N. E. 567.

Iowa.—*Brockert v. Iowa C. R. Co.* (1894) 93 Iowa, 132, 61 N. W. 405;

Allen v. North Des Moines M. E. Church (1905) 127 Iowa, 96, 69 L.R.A. 255, 109 Am. St. Rep. 366, 102 N. W. 808, 4 Ann. Cas. 257.

Kentucky.—*Martin v. Sulfrage* (1914) 159 Ky. 363, 167 S. W. 399.

Michigan.—*Cook v. Detroit, G. H. & M. R. Co.* (1880) 43 Mich. 349, 5 N. W. 390.

Missouri.—*Sebree v. Cassville & W. R. Co.* (1919) — Mo. —, 212 S. W. 11; *Helton v. St. Louis, K. & N. R. Co.* (1887) 25 Mo. App. 322.

New Jersey.—*Central R. Co. v. Bunn* (1857) 11 N. J. Eq. 336.

New York.—*Vose v. Cowdrey* (1872) 49 N. Y. 336; *Metz v. Buffalo, C. & P. R. Co.* (1874) 58 N. Y. 61, 17 Am. Rep. 201; *MALE v. ATCHISON, T. & S. F. R. Co.* (reported herewith) ante, 1098.

Pennsylvania.—*Stewart's Appeal* (1852) 72 Pa. 291.

South Carolina.—*Hammond v. Port Royal & A. R. Co.* (1881) 15 S. C. 10.

Texas.—*Houston & T. C. R. Co. v. Shirley* (1880) 54 Tex. 125; *Gulf, C. & S. F. R. Co. v. Newell* (1869) 73 Tex. 334, 15 Am. St. Rep. 788, 11 S. W. 342 (obiter); *Texas State Fair & D. Exposition Asso. v. Caruthers* (1894) 8 Tex. Civ. App. 474, 29 S. W. 48; *Houston, E. & W. T. R. Co. v. Keller* (1896) — Tex. Civ. App. —, 36 S. W. 859.

West Virginia.—*GEORGE E. WARREN Co. v. A. L. BLACK COAL Co.* (reported herewith) ante, 1083.

Wisconsin.—*Smith v. Chicago & N. W. R. Co.* (1884) 18 Wis. 17; *Gilman v. Sheboygan & F. du L. R. Co.* (1875) 37 Wis. 317; *Neff v. Wolf River Boom Co.* (1880) 50 Wis. 585, 7 N. W. 553; *National Foundry & Pipe Works v. Oconto City Water Supply Co.* (1879) 105 Wis. 48, 81 N. W. 125, affirmed on other grounds in (1901) 183 U. S. 216, 46 L. ed. 157, 22 Sup. Ct. Rep. 111.

The purchasers of the property and franchise of a corporation upon foreclosure do not, by proceeding upon the idea that they have acquired by their purchase the right to be the corporation created by the original charter, render themselves answerable for its debts. *Memphis Water Co. v. Magens* (1885) 15 Lea (Tenn.) 37.

A provision in a charter of incorporation that the purchasers of the prop-

erty and franchises of the corporation, under foreclosure of a mortgage thereof, shall be "vested with all the powers and privileges and be subject to all the duties and liabilities of said company," does not subject such purchasers to the debts of the old company. *Ibid.*

There is a class of cases which properly does not fall within the scope of this note, but which are here adverted to because they constitute an apparent exception to the rule that the successor corporation acquiring the property and franchises of another through a foreclosure sale, or other judicial proceeding, is not liable for the debts of the old corporation. These are cases in which a railroad company has trespassed in locating its tracks on the property of another (as in *Indiana, B. & W. R. & N. Co. v. Allen* (1887) 113 Ind. 308, 3 Am. St. Rep. 650, 15 N. E. 451 and *Donald v. St. Louis, K. C. & N. R. Co.* (1879) 52 Iowa, 411, 3 N. W. 462), or in a public street without compensating the abutting owner (as in *Harbach v. Des Moines & K. C. R. Co.* (1890) 80 Iowa, 593, 11 L.R.A. 113, 44 N. W. 348, and *Ft. Scott, W. & W. R. Co. v. Fox* (1889) 42 Kan. 490, 22 Pac. 583), or in which it entered under an agreement to pay such damages as might be occasioned (as in *Chicago & I. Coal R. Co. v. Hall* (1893) 185 Ind. 91, 23 L.R.A. 231, 34 N. E. 704), or against which a judgment for such damages has been rendered in condemnation proceedings (as in *Lake Erie & W. R. Co. v. Griffin* (1883) 92 Ind. 487, s. c. on subsequent appeal (1886) 107 Ind. 464, 8 N. E. 451, *Western Pennsylvania R. Co. v. Johnston* (1868) 59 Pa. 290 and *Pfeifer v. Sheboygan & F. du L. R. Co.* (1864) 18 Wis. 155, 86 Am. Dec. 751), and in which the successor corporation has been held liable, not as for a tort, or breach of contract, or judgment debt of its predecessor, but on the ground that it has subjected itself to an original liability, upon the principle that, having seen fit to adopt and ratify the original taking, it is bound to make compensation. The landowner in such case cannot maintain an action of debt against the new corporation on the judgment, but must seek his remedy in equity. *Gilman v.*

Sheboygan & F. du L. R. Co. (1875) 37 Wis. 317.

Liability to Men creditors.

A corporation organized by bondholders to take over the property and franchises of a railway company on foreclosure cannot claim to hold the property so acquired as a bona fide purchaser, as against liabilities of the old company which by statute are given precedence over the bonded debt, where the owners of such claims are not parties to the foreclosure. *Frazier v. East Tennessee, V. & G. R. Co.* (1889) 88 Tenn. 138, 12 S. W. 537, affirmed on other grounds in (1891) 139 U. S. 238, 35 L. ed. 196, 11 Sup. Ct. Rep. 517.

The fact that the purchasers upon the foreclosure sale, and the corporation formed by them, knew that the creditor had an adjudged lien on the property of the old corporation for the amount of its claim, good against the common debtor, does not operate to render it liable therefor, under the maxim "*qui sentit commodum sentire debet et onus*" (he ought to bear the burden who would derive the advantage), where the right of the mortgagees was paramount to the right of the lien creditors. *National Foundry & Pipe Works v. Oconto City Water Supply Co.* (1899) 105 Wis. 48, 81 N. W. 125, affirmed on other grounds in (1901) 183 U. S. 216, 46 L. ed. 157, 22 Sup. Ct. Rep. 111.

Under statutes transferring rights of old corporation to purchasers.

The effect of an act of the legislature, providing that the trustees in a deed of trust given by a railway company upon its franchise, road, and property connected therewith, and the cestuis que trust and their associates who should thereafter purchase at the sale under the deed of trust, should be incorporated, with power to purchase and own the franchise and property of the old company, and upon such purchase should be invested with all the corporate powers, privileges, etc., before given to the old company, but not given the stockholders under the old, was not to reorganize the old company, but to create a new and distinct corpora-

tion, which took the property subject only to such liens or claims as were paramount to the deed of trust. *Morgan County v. Thomas* (1875) 76 Ill. 120.

A corporation formed by the purchasers of property of a railroad company on foreclosure, under a statute which provides that such purchasers, if they provide suitable equipment for running the road and performing the duties incumbent on it by law, and transfer to it again its track and appurtenances and necessary equipment, and make the declaration therein provided, may issue and hold new stock in the corporation to such an amount and in such denominations as they shall deem proper, but not more than the value of the corporate property, unless additional stock is subscribed by parties able to pay for it, and making provision for the cancellation of the old stock, and the election of officers by the new holders, and the continuance of all the former charter rights and powers, and further declaring that the corporation shall not be liable for any debts except those subsequently contracted by it, saving, however, all prior mortgages and liens, and leaving all property not included in the foreclosure sale liable for existing debts—cannot be held to be bound to pay all the debts of the old company, on the ground that it is in law the same corporation; but its liability is limited by the amount of the assets of the old company not affected by the foreclosure. *Cook v. Detroit, G. H. & M. R. Co.* (1880) 43 Mich. 349, 5 N. W. 390.

In *Huff v. Winona & St. P. R. Co.* (1866) 11 Minn. 180, Gil. 114, and *Hilbert v. Winona & St. P. R. Co.* (1866) 11 Minn. 246, Gil. 163, it was held that an act of the legislature providing that "all the rights, benefits, privileges, property, franchises, and interests, of" a certain railroad company, which had been acquired by the state upon foreclosure of a trust deed "be and the same hereby are granted, transferred, and continued to" individuals named, "for the purpose and on the terms and conditions hereafter in this act provided, free and clear of all claims or liens thereon and free and

discharged from all claims of the state of Minnesota against the same, except as hereinafter provided. And the said persons by the name and style of the Winona & St. Peter Railroad Company are hereby invested with the right to enter upon, use, and enjoy all and singular the road, property, franchises, and immunities heretofore possessed by or granted to the Transit Railroad Company . . . and all the corporate rights, and franchises of said Transit Railroad Company are hereby vested in and continued to the said" individuals, "their associates, successors, and assigns, by the name and style of the Winona & St. Peter Railroad Company," did not merely revive the old company and continue and regrant its franchises, rights, and property to it under a new name, but created a new company which could not be held liable for the debts of its predecessor.

A like decision under a similar statute was made in *Fitz v. Minnesota C. R. Co.* (1866) 11 Minn. 414, Gil. 304.

In *Western North Carolina R. Co. v. Rollins* (1880) 82 N. C. 523, it is said that, in case of the transfer by act of legislature of the property of a railroad company to a new corporation, the trust in favor of creditors and stockholders, under which the property was held by the old corporation, will attach to the transferred property, even in the absence of a provision to that effect in the statute under which the transfer is affected.

Where the statute providing for the reorganization of the corporation expressly declares that the old company shall be reorganized as a "new corporation," and the fundamental powers conferred upon the new company differ in most material respects from those of the old one, the reorganized corporation must be regarded as independent of the old one, and therefore not individually liable for its debts except so far as such liability may have been imposed by statute. Such corporation, however, takes the property of the old one subject to the rights of the creditors of the old corporation to follow it.

Marshall v. Western North Carolina R. Co. (1885) 92 N. C. 322.

In **Neff v. Wolf River Boom Co.** (1880) 50 Wis. 585, 7 N. W. 553, it was held that a corporation organized under a statute which provides that any person, company, or association which shall become the owner or assignee of the rights, powers, privileges, and franchises of any corporation by purchase or sale under a mortgage sale, or on any bankrupt sale, or upon sale under any judgment, order, decree, or proceedings of any court, may within two years after such purchase reorganize under the charter or act of the corporation, or law under which such company or association was created or organized, and shall have the same rights, powers, privileges, and franchises such company, association, or corporation had, or was entitled to, at the time of such purchase or sale, is not a continuation of the old corporation, and liable as such for its debts, the provision that the purchasers of the franchise may "reorganize under the charter of incorporation, or law under which such company or association was created or organized," meaning simply that the new corporation may use the machinery of the original charter to perfect its organization. The court further adduced in support of this construction the fact that the title of the act was, "An Act to Provide for the Organization of Corporate Companies in Certain Cases,"—not reorganization,—and the further fact that the organization under the act is denominated as "such new company," and "the new organization or company," and the further argument that a construction which would render the new company liable for the debts of the old would render the act inoperative and useless in most cases, since no purchasers of the assets of an insolvent corporation would take the risk of organizing under the act, when to do so would make them liable for the debts of the old corporation.

2. Where stockholders in old company retain an interest.

Although, as above pointed out (II. i, 1, *supra*), the fact that stockholders

in the debtor company are also interested in the reorganized company is not of itself ground for holding the new company liable, it is now settled law that the new company may be held liable, where the scheme of reorganization adopted prior to the sale does not provide for creditors, to the extent to which the interest of such stockholders represents stock in the old company, since the law will not permit the stockholders of a debtor corporation to participate in its assets until the claims of creditors have been satisfied.

Thus, in **MALE v. ATCHISON, T. & S. F. R. Co.** (reported herewith) *ante*, 1098, no scheme of reorganization which contemplates the transfer to the original stockholders of stock in the new corporation, unburdened by the old debts, can be upheld.

And in **Sehree v. Cassville & W. R. Co.** (1919) — Mo. —, 212 S. W. 11, it is said that, in contemplation of law, the shares of stock in a corporation represent the property thereof, and so, where part of the stock of the old company is put in as part of the reorganization consideration, it is equivalent to the transfer to the new corporation of a part of the tangible property of the old corporation which creditors are entitled to have applied to the payment of their debts.

So, where a new corporation is formed by the stockholders and creditors of the old, stock in the new corporation being issued in lieu of that of the old corporation, and the assets of the old corporation are transferred to the new in consideration of the assumption of certain debts, such transfer is fraudulent as to a creditor whose claim is not provided for. **Montgomery Web Co. v. Dienelt** (1890) 133 Pa. 585, 19 Am. St. Rep. 663, 19 Atl. 428; **Carstens v. Hofius** (1906) 44 Wash. 456, 87 Pac. 631; **Hibernia Ins. Co. v. St. Louis & N. O. Transp. Co.** (1882) 4 McCrary, 432, 13 Fed. 516; **Blair v. St. Louis, H. & K. R. Co.** (1884) 22 Fed. 36, (1885) 24 Fed. 148.

There is no difference in principle if the contract reorganization, instead of being effectuated by private sale, is consummated by a master's deed under a consent decree. **Northern P. R. Co.**

v. Boyd (1912) 228 U. S. 482, 57 L. ed. 931, 33 Sup. Ct. Rep. 554.

Accordingly, the same rule prevails where the stockholders of the debtor corporation are admitted to membership in the corporation formed to acquire title to property of the debtor corporation through a judicial sale, in pursuance of an arrangement made prior to the sale, and the claims of creditors are not provided for. See *Northern P. R. Co. v. Boyd* (U. S.) supra; *Kansas City Southern R. Co. v. Guardian Trust Co.* (1916) 240 U. S. 166, 60 L. ed. 579, 36 Sup. Ct. Rep. 334; *Central of Georgia R. Co. v. Paul* (1899) 35 C. C. A. 639, 93 Fed. 878; *Blue Ridge Electric Co. v. American Bank Note Co.* (1916) 150 C. C. A. 509, 237 Fed. 755 (recognizing the rule, but holding it inapplicable under the facts of the case); *Howard v. Maxwell Motor Co.* (1920) 269 Fed. 292; *Farnsworth v. Muscatine Produce & Pure Ice Co.* (1916) 177 Iowa, 21, 158 N. W. 741; *Pittsmtont Copper Co. v. O'Rourke* (1914) 49 Mont. 281, 141 Pac. 849; *SKIRVIN OPERATING CO. v. SOUTHWESTERN ELECTRIC CO.* (reported herewith) ante, 1104.

In *Northern P. R. Co. v. Boyd* (U. S.) supra, it is said that the invalidity of a foreclosure sale, made in pursuance of a reorganization agreement by which the stockholders in the old company were to receive stock in the new, rose from the character of the reorganization agreement, regardless of the value of the property, and that the question must be decided according to a fixed principle, not leaving the rights of the creditors to depend upon the balancing of evidence as to whether, on the day of sale, the property was insufficient to pay prior encumbrances.

In *Central Improv. Co. v. Cambria Steel Co.* (1913) 127 C. C. A. 184, 210 Fed. 696, affirmed in (1916) 240 U. S. 166, 60 L. ed. 579, 36 Sup. Ct. Rep. 334, in reply to the argument that the creditor was entitled to no relief, because the equitable interest of the creditors in the property of the old corporation was of no value, the court said: "This contention is founded on the findings of the master that there

was no direct testimony of the fair value of the Belt Company's property, at or before the time of the foreclosure, no proof that it was worth more than the \$1,000,000 for which it was sold at the foreclosure sale, and therefore that it was sold at its fair market value. The mortgage was \$1,000,000, and the deduction is that the equitable interest of the creditors was valueless. But the crucial issue here was not what the fair market value of the mortgaged property was, nor was it how much more the mortgaged property was worth than the amount of the mortgage. Although evidence upon these subjects would have been competent in the consideration of the real issue here, in the absence of an estoppel, that issue was: What was the equitable interest of the creditors in the mortgaged property of the Belt Company worth, during the execution of the scheme and immediately after the foreclosure sale and the appropriation of it thereby by the Southern Company [the reorganized corporation], the trustee for the creditors, to itself, for a trustee who violates his trust may not profit thereby? . . . The creditors were entitled to the highest value their interest had during this time, either for the purpose of sale, or for the purpose of preventing a foreclosure of the mortgage upon the Belt property, or for the purpose of compromising their claims or conditioning the foreclosure, or for the purpose of the present or future control of the property."

For discussion of the extent of such liability, see post, II. j, 3.

But where the arrangement by which the stockholders in the old company are permitted to convert their stock into stock in the new company has its inception subsequently to the sale, so that it did not in any manner affect the foreclosure proceedings, the rights obtained by the stockholders are at the expense of the purchasers, and not of the unsecured creditors of the old corporation; and the new corporation is accordingly not liable.

Thus, in *Stewart's Appeal* (1852) 72 Pa. 291, it was held that a railroad company, acquiring the property and franchises of its predecessor through

purchase upon a foreclosure sale under judicial proceedings to every appearance adversary, was not liable for the debts of its predecessor, although, by an arrangement made subsequently to such sale, the stockholders in the old company were allowed to become stockholders of the new company without payment of any money.

It is immaterial that the reorganization is consummated in good faith and in ignorance of the existence of the creditor. When he appears and establishes his debt, the subordinate interest of the old stockholders will still be subject to his claim in the hands of the reorganized company. *Northern P. R. Co. v. Boyd* (1912) 228 U. S. 482, 57 L. ed. 931, 33 Sup. Ct. Rep. 554.

A corporation organized by the stockholders of an old corporation, who had purchased its property at a receiver's sale by assuming and agreeing to pay such of the debts of the old corporation as were listed by the receiver as debts against it, is not a bona fide purchaser of the property in the ordinary course of business; and a creditor of the old corporation, whose claim was not listed, is accordingly entitled to an equitable lien upon the property transferred to the new corporation. *Farnsworth v. Muscatine Produce & Pure Ice Co.* (1916) 177 Iowa, 21, 158 N. W. 741.

The existence of creditors in the shareholding body of a reorganized corporation does not make it an innocent purchaser, or put them in a position to complain of the subjection of the assets of the old corporation in the hands of the reorganized corporation, to the claims of nonconsenting creditors. *Pittsont Copper Co. v. O'Rourke* (1914) 49 Mont. 281, 141 Pac. 849.

Rights of creditor not accepting provision made in scheme of reorganization.

Where, however, the reorganization agreement contains a provision for creditors and is sanctioned by the court, the fact that the stockholders in the old corporation retain an interest in the property will not subject the reorganized corporation to liability to the extent of such interest; but it is liable only to the extent of the provision made.

Thus, in *Northern P. R. Co. v. Boyd* (U. S.) supra, it is said that it is not necessary to pay an unsecured creditor in cash as a condition of stockholders retaining an interest in the reorganized company. His interest can be preserved by the issuance on equitable terms of income bonds or preferred stock. If he declines a fair offer, he is left to protect himself as any other creditor of the judgment debtor; and, having refused to come into a just reorganization, cannot thereafter be heard in a court of equity to attack it. If, however, no such tender is made and kept good, he retains the right to subject the interest of the old stockholders in the property to the payment of his debts. If their interest is valueless, he gets nothing. If it be valuable, he merely subjects that which the law had originally and continuously made liable for the payment of corporate liabilities.

See also *Pennsylvania Transp. Co.'s Appeal* (1882) 101 Pa. 576, in which the reorganized company was held not liable to a creditor who elected not to come into the reorganization, and who had ample knowledge of the sale and an opportunity of bidding thereat.

Where the assets of an old corporation have been transferred to a new corporation organized by its creditors, who took stock therein in lieu of their debts, a creditor who elected not to come into the scheme, while he cannot hold the new company liable, is entitled to levy on the stock of the new corporation which had been tendered to him in satisfaction of his debts and refused by him, such stock being, in equity, an asset of the old corporation. *Wheeler v. Acme Harvesting Mach. Co.* (1912) 175 Ill. App. 69.

But compare *Alberger Condenser Co. v. United Water, Gas & E. Co.* (1912) 87 Kan. 843, 126 Pac. 1087, in which it was held that, where, upon the insolvency of a corporation and the appointment of a receiver for it, the stockholders and certain of its creditors united in a plan to finance and organize a new corporation to buy the property and assets of the old corporation, and also to buy out a competing company, whereby the secured credit-

ors agreed to accept certain specified securities, and about 95 per cent of the unsecured creditors agreed to accept preferred stock in the new company for their claim, whereupon the receiver, under an order of the court, sold the property to the new corporation for a consideration the character of which is not stated, but which was presumably the undertaking of the new corporation to settle with the creditors of the old, a creditor who refused to accept stock for his claim might hold the new company liable, it having acquired all the property and assets of the old corporation without giving that corporation anything with which his debt could be paid.

A reorganized corporation acquiring title through a judicial sale of the property of subsidiary corporations, the capital stock of which was largely owned by the old company, and to which reorganized company the stockholders in the old company were admitted on terms, is liable, to the extent of the interest of such stockholders, for a contingent claim arising subsequent to the period when creditors were permitted to avail themselves of the reorganization plan. *Howard v. Maxwell Motor Co.* (1920) 269 Fed. 292.

3. Right to priority over creditors of reorganized company.

In *Livingston County Agri. Soc. v. Hunter* (1884) 110 Ill. 155, it was claimed that the creditors of an original corporation organized for the purpose of conducting county fairs, which was reorganized as a joint stock company, were entitled to a lien or preferred claim upon the assets originally belonging to the old company to which the new company succeeded; but it was held that the creditors of the society, whether their claims accrued before or after the reorganization, stood upon the same footing, and that the only way for one to obtain an advantage over the other was by the exercise of superior diligence in the prosecution of his claims to judgment.

4. Liability of purchaser for debt or liability incurred by trustee for bondholders or receiver.

In *Spadra-Clarksville Coal Co. v. Nicholson* (1915) 93 Kan. 638, 145 Pac. 571, Ann. Cas. 1916D, 562, it was held

that a corporation organized by the bondholders of a manufacturing corporation to acquire the property upon foreclosure, no consideration being paid for the purchase of the property by the new company except the interest its incorporators owned as bondholders, was liable for a debt incurred in the name of the old company prior to the foreclosure, while the trustee for the bondholders was in possession of the property and business, for material and supplies which were used for the purpose of preserving the property, both on the ground that it would constitute a fraud on the rights of the particular creditors who had furnished supplies for the purpose of keeping the plant in operation and to protect and preserve the security, to permit the same persons who incurred the indebtedness, to avoid liability therefor, and on the ground that the circumstances surrounding the creation of the new corporation and its succession to the business and property of the old showed conclusively that there was in fact no purchase, but simply a change in the capacity in which the business was conducted.

A new corporation to which a railroad is turned over by the receivers of another company cannot be held liable for personal injuries sustained by an employee while the road was in the hands of the receivers. *Archambeau v. New York & N. E. R. Co.* (1898) 170 Mass. 272, 49 N. E. 435.

A railroad company acquiring property by purchase at a receiver's sale, under a decree providing that "on confirmation of such sale the purchaser or purchasers shall take title to the railroad and property so purchased, subject to the lien of any and all debts, obligations, and liabilities of the receivers heretofore or hereafter lawfully incurred by or under the authority of the court, or arising out of the operation of such railroad by the receivers," is not liable for personal injuries sustained by an employee during the receivership, where it does not appear that his claim had ever been recognized by the receivers either as to liability or by any sum as liquidated damages. *Tobin v. Central Vermont R. Co.* (1904) 185 Mass. 337, 70 N. E. 431.

A railroad company acquiring its property upon a receiver's sale, un-

der a decree and deed stipulating that the purchaser shall "pay any unpaid indebtedness, obligation, or liability contracted or incurred by the receiver before delivery of the property sold," is liable for the statutory penalty for a failure to construct cattle guards, etc., incurred by the receiver. *Memphis & C. R. Co. v. Glover* (1900) 78 Miss. 467, 29 So. 89.

The acquisition of the property of a railroad by purchase at foreclosure sale will not render the purchasing company liable for any claims against the receiver except such as may be imposed by the terms of the sale. *Howe v. St. Clair* (1894) 8 Tex. Civ. App. 101, 27 S. W. 800.

A railway company which has become the owner of a railroad through the purchaser at a receiver's sale is not liable for a claim accruing during the operation of the road by the receiver, after such sale, unless the earnings during such period have been diverted to the making of improvements. *Ray v. Dillingham* (1897) — Tex. Civ. App. —, 41 S. W. 188.

1. Character and extent of liability.

1. In case of consolidation or merger.

Where the corporation incurring the liability ceases to have an independent existence *de jure*, the consolidated or absorbing corporation is liable at law as well as in equity, the ground for such liability being sometimes stated to be a continuance of the original corporation under a new guise (see *Meyer v. Johnston* (1875) 58 Ala. 237; *Wolff v. Shreveport Gas, E. L. & P. Co.* (1916) 138 La. 743, L.R.A.1916D, 1138, 70 So. 789; *Morrison v. American Snuff Co.* (1901) 79 Miss. 330, 89 Am. St. Rep. 598, 30 So. 723; *Quinn v. American Bankers' Assur. Co.* (1914) 183 Mo. App. 8, 165 S. W. 823; *Sharples Co. v. Harding Creamery Co.* (1907) 78 Neb. 795, 11 L.R.A.(N.S.) 863, 111 N. W. 783; *Memphis Water Co. v. Magens* (1885) 15 Lea (Tenn.) 37; *Langhorne v. Richmond R. Co.* (1895) 91 Va. 369, 22 S. E. 159), and sometimes to be an assumption of liabilities arising by implication (see *Louisville, N. A. & C. R. Co. v. Boney* (1889) 117 Ind. 501, 3

L.R.A. 435, 20 N. E. 432; *Berry v. Kansas City, Ft. S. & M. R. Co.* (1894) 52 Kan. 774, 39 Am. St. Rep. 381, 36 Pac. 724; *Texas Seed & Floral Co. v. Chicago Set & Seed Co.* (1916) — Tex. Civ. App. —, 187 S. W. 747).

It is frequently said that the extent of such liability is to be measured by the assets received, but as such assets are usually greater than the claim in litigation, this question cannot be regarded as having been directly decided. Such limitation would seem inconsistent with the theory that the new or surviving corporation is to be regarded as the alter ego of the corporation consolidated or merged, but is reconcilable with the implied-assumption theory.

Thus, in *Whipple v. Union P. R. Co.* (1882) 28 Kan. 474, it is held that a consolidated corporation is not personally liable for the debts of its constituent companies, except so far as it has contracted to assume them.

So, also, in *Shaw v. Norfolk County R. Co.* (1860) 16 Gray (Mass.) 407, it was held that the transfer of the property of the constituent corporations to a consolidated corporation does not impose upon the new corporation the obligation to pay the debts of the former corporations, nor subject it to any liability to the creditors, but that such creditors may resort to such property as a fund from which they may deprive payment of their claims.

In *Atlantic & B. R. Co. v. Johnson* (1907) 127 Ga. 392, 11 L.R.A.(N.S.) 1119, 56 S. E. 482, it was said by Lumpkin, J., in discussing the extent of liability: "Some of the authorities say that where provision has not been made for paying existing debts and liabilities of one of the constituent companies, the consolidated company is liable 'at least to the extent of the assets of the absorbed corporation.' This term of expression was used in *Tompkins v. Augusta S. R. Co.* (1897) 102 Ga. 436, 30 S. E. 992, and was based on a quotation from 1 Thompson on Corporations, § 375, in which it is said: 'Where several corporations are united in one, and the property of the old companies is vested in the new,

the latter is liable in equity for the debts of the former, at least, to the extent of the property received from them, and if it is also liable at law, the legal remedy is not exclusive.' This mode of expression has been quite extensively copied, and I should hesitate to criticize even indirectly so able and learned a writer as Judge Thompson, and some of the able judges who have adopted the similar formula of words. But what is the exact meaning of the expression that the consolidated company is liable for the debts and torts of its constituent companies, 'at least to the extent of the property received from them?' The use of the qualifying words 'at least' shows that this was not intended as limiting entirely the liability. Those words indicate a minimum of liability. And where it is so carefully stated that this is the minimum, it can hardly be contended with reason that it was also the maximum. If the consolidated company is liable 'at least' to this extent, how far is it liable at most? It will be noticed also that the learned author immediately follows the statement referred to by adding, 'and if it is also liable at law, the legal remedy is not exclusive,' thus indicating the view that there might be a legal remedy as well as an equitable one. This section, which was a statement of the result of certain authorities, should be construed in the light of the other sections already referred to, and of the statement at the close of § 373, where, after discussing the decision in *Smith v. Chesapeake & O. Canal Co.* (1840) 14 Pet. (U. S.) 45, 47, 10 L. ed. 347, 348, the author adds: 'Modern holdings would, it is believed, on the general implications of the law, allow a party standing in such a position as the complainant in this case did, to bring a direct action against the consolidated company, and recover a judgment in personam.' Viewed in the light of the various sections and of the authorities from which they are derived, some of which affirm the right of direct suit against the consolidated company, in the absence of statutory provision to the contrary,

and some of which affirm the right to pursue assets of the constituent company, on the ground 'that a corporation cannot give away its assets, to the prejudice of its creditors, but that a court of equity will follow such assets as a trust fund into the hands of any new custodian, the same not being a creditor or bona fide purchaser,' may it not be said that either remedy may be open to the creditor, according to the facts of the particular case? Mr. A. C. Freeman, a careful and excellent annotator, says on this subject: 'In some of the cases, to the statement that the new company will be answerable for the debts and liabilities of the old, there is added the qualification, "at least, to the extent of the property received by it from the old corporation." . . . The qualification seems, however, to have been employed from an abundance of caution, rather than because of any well-settled rule limiting the liability of the consolidated company for the debts of its constituents to the extent of the property received from them, and is not referred to in the great majority of cases.' See note to *Morrison v. American Snuff Co.* 89 Am. St. Rep. 638. It is possible, also, that some of the courts may have had in mind the existence of a limitation even upon legislative power to authorize a corporation to give away or merge its assets with those of another company, so as to defeat creditors. It would put a severe burden upon a creditor of a corporation whose demand, or the extent of whose damages, might amount to only a few dollars, where such corporation and another voluntarily merge into one and lose their previous identity, to hold that he cannot sue the original corporation because it has passed out of existence, and that he cannot sue the consolidated corporation and recover against it without alleging and proving that the consolidated company had received assets from the constituent company (or, as contended here, net assets) sufficient to cover any amount which the jury might award him. To so hold would be practically to deny any remedy to a person having a

small claim against a constituent company, or who had received a slight injury by reason of its tort, because, to discover all the assets of the constituent company and trace them into the hands of the consolidated company, as a condition precedent to bringing any suit or having any recovery, would involve a litigation out of all proportion to a small claim. If he must further show not only what were the assets of the constituent company, but also what were its liabilities, and this must be determined before he can recover on a contract or for a tort, then every claimant against such constituent company would carry the burden of having to make an equitable accounting between the consolidated entity and its various component elements, in order to press the smallest suit or have the smallest recovery. It is to be borne in mind, too, that a large part of the assets of the constituent company may be in the form of cash, stocks, bonds, choses in action, and other property or franchises of a kind peculiarly within the knowledge of the companies themselves, and as to which the individual would be compelled to seek information by a bill for discovery, or some similar means."

In *Prouty v. Lake Shore & M. S. R. Co.* (1873) 52 N. Y. 363, and *Boardman v. Lake Shore & M. S. R. Co.* (1881) 84 N. Y. 157, it is held that where two companies are consolidated, so far as the creditors of one of the original companies is concerned the consolidated company is the successor of the old company; but in respect to the properties of the other company, it is a new and independent company, and such creditor has no claim against it upon the original contract, but only by virtue of its assumption of the obligations of the old company.

2. In case of absorption.

Where there is an absorption of the business and assets—in other words, a merger *de facto*—either by a corporation formed for the purpose, or by one already in business, the liability of the corporation receiving the

assets is, where it exists, based upon the so-called "trust-fund doctrine," on the ground that such receiving corporation does not stand as a bona fide purchaser for value. In such case the extent of the liability is necessarily determined by the value of the property received.

The question of the extent of liability is elaborately discussed in *Okmulgee Window Glass Co. v. Frink* (1918) 171 C. C. A. 195, 260 Fed. 159, writ of certiorari denied in (1920) 251 U. S. 563, 64 L. ed. 415, 40 Sup. Ct. Rep. 342, and the conclusion there reached that such liability is limited to the amount of the value of the property received.

The purchasing corporation is liable for the debts of the selling corporation only to the extent of the value of the assets actually received by it. *Mahaffey Co. v. Russell* (1911) 100 Miss. 122, 54 So. 807.

It has accordingly been held that where there is no identity between the two corporations, the successor cannot be sued at law for the debts of its predecessor (*Hopkins v. St. Paul & P. R. Co.* (1872) 2 Dill. 396, Fed. Cas. No. 6,690); and that a personal judgment cannot be rendered against the purchasing corporation in an action for negligence of its vendor (*Abilene Cotton Oil Co. v. Anderson* (1906) 41 Tex. Civ. App. 842, 91 S. W. 607).

But in *Okmulgee Window Glass Co. v. Frink* (Fed.) supra, it was held that where the new corporation is, in its essence, but a continuation of the activities and interests of the old company, which retains simply its franchise as a corporation, thus becoming practically extinct as an active entity, direct recovery is allowable, since it can be seen in advance that a judgment against the old company will require a further proceeding against the new company to secure any satisfaction.

Where part of the property transferred would not have been subject to the claims of creditors in the hands of the constituent corporation, the liability of the successor company is measured, not by the total amount of

property it has received, but by the value of the portion thereof to which creditors of the old company had a right to look for the payment of their demands. *Jackson v. Knights & Ladies of Orient* (1917) 101 Kan. 383, 167 Pac. 1046.

3. In case of reorganization.

In *Seymour v. Boise R. Co.* (1913) 24 Idaho, 7, 132 Pac. 427, it is held that where the new company is a mere reorganization of the old company, a claim against the old company is collectible not merely against the franchises and property transferred, but out of any and all property belonging to the new corporation. The facts of this case, however, show that the transaction was not, strictly speaking, a reorganization, but the formation of a new company by the persons interested in the old company, which acquired for a consideration passing directly to the stockholders of the old company, the property and franchises of such company, so that the new company was virtually a reincarnation of the old company.

In the case of a reorganization proper, the extent of the liability of the reorganized corporation, where such liability exists, has been said to be the value of the equity in the corporate assets available to unsecured creditors (*Central Improv. Co. v. Cambria Steel Co.* (1913) 127 C. C. A. 184, 210 Fed. 696, affirmed in *Kansas City S. R. Co. v. Guardian Trust Co.* (1916) 240 U. S. 166, 60 L. ed. 579, 36 Sup. Ct. Rep. 334); which also see the value of the interest in the assets of the new company given (without a valuable equivalent therefor) to the stockholders of the old company (*Northern P. R. Co. v. Boyd* (1913) 228 U. S. 482, 57 L. ed. 931, 33 Sup. Ct. Rep. 554; *Howard v. Maxwell Motor Co.* (1920) 269 Fed. 292; *Sebree v. Cassville & W. R. Co.* (1919) — Mo. —, 212 S. W. 11); or the value of the stock which the creditor would have received had he assented to the scheme of reorganization (*Wheeler v. Acme Harvesting Mach. Co.* (1912) 175 Ill. App. 69).

The exchange of stock in an old corporation, having a substantial value, for stock in another corporation, formed pursuant to a reorganization scheme, justifies the conclusion that there was a valuable equity in the property of the old corporation for which the new corporation must account to unsecured creditors of the old corporation where, in carrying out the reorganization plan, the new corporation acquired all the property of the old corporation for the amount of the mortgage. *Kansas City S. R. Co. v. Guardian Trust Co.* (U. S.) *supra*.

In *Northern P. R. Co. v. Boyd* (U. S.) *supra*, with reference to the contention that, as the property was insufficient to pay the mortgaged debt, there was nothing which could come to the unsecured creditors, and they therefore had no ground to complain if the bondholders were willing to give new shares to the old stockholders, the court said: "If the value of the road justified the issuance of stock in exchange for old shares, the creditors were entitled to the benefit of that value, whether it was present or prospective, for dividends or only for purposes of control. In either event, it was a right of property out of which the creditors were entitled to be paid before the stockholders could retain it for any purpose whatever."

In *Central Improv. Co. v. Cambria Steel Co.* (Fed.) *supra*, it was said, in reply to the contention that because the original stockholders of the old company, by the exchange of their stock for that of the reorganized company, retained only 3½ per cent of the value of their equitable interest in the property of the old company, therefore the reorganized company was liable for only 3½ per cent of that interest: "But the measure of the creditors' recovery is the value of the creditors' equity which was diverted from them by their trustees, the stockholders of the Belt Company [the old company], including the Southern Company [the reorganized corporation], the successor trustee, and vested in that trustee. If the Southern Company had been the owner of the bonds

of the Belt Company only, and, knowing the condition and indebtedness of the Belt Company, as it did, had paid to the stockholders of that company, \$475,000, to the exclusion of the creditors, for a conveyance of its property by the Belt Company to the Southern Company, it could not have escaped liability to the creditors of that company for that amount. Much less can it do so when it became owner of nearly all the Belt Company's stock, and in equity a trustee for its creditors."

In *Ferguson v. Ann Arbor R. Co.* (1897) 17 App. Div. 336, 45 N. Y. Supp. 172, where a new corporation was organized in pursuance of a plan of reorganization adopted by the bondholders of a railroad company to which the old corporation or its directors or stockholders were not parties, in pursuance of which plan the property of the railroad company was bid in upon foreclosure for a sum the relation of which to the value of the property does not appear, and the new corporation permitted the stockholders of the old corporation each to purchase one share of its stock for two shares of stock in the old corporation held by them, at \$10 per share of \$100 each, it was held that a creditor of the old company was not entitled to subject the proceeds of the sale of stock to the payment of his debt, the court saying: "How much this common stock was worth, in view of the \$11,000,000 of bonds and stock which was ahead of it, does not appear. The old stockholders were permitted to purchase the common stock at \$10 per share, and for all that appears that was all the stock was worth. If so, then this part of the plan was no more objectionable than any other part of it. The most that can be claimed is that the stockholders of the old corporation were enabled to get shares of stock in the new corporation at less than their real value. Suppose they were, the stock belonged to the new corporation, and not to the old one, and could be sold at whatever price the new corporation saw fit to ask for it. And if it is claimed that the old corporation had in any way any

equitable interest in this stock sold by the new corporation, and that the stockholders in the old corporation had not paid enough for the stock, their remedy would have been to follow the stock into the hands of such stockholders. They would have no right to take from the new corporation what little it did realize from a sale of the stock."

4. Miscellaneous.

An action against a new corporation to enforce its liability for the debts of its predecessor is not an action *ex delicto*. *Stanford Hotel Co. v. M. Schwind Co.* (1919) 180 Cal. 348, 181 Pac. 780.

Execution issued upon a judgment against a corporation cannot be levied upon the property of its successor, where the latter was not a party to the suit and bound by the judgment. *Citizens' Nat. Bank v. McClelland* (1894) 53 Kan. 699, 57 Pac. 132.

A judgment recovered against the old company for a tort of its successor is not enforceable against the new company. *Gray v. National S. S. Co.* (1885) 115 U. S. 116, 29 L. ed. 309, 5 Sup. Ct. Rep. 1166.

In *Stanford Hotel Co. v. M. Schwind Co.* (Cal.) *supra*, where the persons interested in a company operating a number of restaurants formed a new corporation, to which the old company transferred all its property with the exception of a certain lease, and then proceeded to vacate the leased premises, it was held that the new company might be held liable on the lease.

In *MCALISTER v. AMERICAN R. EXP. Co.* (reported herewith) *ante*, 1090, it was held that while an express company taking over the business of another cannot be directly charged with the statutory penalty for the failure of the latter to settle a claim which accrued before it took over the property, its liability, if any, for the debts of its predecessor, will include the penalty.

III. Character of particular transaction.

Different inferences as to the character in law of the various transactions by which the assets of one corporation have become the property of

another have been drawn by the courts in essentially similar cases. To such an extent has this gone that it has been stated in one case (*Collinsville Nat. Bank v. Esau* (1918) — Okla. —, 176 Pac. 514) that whether a particular transaction is in reality a sale of the assets of one corporation to another, a conversion of the assets of one corporation by another, a consolidation or a merger, to a great extent depends on the circumstances of each particular case.

It is accordingly believed that a setting forth of the decisions with reference to the facts involved may prove useful.

Where new charter has been obtained.

In *Broughton v. Pensacola* (1876) 93 U. S. 266, 23 L. ed. 896, it was held that a change in the charter of a municipal corporation, in whole or in part, by an amendment of its provisions, or the substitution of a new charter in place of the old one, embracing substantially the same incorporators and the same territory, will not be deemed, in the absence of express legislative declaration otherwise, to affect the identity of the corporation, or to relieve it from its previous liabilities.

In *Wyman v. Hallowell & A. Bank* (1817) 14 Mass. 58, 7 Am. Dec. 194, it was held that a bank incorporated under the same name as a former one, and having the same persons for president and cashier, could not be held liable upon the notes of the former company, where such debts had not been adopted by any corporate act.

A reincorporated church society which has taken to itself the property of the old society must be considered as having adopted its debts. *Episcopal Charitable Soc. v. Episcopal Church* (1823) 1 Pick. (Mass.) 372.

Where, upon the expiration of the charter of a company by limitation of time, a new company was formed by the stockholders, or a part of them, and all the property and effects of the old corporation were transferred to and received by the new company, the new company must be regarded as a mere continuation of the old one, with all its responsibilities and ob-

ligations. *Cushman v. Shepard* (1848) 4 Barb. (N. Y.) 113.

Where the charter of a corporation is simply a revival and confirmation of the charter of a corporation of another name, the two should be regarded, as to creditors of the corporation by the old name, as substantially the same corporation. *Lea v. American A. & P. Canal Co.* (1867) 3 Abb. Pr. N. S. (N. Y.) 1.

In *Clough v. Rocky Mountain Oil Co.* (1898) 25 Colo. 520, 55 Pac. 809, where persons interested in a corporation which by law could not so amend its articles as to work a change in the object or purpose for which it was originally organized, prepared a certificate of incorporation in all respects the same as was necessary in forming a new corporation, and stating as the objects of the new corporation some which differed essentially from the purpose for which the original corporation was organized, and the old company continued to transact business after the new was organized, and its officers sold to the new company all of the property of the old for a consideration which included an assumption of all the liabilities and indebtedness of the old corporation, it was held that the corporation was a new corporation, and not merely the old one with an amended charter.

See also, in this connection, II. c, ante.

Where the new corporation was formed by the stockholders of the old.

Where it appears that persons interested in a company formed a new company which acquired by purchase the assets and assumed the liabilities, as enumerated in a list prepared for the purpose, the two companies must be regarded as independent entities, although one of the interested parties referred to the transaction as a reorganization. *Little Rock Chamber of Commerce v. Reliable Furniture Co.* (1919) 138 Ark. 403, 211 S. W. 371.

The law does not prohibit persons from being interested in different corporations, even though the stockholders in such corporations are substantially identical; nor does it prohibit

the transfer of property from one of such corporations to the other; but whether the organization of the one and the transfer to it of property by the other is a fraudulent device to evade the claims of creditors is a question of fact. *Atkinson v. Western Development Syndicate* (1915) 170 Cal. 503, 150 Pac. 360.

The mere fact that separately created and existing corporations bear the same name and deal in the same commodities will not suffice, even if the officers and stockholders of each corporation be the same, to create a merger of corporate capacity, identity, and liability. *Koch v. Speedwell Motor Car Co.* (1914) 24 Cal. App. 123, 140 Pac. 598, 600.

The fact that a certain person was the general manager of a corporation, and owned a large quantity of stock therein, and that after another corporation was organized which purchased all or nearly all of the stock and property of the former corporation, he became manager of the new corporation and owned a large quantity of its stock, is not sufficient to hold the new corporation for the debts of the former; and this is especially true where it is shown that the bank check sued on was given more than eight months prior to the organization of the new company, and there is neither an allegation nor proof of fraud in the transfer. *Anderson v. War Eagle Consol. Min. Co.* (1903) 8 Idaho, 789, 72 Pac. 471.

Where property sold on foreclosure has been bid in by the mortgagees for substantially its appraised value, the fact that stockholders in the mortgagor corporation are interested in a corporation formed to purchase the property does not render the new corporation chargeable with a claim against the old company. *Martin v. Sulfrage* (1914) 159 Ky. 363, 167 S. W. 399.

The fact that one person held stock in both companies is not proof that they are the same company, or that either is liable for the debts of the other. *Carter Coal Co. v. Clouse* (1915) 163 Ky. 337, 178 S. W. 794.

The fact that the majority stock-

holder in a company becomes a promoter and participant in the formation of another company organized for the purpose of taking over the business of the old company and of other similar concerns, the stockholders in such new company not being shown to be the same as those in the old company, does not prove that the new company is the successor of the old company, or the same corporation in fact. *Sharples Co. v. Harding Creamery Co.* (1907) 78 Neb. 795, 11 L.R.A. (N.S.) 863, 111 N. W. 783.

Acquisition by purchase.

A purchase of the assets of an old corporation by a new is not an absorption or merger of the old, and in the absence of fraud, either actual or constructive, the new company is not liable for the obligations of the old. *Zimmerman v. Grush Produce Co.* (1911) 156 Mo. App. 588, 137 S. W. 642; *Graham Paper Co. v. Sheridan Pub. Co.* (1913) 172 Mo. App. 495, 158 S. W. 92.

A purchase by definite contract by one corporation of the assets of another, and the assumption of debts specified in the contract, does not constitute a merger or consolidation. *Drovers' & M. Nat. Bank v. First Nat. Bank* (1919) 171 C. C. A. 45, 260 Fed. 9.

A transfer of its property by a street railroad company under the authority of a statute which provides that such a company may sell, lease, or otherwise transfer its property, franchise, and assets to any company authorized to acquire it by purchase, lease, or otherwise, and that all rights of creditors and liabilities for damages, and all liens for encumbrances upon the property or franchise sold or transferred, shall continue unimpaired, and may be enforced against such property or franchise as if such sale or transfer had not been made, is not a merger. *Ft. Wayne & W. Valley Traction Co. v. Kendlesparker* (1910) 46 Ind. App. 299, 92 N. E. 228.

— purchase of part of property.

Where one corporation did not purchase the franchise of the other, but only part of its assets, and the selling corporation continued to do business

in its own name, the transaction between them was one of sale, and not of merger. *Austin Co. v. Smith Co.* (1912) 138 Ga. 651, 75 S. E. 1048, Ann. Cas. 1913E, 1042; *De Shelter v. American Spring Water Supply Co.* (1913) 182 Ill. App. 403.

— where purchase-money notes are exchanged for stock.

Where two of the stockholders of a corporation, owning practically all of its stock, acquired all the capital stock in another corporation, using for the purpose money furnished by their company, and then caused a conveyance of all the property and assets to be made to their company in consideration of notes payable to the vendor company, which finally were exchanged for the stock of such company, and both notes and stock were canceled, whereby a prosperous going concern with assets to meet all its liabilities was converted into one that had no assets, and had ceased to do business, so that neither money nor property was left to satisfy the obligations of the corporation, a court of equity will hold the purchasing corporation liable to the extent of the property and assets received. *Standard Distilling & Distributing Co. v. Springfield Coal Min. & Tile Co.* (1909) 239 Ill. 600, 88 N. E. 236.

— character of transaction as purchase of stock or assets.

A consolidation effected by an exchange of stock in the constituent companies for that of the consolidated company is not a sale of the property of the constituent companies. *Compton v. Wabash, St. L. & P. R. Co.* (1888) 45 Ohio St. 592, 16 N. E. 110, 18 N. E. 380.

In *Kentucky Distilleries & Warehouse Co. v. Webb* (1918) 181 Ky. 90, 203 S. W. 870, where one corporation paid another the sum of \$85,000, with the understanding that it should be immediately distributed among the stockholders, who were to turn over their stock to a trustee for the benefit of the former company, and the directors subsequently elected caused a deed to be executed conveying to the former company all the property and assets of the latter company, it was

held that although the question in the case was a close one, on account of the divergent conclusions that might be drawn from the admitted facts, the transaction must be regarded as a purchase of the stock rather than of the assets of the vendor company, and consequently that the purchaser was liable for its debts. The court said: "It is true that the \$85,000 was paid to the Commonwealth Company as a corporation, but it was paid with the distinct agreement that it should be immediately distributed among the stockholders, and it was so immediately distributed. This being so, we fail to see that it makes any difference that the money was paid directly to the corporation in place of being paid directly to the stockholders, as the substantial effect of the transaction was exactly the same as if the \$85,000 had been distributed by the Kentucky Company among the stockholders of the Commonwealth Company, in place of being paid to the Commonwealth Company for immediate distribution by it of the sum paid to its stockholders."

— acquisition of stock followed by transfer of assets.

Where persons interested in a corporation form a new one, stock in which is issued to the holders of the capital stock of the old corporation, and the property of the old corporation is transferred without consideration to the new corporation, such conveyance is a fraud upon the creditors of the old corporation. *San Francisco & N. P. R. Co. v. Bee* (1874) 48 Cal. 398.

Where a railroad company acquires all the capital stock of another, and thereafter causes the property of such other to be conveyed to it for a nominal consideration, subject to the bonded or other indebtedness of the vendor company, the transaction is equivalent to an absorption of one corporation by the other. *Louisville & N. R. Co. v. Biddell* (1902) 112 Ky. 494, 66 S. W. 34.

In *Camden Interstate R. Co. v. Lee* (1905) 27 Ky. L. Rep. 75, 84 S. W. 382, where the owner of a controlling interest in the company which owned the

majority of the stock of a street railway company acquired a part of the remainder of such stock by purchase, and agreed with other stockholders to exchange their stock for stock in a new corporation, and caused the street railway company to deed all its property and franchises to the new company, it was held that, looking not merely at the form of the transaction, but at the substance of it, it was not a purchase of the stock of the old company, but an absorption of the old company into the new, rendering the new company answerable for all liabilities of the old company which it absorbed.

In *Shadford v. Detroit, Y. & A. A. R. Co.* (1902) 130 Mich. 300, 89 N. W. 960, where a corporation acquired the stock and bonds of another in exchange for its own stock and bonds, and thereafter procured a transfer of the property of such other corporation to it, it was held that the transaction constituted a consolidation rather than a sale.

Where the stockholders of an unprosperous corporation transferred all of their stock to one of their number for the purpose of winding up the business, and he turned over such stock to the mortgagee of the plant of the corporation, and the mortgagee turned it over to a new corporation, in which the principal stockholder of the old corporation was also the principal stockholder, taking a new mortgage from the new corporation, and the old corporation executed a bill of sale of its property to the new corporation, the circumstances attending the creation of the new company and its succession to the business of the old company warrant a finding that the new corporation was a mere continuance of the old one, and liable for its debts. *Douglas Printing Co. v. Over* (1903) 69 Neb. 320, 95 N. W. 656.

In *Wilson v. Æolian Co.* (1901) 64 App. Div. 337, 72 N. Y. Supp. 150, affirmed without opinion in (1902) 170 N. Y. 618, 63 N. E. 1123, in which it appeared that, with a view to the consolidation of two existing corporations, a new corporation was formed, the stock in which was issued share

for share to the stockholders of one of the original corporations, while the other took a certain amount of stock and a sum of money realized from the sale of stock to outside parties, and all the property was conveyed to the new corporation, it was held that the latter could not be considered as a bona fide purchaser, as against a creditor of one of the constituent companies, of whose claim its executive officers were aware at the time of the transfer, although it may not have been known to some of the individual stockholders.

In *Collinsville Nat. Bank v. Esau* (1918) — Okla. —, 176 Pac. 514, it is held that where the officers of an existing corporation organize a new corporation, and stock in the new corporation is exchanged for stock in the old without the payment of any other consideration therefor, and the officers of the old become the officers of the new corporation, which continues to transact business at the same place as the old, and the new acquires all the property and assets of the old corporation, such transaction does not amount to a sale, but is a merger of the two corporations.

In *Chattanooga, R. & C. R. Co. v. Evans* (1895) 14 C. C. A. 116, 31 U. S. App. 432, 66 Fed. 809, where the entire property and franchises of a railroad company were sold to another company in consideration of the exchange of the bonds and stock of the selling corporation for bonds of the purchasing company, guaranteed by a banking corporation, such stock and bonds not to be extinguished, but to become the property of the banking corporation, in consideration of the guaranty, it was held that such sale was fraudulent as to unsecured creditors.

— conveyance in satisfaction of debt.

In *Higgins v. California Petroleum & Asphalt Co.* (1898) 122 Cal. 373, 55 Pac. 155, where a mining company operating under a joint lease from the owners of adjoining lands obtained from one of them a conveyance of his separate part of the demised premises, the effect of which was held by the court merely to diminish the amount of royalty pro tanto, and not to affect

the right of the co-lessor to receive royalty on mineral removed from the land conveyed, and after such decision conveyed such property and all of its business and assets, with the exception of the lease, to a new company, and all of the stock issued by the new company was issued to one who was practically the sole stockholder of the old company, the sole consideration being a debt which the old company owed him, it was held that a finding that the new company was only the old one under another name, and therefore liable for the royalty, was warranted, although there was no actual fraud in the transaction.

See also, to the same effect, *Higgins v. California Petroleum & Asphalt Co.* (1905) 147 Cal. 363, 82 Pac. 1070, a subsequent action for royalty against a third corporation organized by the officers and stockholders of the second corporation, in which it was held to be immaterial that, when such third corporation was formed, the intention of the incorporators was to take in other persons as stockholders.

A transfer by a timber company of its timber land to a creditor in satisfaction of the mortgage held by him thereon is shown to have been in good faith and for full value, where it appears that the debtor company had unsuccessfully attempted to sell such lands for more than the amount of the mortgage, and that the stockholders got nothing whatever out of the sale, and lost their stock entirely, although it also appeared that the same person was president of both the debtor and the creditor companies. *Justice v. Catlettsburg Timber Co.* (1916) 168 Ky. 665, 182 S. W. 831.

In *Douglas Printing Co. v. Over* (1903) 69 Neb. 320, 95 N. W. 656, it appeared that two of the three holders of an unprosperous corporation turned over their stock to the third, with the understanding that he was to wind up the business and liquidate the obligations of the company; that he paid some of the debts and turned over the property of the company to a mortgagee; that thereupon he became associated with two other individuals in a new company to which the

mortgagee turned over the property, taking back a new mortgage for the amount owing to it by the old company, and that the old company thereafter executed a bill of sale to the new company, claimed to have been for the purpose of clearing the title. It was held that the circumstances attending the creation of the new company and its succession to the business and property of the old one were of such a character as to warrant the finding that the new concern was a mere continuance of the old one.

— transfer for consideration consisting in whole or in part of the assumption of liabilities.

A new corporation formed by creditors of the old corporation under a plan by which the creditors are given an option to receive for their debts either stock in the new corporation, at 100 cents on the dollar, or cash at 50 cents on the dollar, to which the assets of the old corporation are transferred in consideration of the satisfaction of its debts, is a new and totally independent corporation, which is not liable for the debts of the old company except so far as it has expressly agreed to pay them. *Wheeler v. Acme Harvesting Mach. Co.* (1912) 175 Ill. App. 69.

In *Warfield, H. & Co. v. Marshall County Canning Co.* (1887) 72 Iowa, 666, 2 Am. St. Rep. 263, 34 N. W. 467, where an insolvent corporation had mortgaged a part of its property to secure some of its creditors, who were directors and shareholders, and these persons, with others, organized a corporation to which the debtor corporation transferred the mortgaged property in consideration of the payment of the mortgage by the second corporation, and it appeared that this was all the property was worth, and that there was no actual fraudulent intent, it was held that the new corporation was not liable for other debts of the mortgagor, the court saying: "While it is true that the stockholders in the Marshall Company [the mortgagor] are shareholders in the Gilman Company, they did not become so because of their being shareholders in the former; but they paid money for the

stock in the latter company. It is true there seems to have been an understanding or expectation that they might have stock in the Gilman Company for a portion or all of their stock in the Marshall Company, depending upon the settlement of the business of the latter; that if there was anything left after payment of the debts of the latter, belonging to shareholders, which came into possession of the Gilman Company, such shareholders should have stock pro rata for the value of the stock in the latter company. We do not understand that there is any such property; therefore, the Gilman Company obtained no property from the Marshall Company except what it paid full value for. We cannot see, therefore, upon what principle it can be held that the Gilman Company should pay the debts of the Marshall Company. It may be conceded that if it appeared that the mortgagees received stock in the Gilman Company in consideration for property conveyed to it which was in excess of the indebtedness assumed, the plaintiff would be entitled to relief to the extent or value of such excess."

Where, under a contract between two insurance companies, one of them, in consideration of the transfer to it of all the assets, rights, and privileges of the other, expressly assumes all the liabilities of the latter organization upon its outstanding beneficiary certificates, but none other, there is a substantial merger under such circumstances as to charge the going corporation to a certain extent with the liabilities of that which it, in a way, replaces. *Jackson v. Knights & Ladies of the Orient* (1917) 101 Kan. 383, 167 Pac. 1046.

Where one corporation acquires the property and franchises of another for a consideration consisting of money, bonds, and the assumption of certain liens and current indebtedness, the transaction is not a consolidation but a purchase, and the purchaser takes the property free from the claims of creditors not assumed by it. *Chesapeake, O. & S. W. R. Co. v. Griest* (1887) 85 Ky. 619, 4 S. W. 323.

In *Evans v. Unity Invest. Co.* (1917)

— Mo. App. —, 196 S. W. 49, where a corporation organized by a stockholder in a corporation which was in an insolvent and embarrassed condition, for the purpose of taking over the business, agreed, in consideration of a transfer of the assets of the old corporation, to pay off certain of its debts at 35 cents on the dollar, which the holders thereof had agreed to accept, and the indebtedness thus assumed exceeded the value of the assets, it was held that the transfer was not to be treated as a mere merger of the old corporation into the new, or as a mere transformation in name, but at a legitimate sale of the assets.

In *Burkholder v. Okmulgee Coal Co.* (1921) — Okla. —, 196 Pac. 679, it appeared that an individual purchased all the shares of stock of a corporation except two shares, agreeing with the stockholders, in consideration of such transfer, to assume the bonded indebtedness, and to pay or cause to be paid certain unsecured indebtedness, and to operate the mine theretofore operated by the company, in accordance, with the terms of the mining lease. The stockholders represented that there was no other outstanding indebtedness against the corporation. Twenty-six days thereafter, such individual and other parties incorporated a company, to which the old company transferred the mining lease for a consideration of \$1, subject, however to the original lease and the bonded indebtedness, and subject to the contract made between the stockholders and such individual. At the time of such transfer the individual had paid all the unsecured debts of the corporation enumerated in the contract. The value of the mining lease and all the assets of the corporation was not more than the amount of the indebtedness assumed. It was accordingly held that the new company was a purchaser for value, and that, as none of its incorporators or stockholders at the time of purchasing the property had any knowledge or intimation of the claim of the plaintiff, it was an innocent purchaser for value; and accordingly that the property could not be subjected to the plaintiff's claim.

In *Williams v. Commercial Nat. Bank* (1907) 49 Or. 492, 11 L.R.A. (N.S.) 857, 90 Pac. 1012, 91 Pac. 443, it appeared that a bank, being in financial straits, sought another to come to its aid by purchasing part of its stock and thus lending its name to give the bank standing; that accordingly such other purchased shares of stock, the certificates for which were taken in the names of its officers and stockholders; that thereafter the capital stock of the bank, at the request of the new stockholders, was increased, and the stock for the whole amount of such increase was issued in the names of officers and stockholders of the second corporation; that the management of the bank thereafter procured an assessment to be made upon the capital stock, in default of payment of which the stock of plaintiff was sold to pay such assessment; that soon thereafter the stockholders of the bank passed a resolution to liquidate the bank, which was accomplished by the second bank taking over the principal part of the assets and business and continuing the bank business at the same place, assuming to pay all of the old bank's depositors, and thereafter purchasing from the old bank its remaining assets for a stated consideration; but that in such purchase no money changed hands, the transaction being strictly a matter of entries in the books of the two concerns. The sum so paid was claimed to have been distributed to the stockholders of the old bank as dividends. It was held that the successor was not an innocent purchaser, but took the property of the old bank charged with full notice of the liability of the assets of such bank for its debts.

In *Island City Sav. Bank v. Sachtleben* (1887) 67 Tex. 420, 3 S. W. 733, where a bank, having become insolvent, compromised with its debtors save one, at 74 per cent, and transferred all of its assets of every character, including its name and franchise, to an association which agreed to carry out the compromise, and the new association thereafter carried on a banking business in the same office theretofore occupied by the old organ-

ization, and claimed the franchise of the old association, and continued to use its seal, it was held that there was a mere change of membership and a continuation of the original corporation, and consequently that obligations existing against it before the original organization continued to exist against it when reorganized.

— transfer of assets for consideration consisting in whole or in part of stock in transferee company.

In the *Key City* (1872) 14 Wall. (U. S.) 653, 20 L. ed. 896, where a new corporation was formed exclusively by persons interested in two corporations operating steamboats, and the property of the old companies was transferred to the new company by appropriate instruments, and provision was made for the debts of one of the old companies by an agreement that no dividends should be paid on the stock issued for its property until its indebtedness should be paid out of the proportion of the net profits which the stockholders of that company would otherwise be entitled to, it was held that the facts showed that there was no sale of the property of one of these original corporations to the other, and therefore that the new corporation was not entitled to the benefit of the rule that where a maritime lien is to be enforced to the detriment of a bona fide purchaser for value, without notice of the lien, the defense of laches in enforcing the lien will be held good under a shorter time than when the claimant is the owner at the time the lien accrues.

In *Wesco Supply Co. v. Eldorado Light & Water Co.* (1913) 107 Ark. 424, 155 S. W. 518, it was held that a corporation which took over all the property (except a small amount of book accounts) of another corporation, then in financial difficulties and unable to meet its obligations, the same person being the president, business manager, and owner of all the stock of the selling corporation at the time of the transfer, and president, business manager, and owner of four fifths of the stocks of the purchasing corporation, which issued its stock in payment, not to the old company nor

to a trustee for the benefit of its creditors, but directly to the stockholder owning all the stock,—was not, under the circumstances, an innocent purchaser, and that it was therefore bound to the payment of creditors of the old concern to the extent of the value of the assets received therefrom without regard to whether there was any agreement to assume its obligations.

In *Schaafe v. Eagle Automatic Can Co.* (1902) 135 Cal. 472, 63 Pac. 1025, where a corporation transferred its entire assets in consideration of the issue to its stockholders of stock in the purchasing company, it was held that the purchasing company took the property charged with the liability to creditors of the transferor.

In *Capital Traction Co. v. Offutt* (1900) 17 App. D. C. 292, 53 L.R.A. 390, it was held that the purchase of the assets and franchises of one street railway company for a consideration consisting of stock of the purchasing company, a portion of which was to be exchanged for stock held by the stockholders of the selling company, and the balance devoted to the redemption and cancellation of the bonds of the selling company, was not equivalent to a consolidation, so as to charge the purchaser with the liabilities of the seller. This conclusion, however, seems to have been largely influenced by the fact that the statutory authority given was not for a consolidation of the two companies, but merely for the purchase, and provision of means therefor by an increase of capital stock equal to the consideration to be given.

In *Seymour v. Boise R. Co.* (1913) 24 Idaho, 7, 134 Pac. 427, where the new corporation had a board of directors who composed the majority of the board of directors of the old corporation, and more than 98 per cent of the subscribed stock of the new corporation was held by the same stockholders who held the stock of the old corporation, and the consideration for the transfer of the property of the old corporation to the new corporation consisted of an issue of stock, and the proceeds of certain

bonds of the new corporation, which passed, not to the old company, but to its stockholders, it was held that the new company was, both in law and in fact, only a reorganization of the old company.

A consolidation, and not a mere purchase by one corporation of the property of another, is effected where the consideration for the transfer of the property of one corporation to the other is the assumption and payment of its bonded indebtedness and the issuance by the purchaser of its stock to the stockholders of the seller, in exchange for their stock in the latter company. *Chicago, S. F. & C. R. Co. v. Ashling* (1895) 160 Ill. 373, 43 N. E. 373.

A consolidation, and not a purchase, is effected by the transfer of the franchise and all the property of one corporation to another under an arrangement by which the stockholders of the former company exchanged their stock, for stock in the latter company. *Chicago & J. Electric R. Co. v. Ferguson* (1903) 106 Ill. App. 356; *Swing v. American Glucose Co.* (1905) 123 Ill. App. 156.

A corporation which purchases the entire assets of another corporation, and issues therefor its own stock to the president of the latter individually, thereby enabling him to use it for his private ends, is not a bona fide purchaser, so as to be able to protect the assets from the claims of creditors of the selling corporation which were in suit when the transfer was made. *Luedecke v. Des Moines Cabinet Co.* (1908) 140 Iowa, 223, 32 L.R.A.(N.S.) 616, 118 N. W. 456.

Where one corporation transfers all its assets to another, receiving in return stock in such other corporation which succeeds to its business, the transaction is essentially a merger. *Altoona v. Richardson Gas & Oil Co.* (1910) 81 Kan. 717, 26 L.R.A.(N.S.) 651, 106 Pac. 1025.

Where the assets of a corporation are transferred to another without consideration, the purchasing company issuing stock, whenever it was practicable, to the stockholders of the selling company, in lieu of their orig-

inal stock, and in some instances purchasing the stock of holders who would not agree to the exchange, the transaction is a merger. *Harbison-Walker Refractories Co. v. McFarland* (1913) 156 Ky. 44, 160 S. W. 798.

A purchase by one corporation of the property of another for the purpose of taking over its business, in consideration of an issuance of stock, is not a merger or consolidation of the two companies. *American R. Exp. Co. v. Com.* (1920) 190 Ky. 636, 228 S. W. 433.

In *American R. Exp. Co. v. Com.* (Ky.) supra, it was held that the purchasing corporation, paying the full purchase price to the selling corporation by the issuance of its stock to it, is responsible in law to the extent of the value of the property received for the debts or liabilities, whether liquidated or unliquidated, or sounding in contract or tort, that were outstanding against the selling corporation at the time of the sale, when the effect of the sale is to leave the selling corporation without any property in the state in which the liability accrued to satisfy it, although, except for the sale, it would have had ample property in the state that could have been subjected to the payment of the liability, and may have property in some other state that could be subjected thereto, on the ground, that such a sale is constructively fraudulent as to creditors in the state.

In *Forbes v. Thorpe* (1911) 209 Mass. 570, 95 N. E. 955, it is said that it would be plainly in fraud of creditors for a debtor to convey all his property to a corporation, taking in pay therefor certificates of stock, which are pledged to a specified creditor, without making any provision for the payment of general indebtedness.

In *Howell v. Lansing & Suburban Traction Co.* (1906) 146 Mich. 450, 109 N. W. 846, it was held that where a new corporation was organized for the purpose of taking over certain other corporations, and substantially simultaneously with the acquisition of the property of one of them, it entered into an agreement with the other, whereby the latter conveyed all its

property of every description to the new corporation upon the sole consideration that the new corporation should issue to stockholders in the selling corporation a certain amount of the capital stock of the new corporation, and should assume and pay the debts, there was a practical consolidation.

In *Swing v. Empire Lumber Co.* (1908) 105 Minn. 356, 117 N. W. 467, it was held that allegations that a Minnesota corporation had acquired the property and assets of a Wisconsin corporation, and paid for the same by the issuance of its stock to persons who had been stockholders in the Wisconsin corporation, that the stockholders of said Minnesota corporation were practically the same as the stockholders of the Wisconsin corporation, that the Wisconsin corporation had divested itself of all its property, assets, and rights, which were so acquired by the Minnesota corporation, and ceased to transact business, and that the Minnesota corporation has continued the business which the Wisconsin corporation had formerly carried on, failed to state a consolidation or merger of the two companies.

In *Meridian Light & R. Co. v. Catar* (1912) 103 Miss. 616, 60 So. 657, in which it appeared that the stockholders in an unprofitable street railway company agreed with certain promoters that they would transfer the property to a corporation to be organized in consideration of receiving stock in and bonds of the new company, which was accordingly done, it was held that the new company was not a purchaser in good faith and for value, but that it was virtually a reincarnation of the old company, and therefore liable for a claim against it.

Where a corporation authorized by statute to transfer and assign by a vote of a majority in interest of the stockholders to the amount of the another railway company, upon which transfer and acceptance the company is "to cease to have a corporate existence, and its franchises are to become completely vested in the other railway company," so transferred its property

in consideration of a covenant to pay a stated sum for the liquidation of the debts of the company to that amount, and to issue certificates of stock to its stockholders to the amount of the actual paid-up stock held by each one upon a surrender of the old certificates for cancelation, the transaction was not a consolidation or a sale, but a merger. *Powell v. North Missouri R. Co.* (1867) 42 Mo. 63.

In *Berthold v. Holladay-Klotz Land & Lumber Co.* (1901) 91 Mo. App. 233, where the sole owner of a corporation made an arrangement with other persons for the organization of a new corporation with an enlarged capital to take over the property and business, pursuant to which substantially all the assets of such corporation, as well as some individual assets of the owner, were transferred to a trustee for the benefit of all parties in interest until the new corporation should be born, and the trustee transferred such property to the newly organized corporation in payment for its stock, and the old corporation thereupon quit business, it was held that the transaction was an absorption of the old corporation by the new one, notwithstanding the old one may have nominally continued in existence for the purpose of collecting debts owing to it.

In *Sweeney v. Heap O'Brien Min. Co.* (1916) 194 Mo. App. 140, 186 S. W. 739, a corporation formed by some sixteen of the fifty-three stockholders of an insolvent mining company—both companies being dominated by the same individuals—for the purpose of mining in another locality, and for that purpose taking over the mining plant and machinery of the old company, which was subject to a mortgage to several of its stockholders for more than its value, to secure loans made by them, the new corporation agreeing with the old to purchase the mining plant for a consideration consisting of stock to be issued to and held by a trustee for the benefit of (1) the secured creditors, who agreed to relinquish their security, (2) the plaintiff, who was the principal un-

secured creditor, and (3) for the benefit of the stockholders of the old company generally, was held to be liable to the creditors of the old company to the extent of the value of the property received, although such property would not, on account of the mortgage, have been available to them in the hands of the selling company, and although the good faith of the transactions above detailed was not questioned. This decision seems erroneous. Although the secured creditors may have lost their legal rights by agreeing to relinquish their security in consideration of the issue of stock in the new corporation, surely their equity was superior to that of a simple contract creditor.

Where an insolvent corporation transferred its assets to another corporation without consideration other than the issuance of stock to its stockholders, the transfer is one in fraud of creditors, and the corporation receiving such assets may be held accountable in equity to the creditors of the old corporation to the extent of the property received. *Sharples Co. v. Harding Creamery Co.* (1907) 78 Neb. 795, 11 L.R.A. (N.S.) 863, 111 N. W. 783.

In *Couse v. Columbia Powder Mfg. Co.* (1895) — N. J. Eq. —, 33 Atl. 297, it was held that a corporation to which another had transferred its entire property, the only consideration paid being the issuance of stock to trustees, to be exchanged for the stock of the selling corporation, was not a purchaser in good faith so far as the creditors of the selling corporation was concerned, but must, as to them, be considered a fraudulent grantee, although the purchasing company also agreed, as part of the consideration, to save the selling company harmless from all indebtedness of every kind.

A corporation which acquires practically all the property and assets of another upon a consideration consisting wholly of an issue of stock to an individual stockholder in the vendor corporation, who does not undertake to pay the corporate debts, is not a purchaser for value. *Hurd v. New*

York & Commercial Steam Laundry Co. (1901) 167 N. Y. 89, 60 N. E. 327.

Where a company transfers all its property, rights and franchises, to a new company incorporated and organized by the same stockholders and directors, the shareholders of the old company receiving two shares of stock in the new in lieu of every one previously held in the old, the effect of such merger is to create a novation so far as the creditors of the old company are concerned, and to substitute the new one as a debtor for it. *Friedenwald Co. v. Asheville Tobacco Works* (1895) 117 N. C. 544, 23 S. E. 490.

In *McIver v. Young Hardware Co.* (1907) 144 N. C. 478, 119 Am. St. Rep. 970, 57 S. E. 169, where a corporation sold its entire stock of goods to another corporation, taking in payment therefor capital stock of the purchaser, a portion of which was divided among the stockholders of the vendor, the rest being retained by the purchaser until the debts of the vendor should be paid, it was held that the vendee was not a bona fide purchaser, and therefore liable to account for the property received in so far as it was necessary to pay the vendor's debts.

In *MCALISTER v. AMERICAN R. EXP. Co.* (reported herewith) ante, 1090, it was held that the transfer by the various express companies doing business in the United States to the American R. Express Company of their property used in the business of transportation, in consideration of the issuance to them of stock equivalent in value thereto, was not a merger or consolidation, there being no surrender of their franchises or separate corporate existences as going concerns by such companies, but simply a sale of property, carrying with it no liability for the debts of the sellers.

Where the property of a corporation is transferred by its members to another for an equal interest in it as property of a new corporation, the transaction does not constitute a sale by the one and a purchase by the other, but is simply a change in the manner and form of carrying on the same business by the same persons.

Andres v. Morgan (1900) 62 Ohio St. 236, 78 Am. St. Rep. 712, 56 N. E. 875.

A corporation formed for the purpose of purchasing and taking over all the property and business of another corporation, the incorporators and initial subscribers to the capital stock of which were, with the exception of the nominal owner of one share, the same persons who held the stock of the old company, though in different amounts, and which acquired the property in consideration of the assumption of indebtedness, the payment of cash, and the issuance of stock to the stockholders of the old company in an amount substantially equal to the value of the assets acquired, is a mere continuation of the old company, and, as such, liable for its debts. *Auglaize Box Board Co. v. Hinton* (1919) 100 Ohio St. 505, 126 N. E. 881.

In *Bruce-MacBeth Engine Co. v. J. P. Eustis Mfg. Co.* (1917) 8 Ohio App. 341, it appeared that a contract had been entered into between two corporations "for the purpose, among other things, of combining the business and property of said two companies," which provided that all the property, assets, and effects of both companies should be appraised and the value fixed, that one should transfer to the other all its assets of every kind, and list all of its debts and liabilities, which were to be paid by the other company, the directors of the one guaranteeing that the liability of such company would not exceed the sums so listed, and that they would hold harmless the other company from any liabilities in addition to those listed. The agreement further provided that one company should be dissolved, that the other should change its name, and, if necessary, increase its capital stock, that both companies would list their assets and liabilities and would issue stock to the stockholders of the one to be dissolved, pro rata, to represent the net assets of such company. It was held that the transaction could not be considered as a sale of the assets of one corporation to the other, carrying no obligations except those fairly expressed in

the contract, for the reason that no consideration whatever was given by one company to the other, but that it amounted virtually to a merger.

In *Montgomery Web Co. v. Dienelt* (1890) 133 Pa. 585, 19 Am. St. Rep. 663, 19 Atl. 428, where practically all of the assets of the old corporation were transferred to the new, which, in consideration therefor, issued its stock to the stockholders of the old company, and paid the claims of all its creditors, with the exception of the plaintiff, partly in cash and partly in its stock, it was held that the old stockholders were not purchasers for value at all, and the new stockholders were not innocent, for they knew or were bound to take notice of the taint in their coadventures' title; that, as to the stockholders in the old company, this was a transfer of property by a debtor, with the retention of an interest in himself, within the settled rules of law that make such transfers void as against creditors; and that the creditors of the old company who became new stockholders in the new company took with such notice as prevented them from claiming as innocent holders for value against execution creditors of the old corporation.

Where one corporation acquires all the property of another in consideration of its assumption of such other's indebtedness and the issuance of its stock to the stockholders of the vendor, it holds the property acquired in trust for the creditors of the vendor, and is accordingly liable to suit. *Landes Bros. v. Eastern Export & Mill. Co.* (1903) 12 Pa. Dist. R. 625, 27 Pa. Co. Ct. 630, 19 *Montgomery Co. L. Rep.* 54.

Where one corporation acquires practically the entire assets of another in exchange for its stocks and bonds, the selling company retaining no property and going out of business, there is not, strictly speaking, a legal merger, because the selling company retains its legal entity although it is entirely dismantled of its assets. *Jennings, N. & Co. v. Crystal Ice Co.* (1913) 128 Tenn. 231, 47 L.R.A.(N.S.) 1058, 159 S. W. 1088.

In *Abilene Cotton Oil Co. v. Ander-*

son (1906) 41 Tex. Civ. App. 342, 91 S. W. 607, it is held that where a corporation acquires practically all of the assets of another, paying the stockholders therefor with its own stock and bonds, the purchasing corporation having much other property and a different set of stockholders, there is no such identity of the two companies as will justify the rendering of a personal judgment against the purchasing corporation in an action for negligence of the other corporation.

Where a company, in consideration of the transfer to it of the property and assets of another, issues its stock directly to the stockholders of such other company, the transaction is a fraud, in law, upon the creditors of the vendor. *Cooper v. Utah Light & R. Co.* (1909) 35 Utah, 570, 136 Am. St. Rep. 1075, 102 Pac. 202.

In *Hoggan v. Price River Irrig. Co.* (1919) 55 Utah, 170, 134 Pac. 536, the creditors of the first corporation were held entitled to enforce their claims against the property transferred to another corporation in consideration of its stock, although such stock, with the exception of one share in the name of each of the incorporators, was placed in the hands of a trustee for the benefit of the first corporation.

In *Jones v. Francis* (1912) 70 Wash. 676, 126 Pac. 307, it is held that where a corporation which takes over the assets of another without any consideration other than to issue its capital stock to the stockholders of the latter in the ratio of their former holdings, the transaction is not a sale, but an absorption of the assets of the old corporation.

Pledge of assets to corporation agreeing to discharge liabilities.

In *Overstreet v. Citizens' Bank* (1903) 12 Okla. 383, 72 Pac. 379, it appeared that two banking corporations, the Farmers & Merchants' Bank and the Citizens' Bank, finding that there was not sufficient business to support both, held a conference at which it was agreed that the Farmers & Merchants' Bank would retire from business if arrangements could be made to pay its depositors, and for

that purpose it deposited in the Citizens' Bank a sum of money in cash, and executed its note to such bank for a sufficient additional amount to cover such deposit, putting up its notes and securities as collateral therefor. The deposits in the Farmers & Merchants' Bank were then transferred to the books of the Citizens' Bank, and paid by it from the deposit held by it to the credit of the Farmers & Merchants' Bank. After making the transfer of deposits and executing the note before mentioned, the Farmers & Merchants' Bank quit business, without, however, surrendering its charter. About the same time the cashier of the Farmers & Merchants' Bank, and two or three stockholders therein, purchased stock from individual stockholders in the Citizens' Bank, and such cashier then became assistant cashier of the Citizens' Bank. Some time after the first transaction, the directors of the Citizens' Bank became dissatisfied with the amount being realized from the collaterals, and demanded of the officers of the Farmers & Merchants' Bank additional security, in response to which demand the furniture and fixtures of the Farmer & Merchants' Bank were turned over to the Citizens' Bank at an agreed price, and the amount credited on the note. It was held that these transactions did not amount to a consolidation or merger of the two banking companies so as to render the Citizens' Bank liable in equity for the assets of the Farmers & Merchants' Bank turned over to it at the suit of one who has recovered a judgment against said bank after its suspension upon other demands, but that the right of such creditor, at most, was merely to have the excess from the collaterals in the hands of the Citizens' Bank applied upon the judgment.

Lease of corporate property.

In *Chicago, M. & St. P. R. Co. v. Third Nat. Bank* (1890) 134 U. S. 276, 33 L. ed. 900, 10 Sup. Ct. Rep. 550, where a railroad company whose property had been sold on foreclosure leased its road to another company for a term of 999 years, and joined

with such other company in the institution of a deed of trust upon the property to secure the payment of bonds the proceeds of which were in part used in redeeming from the foreclosure sale and in completing the leased road, and in part were appropriated to the improvement of the property of the lessor, it was held that there had been a misappropriation of the funds of the lessor corporation for which the lessee was answerable in equity to the creditors of the lessor.

A lease by one railroad to another of all its property for a term of ninety-nine years was held in *Black v. St. Louis & S. F. R. Co.* (1905) 110 Mo. App. 198, 85 S. W. 96, to be practically and in law a consolidation and merger of the two companies, its effect being to subject the two roads so consolidated to the liabilities of each.

In *Santa Fe Electric Co. v. Hitchcock* (1897) 9 N. M. 156, 50 Pac. 332, where persons interested in a corporation organized to develop electricity by water power acquired a majority of the stock of a corporation manufacturing electricity by the use of coal, and being unsuccessful in inducing a mortgagee of the property of the latter corporation to accept stock in the new concern for his obligation, procured a lease from the old company of all its poles, wires, fixtures, and apparatus, thus leaving the old company, although possessing the power house and machinery, without business, it was held that the leasing of an essential portion of the company's property operated as a fraud upon the mortgagee, rendering the lessee liable for a deficiency arising upon foreclosure of a mortgage upon the property of the old company.

A lease by a railroad company of its road to another company cannot be treated as a consolidation of the two companies, as technically understood, though practically it may accomplish, and was intended to accomplish, in some respects, the same purposes and results. But if it was so intended, and such form of conveyance was resorted to for the reason that, under the laws of a state, a consolidation

was unauthorized, then, as to creditors and all persons not parties and privies to the lease, it should be treated and considered, as to its legal consequences and effects, as a consolidation of the two companies. *Missouri P. R. Co. v. Owens* (1888) 1 Tex. App. Civ. Cas. (White & W.) 163.

Obtaining surrender of lease.

In *Barrie v. United R. Co.* (1909) 138 Mo. App. 557, 119 S. W. 1020, where a company owning a street railway system procured a company operating it to surrender its lease for an inadequate consideration, and both corporations were controlled by the same person, it was held that the lessor company might be held liable in equity for the debts of the lessee. The court said that the history of the two companies demonstrated that their plans all looked to one and the same purpose,—the successful financing of the same enterprise and the development of the same property; that when that end could best be attained in and under the name of the operating company, the control of the lines went under the name of that company into that company in the form of a lease. When financial clouds gathered, the lease was abrogated and the owning company took back its property and operated it in its own name, that through it all, the identical persons, the one mind, concentrated in the same board of directors, operating through those bodies made up of the same men, were in charge and absolute control. "The plan adopted and worked out involved a mere surrender of possession, as was thought; a vacation by the tenant, a taking over of possession by the landlord, as was testified to, and this, it undoubtedly was thought by all the parties to the transaction, would avoid all liabilities other than those then fixed on the property established as liens from which there was no escape, and thereby through off all unadjudicated and all unsecured claims which, beyond all doubt, guided by the evidence in the case, we cannot but believe was prominently in the minds of all. The transaction was practically in law and in fact just what the plaintiff has

charged it to be,—an absorption by the one corporation of all the effects of the other."

Acquiring title through foreclosure.

In *Northern P. R. Co. v. Boyd* (1913) 228 U. S. 482, 57 L. ed. 931, 33 Sup. Ct. Rep. 554, it was held that the reservation by the old stockholders in an agreement for the reorganization of an insolvent railroad company, of a stock interest in the new company, which was to and did purchase the railway property at a foreclosure sale made pursuant to the agreement and under a consent decree, although free from fraud, leaves the property still subject to the claims of nonassenting unsecured creditors of the original company, who were not parties to the foreclosure, nor made such by notifying creditors by publication to prove their claims.

Unsecured creditors of a corporation whose property, though worth enough above the mortgage to pay their claims, was sold on foreclosure for the amount of the mortgage to a new corporation formed under a reorganization scheme by which the new company was to issue its stock and bonds in exchange for stock and bonds in the old company,—are entitled to charge the new corporation with their debts. *Kansas City S. R. Co. v. Guardian Trust Co.* (1916) 240 U. S. 166, 60 L. ed. 579, 36 Sup. Ct. Rep. 334.

And where a new corporation was formed in pursuance of a reorganization plan adopted by the stockholders and secured creditors of the original corporation, under which all of the property of the old corporation was sold by foreclosure and otherwise, and transferred to the new corporation, and, notwithstanding all the sales of property and other transactions in liquidation, the stockholders of the old corporation retained their interests and rights, and by virtue thereof either became stockholders of the new corporation or were otherwise provided for, a creditor of the old corporation may look to the new company for the payment of his claim. *Central of Georgia R. Co. v. Paul* (1899) 35 C. C. A. 639, 93 Fed. 878.

In *Blue Ridge Electric Co. v. American Bank Note Co.* (1916) 150 C. C. A. 509, 237 Fed. 755, reversing (1916) 230 Fed. 911, it was held that where a corporation was formed for the purpose of acquiring title to the property of another corporation through a mortgage foreclosure, paying for it in bonds of the mortgagor which it acquired in exchange for bonds of a third company, to which it agreed to convey the property, there was no such consolidation or merger as made the corporation purchasing at the foreclosure sale the alter ego of the corporation whose property it purchased.

In *Jones v. Arkansas Mechanical & Agri. Co.* (1881) 38 Ark. 17, the real property of an incorporated fair association was sold on foreclosure, to satisfy an unpaid balance of \$1,409, to one of its directors for \$4,000, payable in three months. Before the expiration of the three months, the stockholders of the old company held a meeting at which it was resolved to assess each stockholder \$8 per share for the purpose of repurchasing such land, and a printed circular was issued, addressed to the stockholders, stating the total indebtedness of the company at \$6,252, and the value of the land at \$15,000, and representing that an assessment of \$8 per share, if responded to by all, would discharge all of their indebtedness, and that the purchaser of the property, who was one of the signers of the circular, would allow such of the stockholders as should pay their pro rata to redeem and hold the grounds for the purposes designated by the original founders. The capital stock having been already paid in, the payment of this assessment was, of course, voluntary, the purpose being to raise a fund for the payment of the corporation's debts and to freeze out such of the shareholders as were unwilling to put any more money into the enterprise. Some honored the call, but not all, so that sufficient money was not raised to pay the debts in full. The amount of the foreclosure decree was paid in cash, and the balance of the bid in claims

against the company, and the bidder thereafter conveyed the property to a new corporation composed of those who had paid the assessment. Under these circumstances it was held that the evidence would warrant the setting aside of the sale to the director and his subsequent conveyance to the new corporation as an attempt to place the assets of the old corporation beyond the reach of creditors by going through the process of reincorporation, taking a new corporate name, transferring the assets of the old corporation to the new one, and issuing stock in the new corporation to holders of stock in the old one; and therefore that such director and the new corporation took the property charged with a trust in favor of the creditors of the old corporation.

Where a debtor corporation made an assignment of all its property to its acting managing officer and agent, for the alleged purpose of paying its debts, and such assignee made a pretended sale of such property at public auction, and became the purchaser of the property for a nominal sum, and thereupon, together with other officers and stockholders of the debtor company, proceeded to organize a new company to which he turned over all of such property, for which the new corporation never paid any consideration, a court of equity will regard the new corporation as a mere continuation of the former corporation under a different name, and, as such, liable for the indebtedness of the former corporation, at least to the extent of the value of the property received. *Blanc v. Paymaster Min. Co.* (1892) 95 Cal. 524, 29 Am. St. Rep. 149, 30 Pac. 765.

In *Goddard v. Fishel-Schlichten Importing Co.* (1897) 9 Colo. App. 306, 48 Pac. 279, it was held that a creditor's bill filed by a judgment creditor of the corporation, alleging that the property of such corporation had been sold under certain chattel mortgages securing debts to two of its directors, and bought by an intermediary at a nominal consideration of \$2,000 over and above the amount of those encumbrances, and had been by him

transferred to a new corporation organized by the directors of the old corporation, whereby such new corporation became possessed of all the assets of the insolvent corporation, which would be appropriated to their own use and benefit, to the exclusion of creditors, stated a cause of action, the court saying: "We are well satisfied that even though the mortgages were regarded as valid as to their entirety, and enforceable against the goods, and that the proceedings for the foreclosure were regular and those debts paid, yet these defendant directors and the Fishel Importing Company could not acquire title to the assets of the Fishel-Schlichten Importing Company, unless they were all absorbed in the payment of those mortgages; and it should appear the goods were only sufficient to liquidate those two mortgage debts. In other words, if the plaintiffs are able to prove that the Fishel Importing Company and these defendant directors acquired property largely in excess of what was requisite to liquidate the mortgages, and the sale was made for the purpose of bringing about this result and securing to the new company and the directors large gains and advantages and they thereby became possessed of what in reality were assets of the Fishel-Schlichten Company which ought to have been devoted to the payment of debts, they may pursue this property in the hands of this company, and in the possession of these directors, and compel them to respond for whatever they may be able to prove was their actual gain and advantage. It does not alter the fraudulent character of the arrangement that the end was accomplished through the agency of valid mortgages regularly enforced."

In the absence of fraud, a creditor of a religious corporation has no right to enforce his claim against property formerly belonging to it after it had been sold on mortgage foreclosure, the corporation dissolved, a new one organized out of the old members and new ones, and the property bought from the purchaser at the foreclosure sale, although the new corporation

proceeded to carry on the work of the old one at the old location, and maintained the same relation as the old one to the general religious denomination. *Allen v. North Des Moines M. E. Church* (1905) 127 Iowa, 96, 69 L.R.A. 255, 109 Am. St. Rep. 366, 102 N. W. 808, 4 Ann. Cas. 257.

Where a bank holding a mortgage upon the property of a planing mill company purchases it on foreclosure, and thereafter sells it to another company having different stockholders and different management, accepting a mortgage for the price, the transaction is not one in fraud of creditors, so as to impose upon the corporation acquiring the property a liability for the debts of its predecessor. *Lowry v. West Monroe Lumber Co.* (1901) 105 La. 223, 29 So. 485.

In *Pittsmtont Copper Co. v. O'Rourke* (1914) 49 Mont. 281, 141 Pac. 849, it appeared that a mining company having become financially embarrassed, a committee of its creditors proposed a plan of reorganization contemplating the formation of a new company which was to acquire all the bonds, stocks, notes, and other obligations of the mining company the holders of which might assent, using for the purpose stock in the new corporation and bonds to be issued by it upon the security of the bonds and stock of the mining company acquired under the plan. The reorganization agreement provided that, in the event that the new company should find it practicable to acquire the property of the mining company, then the bonds of the new company might be made a first lien upon such property. Instead of organizing a new company, however, the committee appear to have decided to utilize a company then in existence, but which possessed no property and conducted no business. This company issued bonds secured by a collateral trust agreement by which it transferred to the trustee all the bonds and stocks of the mining company to be acquired by it, for the security and benefit of all persons who might hold its bonds, such agreement providing that the mining company might, with the consent of the managing committee, be merged or consolidated with, or all

or any part of its property sold or conveyed to, the second corporation. It also contained a clause to the effect that, in case of a sale of all or any of the property of the mining company at any judicial or other sale, the trustee might, and upon demand of the committee should, purchase or permit the second company to purchase such property, using the bonds, stocks, and indebtedness covered by the agreement to make payment therefor, and in case of such purchase by the trustee such steps should be taken as the committee might direct to cause the property to be vested in the plaintiff or in some other corporation organized or to be organized for the purpose. Proceeding according to the plan, the second company acquired all the bonds of the mining company, its unsecured notes, and the greater portion of its capital stock. Both companies had the same executive officers. With the aid of funds derived from the sale of bonds, an attempt was made to keep the mining company afloat, to restore to it the status of a profitable concern, and to avoid foreclosure; notwithstanding which, the mining company became unable to pay the interest or principal due upon its bonds, whereupon the second company required the trustee to foreclose the mortgage given by the mining company to secure such bonds, and, upon the foreclosure sale, bid in the property, valued by it at \$6,000,000, for an upset price fixed by the court of \$5,000. It was held that, notwithstanding there was no special intent to defraud one having a claim against the mining company for personal injuries, the fact that stockholders in the mining corporation were permitted to acquire stock in the second corporation merely by an exchange operated as a fraud upon creditors of the mining corporation not consenting to the reorganization.

In *Vose v. Cowdrey* (1872) 49 N. Y. 336, it was held that a corporation organized by the creditors of a railroad company to take over its property and franchises upon a mortgage foreclosure took the property unencumbered by claims against the old company, not provided for in the reorganization agreement, where none of the stock-

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holders of the old company united in the new organization, or received any of the property of the old company, or any of the bonds or stock of the new company, and there was no claim that the foreclosure was collusive, or the sale unfairly conducted.

In *MALE v. ATCHISON, T. & S. F. R. Co.* (reported herewith) ante, 1098, it appeared that two railroad companies, the Atchison and the St. Louis, owning a majority of the stock of a third, the Atlantic & Pacific, whose road was only partly constructed, and which was then insolvent, agreed to complete it, the additional construction being financed by an issue of first-mortgage bonds, which were afterward held as collateral security for a like amount of bonds guaranteed by the other railroads, issued as a substitute for them. Both of the stockholding roads having become involved in financial difficulties, the holders of the stock and bonds of one of them entered into a plan for reorganization, in pursuance of which its property was to be brought in on foreclosure and conveyed to a new corporation, which was to distribute its stock and bonds to the original stock and bondholders. Meanwhile the Atlantic & Pacific had failed to pay interest on its substituted guaranty bonds for which the first-mortgage bonds were held as collateral, in consequence of which a sale of this collateral was caused by the holders of the guaranteed bonds. Then, a foreclosure of these first-mortgage bonds having been instituted, the reorganized Atchison proceeded to acquire all the bonds and became a purchaser at the foreclosure sale for a sum much less than the amount due, claimed to be less than the value of the property. Under these circumstances, it was held that the reorganized Atchison incurred no liability to the other creditors of the Atlantic & Pacific Company, since neither the Atchison nor the new Atchison received anything by virtue of their ownership of Atlantic & Pacific stock; that as guarantor of the bonds to which the first-mortgage bonds were collateral the Atchison was not bound to pay them; and that the purchase by the Atchison of the Atlantic & Pacific bonds

could not be considered as a payment of the debt.

In *SKIRVIN OPERATING CO. v. SOUTHWESTERN ELECTRIC CO.* (reported herewith) ante, 1104 it appeared that the lessor of a hotel building whose lease operated as a chattel mortgage upon the furnishings placed by the lessee therein, to secure the payment of its rent, instituted proceedings to foreclose the lien thereby created against the hotel company, which was deeply involved in debt, and whose managing director had committed suicide, and that such lessor proposed to a party interested in the hotel company that if he would buy the property at the sale and furnish money to operate the hotel, the lessor would take stock in the new organization for the rents that were due. Such person accordingly bid in the property for a sum which appears to have been the amount of the overdue rent, and caused stock in the new corporation to such amount to be issued to the nominees of the lessor to the amount of \$15,000, turning over the property to the new corporation for a consideration of \$20,000, and also purchased \$10,000 worth of stock in the new corporation, which he paid for in cash, which was used by the new corporation as working capital. Thereafter, some litigation having been instituted against the old and new companies and the parties interested therein, the character of which is not stated by the report, but which was presumably instituted by creditors of the old company, a so-called plan of reorganization was presented to and approved by the court by which the issuance of the \$15,000 to the nominees of the lessor and of the \$10,000 above mentioned was ratified, provision was made for the issuance of stock to the creditors of the old company to the amount of their claims, and the remainder was to be issued and distributed pro rata among the stockholders of the old company. It was held that the new corporation was a mere reincarnation of the old one, and, as such, liable to a creditor of the old company whose claim had not been provided for.

This decision appears to go to an extreme in treating the transactions therein detailed as a fraud upon credi-

tors. The formation of the new corporation appears to have been at its inception a bona fide effort to found a new enterprise upon the ruins of the old, the only connection between the two being in the personnel of the parties interested. This circumstance is not alone sufficient to prove identity between the two corporations where, as seems to have been the case here, the stock held by them in the new company represents an additional investment. In order to render the new company liable to creditors of the old company to the extent of the property received, there must have been fraud and collusion in the foreclosure sale at which such property was acquired. That such was the case does not affirmatively appear; unless the probable acquiescence of the surviving members of the old company in the proceeding in view of the fact that they expected to be interested in the new company can be considered such.

But a further circumstance appears which may justify the decision. This is, that under the so-called plan of reorganization adopted as a result of the litigation, a portion of the stock of the new company was directed to be issued to the stockholders of the old company in proportion to their respective holdings. The effect of this was to permit holders of stock in the old company, as such, to acquire, without consideration, an interest in the property of the old company without having first agreed to satisfy the claims of its creditors,—a thing which the law does not allow.

In *Texas State Fair & D. Exposition Asso. v. Caruthers* (1894) 8 Tex. Civ. App. 474, 29 S. W. 48, it was held that the fact that a corporation organized for the purpose of conducting a state fair was composed practically of the same stockholders as its predecessor, which had become insolvent, that it had acquired the grounds of its predecessor through a foreclosure sale, and, in order to secure its own success, had voluntarily paid a portion of the premiums which had been offered by the old corporation and some claims of newspapers for advertising, was not sufficient to show the identity of the old and new corporations.

In *National Foundry & Pipe Works*

v. Oconto City Water Supply Co. (1899) 105 Wis. 48, 81 N. W. 125, affirmed on other grounds in (1902) 183 U. S. 216, 46 L. ed. 157, 22 Sup. Ct. Rep. 111, it was held that a corporation organized by the purchasers of the property of the company upon foreclosure was not a continuation of the old company, but an entirely new body, entitled to hold and enjoy the property formerly owned by the old corporation, free from the latter's liabilities, including liens against such property not prior to that through which the new corporation acquired title.

Miscellaneous.

In **Loughlin v. United States School Furniture Co.** (1905) 118 Ill. App. 36, it was held that a bill in equity alleging a conspiracy on the part of the principal stockholders of a corporation to organize a new corporation in the same line of business which should succeed to and take over the good will and all the assets of the former company, the formation of such new corporation, and the transfer to it of all the business, property, assets, trade, and good will of the original corporation, leaving said company entirely denuded of its assets, and without means for the continuation of its business or the payment of its indebtedness, showed conclusively that the thing accomplished was not a consolidation, but was a succession.

Where associates who hold property which is subject to a lien or under a conditional sale combine to create a corporation to hold the property and to which they transfer it, such associates being the only persons having any substantial interest in the corporation, the corporation cannot be considered as a bona fide purchaser and, as such, entitled to allege that the sale contract, not having been recorded, was inoperative as to it. **York Mfg. Co. v. Brewster** (1909) 98 C. C. A. 348, 174 Fed. 566.

A new corporation will be considered as but a mere continuation of the old where it continues to occupy the same premises and conduct the same business, and the old names are publicly displayed at the original place of

business. **Strahm v. Fraser** (1916) 32 Cal. App. 447, 163 Pac. 680.

Evidence which shows the identity of name of the second corporation with the first, that the second had the same president as the first, that it carried on business of the same character as the first, and, by agreement of the stockholders, took the goods, accounts, etc., and assumed the debts of a branch of the first from a certain day, and that the charter of the second recited that it was "formed for the purpose of continuing and taking over one of the same name," is sufficient to warrant a finding that the second was a successor of the first. **Quinlan v. Almini Co.** (1915) 191 Ill. App. 568; **Luce Furniture Co. v. Almini Co.** (1915) 192 Ill. App. 386.

In **Crozier v. Menzies Shoe Co.** (1918) 103 Kan. 565, 175 Pac. 376, where the principal stockholders of the debtor corporation, and another company, and the debtor company, and the president of the latter individually, all agreed that a new company should be organized, that it should assume the debtor company's corporate name, and that the president of the debtor company should be the president of the new company, the parties also agreeing as to the amount of the capital stock of the new company, and as to its disposition, and agreeing that the old company should cease to do business, and the assets should be apportioned in part to the new company and in part to the outside corporation, it was held that as the new corporation had not procured the assets of the old as a wholly independent purchaser, it was answerable for the liabilities of the old company.

The division of a railroad company into two divisions under distinct and separate management will not effect the right of prior existing creditors. **Cumberland & O. R. Co. v. Harrison** (1880) 1 Ky. L. Rep. 411.

IV. Liability under statutory or constitutional provisions.

a. Generally.

A statute authorizing a consolidation, and declaring that the consolidated company shall be subject to the

liabilities of the constituent companies, does not operate to impose such liability unless it is shown that the consolidation took place. *Southgate v. Atlantic & P. R. Co.* (1875) 61 Mo. 89.

Under a statute providing that "in every case of purchase by one corporation of the entire property, rights and franchises of another . . . the corporation purchasing shall have, hold, possess, exercise and enjoy all the locations, powers, privileges, rights, franchises, property and assets which, at the time of such purchase, shall be had, held, possessed or enjoyed by the corporation or corporations selling, or either or any of them, and shall be subject to all the duties, restrictions, and liabilities to which they or either or any of them shall be subject," a corporation which acquires all the capital stock of another, and takes possession of its assets, is liable for a claim against it, although the statutory requirements for a consolidation of the two have not been complied with. *Whiting v. Malden & M. R. Co.* (1909) 202 Mass. 298, 132 Am. St. Rep. 493, 88 N. E. 907.

A statute permitting the consolidation of corporations, and providing that consolidated corporations shall be entitled to all the property and rights of each of the united corporations, and shall be liable to the debts and obligations of each of them, and that suits pending for or against either of the original corporations at the time of the consolidation shall not abate, but shall proceed in the name of the consolidated corporation, is effective to preserve such liability through successive consolidations. *Birmingham R. Light & P. Co. v. Enslen* (1905) 144 Ala. 343, 89 So. 74.

Georgia Civil Code, § 1863, which provides that "all corporations . . . operating the franchise of a corporation chartered by this state, are subject to its burdens, and can be sued when and where and for like causes [for] action for which suits could have been maintained against such other corporation, were it in possession of the franchise so acquired or usurped," does not render a corporation purchasing the line of railway of another

corporation liable either upon the contracts or for the torts of its predecessor in title, in the absence of an agreement to be so liable. *Seaboard Air Line R. Co. v. Leader* (1902) 115 Ga. 702, 42 S. E. 38.

Section 15 of article 11, of the Idaho Constitution, which provides that "the legislature shall not pass any law permitting the leasing or alienation of any franchise, so as to release or relieve the franchise or property held thereunder from any of the liabilities of the lessor or grantor or lessee or grantee, contracted or incurred in the operation, use, or enjoyment of such franchise, or any of its privileges," operates to make such pre-existing liabilities preferred claims against the franchise and property transferred, and to declare them prior and superior to any subsequent bonds, mortgages, or encumbrances placed thereon by the purchaser or transferee of such franchise and property. *Seymour v. Boise R. Co.* (1913) 24 Idaho, 7, 132 Pac. 427.

In *Berry v. Kansas City, Ft. S. & M. R. Co.* (1894) 52 Kan. 774, 39 Am. St. Rep. 381, 36 Pac. 724, it was held that a statute authorizing the consolidation of any two or more railroad companies "with all the rights, powers, privileges and immunities, and subject to all the obligations and liabilities to the state which belonged to or rested upon either of the companies making such consolidation," might be construed as compelling the consolidated or new company to pay all claims, debts, or other pecuniary demands of each of the original companies, the court saying: "All of the authorities seem to agree that 'unless the statute or articles of consolidation make express provision therefor, the new corporation assumes all the liabilities of the old ones, at least in equity, to the extent of the property received by it from the old corporation.' 3 Wood, *Railway Law*, § 486; *Brum v. Merchants' Mut. Ins. Co.* 16 Fed. 140; *Wabash, St. L. & P. R. Co. v. Ham* (1885) 114 U. S. 587, 29 L. ed. 235, 5 Sup. Ct. Rep. 1081). The foundation of the liability of a consolidated corporation may rest on a statute or on an agreement, either expressed

or implied. If the statute does not provide that the new company shall assume the debts and liabilities of the constituent companies, and there is no express agreement respecting the same, the debts of the original companies follow as an incident of the consolidation, and become by implication the obligations of the new corporation." The court further supported this construction by reference to the fact that it has been held that, upon the consolidation of a railroad company, it ceases to exist as a corporation, and that an action brought by or against it before such consolidation cannot thereafter be prosecuted by or against it in its original name, so that if the consolidated company should not be held answerable to creditors and others for the debts and obligations of the old company there would be no corporation in existence against which an action could be maintained.

See also, to the same effect, *Hutchinson & S. R. Co. v. Fair* (1897) 58 Kan. 813, 48 Pac. 591.

The provisions of a statute authorizing the consolidation of corporations, that when the several companies shall, in conformity to its requirements, have become one, "all the franchises, property, powers and privileges now enjoyed by, and all the restrictions, liabilities, and obligations imposed upon, said two corporations by virtue of their respective charters, shall appertain to such united corporation, in the same manner as if contained or acquired under an original charter," do not require the assumption of liabilities incurred by the former companies by the contracting of debts, or arising out of acts done in the prosecution of their business. *Shaw v. Norfolk County R. Co.* (1860) 16 Gray (Mass.) 407.

In *New Bedford R. Co. v. Old Colony R. Co.* (1876) 120 Mass. 397, it was held that a statute authorizing one railroad company to purchase and the other to convey "its franchises and property and all the rights, easements, privileges and powers granted to it," and declaring that, upon such conveyance, the purchasing corporation shall "have and enjoy all the rights, powers, privileges, easements, franchises and

property of said [vendor corporation] and be subject to all the duties, liabilities, obligations, and restrictions to which said last-named corporation may be subject," was not to be construed merely as imposing upon the purchasing corporation those obligations which the selling corporation owed the public under its charter and the laws of the state, but to subject it to the liabilities of the selling corporation.

A statute which provides that if the capital stock of any corporation shall be withdrawn and refunded to the stockholders before payment of all the debts of the corporation for which such stock would have been liable, the stockholders of such corporation shall be jointly and severally liable to any creditors of such corporation, and to the amount of the sum refunded, does not impose any liability upon a corporation which, owning nearly all of the stock of another company, purchases its property and franchises, where nothing appears beyond the mere fact of the sale. *Chase v. Michigan Teleph. Co.* (1899) 121 Mich. 631, 180 N. W. 717.

Under a statute authorizing a railroad company to purchase the property of another company subject to all demands, claims, and rights of action against said company, the purchasing company takes such property subject to the obligations imposed. *Plainview v. Winona & St. P. R. Co.* (1887) 36 Minn. 505, 32 N. W. 745.

Where a statute providing for the consolidation of railroad companies declares that the effect of such consolidation is to impose upon the consolidated company all the obligations and liabilities which belong to or rest upon either of the companies making the consolidation, the effect of a consolidation, so far as regards any right of action that existed against either of the corporations prior to their being so united, is not more than a change of names. *Kinion v. Kansas City, Ft. S. & M. R. Co.* (1890) 39 Mo. App. 574; *Karn v. Illinois S. R. Co.* (1905) 114 Mo. App. 162, 89 S. W. 346 (obiter); *Wright v. Kansas City, Ft. S. & M. R. Co.* (1910) 141 Mo. App. 518, 126 S. W. 517.

Where the statute authorizing a consolidation declares that the consolidated company shall have all the powers, rights, and privileges of the original company, and be subject to the same rules, conditions, and liabilities, the fact of consolidation thereunder implies, as between the companies, the assent to transfer and acceptance of the rights and liabilities as declared by the act, and therefore the consolidation by virtue of such provision has the effect to subject the consolidated company to liability of a claim against a constituent company. *Miller v. Lancaster* (1868) 5 Coldw. (Tenn.) 514.

The word "franchise," as used in the provision of the Utah Constitution that "no corporation shall lease or alienate any franchise so as to relieve the franchise or property held thereunder from the liabilities of the lessor or grantor, lessee or grantee, contracted or incurred in operation, use or enjoyment of such franchise, or any of its privileges," includes all franchises, both primary and secondary, and is distinguished from the corporeal property of the corporation. So construed, such constitutional provision restricts the alienation of the franchises held by a public utility company, which were granted by the municipality to occupy and use the streets and public places, so as to relieve such franchises or any property necessarily held and used in the operation, use, or enjoyment of the rights and privileges conferred by such franchises, and which property was necessary to successfully operate, use, or enjoy such rights or privileges, from the class of liabilities referred to in the Constitution. *Cooper v. Utah Light & R. Co.* (1909) 35 Utah, 570, 136 Am. St. Rep. 1075, 102 Pac. 202.

A statute giving to a company formed by the purchasers of a railroad upon foreclosure all the rights and powers of the old company does not so identify the new company with the old as to render the former liable for the latter's debts. *Vilas v. Milwaukee & P. du Ch. R. Co.* (1863) 17 Wis. 498.

See also, to the same effect, *Smith v. Chicago & N. W. R. Co.* (1864) 18 Wis. 17.

In *Keeler v. Atchison, T. & S. F. R.*

Co. (1899) 34 C. C. A. 523, 92 Fed. 545, it was held that a Kansas statute permitting the organization of a new corporation by the purchasers of the property and franchises of a railroad company upon foreclosure, in providing that "such organization shall in no wise affect any liability against the old corporation existing at the time of the organization of such new company," does not have the effect to impose the liabilities of the old corporation on the new company, since a law of that character would render foreclosure proceedings wholly meaningless and futile; but was probably inserted to avoid a possible inference that the organization of a new corporation in the mode provided by the act worked a dissolution of the old corporation, and thereby extinguished its debt.

b. Character of claim.

1. Breach of contract.

An Ohio statute providing that "any company may . . . purchase any part or all of a railroad constructed or in course of construction . . . and after such purchase the purchasing company shall be vested of all the rights and powers in respect to the location, construction, completion and operation of such railroad, . . . including the power to acquire and appropriate property therefor and shall be subject to all the duties, obligations and restrictions of said company," does not operate to impose upon the purchasing company any liability for a breach of contract on the part of the seller. *Rice v. Norfolk & W. R. Co.* (1907) 82 C. C. A. 447, 153 Fed. 497.

2. Judgment recovered subsequently to consolidation.

A judgment recovered against a company subsequently to its consolidation with another, in an action pending at the time of such consolidation, must be regarded as a liability for which the consolidated company is answerable, under a statute providing that, in case of consolidation of any corporation with another, "such consolidated company shall be liable for all debts or liabilities of each company

included in such consolidated company, existing or accrued prior to such consolidation," where a statute also provides that the consolidation "shall not affect the suits pending," "nor causes of action, nor the rights of persons in any particular," and that suits previously brought shall not abate. *Chicago, S. F. & C. R. Co. v. Ashling* (1895) 160 Ill. 373, 43 N. E. 373; *Chicago & J. Electric R. Co. v. Ferguson* (1903) 106 Ill. App. 356.

3. *Debt secured by mortgage.*

The exception of mortgages in a statute authorizing the consolidation of corporations, and declaring that the rights of all creditors of and all liens upon the property of the constituent corporations shall be preserved unimpaired, "and all debts and liabilities incurred by either of said corporations, except mortgages, shall thenceforth attach to such new corporation and be enforced against it and its property to the same extent as if said debts or liabilities had been incurred or contracted by it," does not exonerate the consolidated company from liability for a debt secured by a mortgage, but such exception simply operates to confine the property lien created thereby to the property theretofore held by the consolidating company. *Polhemus v. Fitchburg R. Co.* (1890) 123 N. Y. 502, 26 N. E. 31. The reasoning of the court in this case is as follows: "The argument is, in effect, that by the excepting of mortgages from the liabilities which are made to attach to the new corporation, the bonds themselves, to which the mortgage was a collateral security, are also excepted. This seems to be somewhat startling as a proposition, whether we view it in the light which a usual and correct use of the English language affords, or whether we view it in connection with the legal fact that, by the consolidation, a transfer of the properties and franchises of the debtor is effected and its earning capacity annulled. The statute under which the defendant is organized was passed to authorize the consolidation of companies owning continuous or connected

lines of road. Naturally, it has reference to solvent, or going, concerns, and the force of its authority is in the direction of empowering corporations to do what otherwise they could not do. Its evident object is to enable corporations so situated to unite their business means and facilities when it seems to their mutual advantage. For this statute, which we may presume to have been enacted with a public and liberal end in view, to be construed, nevertheless, in such wise as to legalize the impairment of promises made to creditors, we should find language so unmistakable and words so explicit as to make such a legislative intent patent. The natural idea of such a statute, I take it, is that the new corporation, which springs from the two consolidating corporations, represents each one, as well in its duties or obligations assumed to others, as in its rights to enforce performance by others of their obligations. The idea of a transfer of properties and franchises involves, as the correlative idea, an assumption of those duties and obligations which were predicated upon the possession and operation of such properties and franchises, and which gave strength and inducement to corporate promises. And this idea is, in my opinion, what underlies the legislative act, and not the one which the appellant seeks to inject into it, and which so strongly shocks the moral sense. The legislature, after having vested in the new corporation all the rights, franchises, properties, and claims of each party to the consolidation agreement, proceeds, in this fifth section, to define the position of the creditors of each. It preserves their rights and their liens acquired against or upon the property of the corporation, and each corporation is continued in existence solely for that purpose. It provides that 'all debts and liabilities incurred by either corporation except mortgages shall thenceforth attach to such new corporation and be enforced against it and its property to the same extent as if said debts or liabilities had been incurred or contracted by it.' Omit the words 'except mortgages' and the

new corporation would fill the precise position towards creditors which each corporation had filled. What does their insertion accomplish? They are ill calculated to express anything in the legal sense, for mortgages mean the instruments which charge property with the liability to make good the debt its owner has contracted. They may be said to describe a property liability, but never to describe the principal debt or promise, which is evidenced by the promissory note, or bond of the property owner. They are collateral, or incident to the debt itself, and where made, as here, to secure the payment of bonds, they cannot properly be termed the debt or liability of the obligor, but only the liability charged upon his property. The argument for the appellant is that we must supply the sense which is wanting in the words, and should read the clause as excepting mortgage debts, and that such a reading would exempt the new corporation from any liability upon the bonds of either corporation. I think several considerations militate against this course of reasoning. In the first place, it is a rule in the interpretation of statutes that where a sense is to be supplied to inaccurate or incomplete words in an enactment, that sense which works an injustice should be avoided. In the next place, to except mortgage debts from the debts and liabilities which are assumed by the new corporation does not operate to except the corporate liability upon the bonds, unless we are willing to adopt a vulgar or careless and inexact use of language. In construing language so fraught with important consequences to the rights of persons, we ought to give to the words their precise and natural sense, and not force from them a meaning which strains construction and works a wrong. If the legislature had meant to except the personal debts or obligations, that is, the bonds themselves, it is altogether a more natural supposition that it would have used language importing that much. It would have said 'except bonds and mortgages.' To refer to popular expressions, we all know that,

in speaking of the liabilities of railroad companies, men mention their 'bonded debt,' and speak of the 'bonds outstanding,' and they inquire as to the extent of the company's earnings beyond an amount sufficient to meet the interest on its bonds. But it is possible for us to attach a sense to the words 'except mortgages,' which is more natural, and avoids our sanctioning the impairment of a corporate obligation. The word 'mortgage,' taken in its literal sense, and as it would be employed by persons dealing with legal rights, or in affecting legal conditions, means the liability impressed by the company upon the property then owned or thereafter to be acquired; and to except mortgages means to confine the property lien created by a mortgage to the property theretofore held by the consolidating company. Railroad mortgages are known to contain clauses for extending their lien to future acquisitions of property or extensions of road, and by their exception, in the clause under consideration, such a consequence would be prevented. We need not consider the legal probability of such a result in this case; although we have been referred to a decree of the Federal court for the northern district of Ohio, in *Farmers' Loan & T. Co. v. Toledo, etc., R. R. Co.*, extending a mortgage lien to property acquired after consolidation by the new company. We need only see a reason for the legislature's inserting the exception. If we read the words simply and naturally, they merely emphasize the understanding that all liens remain as they were before consolidation, neither impaired nor extended. Questions and complications which might be raised by the ingenuity of minds, as to the status of the mortgages of consolidating companies, are set at rest. It may be surplusage; but that criticism is not infrequently invited by legislation. Except for these words, it is conceded that the consolidated company is liable upon the bonds of the consolidating companies; and because of their insertion it is insisted that the bondholders are remediless to enforce performance

of their debtor's obligation, other than by a foreclosure of the mortgage. That would be a most inequitable and harsh rule. It discriminates against the bondholder. The act professes to save the rights of all creditors, and yet, only the general or unsecured creditors can hold the new company upon the liabilities of the consolidating company. The consolidating companies are solvent, and they are divested of their property and earning capacities in favor of the new company, which thus is enabled, by operation and use of the acquired property, to appropriate its earnings. If it refuses to discharge the full obligation incurred by a consolidating company in its bonds, we are asked to hold that the bondholder is at its mercy, and bound to accept what it is willing to pay him, or to foreclose his mortgage. Manifestly, as in this case, that is a process for forcing the bondholder out of his contract, which should not meet with the favor of courts of equity. If, here, the defendant can compel the plaintiff, and those similarly situated, to accept payment of the principal and interest of their bonds, it would be in a position to effect a new loan at a less interest rate, which means a very great saving and a consequent benefit to the stockholders. Shall we ascribe to the legislature a purpose to benefit stockholders at the expense of bondholders; practically, to give an advantage to the debtor over his creditor? The inequity, and, as well, the iniquity, of the thing, seem most apparent. Except in bankruptcy courts, the secured creditor is never obliged to resort to his security in the first order, or to surrender it if he wishes to come in and claim with other creditors. The rule in equity imposes no such obligation in cases of solvency or of insolvency; and yet here, in a case of the transfer of its franchises, properties, and choses in action by a solvent corporation to another, for the purpose of operation and use conjointly with those of another corporation, under the authority of a statute which purports to preserve the rights of all creditors, and to give them a

claim upon the new corporation, it is insisted that the creditor who holds a bond has no rights against the new corporation at all; that that obligation is practically extinguished. The ability of the old corporation to earn money by operation of its chartered franchises is taken away, for it is divested of its properties, and, thereby, the remedy by action and judgment for the interest, where payment has been refused to be made by the company, is rendered futile. I think the legislature never intended such a condition of affairs to result from consolidation under the statute, and that it is doing violence to language and to the rules for the construction of statutes to imply such an intention. The true theory of this act is that each consolidating company survives in the consolidated company, and that it represents each company in its claims and its obligations; but as to the mortgage liabilities, the properties acquired remain affected only as they were affected before the consolidation. Whatever the liability created by the mortgage instrument, it shall not be deemed to be extended or to affect the new company otherwise than might result from a foreclosure."

The foregoing case in effect overrules a decision to the contrary in *Janes v. Fitchburg R. Co.* (1888) 50 Hun, 310, 3 N. Y. Supp. 165.

4. Taxes.

Under a statute providing that "the rights of all creditors of, and of all liens upon, the property of the corporations, parties to the agreement and the act, shall be preserved unimpaired, and the respective corporations shall be deemed to continue in existence to preserve the same, and all debts and liabilities incurred by either of the corporations, except mortgages, shall thenceforth attach to such new corporation, and be enforced against it and its property to the same extent as if such debts or liabilities had been incurred or contracted by such new company," the consolidated company is liable for a tax levied before consolidation upon one of the constituent companies.

Bailey v. New York C. & H. R. R. Co. (1875) 22 Wall. (U. S.) 604, 22 L. ed. 840.

5. Torts.

Where it is provided by statute that all the debts, liabilities, and duties of each and all of the consolidated corporations shall attach to the consolidated company, and be enforced to the same extent and in the same manner as if such debts, liabilities, and duties had been originally incurred by it, the consolidated company is responsible for the torts of a constituent company. *Zealy v. Birmingham R. & Electric Co.* (1892) 99 Ala. 579, 13 So. 118.

A statute which casts upon the absorbing company all the contracts of the company absorbed may be sufficient to impose upon it a liability for torts as well, where it is probable that the word "contracts" was not used in the act in a strict sense, but in a loose and comprehensive signification as meaning "liabilities," without respect to the means by which they arose. *Coggin v. Central R. Co.* (1879) 62 Ga. 685, 35 Am. Rep. 132.

In *Stewart v. Waterboro & W. R. Co.* (1902) 64 S. C. 92, 41 S. E. 827, it was held that one having a claim for damages against a constituent company, arising out of a tort, was a "creditor" within the meaning of the provisions of a statute that, in case of consolidation, "all rights of creditors and all liens upon the property of said corporation shall be preserved unimpaired; and the respective corporations may be deemed to continue in existence to preserve the same; and all debts and liabilities and duties of either of said companies shall henceforth attach to said new corporation, and be enforced against it to the same extent as if said debts, liabilities, and duties had been incurred or contracted by it."

Under such statute the consolidated corporation as well as the constituent corporation is liable for debts existing against the constituent corporation at the time of consolidation. *Pickett v. Southern R. Co.* (1904) 69 S. C. 445, 48 S. E. 466.

In *International & G. N. R. Co. v.*

Edmundson (1916) — *Tex. Civ. App.* —, 185 S. W. 402, it was held that the injury sustained by an express messenger and baggageman by reason of an allegation of misconduct made against him, in consequence of which he lost his position, was a "personal injury sustained in the operation of the road," within the meaning of a statute which provided that the purchaser of the railroad should be subject to liability for such injuries.

Under a statute providing for the consolidation of railroad companies, and making the new company subject to all "debts, liabilities and duties" as if "originally incurred by it," the consolidated company is liable to the same extent as its predecessor for a personal injury sustained by an employee. *Batterson v. Chicago & G. T. R. Co.* (1884) 53 Mich. 125, 18 N. W. 584.

The word "indebtedness," as used in a statute providing that the purchaser of any railroad shall be subject to any and all liens, encumbrances, or indebtedness against the railroad company, includes a cause of action existing against the railroad company in favor of an injured employee. *Chicago, St. P. M. & O. R. Co. v. Lundstrom* (1884) 16 Neb. 254, 49 Am. Rep. 718, 20 N. W. 198.

A statute which, in case of consolidation, imposes upon the new company "all debts, liabilities and duties" of any company entering the consolidation, and provides that they shall be enforced against the new company "to the same extent as if said debts, liabilities and duties had been incurred or contracted by it," the consolidated company is liable for a nuisance created by one of its constituent companies without demand for removal and a refusal. *Jones v. Seaboard Air Line R. Co.* (1903) 67 S. C. 181, 45 S. E. 188.

c. Liability on obligations of predecessor as affected by their renewal.

The statutory liability of a consolidated corporation for the debts of a constituent company is not discharged by the taking by the creditor of notes of the consolidated company in renew-

al of notes of a consolidating company, where it is shown that the intention of the parties was not that the taking of the new notes would have the effect of payment, but that it was to operate simply to extend the time of payment of the obligation, and to evidence its continued existence. *Re Utica Nat. Brewing Co.* (1897) 154 N. Y. 268, 48 N. E. 521.

d. Who entitled to benefit of statute.

The mere fact that money borrowed was used for the payment of certain debts and claims which, by statute, are enforceable against the property of a railroad company in the hands of a purchaser, is not sufficient to create a liability therefor against the purchaser of the road. *International & G. N. R. Co. v. Concrete Invest. Co.* (1917) — *Tex. Civ. App.* —, 201 S. W. 718.

e. Effect of statute upon lien of mortgage.

Under a statute authorizing the consolidation of corporations, which provides that "all rights of creditors and all liens upon the property of each of said corporations shall continue unimpaired, and the respective constituent corporations may be deemed to be in existence to preserve the same; and all debts, duties and liabilities of each of said constituent corporations shall thenceforth attach to the said new corporation," the lien of a mortgage upon the property of a constituent corporation remains thereon by operation of law in addition to any rights given creditors against the merged company; and the fact that, by virtue of the merger, the physical property of the new corporation has become intermingled and united, does not estop the mortgagees from seeking to foreclose their liens. *Columbia & M. Electric Co. v. North Branch Transit Co.* (1917) 258 Pa. 447, 102 Atl. 214.

f. Effect of statute as creating equitable lien.

In *Compton v. Wabash, St. L. & P. R. Co.* (1888) 45 Ohio St. 592, 16 N. E. 110, 18 N. E. 380, it was held that the effect of a statute authorizing consolidation, in providing that all rights

of creditors and all liens upon the property of the constituent corporations shall be preserved unimpaired, and that the respective corporations may be deemed to be in existence to preserve the same, and that all debts, liabilities, and duties of the constituent company shall thenceforth attach to such new corporation, and be enforced against it to the same extent as if said debts, duties, and liabilities, had been contracted by it, is to create an equitable lien upon the property transferred to the consolidated company, and not merely to substitute the responsibility of the consolidated company.

The court in this case declined to follow a construction of the same statute made by the United States Supreme Court in *Wabash, St. L. & P. R. Co. v. Ham* (1885) 114 U. S. 587, 29 L. ed. 235, 5 Sup. Ct. Rep. 1081.

g. Remedies of creditors.

The fact that, by the legislative acts consenting to and approving the consolidation of certain railroad companies, it was expressly provided that each company should continue liable to third persons for all the obligations it had undertaken before consolidation, does not warrant the rendition of a judgment in a suit pending against one of the companies, at the time of its consolidation, against the consolidated company in its new name. *Selma, R. & D. R. Co. v. Harbin* (1870) 40 Ga. 706.

Where the statute provides that, in case of consolidation, the consolidated company shall be liable for all debts or liabilities of each company included in such consolidated company, existing or accrued prior to such consolidation, and that actions may be brought and maintained and recovery had therefor against such consolidated company, a person having a claim against one of such companies may discontinue an action pending against such company, and bring suit against the consolidated company, notwithstanding the statute also provides that pending actions shall not abate by reason of such consolidation. *Franklin L. Ins. Co. v. Hickson* (1901) 97 Ill. App. 387,

affirmed in (1902) 197 Ill. 117, 64 N. E. 248.

Where, under the provisions of a statute authorizing the consolidation of corporations, it is open to the creditor of a constituent company to enforce his claim either against the corporation whose debt it was, or against the new corporation whose debt it became under the statute which made it liable to pay and discharge all the liabilities of each of the corporations consolidated, a recovery of a judgment against the original debtor will not affect the creditor's right against the new company, the effect of the judgment being simply to change the form of the debtor's liability to its creditor. *Re Utica Nat. Brewing Co.* (1897) 154 N. Y. 268, 48 N. E. 521.

And where, upon the sale of an insolvent railroad, its purchasers were incorporated under a statute which provided that the new corporation should not exercise the corporate franchise until it should pay and discharge all unsatisfied judgments recovered against the old company for work and labor performed, an action is maintainable against the reorganized company upon such a judgment. *St. Louis, A. & T. H. R. Co. v. Miller* (1867) 43 Ill. 199.

The New York statute authorizing the consolidation of corporations, which provides that the rights of creditors shall not in any manner be impaired, or any claim or demand for any cause existing against such corporation be released or impaired by any such consolidation, but that the new corporation shall proceed to and be held liable to pay and discharge all such debts and liabilities in like manner as if incurred by itself, furnishes to the creditors of the constituent corporation a remedy concurrent in its nature. They may enforce the liability either against the corporation whose debt it was, or against a new corporation whose debt it has become by virtue of the statute. *Irvine v. New York Edison Co.* (1911) 143 App. Div. 344, 128 N. Y. Supp. 297, affirmed on another ground in (1913) 207 N. Y.

425, 101 N. E. 358, Ann. Cas. 1914C, 441.

Under the provisions of the Ohio statute relating to the consolidation of corporations, that "all rights of creditors, and all liens upon property of either shall be preserved unimpaired, and the respective companies may be deemed to be in existence to preserve the same; and all debts, liabilities and duties of either shall thenceforth attach to the new, and be enforced against it, as if such debts, liabilities and duties had been contracted by it," the consolidated company becomes directly liable for the obligations of the component companies. *Boehmke v. North Ohio Traction Co.* (1913) 88 Ohio St. 156, 102 N. E. 700.

Where by the agreement of consolidation the consolidated company assumes all the debts and liabilities of the component companies, a judgment debtor of one of such companies may subject the property received by the consolidated company from the debtor company to the satisfaction of the judgment. *Atlantic Coast Line R. Co. v. Cone* (1907) 53 Fla. 1017, 43 So. 514.

Under a statute providing for the merger of corporations, which provides that, upon the filing of a certificate of ownership of all the stock of another corporation, and of the resolution of its board of directors to merge such other corporation, the possessor corporation shall acquire and become possessed of all the estates, property, rights, and privileges and franchises of such other corporation, "but without prejudice to any liabilities of such other corporation or the rights of any creditors thereof," the possessor corporation is not directly liable for the debts of the merged corporation, but the creditor may reduce his claim to judgment by an action against the merged corporation, and subject its property in the hands of the surviving corporation to the payment thereof. Such right rests upon the express terms of the statute, and does not necessarily depend upon the existence and a finding of a fraudulent transfer. *Irving v. New York Edison*

Co. (1913) 207 N. Y. 425, 101 N. E. 358, Ann. Cas. 1914C, 441; Syracuse Lighting Co. v. Maryland Casualty Co. (1919) 226 N. Y. 25, 122 N. E. 728.

V. Liability under agreement to assume debts.

a. Generally.

A corporation may become liable for the debts of its predecessor where it has expressly or by reasonable implication assumed their payment. Spear Min. Co. v. T. J. Shinn & Co. (1910) 98 Ark. 346, 124 S. W. 1045; Good v. Ferguson & W. Land, Lumber & Handle Co. (1913) 107 Ark. 118, 153 S. W. 1107, Ann. Cas. 1915A, 544; Collinsville Nat. Bank v. Esau (1918) — Okla. —, 176 Pac. 514.

So, a banking corporation which, as the successor in business of a co-partnership conducting such business, has assumed the liabilities upon a sufficient consideration, is liable thereon. Tecumseh Nat. Bank v. Best (1897) 50 Neb. 518, 70 N. W. 41.

And a de jure corporation may be held liable for the debts of a de facto corporation where the evidence shows that the new organization took all the property belonging to the old, and assumed its liabilities and agreed to pay its bills. Calumet Paper Co. v. Stotts Invest. Co. (1895) 96 Iowa, 147, 59 Am. St. Rep. 362, 64 N. W. 782.

That an organization never became more than a de facto corporation will not relieve it from liability for the debts of a partnership whose business it was organized to continue, and whose assets it received upon undertaking to pay its liabilities. Lamkin v. Baldwin & L. Mfg. Co. (1899) 72 Conn. 62, 44 L.R.A. 786, 43 Atl. 593, 1042.

A corporation which has succeeded to all the property and rights of another is estopped to take advantage of the fact that a letter advising a creditor of such other of the consolidation, and assuming the indebtedness to it, was written, and the meeting of the board of directors at which such obligation was assumed was held, before the second corporation had become fully organized, and was never ratified after such organization was completed. Central Mach. Co. v.

Northern Equipment Co. (1914) 185 Ill. App. 476.

A consolidated corporation which has assumed the liability of the consolidated companies cannot be permitted to divide up the obligation and thereby reduce the responsibility, but must be held to be liable precisely as though it had been the sole actor from the outset. Smith v. Los Angeles & P. R. Co. (1893) 98 Cal. 210, 33 Pac. 53.

In an action against a corporation which has agreed in writing to assume the debts of its predecessor, it is not competent to prove by parol evidence that the parties understood or agreed that only specific debts aggregating a stated amount were assumed, since, although the rule that parol evidence may not be received to vary a written instrument does not apply where either of the parties between whom the question arises is a stranger to the instrument, it does apply where the one not a party to the instrument bases his claim upon it, and seeks to enforce a right which the instrument gives him, such a person being in no proper sense a stranger to the instrument. Geiger v. Sanitary Farm Dairies (1920) 146 Minn. 235, 178 N. W. 501.

A statute which merely exonerates a consolidated corporation from liability for the debts of its predecessors does not prevent the assumption of such debts by agreement. Taylor v. Atlantic & G. W. R. Co. (1878) 57 How Pr. (N. Y.) 26.

b. Existence of agreement.

In order that a promise may be implied on the part of a corporation to pay the debts of another corporation to the property and franchises of which it has succeeded by valid purchase, the conduct relied upon must show an intention. Colorado Springs Rapid Transit R. Co. v. Albrecht (1912) 22 Colo. App. 201, 123 Pac. 957.

The fact that all or nearly all the shares in a corporation organized to take over the business of a partnership were issued to the partners is insufficient to establish an understanding that the corporation will assume

the partnership debts. *McLellan v. Detroit File Works* (1885) 56 Mich. 579, 23 N. W. 321; *Schufeldt v. Smith* (1897) 139 Mo. 367, 40 S. W. 887.

That a company organized by one who had been engaged in a mercantile business, to conduct that business, and to which he turned over all his property in consideration of its stock, 300 shares being issued directly to him, 27 shares to his wife, and 1 share each to three of his employees, is liable for his debts, is not to be conclusively presumed, but it is a question of fact, to be determined by the evidence. *Durlacher v. Frazer* (1898) 8 Wyo. 58, 80 Am. St. Rep. 918, 55 Pac. 806.

No agreement on the part of a corporation organized by an individual to take over a business formerly conducted by him, to pay his individual debts, can be implied from the transfer of his property to it, on the one hand, and the issuance of its stock, on the other, where the consideration expressed for the transfer amounted to \$32,200, and the stock issued was of the par value of \$33,000, while his debts amounted to more than \$22,000. *Ibid.*

In *Church v. Church Cement Co.* (1898) 75 Minn. 85, 77 N. W. 548, it was held that the fact that other obligations of the predecessor had been paid by the corporation did not tend to establish an assumption or promise on the part of the corporation to pay other debts of its predecessor.

The fact that the employees of the old company were continued in the employment of the vendee company after the transfer, and that its business continued to be carried on the same as before, is without significance, and has no tendency to show a consolidation, or assumption of the obligations of the old company. *Chase v. Michigan Teleph. Co.* (1899) 121 Mich. 631, 80 N. W. 717.

In *Hall v. Herter Bros.* (1895) 90 Hun, 280, 35 N. Y. Supp. 769, affirmed on opinion below in (1898) 157 N. Y. 694, 51 N. E. 1091, it was held that the jury might infer that a corporation of which the proprietors of a former partnership were the princi-

pal stockholders, and which took over the partnership business and assets, assumed the obligation of the partnership toward an employee who was supervising work by the partnership under an agreement for a commission to be paid when the work was completed, the completion occurring after the forming of the corporation.

An agreement on the part of a corporation formed for the purpose of taking over a business, to assume the debts of the old concern, may be implied where the evidence shows an identity in name and almost complete identity between the stockholders of the corporation and the persons formerly interested, the continuation of the same business at the same place, the identity of property, the use of the old books without break or rest in the accounts, and a resolution adopted by the corporation to take over the property of the former associates as of a preceding date. *Zierner v. C. G. Bretting Mfg. Co.* (1911) 147 Wis. 252, 133 N. W. 189, Ann. Cas. 1912D, 1275.

Evidence that a debtor notified all his creditors of his intention to transfer his property to a corporation formed by himself and several of his employees, that such corporation gave him its note for property turned by him to it, which note he indorsed and left with the corporation, to be applied toward the payment of his debts, and the balance, after such payment, to be paid over to him, is not sufficient to show that the corporation assumed his debts. *Griffler v. Rabinowitz* (1914) 150 N. Y. Supp. 625.

The fact that a railroad company was authorized by law to purchase the road of another company upon condition that it should pay the latter's debts is not sufficient, in the absence of a showing that it did so purchase the road, to make it liable for such debts. *Desmond v. St. Louis, A. & T. H. R. Co.* (1875) 77 Ill. 631.

Where a contract between a committee appointed from the subscribers to stock of the proposed new corporation to prepare for the formation of the latter, and the old corporation, provided that the business of the old

corporation should be continued by it under its present organization "for and on behalf of said corporation so to be formed by said committee," and that the old company "shall continue to operate said business until said new corporation shall be formally organized, and shall by proper resolution take over the operating of said business for its own account," it is clearly inferable that the new corporation is not only to take over all the properties of the old corporation, but to assume all its obligations and contracts. *Stevens v. Selma Fruit Co.* (1912) 18 Cal. App. 242, 123 Pac. 212.

Where the property of a partnership is transferred to a corporation "subject to the payment" by such corporation of a certain debt, it amounts to an agreement by the corporation to pay such debt. *Dingeldein v. Third Ave. R. Co.* (1868) 37 N. Y. 575, reversing (1861) 9 Bosw. 79.

In *Re Halstead & Co.* (1914) 131 C. C. A. 393, 215 Fed. 85, affirming (1913) 204 Fed. 115, where a corporation was formed for the purpose of consolidating the interests of several concerns under a plan of organization by which its stocks and bonds were issued to the various members according to the net value of their assets, the agreement providing that if, upon inventory, the assets of a certain firm should aggregate \$525,000, then the total amount of the debts of the firm to be assumed by the new corporation was not to exceed the sum of \$100,000, but if the firm's assets should exceed such amount, then the firm, at its option, might add a like amount to the indebtedness which the purchasing corporation was to assume, it was held that a creditor of the firm was not entitled to prove its claim in bankruptcy against the corporation.

c. As affected by Statute of Frauds.

The promise of a corporation to pay the debts of a partnership in consideration of the transfer of its assets to the corporation is not a promise to pay the debt of another, within the meaning of the Statute of Frauds. *Schufeldt v. Smith* (1897) 139 Mo. 367, 40 S. W. 887.

An agreement by a consolidated corporation, in consideration of the transfer of the property of the constituent company, to pay such company's debts, is an original undertaking and no writing is necessary. *Re Amsdell-Kirchner Brewing Co.* (1917) 240 Fed. 492 (obiter).

The fact that the indenture of transfer whereby the transferee agreed to assume the transferor's debts was not signed by it, so that it has not agreed in writing to answer for those debts, will not enable the transferee to set up the Statute of Frauds as a defense to a creditors' suit, since the sale of the property cannot stand except upon performance of the condition. *Forbes v. Thorpe* (1911) 209 Mass. 570, 95 N. E. 955.

The vote of the directors of a corporation, assuming payment of the debts of its predecessor, duly recorded, is a sufficient memorandum in writing, and the signature of the recording officer in attestation of the minutes a sufficient signing by the party to be charged, to satisfy the Statute of Frauds. *Lamkin v. Baldwin & L. Mfg. Co.* (1899) 72 Conn. 62, 44 L.R.A. 786, 43 Atl. 593, 1042.

d. Effect of misrepresentation as to amount of debts.

Where a partnership transferred all its property to a corporation subject to the debts and liabilities of the partnership, which the corporation expressly assumed, the latter cannot retain the property acquired and at the same time avoid the payment of the debts which it agreed to pay as part of the purchase price, simply because the amount of the debts was misrepresented; it cannot keep the advantages of the transaction and avoid its obligations. *Forbes v. Thorpe* (1911) 209 Mass. 570, 95 N. E. 955.

e. Liabilities assumed.

1. Generally.

Where the holders of all the stock of a succeeding corporation agree that they will assume all the debts incurred by a branch of its predecessor before October 1, 1912, and that a third person shall assume the debts incurred

after that date, a debt incurred on October 1, 1912, is assumed by the corporation. *Quinlan v. Almini Co.* (1915) 191 Ill. App. 568.

In *Ziemer v. C. G. Bretting Mfg. Co.* (1911) 147 Wis. 252, 133 N. W. 139, Ann. Cas. 1912D, 1275, it was held that where joint owners of a manufacturing plant formed a corporation which, in consideration of its shares of stock, took over the plant "as of date of April 1st," and continued the same account books, under the same name, at the same place, for the purpose of continuing the same business, it assumed any liability of the joint owners for injuries to an employee in the business, occurring prior to the incorporation and the actual transfer, but subsequently to April 1st.

Where a corporation having a contract with its president by the terms of which he was to advance from time to time sums of money to carry on its business, and to have as security therefor a first lien upon all its property, was afterward reorganized for the purpose of increasing its capital stock, with the understanding that the business of the new corporation should be a continuation of the old, the new company receiving all the assets and assuming all the liabilities of the old, and such arrangement was continued by the new corporation, notes and mortgages executed by the officers of the company to secure such advances are valid obligations and a first lien upon the property of the company. *Baker v. Harpster* (1889) 42 Kan. 511, 22 Pac. 415.

The effect of an agreement entered into under the sanction of the legislature, providing for the transfer of certain lines of railroad to a new corporation, that it shall assume all the liabilities of the old company of every name and nature, is to render such corporation liable for debts incurred in the construction of such lines of road, and secured thereon by a trust mortgage. *Welsh v. First Div. St. Paul & P. R. Co.* (1878) 25 Minn. 314.

In *Mississippi Valley Co. v. Chicago, St. L. & N. O. R. Co.* (1881) 58 Miss. 846, it was held that a consolidated company, which, by the terms of the

consolidation, assumed all the debts and obligations of its constituent corporations, was bound by an unrecorded mortgage given by one of its constituent companies, whether or not it had any actual knowledge thereof.

In *Manny v. National Surety Co.* (1904) 103 Mo. App. 716, 78 S. W. 69, a surety company which had absorbed all the assets of another, and assumed all of its liabilities, was held liable on the bond of the old corporation, executed on behalf of a building contractor, to indemnify the owner against claims, judgments, liens, etc.

An assumption by a consolidated corporation of the liabilities of its constituent companies includes a liability for cumulative dividends upon the preferred stock of one of them. *Boardman v. Lake Shore & M. S. R. Co.* (1881) 84 N. Y. 157.

In *Baker v. D. Appleton & Co.* (1905) 107 App. Div. 358, 95 N. Y. Supp. 125, affirmed without opinion in (1907) 187 N. Y. 548, 80 N. E. 1104, a corporation to which a receiver of another had transferred the latter's property upon the former's agreement to pay "the business indebtedness" of the latter was liable to one employed under a yearly contract by the old corporation, who had been wrongfully discharged before the transfer.

The assumption by one corporation of all the indebtedness of another of whatsoever kind, and its agreement to pay and discharge the same when due, in consideration of the conveyance to it of all the property of another corporation, binds the former to pay all the liabilities of the latter, though some of them, such as demands for unliquidated damages, may not be debts in the technical sense of the term. *Billmyer Lumber Co. v. Merchants' Coal Co.* (1910) 66 W. Va. 696, 26 L.R.A.(N.S.) 1101, 66 S. E. 1073.

A company acquiring all the property of another at a sale under a decree of foreclosure which required it to pay, among other things, all liabilities incurred by its predecessor which were prior in lien to the mortgage under which the foreclosure was had, is liable to account for a trust fund

wrongfully diverted by its predecessor. *Mercantile Trust Co. v. St. Louis & S. F. R. Co.* (1900) 99 Fed. 485.

In *Boyd v. Northern P. R. Co.* (1909) 170 Fed. 779, affirmed in (1910) 101 C. C. A. 18, 177 Fed. 804, which was affirmed in (1913) 228 U. S. 482, 57 L. ed. 931, 33 Sup. Ct. Rep. 554, it was held that the provisions of a lease of the property of a railroad company for 999 years, that the lessee should, "at all times, save, keep harmless, and indemnify the [lessor] from and against any and all charges, cost, expenses, suits, damages, demands and claims of any and all kinds whatsoever arising out of, or in any manner appertaining to, or connected with, the maintenance, operation, or management, of the said demised railways, premises, and their appurtenances during the existence of this lease," were not to be construed as imposing upon the lessee a liability for a claim arising out of the construction of the road.

Under a reorganization agreement which provides only for the redemption of different classes of bonds therein specified, held by the parties to the agreement, and which makes no provision for general, unsecured creditors, a creditor cannot claim to have provision made for any unsecured and unliquidated demand for damages. *Vose v. Cowdrey* (1872) 49 N. Y. 336.

In *Chicago, M. & St. P. R. Co. v. Third Nat. Bank* (1890) 134 U. S. 276, 33 L. ed. 900, 10 Sup. Ct. Rep. 550, a 999-year lease of property of one railroad company to another, in which the lessee undertook to redeem the leased property from a foreclosure, to pay certain enumerated claims, and to complete the road, and which contained a recital that the purpose of such arrangement was "the redemption from said foreclosure sale, and the protection of the property from all the aforesaid valid judgment liens," was held, in view of a further covenant on the part of the lessee to pay and discharge fully a proposed mortgage indebtedness, and to return at the end of the lease to the lessor the demised property, to indicate that

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the understanding and intent were that the lessee should discharge all judgment liens founded upon existing claims even though such claims were not included in the recital, the court saying: "A judgment after a lease does not, of its own right, defeat the lease, or deprive the lessee of his interest and possession; but it operates against the lessor, and whatever interest, great or small, is retained in the leased premises. The purpose of this stipulation was not the protection of the lessee, but of the lessor. It was not that the lessee should be able to retain and enjoy the possession during the terms of the lease, but that the property should be freed from all burdens, so that, at the termination of the lease, the lessor might retake and enjoy it."

Where, by the instrument of conveyance made for the express purpose of merging two railroads, it is provided that the grantee shall take the property subject to the just debts against the grantor, a judgment rendered in condemnation proceedings is binding upon the grantee. *Chicago & S. E. R. Co. v. Galey* (1895) 141 Ind. 360, 39 N. E. 925.

2. Judgments recovered subsequently to the transfer.

An agreement by a purchasing corporation to pay all of its "predecessor's debts" will render it liable to pay a judgment recovered against the old corporation in a suit pending at the time of the transfer. *Noll v. Chattanooga Co.* (1896) — Tenn. —, 38 S. W. 287.

But the assumption by a company of the debts of another, which has transferred its property to the former preparatory to its dissolution, cannot operate to render it liable for a judgment recovered against its transferor for a personal injury sustained subsequently to the transfer. *Miller v. National S. S. Co.* (1875) 67 Barb. (N. Y.) 285.

3. Bonded indebtedness.

In *Wabash, St. L. & P. R. Co. v. Ham* (1885) 114 U. S. 587, 29 L. ed. 235, 5 Sup. Ct. Rep. 1081, reversing (1883) 11 Biss. 510, 15 Fed. 763, an

agreement on consolidation that the bonds of one of the constituent corporations should be protected by the consolidated corporation according to the effect and meaning of the bonds was held to give no lien in favor of bonds of one of the old companies, issued after the passage of the statute authorizing the consolidation, unsecured by any mortgage or lien before the consolidation. But, upon the same state of facts, a contrary result was reached in *Compton v. Wabash, St. L. & B. R. Co.* (1888) 45 Ohio St. 592, 16 N. E. 110, 18 N. E. 380.

In *Harrison v. Union P. R. Co.* (1882) 13 Fed. 523, articles of consolidation which provided in substance that nothing should prevent any valid debt, obligation, or liability of either constituent company from being enforced against the property of the proper constituent company, which, by force of such articles, became the property of the consolidated company, were held to render the consolidated corporation liable in equity for the payment of the bonds of the original company; at least, to the extent of the value of the property received from it.

Where a reorganization agreement to which a creditor was a party provided only for bonds actually issued and outstanding, he will not be permitted, on the theory that equity will treat as done that which ought to have been done, to set up a claim against the reorganized corporation in respect of bonds to which he was equitably entitled under an agreement with the old corporation, but which had never been issued. *Vose v. Cowdrey* (1872) 49 N. Y. 336.

In *Fernschild v. Yuengling Brewing Co.* (1898) 154 N. Y. 667, 49 N. E. 151, the holders of the first-mortgage bonds of an insolvent corporation formulated a plan of reorganization which contemplated the purchase of the plant of the company upon foreclosure, the organization of a new company, and the scaling down of the second-mortgage bonds by permitting the holders thereof to exchange them for bonds of the new company equal to 75 per cent of their

face value, and, in addition, 25 per cent of the face value in stock of the new corporation. The reorganization agreement further provided that, in case any of the bondholders should withhold their consent, then the new bonds issued against the old bonds of such nonassenting parties should be sold or used by the committee to pay the parties not consenting the distributive share of the proceeds of the sale of the property to which they might be entitled. Besides the bonded debt, the old company had a large floating indebtedness represented by notes and open accounts, which the committee arranged to have assumed by the new company upon a transfer to it of the personal property of the old company. The directors of the new company accordingly passed the following resolutions: "Resolved, that this company assume all the debts, obligations and liabilities of every kind and description of the D. G. Yuengling, Jr., Brewing Company, in addition to the bonds and other obligations mentioned in the agreement of reorganization, and thereby provided to be assumed by this company, and that in return for, and as a consideration of, the assumption of said debts, obligations, and liabilities, this company accept from said D. G. Yuengling, Jr., Brewing Company the bill of sale presented by the chairman transferring unto this company all the personal property [etc.], the intent hereof being to vest in this company all the property, rights, franchises, privileges, and good will of the old company, and to assume all the obligations and debts of that company, so that this company shall in all respects stand in the place and be the successor of, and, so far as may be, the same, corporate body as, the said D. G. Yuengling, Jr., Brewing Company aforesaid." The bill of sale, which covered all property of the old company not covered by the mortgage given to secure the old bonds, contained a covenant by the vendee to assume "the payment of all the debts and obligations of the party of the first part, excepting the mortgage bonds of said party of the first part, and excepting all other indebted-

ness otherwise provided for in a certain plan or agreement of reorganization of the said party of the first part, pursuant to the terms of which the party of the second part was organized." It was held that the language of the resolution and of the assumption clause in the bill of sale, construed in the light of the purpose which was in view and all the surrounding circumstances, could not be considered as an assumption by the new company of the indebtedness of the old company to holders of the second-mortgage bonds who had failed to become parties to the reorganization agreement, since such bonds were provided for by the reorganization agreement.

In *Equitable Trust Co. v. United Box Board & Paper Co.* (1915) 220 Fed. 714, it appeared that a corporation mortgaged its property to secure an issue of bonds, which bonds, by the terms of the mortgage, were to be executed and delivered by the mortgagor to the trustee, and \$1,750,000 thereof were to be authenticated and delivered by the trustee to the mortgagor without further direction, and the remainder were to be held by the trustee to be authenticated and delivered by it when sold by the mortgagor, in which event the trustee was to use the proceeds thereof, on the order of the mortgagor, to pay all liens upon the mortgaged property prior to the lien of such mortgage. The corporation having become insolvent, and its property vested in receivers appointed at the instance of creditors, its stockholders, acting through a reorganization committee, formed a new corporation for the purpose of taking over the property. The property bid for included all bonds of the old company in the hands of creditors as collateral, or in its treasury, or in the hands of the trustees, with all the rights, powers, and privileges with respect thereto, and the certification, disposition, or use thereof, which the old company was given or had. As a part of the consideration for such conveyance, the purchaser assumed and agreed to pay the outstanding debts and liabilities of the mortgagor,

"not including bonds, debts, or obligations . . . secured by mortgage or mortgages upon real estate, and not including bonds or obligations secured by the collateral trust mortgage . . . or the liability or obligations of said [old company] upon any said bonds or mortgages." This bid having been approved by the court, and the property bid for conveyed to the said purchaser, such purchaser thereafter exercised certain of the rights secured to such mortgagor in said general mortgage, in the following particulars: it obtained a release from the trustee of certain parts of the mortgaged premises, and obtained from the trustee \$120,000 face value of such general mortgage bonds retained by the trustee to pay off liens which were prior in date to said general mortgage, which bonds were sold and the proceeds thereof applied to pay off and reduce liens of such character. By a mortgage covering other properties it gave additional security for the payment of the bonds then outstanding, or that might be thereafter issued under said general mortgage, and also by it secured the performance of all the obligations of the old company, "and its successors, in said mortgage contained, upon all of the terms, conditions and trusts in said mortgage contained." On these facts it was held that the purchaser was not a "successor or assign" within the meaning of the mortgage, and, as such, liable for a deficiency on foreclosure, the court saying: "The purchaser undoubtedly became the successor in title to the mortgaged premises; but it became so not by virtue of the mortgage, or in pursuance of any rights created thereby or preserved therein. It became such through a judicial sale ordered by a competent court, in a cause wherein the mortgagee was not an actual or necessary party. Such mortgagee was a stranger to such contract of purchase and the consideration which supported it. The purchaser bid for and obtained all the mortgagor owned in such property. It took title subject to such mortgage, but it was bound only by such covenants therein

which ran with the land. The mortgagor, by such sale, obtained no indemnity against the mortgage debt. It continued, as it began, the primary and sole debtor on said bonds. The bid for such property expressly excepted and disavowed any liability on account of the bonds issued or to be issued for the payment of which such mortgage was given as security, and the judicial order authorizing the acceptance of such bid expressly countenanced such disclaimer. The obligation of the mortgagor to pay said bonds, principal and interest, was not a covenant running with the land, but one in personam. . . . The purchaser, though its stockholders were the same as those of the mortgagor, was entirely new and distinct. The property taken over was not obtained as the result of a consolidation or merger of other companies, but was property purchased at a judicial sale; and the purchaser became a successor of the mortgagor, not by reason of any right derived from it or said mortgage, but as any stranger would under a judicial sale. In such circumstances, no privity exists between the purchaser and the mortgagor or mortgagee as concerns mere personal covenants contained in such mortgage."

4. Claims arising out of torts.

An agreement by the new corporation to assume "all its obligations, of whatsoever character," includes a liability arising in tort. *Geiger v. Sanitary Farm Dairies* (1920) 146 Minn. 235, 178 N. W. 501.

Where the charter of the consolidated company, following the language of the statute which authorizes the consolidation, provides that the consolidated company shall be subject to all of the obligations and liabilities to the state which belong to or rest upon any of the constituent corporations, it is liable for a tort of a constituent company notwithstanding another article provides that "the contract obligations of each of said constituent companies shall be and are hereby assumed by such consolidated company." *Kansas City-Leavenworth*

R. Co. v. Langley (1904) 70 Kan. 453, 78 Pac. 858.

The obligation of a railroad company which has assumed, upon the purchase of another road, "to pay all sums lawfully due for taxes, and also an indebtedness incurred in the operation of said railroad and property," is limited to contract liabilities, and does not embrace liabilities incurred by the wrongful act of the other contracting party. *Chesapeake, etc. R. Co. v. McLean* (1891) 12 Ky. L. Rep. 989.

Where a partnership conveyed to a trustee for the benefit of, and pending the proper organization of, a corporation, all the business and assets of the firm, subject, however, "to all and singular the debts and liabilities of the grantors contracted in or arising from or on account of the granted premises," the conveyance being declared to be upon trust, to convey all the same assets to a new corporation to be formed "subject to the debts and liabilities of the grantors, as aforesaid, which the corporation shall expressly assume and agree to pay or provide for," it was said that if it had been the main purpose of the instrument by which the property was transferred to the corporation to express an obligation on the part of the latter to assume all the outstanding debts which the conduct of the business had incurred, it would have been difficult to conceive language more apt. The plain words of the covenant include liability for all the frauds committed by the partners as a part of their management of the business. *Forbes v. Thorpe* (1911) 209 Mass. 570, 95 N. E. 955.

In *Campbell v. Pittsburgh & W. R. Co.* (1890) 137 Pa. 574, 20 Atl. 949, where a decree directing a judicial sale of the franchises and property of a railroad company provided that "any purchaser . . . shall take . . . subject to all unpaid purchase money for any of the lands or rights of way herein referred to, as well as also all unpaid claims of landowners for damages for property taken, injured, or destroyed in the construction of the railroad," it was held that

the claim of one who had recovered a judgment against the original company in an action for trespass for entering upon his land and constructing its road, and who had thereafter conveyed a right of way to the railroad company, belonged to the class of general debts of the old company which were not covered by the terms of the decree.

In *Hinrichs v. Mississippi Valley Trust Co.* (1915) 139 C. C. A. 371, 223 Fed. 995, it was held that one whose claim against a corporation for the conversion of coal and timber was in litigation at the time of a reorganization agreement entered into between the corporation, its stockholders, and certain of its creditors, was not a creditor within the real intention of a provision of the reorganization agreement for a new bond issue, to be sold for cash, and the proceeds applied only to "pay the indebtedness of the company not herein otherwise provided for" and various other purposes, and as such, entitled to share in the lien of the mortgage securing such bond issue.

The assumption of "current liabilities" has been held not to include a liability for personal injuries inflicted before the transfer. *Hawkins v. Central of Georgia R. Co.* (1903) 119 Ga. 159, 46 S. E. 82.

And an agreement by a railroad company acquiring the property of another "to pay all current indebtedness in operating" the road does not authorize the maintenance against it of an action for damages by an injured employee of the vendor, but he must first establish his claim against his employer, and then assert his claim, if any, against the purchasing company. *Chesapeake, O. & S. W. R. Co. v. Griest* (1887) 85 Ky. 619, 4 S. W. 323.

A consolidated corporation assuming the payment of all debts and liabilities and the fulfilment of all obligations by the companies consolidated is liable for injuries sustained by an employee of one of such corporations prior to the consolidation. *St. Louis & S. F. R. Co. v. Marker* (1883) 41 Ark. 542, 13 Am. Neg. Cas.

250; *Good v. Ferguson & W. Land, Lumber & Handle Co.* (1913) 107 Ark. 118, 153 S. W. 1107, Ann. Cas. 1915A, 544.

In *Woodworth v. Iowa Central R. Co.* (1914) 170 Iowa, 697, 149 N. W. 522, a stipulation in a contract whereby a corporation purchased all the property of a railroad company, that "the grantee hereby assumes the payment of all the current and ordinary charges, costs, liabilities, and expenses of the grantor arising out of the operation of the railroad and property of the grantor, and remaining unpaid at the date of the execution and delivery of this indenture, and agrees to indemnify and save harmless the grantor from and against any and all such charges, costs, liabilities, and expenses," was held to impose upon the purchaser a liability to an injured employee of the seller notwithstanding a further provision in the contract that "nothing in this indenture, expressed or implied, is intended or shall be construed to confer upon or give to any person or corporation other than the parties hereto, their successors and assigns, any right, remedy, or claim under or by reason of this indenture, or under or by reason of any covenant, condition, or stipulation herein contained; all the covenants, conditions, and stipulations contained in this indenture being for the sole and exclusive benefit of the parties hereto, their successors and assigns;" the court holding that as, in view of the conflicting provisions of these two clauses, one must necessarily give way to the other, and since to construe the latter clause as depriving the creditors of the corporation of all right to avail themselves of the other provisions of the contract would be to defeat and to defraud every creditor of the selling company by rendering him dependent upon the mere grace of his debtor, it would not be so construed.

In *Louisville & N. R. Co. v. Biddell* (1902) 112 Ky. 494, 66 S. W. 34, a provision in a conveyance by a railroad company to another which had acquired all its capital stock, of all its property, that "this conveyance and transfer is made subject to all the

bonded indebtedness and other indebtedness of the said railway company, and the said other companies, without in any manner affecting the same, or the rights of the creditors therein, which said railroad and property hereby conveyed are to be operated as required by the laws of the state of Kentucky," was held to render the succeeding corporation liable for personal injuries sustained by a passenger prior to the conveyance. The court said: "Where terms used have a doubtful meaning, or more than one meaning, then the court must look to the surroundings for aid in giving them proper construction. Therefore, in the use of the terms 'indebtedness' and 'creditor,' as used in this deed, we must presume that the parties used them in their broadest sense, as intending to embrace such obligations as might be legally imposed upon the obligee by the law, without reference to their more restricted meaning. Otherwise the narrow construction of 'debts' (that is to say, that the word included only contractual liabilities) would have been to defeat the legal effect of this absorption, and to have perpetrated a wrong upon appellee. In the absence of an express averment to that effect, the court cannot presume that such was the intention of the parties. We therefore conclude that 'debt,' as used in this conveyance, under the circumstances of this case, meant all liabilities of the grantor, and the clause that 'it shall in no wise affect the rights of the creditors' meant the rights of such persons as held claims or demands against the grantor."

In *Proctor v. San Antonio Street R. Co.* (1901) 26 Tex. Civ. App. 148, 62 S. W. 938, a corporation which had assumed its predecessor's debts was held to be a proper party to a writ of error in a suit for personal injuries in which judgment had been entered for the predecessor.

f. Effect of agreement to create equitable lien; priorities as against other creditors.

In *Franklyn v. Sprague* (1887) 121 U. S. 215, 30 L. ed. 936, 7 Sup. Ct. Rep. 951, it is held that where the

guardian of minor heirs conveys, under proper legislative authority, their interest in the property of a partnership to a corporation which assumes all the debts of the partnership the business of which it was organized to continue, a debt due the minors from the partnership becomes the general debt of the corporation, and does not continue to be a lien upon the property.

It was held in *Hervey v. Illinois Midland R. Co.* (1884) 28 Fed. 169, apparently without reference to the rights of the creditors of the purchasing corporation, that a railroad company which purchased the property and franchises of other railroad companies, and assumed the payment of their indebtedness, did not take the property burdened with an equitable lien in favor of the creditors of the selling company, but that such creditors acquired only the right of looking for payment to the purchasing company.

Debts of the partnership must be postponed to those contracted by the corporation after its organization, where the corporation is organized to continue the business of a partnership whose assets are transferred to it upon its undertaking to pay the partnership debts, and the corporation becomes insolvent. *Lamkin v. Baldwin & L. Mfg. Co.* (1899) 72 Conn. 62, 44 L.R.A. 786, 43 Atl. 593, 1042.

In *Blake v. Domestic Mfg. Co.* (1897) 64 N. J. Eq. 480, 38 Atl. 241, by the transfer of all the assets of one corporation to another, which assumed all of the former's indebtedness, bondholders of the former were held to become creditors of the latter, but they were held to have no lien, except such as existed before, in preference to creditors becoming such after the transfer.

But in *Montgomery & W. P. R. Co. v. Branch* (1877) 59 Ala. 139, an agreement by a corporation acquiring all the property of another, to pay the debts of such other, and the consequent dissolution of the debtor company to which the promise was made, was held to create an equitable lien

on the property acquired, as well as to bind the company acquiring the property personally for the payment of such debts.

And in *Ex parte Savings Bank* (1906) 73 S. C. 393, 5 L.R.A.(N.S.) 520, 53 S. E. 614, it is held that a bank which takes over the assets of a liquidating bank upon an agreement that it will pay its debts and a certain sum to each shareholder assumes toward creditors the trust relation held by the transferrer, and the creditors of the latter have a prior lien on the assets so transferred, in case the transferee becomes insolvent before completing its undertaking.

So, also, in *Lowther v. Lowther-Kaufmann Oil & Coal Co.* (1914) 75 W. Va. 171, 83 S. E. 49, it is held that the general creditors of a corporation whose property has been taken over by another one in consideration of the assumption by it of the debts of the former have an equitable right, on the insolvency of the latter, to preference in the distribution of the proceeds of the sale of the property derived from their original debtor over the claims of the other general creditors of the purchasing corporation, and to have such property separately sold for the purpose of exact ascertainment of their rights, unless they have released the original debtor by complete novation of their debts, or otherwise.

And in *Cole v. Millerton Iron Co.* (1892) 133 N. Y. 164, 28 Am. St. Rep. 615, 30 N. E. 847, it was held that a corporation to which all the property and assets of another are transferred upon a consideration nominal except for an assumption by the vendee of the debts of the vendor, thereby terminating the regular business of the vendor, the transfer being made and accepted for that purpose and intention, is not such a purchaser in good faith and for value as to deprive the creditors of the transferrer of their right to enforce their equitable lien upon the property in the hands of the transferee.

And in *Blair v. St. Louis, H. & K. R. Co.* (1884) 22 Fed. 36 (upon demurrer to answer and cross bill) (1885) 24 Fed. 148 (on demurrer to evidence), where a corporation trans-

ferred all of its property to a new company in consideration of stock in the latter and the assumption by it of the old corporation's liabilities, it was held that one of the creditors of the latter was entitled to a lien superior to that of a mortgagee having notice of the debt and claiming under a subsequent mortgage, although such mortgage was given before the claim was reduced to judgment.

g. Remedies.

The question whether the creditors can maintain an action upon the agreement of the successor corporation to assume the debts of its predecessor is merely one aspect of the general question whether a third person may enforce a promise made for his benefit. The decisions herein set forth are therefore to be taken, not as stating universal principles, but as reflecting the attitude of the courts in the various jurisdictions.

Thus, in some cases it is held that where it is agreed by the articles of consolidation that the new company shall assume the debts and liabilities of the old, and shall carry out and perform its unexecuted contracts, an action may be maintained directly against the new company. *Western U. R. Co. v. Smith* (1874) 75 Ill. 496; *United New Jersey R. & Canal Co. v. Hoppock* (1877) 28 N. J. Eq. 261.

So, where it is shown to the court by verified petition that, after the commencement of the suit, the then defendant corporation, with certain others, had merged and consolidated their respective rights and franchises, and had thereby formed a new and consolidated corporation, which, by such merger and consolidation, had succeeded to all the rights and assumed all the liabilities of the original corporation, including the liability for the cause of action then in litigation, there is no error in ordering the substitution of the consolidated corporation as party defendant, and in rendering judgment against it. *Louisville, E. & St. L. Consol. R. Co. v. Summers* (1892) 131 Ind. 241, 30 N. E. 873.

In *E. I. Du Pont de Nemours & Co. v. Smith* (1918) 164 C. C. A. 407, 252 Fed. 491, in which, although the transaction between the old and new

corporations took the form of a sale, it appeared that it was, in fact, "a financial reorganization of the business," with a very large increase of capitalization, but with little, if any, change of ownership, or management, and the new company agreed "to assume and discharge all the liabilities, debts, and obligations, contractual or otherwise, of every kind, nature, and description, due or to become due, of the vendor, existing on the date of said transfer," it was held that the new company could be sued directly for the negligence of its predecessor, although the old company was continued in existence for certain specific purposes.

On the other hand, in *Louisville & N. R. Co. v. Hughes* (1910) 134 Ga. 75, 67 S. E. 542, it is held that the fact that the grantee corporation has agreed with the grantor to pay all the debts or liabilities of the latter existing at the time of the transfer does not authorize one who claimed to have been injured by a tort of the grantor, committed before the making of the transfer, to bring suit therefor against the grantee.

And in *Martin v. Culpepper Supply Co.* (1921) — W. Va. —, 107 S. E. 183, it is held that one having a claim against the partnership for unliquidated damages cannot maintain an action therefor against a corporation which has purchased the business of the partnership and agreed to assume its debts and liabilities, such contract having been made for the protection and benefit of the former owners, and not for the sole benefit of the plaintiff.

In *Capital Traction Co. v. Offutt* (1900) 17 App. D. C. 292, 53 L.R.A. 390, it is held that a covenant by a corporation purchasing the property and franchise of another, to "assume, discharge, and perform all the obligations of the prior company, and all its liabilities of what kind soever," does not make the purchaser directly responsible to a third party for a tort of the older company, but that such liability can be enforced only in a court of equity.

A provision in a consolidation agreement that "the new company hereby formed does not herein assume

any separate or individual liability for the outstanding debts, obligations, and liabilities of the respective constituent companies whose several and separate existence as to third parties shall, as respects such debts, obligations, and liabilities of every kind and nature, still continue, notwithstanding these articles of union and consolidation," does not admit of the bringing of an action against the consolidated company on an unliquidated demand against one of its constituent companies. It is only after such claim has been adjudicated and converted into a liquidated debt that the plaintiff may pursue the property of the constituent company in the hands of the consolidated company. *Whipple v. Union P. R. Co.* (1882) 28 Kan. 474.

The fact that a corporation has agreed to pay the debts of its predecessor will not authorize a levy upon its property of a judgment and execution against such predecessor. *Shipman Coal Min. & Mfg. Co. v. Pfeiffer* (1894) 11 Ind. App. 445, 39 N. E. 291.

VI. Waiver or loss of right by creditor.

The consent of a stockholder to a reincorporation does not amount to a surrender or release of a claim against the company accruing prior to the reincorporation. *Longley v. Longley Stage Line Co.* (1843) 23 Me. 39.

In *Codman v. Lloyd* (1916) 149 C. C. A. 586, 236 Fed. 534, affirming (1915) 227 Fed. 942, it was held that a creditor of a Delaware corporation of whose business and property a Pennsylvania corporation had assumed control without any formal transfer thereof, and who, upon an attempt being subsequently made to adjust the affairs of the two companies, consisting of the issuance of stock in the Pennsylvania company to an amount equivalent to the value of the assets received from the Delaware company to a trustee, in trust for the stockholders of the Delaware company, and an agreement to apply the dividends thereon to the payment of the claims of the creditors of the Delaware company, signed an agreement in which the Pennsylvania corporation disclaimed any liability for such debts, and the creditors of the Delaware company waived "any

right to claim payment from [the Pennsylvania corporation] in connection with said obligation in any other manner than as hereinbefore set forth," was estopped by his own course and contract from asserting any claims he might originally have had against the Pennsylvania company by reason of its taking possession of the Delaware corporation's assets without right.

One who, as a stockholder in one of the constituent corporations, becomes a party to an agreement of consolidation which provides that the consolidated company shall take the property of the constituent company free from its debts, is thereby precluded from asserting the liability of the consolidated company for a debt due him from the constituent company, such stipulation amounting to an agreement of indemnity on the part of the signers. *Re Utica Nat. Brewing Co.* (1897) 154 N. Y. 268, 48 N. E. 521.

A creditor of, and stockholder in, a corporation, by assenting to a reorganization plan which did not on its face give notice of intent to prefer the company's stockholders to its creditors, and by exchanging its stock under such plan for stock in the new corporation did not lose its right to charge the new corporation with its debt, where such corporation acquired all the property of the old corporation under a sale on foreclosure for the amount of the mortgage, though such property was worth enough above the mortgage to pay the creditors. *Kansas City Southern R. Co. v. Guardian Trust Co.* (1916) 240 U. S. 166, 60 L. ed. 579, 36 Sup. Ct. Rep. 334.

The right of an unsecured creditor of a corporation, whose property, though worth enough above the mortgage to pay the debt, was sold on foreclosure for the amount of the mortgage to a new corporation formed under a reorganization scheme, to

charge the new corporation with its debt, was not affected by a provision in the reorganization agreement that no right or obligation was created thereby or assumed thereunder by or for any new company in favor of any bondholder or any other creditor or holder of any claim, with respect to any property acquired by purchase at any foreclosure sale, even though such creditor became a party to the reorganization agreement because of its other interests as a stockholder in the old company. *Ibid.*

One who, as a stockholder, enters into a reorganization agreement, cannot assert his judgment, obtained against the old company, against the assets of the new company, to the prejudice of other creditors. *Farmers' Loan & T. Co. v. Central R. & Bkg. Co.* (1903) 120 Fed. 1006.

Where an insolvent corporation's creditor, for the amount of his claim, agrees to accept stock in a new corporation organized to protect creditors of those interested in the old corporation, and to take over its business, and the stock is issued and tendered to such creditor, but is refused by him, his claim against the old corporation is canceled. *Smith v. Hutchinson Box Board & Paper Co.* (1917) 101 Kan. 274, 166 Pac. 484.

A creditor who is a party to and beneficiary of a reorganization agreement which provides for the issuance of stock in the reorganized corporation to the shareholders of the old company necessarily assents to such issue; and such assent will preclude him from claiming as against the new company, after they have distributed the new stock, in pursuance of the agreement, and he will be obliged to follow it in the hands of the old stockholders who may have received it. *Vose v. Cowdrey* (1872) 49 N. Y. 336.

E. S. O.

STATE OF WASHINGTON EX REL. CITY OF SEATTLE, Resp.,
v.
SEATTLE & RAINIER VALLEY RAILWAY COMPANY, Appt.

Washington Supreme Court (Dept. No. 2)—January 7, 1921.

(— Wash. —, 194 Pac. 820.)

Public service commission — power to interfere with municipal franchise contract — free carriage of firemen and policemen.

The legislature, in establishing a public service commission and giving it power to regulate rates, did not abrogate the proprietary rights of municipal corporations with respect to the granting of street railway franchises, and therefore the commission has no power to interfere with a provision in such a franchise requiring the railway to carry firemen and policemen free of charge when they are in uniform.

[See note on this question beginning on page 1200.]

APPEAL by defendant from a judgment of the Superior Court for King County (Ronald, J.) in favor of plaintiff in a mandamus proceeding to compel defendant to comply with the provisions of its franchise requiring it to transport free of charge firemen and policemen while engaged in the discharge of their official duties. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Donworth, Todd, & Higgins and Hyman Zettler, for appellant:

The public service commission has jurisdiction over the franchise provision relating to the fares of policemen and firemen.

State ex rel. Seattle v. Public Service Commission, 103 Wash. 72, P.U.R. 1918F, 810, 173 Pac. 737; Winfield v. Public Service Commission, 187 Ind. 53, P.U.R.1918B, 747, 118 N. E. 531; Raymond Lumber Co. v. Raymond Light & Water Co. 92 Wash. 330, L.R.A. 1917C, 574, P.U.R.1916F, 437, 159 Pac. 133; Northern Indiana & S. M. Teleph. Teleg. & Cable Co. v. People's Mut. Teleph. Co. 187 Ind. 496, P.U.R.1918D, 548, 119 N. E. 212; Farmers & M. Co-op. Teleph. Co. v. Boswell Teleph. Co. 187 Ind. 371, P.U.R.1918E, 172, 119 N. E. 513; State ex rel. Indianapolis Traction & Terminal Co. v. Lewis, 187 Ind. 564, P.U.R.1918F, 111, 120 N. E. 129; Re Guilford Water Co. 118 Me. 367, P.U.R. 1920C, 363, 108 Atl. 446; Re Searsport Water Co. 118 Me. 382, P.U.R.1920C, 347, 108 Atl. 452; Salt Lake City v. Utah Light & Traction Co. 52 Utah, 210, 3 A.L.R. 715, P.U.R.1918F, 377, 173 Pac. 556; Sandpoint Water & Light Co. v. Sandpoint, 31 Idaho, 498, L.R.A. 1918F, 1106, P.U.R.1918F, 737, 173 Pac. 972; State Public Utilities Com-

mission ex rel. Quincy R. Co. v. Quincy, 290 Ill. 360, P.U.R.1920B, 313, 125 N. E. 374; Chicago R. Co. v. Chicago, 292 Ill. 190, P.U.R.1921A, 77, 126 N. E. 585; Hollister v. Hollister Water Co. (Cal.) P.U.R.1915D, 626; Farmington Chamber of Commerce v. Mountain States Teleph. & Teleg. Co. (N. M.) P.U.R.1915F, 631; Re Augusta Water District (1916) 2 Ann. Rep. Me. P. U. C. 183, P.U.R.1916E, 39; Leiper v. Baltimore & P. R. Co. 262 Pa. 328, P.U.R.1919C, 397, 105 Atl. 551; Ben Avon Borough v. Ohio Valley Water Co. (Pa.) P.U.R.1917C, 417; Franklin v. United Natural Gas Co. (Pa.) P.U.R. 1920B, 800; Re Mullan Waterworks (Idaho) P.U.R.1916D, 894; Re Hagar (Idaho) P.U.R.1918E, 456; Re Portland R. Light & P. R. Co. (Or.) P.U.R. 1918A, 764.

Messrs. Walter F. Meier, Thomas J. L. Kennedy, and A. C. Van Soelen, for respondent:

Mandamus is the proper remedy to compel free transportation of policemen and firemen.

Oklahoma City v. Oklahoma R. Co. 20 Okla. 1, 16 L.R.A.(N.S.) 651, 93 Pac. 48.

The rendering of free service to a municipality is not, in the absence of a statute so providing, an unlawful dis-

crimination; or a practice contrary to public policy, as a matter of common law.

Belfast v. Belfast Water Co. 115 Me. 234, L.R.A.1917B, 908, P.U.R.1917A, 313, 98 Atl. 738; *Superior v. Douglas County Teleph. Co.* 141 Wis. 363, 122 N. W. 1023; *Fretz v. Edmond*, — Okla. —, L.R.A.1918C, 405, 168 Pac. 800; *New York Teleph. Co. v. Seigel-Cooper Co.* 202 N. Y. 502, 36 L.R.A.(N.S.) 560, 96 N. E. 109.

Free transportation of police officers may be required by statute without violation of the 14th Amendment to the Constitution.

Sutton v. New Jersey, 244 U. S. 258, 61 L. ed. 1117, P.U.R.1917E, 682, 37 Sup. Ct. Rep. 508.

Nor does a free service provision in a franchise mean that service is rendered without compensation, because the municipality pays for the service by granting the privilege of the use of its streets.

State v. Peninsular Teleph. Co. — Fla. —, 10 A.L.R. 501, P.U.R.1917E, 453, 75 So. 201; *Oklahoma City v. Oklahoma R. Co.* 20 Okla. 1, 16 L.R.A.(N.S.) 651, 93 Pac. 48; *Pacific Teleph. & Teleg. Co. v. Everett*, 97 Wash. 259, 166 Pac. 650; *Northwestern Warehouse Co. v. Oregon R. & Nav. Co.* 32 Wash. 218, 73 Pac. 388; *State ex rel. Public Service Commission v. Spokane & I. E. R. Co.* 89 Wash. 599, L.R.A.1918C, 675, P.U.R.1916D, 469, 154 Pac. 1110; *State ex rel. McBride v. Superior Ct.* 103 Wash. 409, 174 Pac. 973.

The public service commission has no jurisdiction to relieve defendant of its franchise obligation to transport policemen and firemen free of charge while on duty.

State ex rel. Tacoma R. & Power Co. v. Public Service Commission, 101 Wash. 601, P.U.R.1918E, 277, 172 Pac. 890; *Seattle v. Puget Sound Traction, Light & P. Co.* 103 Wash. 41, 174 Pac. 464.

The public service commission has only those powers and that jurisdiction expressly granted or necessarily implied.

Wishkah Boom Co. v. Greenwood Timber Co. 88 Wash. 568, 153 Pac. 367; *State ex rel. Public Service Commission v. Spokane & I. E. R. Co.* 89 Wash. 599, L.R.A.1918C, 675, P.U.R.1916D, 469, 154 Pac. 1110; *Ops. Atty. Gen. (Wash.)* 1917-18 p. 280; *Ops. Atty. Gen. (Wash.)* 1911-12, p. 198; *Ops. Atty. Gen. (Wash.)* 1915-16 p. 193.

An attempt to abrogate a franchise

contract is justifiable only when done for the public welfare, in which case the abrogation is the exercise of a governmental function, valid only if done in the legitimate exercise of the police power.

Superior v. Douglas County Teleph. Co. 141 Wis. 363, 122 N. W. 1023; *Walla Walla v. Walla Walla Water Co.* 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77; *Columbus R. Power & Light Co. v. Columbus*, 249 U. S. 399, 63 L. ed. 669, 6 A.L.R. 1648, P.U.R.1919D, 239, 39 Sup. Ct. Rep. 349; *Warsaw v. Pavilion Natural Gas Co.* 111 Misc. 565, 182 N. Y. Supp. 73; *Freeport v. Nassau & S. Lighting Co.* 111 Misc. 671, 181 N. Y. Supp. 830; *Reed v. Anoka*, 85 Minn. 294, 88 N. W. 981; *Omaha Water Co. v. Omaha*, 12 L.R.A.(N.S.) 736, 77 C. A. 267, 147 Fed. 1, 8 Ann. Cas. 614; *Detroit v. Detroit Citizens' Street R. Co.* 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. Rep. 410; *Union Dry Goods Co. v. Georgia Pub. Serv. Corp.* 248 U. S. 372, 63 L. ed. 309, 9 A.L.R. 1420, P.U.R.1919C, 60, 39 Sup. Ct. Rep. 117; *Winfield v. Public Service Commission*, 187 Ind. 53, P.U.R.1918B, 747, 118 N. E. 531.

The Public Service Commission Act does not operate to terminate existing franchise rates, nor does the filing of a tariff with the public service commission have this effect.

State ex rel. Home Teleph. & Teleg. Co. v. Superior Ct. 110 Wash. 396, 188 Pac. 404; *State ex rel. Ellertsen v. Home Teleph. & Teleg. Co.* 102 Wash. 196, 172 Pac. 899; *Seattle Electric Co. v. Seattle*, 78 Wash. 203, 138 Pac. 892; *Raymond Lumber Co. v. Raymond Light & Water Co.* 92 Wash. 330, L.R.A.1917C, 574, P.U.R.1916F, 437, 159 Pac. 133; *Freeport v. Nassau & S. Lighting Co.* 111 Misc. 671, 181 N. Y. Supp. 830; *Warsaw v. Pavilion Natural Gas Co.* 111 Misc. 565, 182 N. Y. Supp. 73; *Freeport Water Co. v. Freeport Water Co. (Me.)* P.U.R.1920E, 49; *Sultan R. & Timber Co. v. Great Northern R. Co.* 58 Wash. 604, 109 Pac. 320, 1020.

Mitchell, J., delivered the opinion of the court:

This appeal by the Seattle & Ranier Valley Railway Company is prosecuted from a judgment of the superior court of King county directing the issuance of a peremptory writ of mandate compelling the appellant to comply with the provisions of its franchises, requiring it

to transport free of charge upon its street railways within the city of Seattle policemen and firemen in uniform while engaged in the discharge of their official duties. No exceptions were taken to the findings made by the court upon the trial of the case. From these findings it appears that prior to the effective date of the Public Service Commission Law of 1911 the city of Seattle, by its franchise ordinances, granted to the predecessors in interest of the appellant the right to operate street railway lines upon certain streets in the city; that in the terms and conditions contained in the franchises granted to the grantees therein named, their successors and assigns, there was a provision, as a part of the consideration for the use of the streets, requiring the holders of the franchises to carry city policemen and firemen in uniform free over their street railway lines while in the discharge of their official duties; that this provision is a valuable undertaking on the part of the franchise holders, in behalf of the city, and, if not enforced, will work great hardship upon and require the expenditure of large sums of money by the city for the carrying of its policemen and firemen over the street railways in the discharge of their several duties; and that the city has paid and is paying for such transportation by granting and permitting the franchise holders the use of its streets. Other findings are to the effect that, pursuant to the franchise grants, the grantees and their successors and assigns, including the Seattle & Ranier Valley Railway Company, have at all times since occupied the public streets of the city, and maintained and operated thereon street railway lines, and in compliance with the terms of the franchises, as rental for the use of the streets, did transport city policemen and firemen in uniform until the 17th day of November, 1919, and, further, that on the 18th day of October, 1919, the Seattle & Ranier Valley Railway Company

sought to avoid its franchise obligations to the city by filing with the public service commission a new tariff, containing the statement as follows: "Under certain tariffs heretofore filed, and specifically under passenger tariff No. 2, in paragraph No. 7, the provision therein contained for carrying policemen and firemen free is hereby eliminated, and hereafter the Seattle policemen and firemen, whether in full uniform or not, will be charged the regular adult fare,"—and upon the expiration of thirty days, without any hearing before the commission or at all, set up the claim that the franchise provision had been canceled, and thereupon refused to comply with that provision,—all without the consent of the city,—and has at all times since refused to comply therewith in spite of the written demand of the city.

No contention is made that the city, which is a city of the first class, was not acting within its rights and power, at the date of the franchise grants, in incorporating therein as a valid and enforceable obligation the requirement that the grantees, their successors and assigns, should carry policemen and firemen free. Counsel for appellant say there is only one question in this case, viz., Did the public service commission have jurisdiction over this franchise provision relating to the fares of policemen and firemen? To put it more fully, if possible, the controlling query is: Did the enactment of the Public Service Commission Law of 1911 supersede the right of the city to insist upon the enforcement of its rights under the terms of franchise ordinances passed by the city and accepted by the grantees prior to the going into effect of that law, requiring the grantees, their successors and assigns, to carry free the city's policemen and firemen when engaged in their respective official duties? To sustain the affirmative of the proposition contained in the inquiry, appellant calls attention to a long list of authorities, of which the Indiana case of

Winfield v. Public Service Commission (1918) 187 Ind. 53, P.U.R. 1918B, 747, 118 N. E. 531, is fairly typical. In that case the city of Logansport had granted a franchise to a telephone company in which it was provided that certain municipal officers should have free telephones for public business. For over ten years the company complied with the requirement, when, after the passage of the Public Service Commission Act of that state, the company secured the consent of the commission to an abrogation of this franchise provision. Before dealing with the narrow question of whether the commission had power to order a charge to be made against the city for the telephones stipulated to be free by the franchise contract, the court reviewed the authorities as to the general principles involved, and reached the conclusion, viz.:

"Except where the state has thus irrevocably, either directly or indirectly, devested itself of the right to so exercise its police power, the state may, for the public good, regulate the . . . conduct of the public service companies, and the most frequent call for such regulation relates to charges of such companies for their public service; the principle underlying such regulation being that the charges for service shall be fair and reasonable, all things considered, and that the rate fixed shall not be so low as to deprive the company of means of adequate service, nor so high as to unduly burden the public.

"Every charter granted by the state, and every franchise, whether granted by the state directly or by the municipality acting as agent of the state, is granted in view of the rules above stated, and especially in contemplation of the fact that unless the state has in the charter to the utility company, or in the authority to its agent, or by ratification, abandoned its power to so regulate, the state's power is by implication written into such contract; and therefore the state's act of regulation, within the limits above stated, is not

an impairment of the contract, but rather an exercise of a right provided in the contract."

The court then proceeded to examine the statutes of that state to see if the state had abandoned its power of supervision over the subject, and expressed its view thereon as follows: "We hold, therefore, that, in so far as the public interests are involved, nothing in the charter of the defendant telephone company, nothing in the powers granted to the city, and nothing in the franchise contract between the city and the defendant telephone company, prevents the state from regulating rates, including the matter of compensation to the city."

It was held the commission had power to make the order complained of. It is claimed by the appellant that the Indiana Public Service Commission Act is identical with ours, so far as the question involved at bar is concerned, and that the decision is directly in point. But the similarity of the Public Service Commission Act of that state to the Public Service Commission Law of this state does not of itself make that decision directly in point or entirely persuasive in the present case. In that case the court necessarily examined not only the Public Service Commission Act, but also the statutes conferring powers upon cities to ascertain if the state had thereby, through the cities as its agents, abandoned the state's important function of supervision over rates and charges; for, said the court, every franchise, whether granted by the state directly or by the municipality acting as agent of the state, is granted in contemplation of the fact that unless the state has in its charter to the utility company, or in the authority of its agent, or by ratification, abandoned its power to regulate, the state's power is, by implication, written into the contract. And, after making a complete examination of all such statutes of that state, the court, as already stated, concluded, among other things, that nothing in the powers granted to the

city "prevents the state from regulating rates, including the matter of compensation to the city."

The same may be said of the case of Sandpoint Water & Light Co. v. Sandpoint (1918) 31 Idaho, 498, L.R.A.1918F, 1106, P.U.R.1918F, 737, 173 Pac. 972, cited and relied on by the appellant. The issue in that case related to the authority of the Utilities Commission to revoke the right of the city to receive water for street sprinkling free of charge under the franchise. It was decided the commission had such power. In discussing the issue, reference was made to the doctrine that the power to supervise and regulate rates and charges by public utilities is an inherent function of government, which occupies a large space within the domain of the police power of the state. Then, considering the question of the abrogation by the state for a limited period of its right to exercise this power, certain provisions of the Constitution of that state were cited to suggest the question if the Constitution does not contain a limitation upon the legislature or any of its agencies to contract in any manner and at any time to suspend the right of the state to exercise its police power in such cases. In this connection, however, the opinion reads: "But, without considering that question our attention has not been called to any attempt upon the part of the legislature of this state to authorize municipalities to enter into contracts which will in any manner abridge this power of the state. The franchise must, therefore, be held to have been granted any accepted subject to the right of the state any time to exercise its reserved police power in the manner of regulating rates."

It follows, therefore, by the careful course pursued in those cases relied on by the appellant, that in answering the question in the present case we must consider not only the Public Service Commission Law of this state, but the statutes conferring powers upon cities as well,

to see if the state has previously suspended its regulatory powers in respect to the particular charges in question. This court has been called upon in a number of cases to determine the power and scope of authority of the Public Service Commission, the rights of cities under franchises which were granted to public service companies prior to the enactment of the Public Service Commission Law, and the rights and obligations of the public service companies as well as those of the general public. Those cases dealing with the power of the commission to abrogate the provisions of such franchises have generally been divided into two classes: (1) Those affecting rates or service designed in behalf of the general public, such as *State ex rel. Webster v. Superior Ct.* 67 Wash. 37, L.R.A.1915C, 287, 120 Pac. 861, Ann. Cas. 1913D, 78, and *State ex rel. Seattle v. Public Service Commission*, 103 Wash. 72, P.U.R.1918F, 810, 173 Pac. 737; and (2) those affecting the individual pecuniary and proprietary rights of the city itself as consideration for the franchise rights granted the public service company, such as *State ex rel. Tacoma R. & Power Co. v. Public Service Commission*, 101 Wash. 601, P.U.R.1918E, 277, 172 Pac. 890, and *Seattle v. Puget Sound Traction, Light & P. Co.* 103 Wash. 41, 174 Pac. 464, the one governmental and the other proprietary, on the part of the city. As to the latter, the kind here involved, it has been decided that the legislature intended to, and did, vest the city with the whole of the state's police power touching the subject-matter, which has not been interfered with by the Public Service Commission Law. While counsel for the appellant contends otherwise, we are satisfied the cases of *State ex rel. Tacoma R. & Power Co. v. Public Service Commission* and *Seattle v. Puget Sound Traction Light & P. Co.* supra, are authorities that settle the question in this case.

In the Tacoma Case the Public Service Commission decided it had no power to relieve the street rail-

way company from certain of its franchise provisions which it had complained of and asked to have abrogated. The controversy was presented to this court by an application for a writ of mandate to the commission. This court said: "The franchise provisions complained of are those requiring the street car company, the petitioner, to pave between its tracks and 1 foot on either side, to contribute to the cost of bridges, to pay a certain percentage of its gross earnings to the city, and to permit certain officers or employees of the city free transportation. The franchises containing these provisions were all granted prior to the passage of the Public Service Commission Law."

The opinion takes notice of the statute granting power to cities of the first class (which need not be repeated here) and holds: "Here is a clear and specific grant by the state to the city to impose terms and conditions upon which any of its streets may be used by a street railroad."

It was claimed, however, by the company, that, this being a matter within the police power, the state had the right by a subsequent statute to confer upon the public service commission the power to abrogate such franchise provisions, and had in fact done so by the Public Service Commission Law. The court then examined and analyzed the Public Service Commission Law, and indeed the history of that law as it passed through the legislature, and decided there is nothing in the law which either expressly or by necessary implication confers power upon the commission to deal with the question of franchises, or to modify the terms previously imposed therein; and that the history of the legislation indicates an affirmative intention on the part of the legislature not to confer such power upon the public service commission. The result was a denial of the writ prayed for.

In the Seattle Case the city sued the street railway company to recover 2 per cent on the gross receipts from the operation of its street railway, as provided for in its fran-

chises. The opinion says: "The question here is whether the Public Service Commission Law, either by its terms or by necessary implication, attempted to confer power upon the public service commission to modify or abrogate franchise provisions which had theretofore been imposed by the city in granting the franchises under the specific grant of the legislature."

The statutes were again examined and discussed, and reference, with approval, was made to the decision in the Tacoma Case. The decision was in favor of the city.

Counsel for appellant, disagreeing with this view, seeks to distinguish the present case from the two cases just referred to, and indeed argues that this court has in effect done so. Reliance is had upon the case of *State ex rel. Seattle v. Public Service Commission*, 103 Wash. 72, P.U.R.1918F, 810, 173 Pac. 737, which was a case wherein it was decided the commission had the power to cancel a provision in a franchise requiring the street railway company to sell commutation tickets to the public generally. The particular thought or language in the opinion referred to by the appellant is that portion wherein, after referring to the Tacoma Case, holding there was no power in the commission to relieve the railway company from certain franchise provisions it was said: "But the provisions under consideration in that case did not relate to rates or fares as in this case."

And further certain language in the Tacoma Case as follows: "The right to deal with the question of rates and service is an entirely different matter from the right to grant franchises or abrogate the provisions thereof."

The language in those opinions, selected and depended upon by the appellant, must be understood in the light of the subjects to which it was directly or impliedly intended. It referred to rates, fares, and service as related to the rights of the general public as distinguished from the proprietary rights of the city granting the franchises. Obviously this is so;

for in the Tacoma Case one of the franchise provisions immediately and directly called in question (similar to the one in the case at bar) was free transportation to certain officers and employees of the city, re-

Public service
commission—
power to inter-
fere with
municipal
franchise con-
tract—free car-
riage of firemen
and policemen.

lief from which it was therein decided the commission was powerless to consider.

Judgment affirmed.

Holcomb, Ch. J., and Mount, Main, and Tolman, JJ., concur.

Petition for rehearing denied March 3, 1921.

ANNOTATION.

Franchise provision for free or reduced rates by public service corporation as within constitutional or statutory provision prohibiting discrimination.

The above question is treated in a note appended to *State v. Peninsular Teleph. Co.* 10 A.L.R. 504. The question involved is one of construction of public utility acts and other statutes prohibiting discrimination, as distinguished from the question of constitutional law as to impairment of contract obligations, assuming that the legislature intended the statute to apply to the franchise provisions. This question of constitutional law is treated in notes to *Salt Lake City v. Utah Light & Traction Co.* 3 A.L.R. 730, and *Virginia-Western Power Co. v. Com.* 9 A.L.R. 1148, on the question of the power of a public service commission to increase franchise rates; and in the note to *Dubuque Electric Co. v. Dubuque*, 10 A.L.R. 499, on the question of franchise provisions for free or reduced rates by public service corporations as constituting contracts protected from change under the contract clause of the Federal Constitution.

In general, the cases cited in the reported case (*STATE EX REL. SEATTLE v. SEATTLE & R. VALLEY R. Co.* ante, 1194) are discussed in the notes above referred to. It will be observed that in that case the court distinguishes, as regards the present question, between the governmental and the proprietary rights of the municipality. While as respects the former, the court held in *State ex rel. Seattle v. Public Service Commission* (1918) 103 Wash. 72, P.U.R.1918F, 810, 173 Pac. 737, cited in the note in 9 A.L.R. on page 1176, that the public service com-

mission had power to authorize the discontinuance of the sale of commutation tickets by a street railway company, provided for in the franchise; yet in the reported case (*STATE EX REL. SEATTLE v. SEATTLE & R. VALLEY R. Co.*) the court held that the Public Service Commission Law had not conferred power on the commission to interfere with a provision in the street railway franchise requiring the railway to carry firemen and policemen in uniform free of charge.

Generally, cases involving the abrogation of free or reduced rates provided for in franchises have turned on the question of constitutional law rather than on that of construction of statutes or constitutional provisions; and a search has disclosed no case directly in point on the present question decided since the preparation of the note in 10 A.L.R. 504, above referred to. Attention may be called, however, to *Hillsboro v. Public Service Commission* (1920) 97 Or. 320, P.U.R.1920C, 817, 187 Pac. 617, and to the decision on rehearing in (1920) 97 Or. 332, 192 Pac. 390, although in this case the question was primarily one of constitutional law. In the first decision the court held that a franchise providing for free hydrants to a municipality after a term of years was a rate-making contract, and subject to modification by the public service commission, on application by the utility, so as to require the payment of a specified rate in lieu of the free hydrants. In deny-

ing the petition for rehearing, the court referred to the provision of the Public Service Commission Act, that nothing therein should prevent transportation of persons or property or the production, furnishing, etc., of light, water, or power within the state, "free or at reduced rates, for the United States, the state, or any municipality

thereof." This language, the court said, must be read in connection with the context, and was found in a section forbidding unjust discrimination, being merely an exception permitting, and not requiring, free service to municipalities; so that such services, like others, were within the scope of the commission's power. R. E. H.

WILLIAM MEINERT, Alias Puss Meinert, Appt.,
v.
STATE OF INDIANA.

Indiana Supreme Court—June 23, 1921.

(— Ind. —, 131 N. E. 515.)

Gaming — keeping room — inmate of jail.

A prisoner in a jail having authority over the other prisoners in the room where he is confined, who furnishes cards and supervises games of chance, taking a "rake-off" on each "pot" for the privilege of playing in the room, violates a statute against keeping a room to be used for gaming.

[See note on this question beginning on page 1202.]

APPEAL by defendant from a judgment of the Criminal Court for Marion County (Ballou, J.) convicting him of keeping a building and room used and occupied for gaming. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Holmes & McCallister for appellant.

Mr. U. S. Lesh, Attorney General, and Mrs. Edward Franklin White, Deputy Attorney General, for the State:

One charged with keeping a house for gaming need not be the owner of the room or any of its contents.

Flatters v. State, — Ind. —, 127 N. E. 5; *United States v. Miller*, 4 Cranch, C. C. 104, Fed. Cas. No. 15,773; *Alexander v. Com.* 12 Ky. L. Rep. 470.

A building which is being "used" for an unlawful purpose is being "kept" for such purpose.

Oligschlager v. Territory, 15 Okla. 141, 79 Pac. 913.

To "set up a gaming table" is to provide whatever may be necessary for the game, and, either by acts or words, to propose to play it.

Com. v. Burns, 4 J. J. Marsh. 177.

That defendant took a percentage of the game, and resided in the room, was sufficient to sustain the judgment.

Ransom v. State, 26 Fla. 364, 7 So. 860.

Ewbank, J., delivered the opinion of the court:

Appellant and three others were jointly indicted upon the charge that they "did then and there unlawfully keep a certain building and a room therein situate to be used and occupied for gaming." Appellant was found guilty and appealed, assigning as error that the trial court erred in overruling his motion for a new trial. The only specifications in the motion were that the finding was not sustained by sufficient evidence and was contrary to law.

The uncontradicted evidence showed that throughout a period of months the appellant presided at a table where many persons played with cards a game of chance called "poker," upon the result of which they wagered money, and won and lost the amounts so wagered except a "rake-off" of 5 cents from each

"pot," which appellant took out. And the appellant, as well as all the other witnesses, testified to such facts as clearly established all the elements of the offense charged, unless it was the element of "keeping" the building and room in which the gaming took place.

The evidence proved, without contradiction, that all of such gaming took place in a large room in the Marion county jail, in which appellant and the other persons who so engaged in gaming were at all of such times confined as prisoners, serving sentences imposed on them by the Federal court for offenses committed against the laws of the United States, and that appellant was at all of such times an "assistant cell boss," appointed by the jailer to assist another prisoner, who was the "cell boss," and that such cell boss and assistant had supervision and authority over their fellow prisoners in that room to see that the room was kept clean, and to require them to help scrub, mop, and sweep. Witnesses also testified that it was part of the duty of the cell boss and assistant to see that the rules of the jail were complied with and to give information and aid to that end; and that the jailer assembled the men in the room and told them they must do anything appellant told them to, and told appellant, in the presence of the other men, that he was looking to appellant to see to everything that went on in there; though other witnesses

denied part of this latter testimony, and explained the rest so as to give it a restricted meaning. There was no evidence that the officers in charge of the jail knew of the gambling, and the jailer and his deputies denied all knowledge of it.

No authorities directly in point have been cited by counsel for either side, and we have not found any decisions relating to the responsibility of a prisoner for gaming that took place in a jail where he was confined as a prisoner.

But we think the evidence that appellant placed or directed the placing of the tables, and furnished the cards, invited the players to use them, supervised the games, and took the "rake-off" of "a nickel on each pot" for the privilege of playing in a room where he had authority over all of the men that engaged in playing there, sufficiently proved that appellant "did keep . . . a room . . . to be used . . . for gaming," even though the room was in the county jail, and he and all of the players who engaged in gaming were confined in that room by authority of law and could not leave it, and the gaming was surreptitiously done without the knowledge of the officers in charge of the jail. *Ransom v. State*, 26 Fla. 364, 7 So. 860; *Keife v. State*, 14 Ala. App. 14, 70 So. 950.

The judgment is affirmed.

ANNOTATION.

Connection with place where gaming is carried on which will render one guilty as keeper thereof.

- I. Scope of note, 1202.
- II. Proprietor, 1203.
- III. Lessor, 1204.
- IV. Lessee, 1205.
- V. Employee, 1205.
- VI. Officer of club, 1206.
- VII. Miscellaneous, 1207.

I. Scope of note.

This note includes only those cases

wherein the question of the guilt or innocence of an accused person as the keeper of a place where gaming is carried on is discussed, and excludes those cases wherein the courts, in deciding whether an accused person is the keeper thereof, confine their discussion merely to the question whether the alleged acts constitute gaming.

II. Proprietor.

It has been held that where the proprietor of a place not kept for the purpose of gaming allows gaming to be carried on, in which he participates or from which he in some way receives a benefit, he may be convicted as the keeper of a gaming place.

Arkansas.—*Lyman v. State* (1909) 90 Ark. 596, 119 S. W. 1116.

Florida.—*Ransom v. State* (1890) 26 Fla. 364, 7 So. 860; *Toll v. State* (1898) 40 Fla. 169, 23 So. 942.

Indiana.—*Hamilton v. State* (1881) 75 Ind. 586.

Iowa.—*State v. Cooster* (1860) 10 Iowa, 453.

Missouri.—*St. Louis Fair Asso. v. Carmody* (1899) 151 Mo. 566, 74 Am. St. Rep. 571, 52 S. W. 365.

North Dakota.—*State v. Chase* (1908) 17 N. D. 429, 117 N. W. 537, 17 Ann. Cas. 520.

Texas.—*Boswell v. State* (1912) 67 Tex. Crim. Rep. 561, 150 S. W. 432.

Canada.—*Rex v. Mah Kee* (1905) 9 Can. Crim. Cas. 47, 6 Terr. L. Rep. 121; *Rex v. Sala* (1907) 13 Can. Crim. Cas. 198.

Thus in *Boswell v. State* (Tex.) *supra*, it appeared that gambling was carried on in a room occupied by the accused, who sold and cashed in the poker chips which were used by the players, and also received a certain amount as a "rake-off" or a charge from each game. It was held that the accused was properly convicted of unlawfully keeping a room as a place where people resorted for the purpose of betting on games played with cards.

So, in *Rex v. Sala* (Can.) *supra*, it appeared that there was a room directly in the rear of the defendant's saloon which was frequented by several persons who played therein the game of draw-poker. The evidence showed a general scheme between the defendant and a person who dealt the cards and had charge of the chips which were used in playing the game, by which a rake-off was taken from each game and used to pay for the drinks which were purchased from the defendant. The court held that the defendant

was properly convicted of keeping a gaming house.

Likewise, in *Toll v. State* (Fla.) *supra*, it appeared that the defendant was the proprietor of a bar room in connection with which was another room under his control, in which games of cards were played for money, to the knowledge of the defendant and in which he frequently participated. It was held that the evidence was amply sufficient to sustain a conviction of the defendant for keeping a room for the purpose of gaming, under the statute (Rev. Stat. § 2044), which prohibited, among other things, the keeping and maintaining of a house, room, or other place for the purpose of gaming or gambling.

So, in *Lyman v. State* (Ark.) *supra*, it appeared that there were several gaming tables in a room of the upper story of the building, in which the business of the accused was conducted. A game of chance at which money was bet was carried on in the room. Poker chips were purchased from the accused or an attendant of the room, which were used in playing the game, and a certain percentage of the amount staked on each game was paid by the players to the "house," or the attendant. The evidence showed that the accused or an attendant was always in the room while the playing was going on, and that the attendant was there in the employ or under the permission of the accused. It was held that the accused was properly convicted of running a gambling house.

In *Rex v. Mah Kee* (Can.) *supra*, it appeared that the game of "Fan Tan" was at different times carried on for money, in a building in which the defendant conducted a laundry business. The defendant sold chips which were used to play with, had general charge of the game, and remarked that he was "doing well out of it." It was held that the defendant was properly convicted of keeping a gaming house.

So, in *Hamilton v. State* (1881) 75 Ind. 586, it was held that the accused was guilty of the offense of keeping a

gaming house, where it appeared that certain billiard tables in his saloon had been used for two years for the purpose of gaming, although he was not in direct charge of the place but was frequently present, and the evidence justified the finding by the jury that he knew and suffered the gaming to be carried on.

In *State v. Cooster* (1860) 10 Iowa, 453, it appeared that the defendant kept a set of dice in his liquor establishment, which were thrown by different persons for money or to determine who should pay for the drinks. The inference was drawn from the evidence that the defendant had knowledge of these acts. The court held that the evidence was sufficient to warrant the conviction of the defendant for keeping a house resorted to for gambling purposes.

In *Ransom v. State* (1890) 26 Fla. 364, 7 So. 860, it was held that the defendant was guilty of keeping a gambling room under an act entitled "An Act to Suppress Gambling Houses and Gambling," where it appeared that he and other persons played poker in his room for money, and the defendant took a certain percentage of the amount for which the game was being played.

In *St. Louis Fair Asso. v. Carmody* (1899) 151 Mo. 566, 74 Am. St. Rep. 57, 52 S. W. 365, the court stated the facts and its holding as follows: "In connection with its racetrack and grand stand it [plaintiff] has provided booths fitted up and supplied with all the gambling devices, appurtenances, and paraphernalia requisite for bookmaking, which it rented for money to gamblers, to be used for that purpose in connection with the races to be run on its track; and by the consent, connivance, and procurement of plaintiff large numbers of people assembled at those booths to gamble by betting on the races, through the devices so supplied. According to all the authorities on the subject that have been brought to our attention, those facts constitute the plaintiff the keeper of a common gaming house."

In *State v. Chase* (1908) 17 N. D. 429,

117 N. W. 537, 17 Ann. Cas. 520, where in it appeared that the defendant was in charge of a room where gambling was going on, and that he had the keys to the card and chip racks, handled money and acted as proprietor, it was held that he was properly convicted, in the absence of any contrary evidence, of keeping a place as a gambling resort.

III. Lessor.

It has been held that if a lessor of premises, being in possession thereof, allows gaming to be carried on, he may be convicted of keeping a gaming house. *Stevenson v. State* (1889) 83 Ga. 575, 10 S. E. 234; *Scott v. State* (1859) 29 Ga. 263; *People v. Trainor* (1901) 57 App. Div. 422, 15 N. Y. Crim. Rep. 333, 68 N. Y. Supp. 263; *Bryan v. State* (1904) 120 Ga. 201, 47 S. E. 574.

Thus, in *Stevenson v. State* (Ga.) supra, it appeared that the accused and several others were playing cards for money in a room which the accused had rented to a third person. It seems the accused used the room at times in which to serve drinks, and kept tables and cards therein. It was held that, notwithstanding the room had been rented to and used by a third person, the act of the accused in allowing and participating in gaming therein rendered him guilty of keeping a gaming house.

So, in *Scott v. State* (1859) 29 Ga. 263, it appeared that the accused was in the possession of a house the rooms of which he rented out to different people. The evidence showed that the accused was seen at different times in one of the rooms which he had rented to another person, playing cards. The court held that if the house was in his possession when the gaming took place, with his consent, he was guilty of keeping a gaming house.

And in *People v. Trainor* (1901) 57 App. Div. 422, 15 N. Y. Crim. Rep. 333, 68 N. Y. Supp. 263, it appeared that the defendant was in charge of a business on the lower floor of a building and had general charge of the building. A room in the building had been leased by the defendant to a club, and

gambling was carried on therein. The court held that, since the defendant had authority and control over the room in which the gambling was carried on, he was properly convicted of keeping a gambling establishment as defined by the statute, Penal Code, §§ 343, 344, notwithstanding the fact that his wife was the owner of the business and the license under which the business was conducted was issued in her name.

Where it appeared that the proprietor of a saloon and restaurant had a room in the upper story of his place of business wherein he kept a faro bank and other gambling devices; and people were allowed to frequent the place for the purpose of playing games, which were managed by the proprietor,—it was held that he was properly indicted for keeping and maintaining a gaming house though the upper story of the place of business had been rented to a third person. *Bryan v. State* (Ga.) *supra*.

IV. Lessee.

If a lessee allows a game of chance to be played on the leased premises, he may be convicted as keeper of a gaming house. *State v. Mosby* (1893) 53 Mo. App. 571; *State v. Black* (1886) 94 N. C. 809; *Parshall v. State* (1911) 62 Tex. Crim. Rep. 177, 138 S. W. 759; *Neeld v. State* (1900) 25 Ind. App. 603, 58 N. E. 734.

Thus in *State v. Mosby* (Mo.) *supra*, it appeared that the defendant rented a room which he used as a bedroom, and at times the room was frequented by several persons who played cards for money and shot craps. The general reputation of some of the players was shown to be that of gamblers. It was held that the defendant was properly convicted of keeping a common gaming house.

So, in *State v. Black* (1886) 94 N. C. 809, it appeared that the defendant leased two adjoining rooms, which were occupied by him and furnished as bedrooms. At times several persons assembled in these rooms and played cards for money. The defendant was not always present when the games were going on, but when he was present he acted as bank-

er of the games, sold chips which were used to bet with on the games, and controlled the games in general. It was held that the evidence was sufficient to warrant a verdict that the defendant was guilty of keeping a gaming house.

In *Parshall v. State* (1911) 62 Tex. Crim. Rep. 177, 138 S. W. 759, it appeared that the accused rented a room in a hotel, where at times a large number of persons resorted for the purpose of gambling. The accused was present and participated in the games, and gambling devices were kept in the room under his supervision. At the beginning of each game the sum of 50 cents was paid by each player to the accused. It was held that the evidence was sufficient to warrant the conviction of the accused for keeping a room for gambling purposes.

In *Neeld v. State* (Ind.) *supra*, it was shown that several men were seen playing cards with the accused in his room, with money and piles of poker chips on the table. Some of the chips were placed in the center of the table, and, after the game was played, the accused would "chip off into the drawer," and the "pot" went to the winner. It was held that the accused was guilty of keeping a room to be used and occupied for the purpose of gaming.

V. Employee.

A person having general charge of a gaming place as an employee may be convicted of the offense of keeping a gaming house. *State v. Harbourn* (1898) 70 Conn. 484, 40 L.R.A. 607, 66 Am. St. Rep. 126, 40 Atl. 179; *Stevens v. People* (1873) 67 Ill. 587; *People v. Brewer* (1908) 142 Ill. App. 610; *Com. v. Drew* (1849) 3 Cush. (Mass.) 279; *State v. Marchant* (1887) 15 R. I. 539, 9 Atl. 902, 7 Am. Crim. Rep. 217.

Thus, in *Stevens v. People* (1873) 67 Ill. 587, it appeared that the accused was arrested with several others while in the act of playing faro in a room which was furnished and being kept as a common gaming room. The accused appeared to be in general charge of the room. The court, in holding the accused to be guilty of the

offense of keeping a gaming house, said: "We are of opinion that if the defendant had the general superintendence and charge, though but as an employee, of the gaming house in question and of the gaming there carried on, he might be regarded as the keeper of the house, or, at least, that he so efficiently aided and abetted in the commission of the offense of keeping the house that he might be rightly convicted of such offense."

So, where gambling was carried on in a room in which the accused was always present, apparently as an employee, and, although there was no proof that he actually participated in any game for money, it was shown that he arranged the chairs and tables for the players, procured the necessary chips which were used in playing, and seemed to have general charge of the room, it was held that this was sufficient evidence to convict the accused of aiding or abetting in keeping a gaming house, and therefore he was guilty as a principal. *People v. Brewer* (1908) 142 Ill. App. 610.

In *State v. Harbourne* (Conn.) supra, it appeared that the defendant was employed as manager of a telegraph office, and transmitted a sum of money for the sender to a third person to be bet on a horse race without the state. The court, in holding the defendant to be guilty of keeping a place in which gambling was carried on, said: "When one opens an office and makes arrangements and furnishes facilities to enable his customers to sit in his office and gamble upon the results of horse races in this state and other states, he keeps a place in which the business forbidden by the statute is carried on; and if he knowingly assists in the transmission of money in the course of that business, he is concerned in the business. It is immaterial whether the illegal business is carried on as an wholly independent business, or as a part of an otherwise legitimate business in telegraphing."

In *Com. v. Drew* (1849) 3 Cush. (Mass.) 279, it was held that the defendant was guilty of keeping a place for the purpose of unlawful gaming,

where it was shown that a building was kept for the purpose of bowling for hire, and the defendant was engaged at the place, doing business as though he was keeper thereof, although in so doing he was acting as agent or employee of another.

In *State v. Marchant* (R. I.) supra, it appeared that the defendant was left temporarily in charge of a room which was kept by the lessee to be used for the purpose of gambling. On an appeal by the defendant from a conviction of being guilty of keeping a certain room to be used and occupied for the purpose of gambling, the court said: "We are of the opinion that if the defendant was in charge and control of the room for the purpose, on his part, of its being used as a gambling room, it was enough to make him guilty of the offense, even though the room was not actually so used while he was in charge of it."

VI. *Officer of club.*

It has been held that where the officers of a club rented the premises occupied by the club, knowing they are to be used for the purpose of gaming, or permit gaming on the club's premises from which they receive a benefit, they may be convicted as keepers of a gaming house. *Cochran v. State* (1897) 102 Ga. 631, 29 S. E. 438; *Swigart v. People* (1893) 50 Ill. App. 181, affirmed in (1895) 154 Ill. 284, 40 N. E. 432; *Jenks v. Turpin* (1884) L. R. 13 Q. B. Div. (Eng.) 505, 53 L. J. Mag. Cas. N. S. 161, 50 L. T. N. S. 808, 15 Cox, C. C. 486, 49 J. P. 20; *Rex v. Merker* (1916) 27 Can. Crim. Cas. 113, 37 Ont. L. Rep. 582; *Reg. v. Brady* (1896) Rap. Jud. Quebec 10 C. S. 539.

Thus, in *Swigart v. People* (1893) 50 Ill. App. 181, affirmed in (1895) 154 Ill. 284, 40 N. E. 432, it appeared that the accused and several others, members of a certain club, rented a tract of land on which they conducted horse racing. The accused was secretary of the club. A certain place on the grounds, called the betting room, was rented to bookmakers and pool sellers, where bookmaking was carried on, not only on the events of the outcome of

the races conducted by the accused, but also on races which were to take place on other tracks. The court held that the accused was properly convicted of keeping a gambling place where persons were allowed to congregate together to play for money, and of knowingly renting such place for such purpose.

And in a case where it appeared that the officers of a social club knowingly permitted gaming with cards for money in the rooms of the club, and collected and received a certain portion of the losses for the use and benefit of the club, it was held that there was sufficient evidence to warrant a verdict finding them guilty of keeping a gaming house. *Cochran v. State* (Ga.) *supra*, wherein the court said: "They were the managing officers of the club, and were present, knowingly aiding and abetting the gambling in its rooms, engaging in such acts, it seems, as the keeper of any gaming house would perform in maintaining an establishment of that character."

So, it was held in *Rex v. Merker* (1916) 27 Can. Crim. Cas. 113, 37 Ont. L. Rep. 582, that the secretary and treasurer, who were in active control and management of a social club, and who permitted gambling for gain to be carried on among the members on the premises owned by the club, were properly convicted of keeping a gaming house. And see *Reg. v. Brady* (Quebec) *supra*, wherein, under similar facts, a similar conclusion was arrived at.

Similarly, in *Jenks v. Turpin* (1884) L. R. 13 Q. B. Div. (Eng.) 505, 53 L. J. Mag. Cas. N. S. 161, 50 L. T. N. S. 808, 15 Cox, C. C. 486, 49 J. P. 20, it appeared that the accused was the proprietor of and occupied the premises used by a club of which he was a member. Gambling took place in the club rooms, from which the accused received a certain per cent. It was held that the accused was properly convicted of opening and keeping a house for the purpose of unlawful gaming within the meaning of a statute (17 & 18 Vict. chap. 38), providing that "any person, being the owner

or occupier, or having the use of any house, room, or place, who shall use the same for the purpose of unlawful gaming, shall," etc.

VII. Miscellaneous.

It has been held that one who sets up a booth for the purpose of book-making by accepting bets from different persons, on the outcome of certain horse races, is properly indicted for keeping a place for the purpose of gaming under an act providing that "every person who shall . . . keep any house or place . . . for the purpose of gaming shall be convicted," etc. *Miller v. United States* (1895) 6 App. D. C. 6.

So, in *Rex v. Saunders* (1906) 12 Ont. L. Rep. 615, 38 Can. S. C. 382, 7 Ann. Cas. 254, it appeared that the defendant was in possession of a movable booth near a race track, and was engaged in making bets with other persons on the outcome of certain races which were to take place on the track. It was held that the booth was an office or place within the meaning of § 197 of the Criminal Code, and that the defendant was properly convicted of keeping a common betting house within the meaning of § 198 of the Criminal Code.

In *People v. Bell* (1918) 212 Ill. App. 144, it appeared that the defendant was frequently seen in a room back of a certain saloon engaged in running a crap game, and, when the dice rolled on the table, the defendant would either take in or pay out money. There was no evidence as to who was the owner or lessee of the room. The court held that the jury were fully warranted in finding the defendant guilty of keeping a gaming house.

In the reported case (*MEINERT v. STATE*, ante, 1201) it is held that an inmate of a jail who supervised a game of poker and took a "rake-off" on each "pot" was guilty of keeping a room where gaming took place.

Where the evidence fails to show that a person is in any way connected with the management of the place or supervision of the game, although he may frequent the place where the gaming is carried on, he cannot prop-

erly be convicted of keeping a gaming place. *Bell v. State* (1893) 92 Ga. 49, 18 S. E. 186; *State v. Hicks* (1917) 101 Kan. 782, 168 Pac. 861; *People v. Mitchell* (1892) 10 N. Y. Crim. Rep. 244, 49 N. Y. S. R. 528, 21 N. Y. Supp. 166; *Bell v. State* (1918) 84 Tex. Crim. Rep. 197, 206 S. W. 516; *Rex v. Charlie Yee* (1917) 27 Can. Crim. Cas. 441, 10 Sask. L. R. 62, 1 West. Week. Rep. 1307; *Rex v. Riley* (1916) 26 Can. Crim. Cas. 402, 23 B. C. 192, 1 West. Week. Rep. 325, 30 D. L. R. 584.

Thus, in *State v. Hicks* (1917) 101 Kan. 782, 168 Pac. 861, wherein it appeared that a certain room was used as a pool room and at times people congregated there and played cards and dice for money, there was no evidence that the accused was in any way connected with the management of the place or the game, although he was there most of the time. It was held that the evidence was insufficient to sustain a conviction of the accused of keeping and maintaining a gambling house.

So, in *People v. Mitchell* (1892) 10 N. Y. Crim. Rep. 244, 49 N. Y. S. R. 528, 21 N. Y. Supp. 166, it appeared that there was a room in the rear of a cigar store in which gambling was alleged to have occurred. The defendant occasionally waited on customers in the cigar store, and the sign on the door bore his name, although the cigar store was conducted by his son, and the building belonged to another person. There was no direct evidence that the defendant was connected in any way with the room in which the gambling was carried on, nor was there any evidence that he had any interest in the cigar store. It was held that the evidence was insufficient to warrant a conviction of keeping a gambling house.

In *White v. State* (1902) 115 Ga. 570, 41 S. E. 986, it appeared that there was a house about the distance of 6 feet from the one occupied by the accused and covered by an extension of the same roof. The accused had no control or supervision over the house not occupied by him, but was, on one occasion, seen, with several others in the house, engaged in playing cards

for money. It was held that the fact that one continuous roof covered both houses did not make him the keeper of the house adjacent to the one occupied by him, and that the evidence was insufficient to warrant a conviction of keeping a gaming house.

The evidence was held to be insufficient to sustain a charge of keeping a gaming house in *Barnaby v. State* (1886) 106 Ind. 539, 7 N. E. 231, wherein it appeared that the game of "faro" was being carried on in a room directly over a saloon which was run by the accused, but there was no direct evidence that the accused had control of the second story of the building, or that he was ever in the room or had any knowledge that the gaming was being carried on.

Where the members of a club frequently played poker for money, taking a "rake-off" from each game and expending it for refreshments, which were furnished by the steward of the club from the club's stock, it was held that the steward could not be convicted of keeping a gaming house under § 228 of the Criminal Code, providing that "anyone who appears, acts . . . as master . . . or as the person having the care, government, or management of any disorderly house, shall be deemed to be the keeper thereof." *Rex v. Riley* (1916) 26 Can. Crim. Cas. 402, 23 B. C. 192, 1 West. Week. Rep. 325, 30 D. L. R. 584.

It was held in *Bell v. State* (1893) 92 Ga. 49, 18 So. 186, that the evidence was not sufficient to warrant the conviction of a married woman for keeping a gaming house, it appearing that there was but one single offense of playing cards for money, and that the husband was present at the time and that the wife did not affirmatively grant permission to play, it being the husband's duty to prevent the unlawful gaming.

In *Bell v. State* (1918) 84 Tex. Crim. Rep. 197, 206 S. W. 516, it appeared that the defendant surrendered a lease which he held on certain rooms, and assisted the lessor in procuring another tenant for the rooms. Gambling was carried on in the rooms while occupied by the second tenant, and

the defendant was at different times in the rooms, and was seen playing in some of the games. There was no evidence that he was interested in the house as owner or keeper. The court said: "We are of the opinion that there must be more testimony than the mere fact that he induced Robinson to rent Campbell the premises, knowing or believing that Campbell might carry on gaming in the rooms, to predicate conviction. This might be considered as a circumstance, along with other circumstances, to show whether or not he was interested in the house; but the house did not belong to appellant, and he was not shown to have any interest in it, further than as agent of Robinson in renting to Campbell. He may have known or believed Campbell intended to permit gaming in the rooms, yet not be guilty under the indictment. This of itself would not constitute him a keeper of a

gambling house. There must be other facts and circumstances to show his connection with it; and if the jury should believe that his connection with the house was simply to obtain a renter for Robinson, and himself not further interested in it, this would not constitute him a principal, or a keeper, or being interested in keeping."

So, in *Rex v. Charlie Yee* (1917) 27 Can. Crim. Cas. 441, 10 Sask. L. R. 62, 1 West. Week. Rep. 1307, it was held that the defendant could not be convicted of keeping a common gaming house under § 228 of the Criminal Code, since § 226 of the Criminal Code provided that a common gaming house was one kept for "gain;" and the evidence was insufficient to prove that the defendant received any gain, or in any way participated in the game, although the gambling took place on the premises which he conducted as a store.
L. W. B.

JEWEL CARMEN

v.

FOX FILM CORPORATION et al., Appts.

United States Circuit Court of Appeals, Second Circuit — November 10, 1920.

(— C. C. A. —, 269 Fed. 928.)

Infant — relief in equity against contract.

One will be denied relief in equity from a contract to render services, made during minority, to enable her to fulfil such a contract negotiated with another person under the misrepresentation that she was free to enter into the second contract.

[See note on this question beginning on page 1215.]

APPEAL by defendants from a decree of the District Court of the United States for the Southern District of New York (Manton, Dist. J.) in favor of complainant in a suit to have certain contracts alleged to have been made with defendants during her minority declared void, and for an injunction restraining them from asserting the validity of such contracts, and from interfering with her contract relations with others. *Reversed.*

The facts are stated in the opinion of the court.

Argued before Ward, Rogers, and Hough, Circuit Judges.

Messrs. Saul E. Rogers and E. Henry Lacombe, for appellants:

The bill should have been dismissed,

as there is no proof that the alleged interference was of a wilful, malicious, and tortious nature.

Bitterman v. Louisville & N. R. Co.
207 U. S. 205, 52 L. ed. 171, 23 Sup. Ct.

Rep. 91, 12 Ann. Cas. 693; *Angle v. Chicago, St. P. M. & O. R. Co.* 151 U. S. 1, 38 L. ed. 55, 14 Sup. Ct. Rep. 240; *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229, 62 L. ed. 260, L.R.A. 1918C, 497, 38 Sup. Ct. Rep. 65, Ann. Cas. 1918B, 461; *Dr. Miles Medical Co. v. John D. Park & Sons Co.* 220 U. S. 394, 55 L. ed. 513, 31 Sup. Ct. Rep. 376; *American Malting v. Keitel*, 126 C. C. A. 277, 209 Fed. 351; 22 Cyc. 900; *Perkins v. Pendleton*, 90 Me. 177, 60 Am. St. Rep. 252, 38 Atl. 96; *Warschauser v. Brooklyn Furniture Co.* 159 App. Div. 81, 144 N. Y. Supp. 257; *Scott v. Prudential Outfitting Co.* 92 Misc. 195, 155 N. Y. Supp. 497; *Woody v. Brush*, 178 App. Div. 698, 165 N. Y. Supp. 867; *De Jong v. B. G. Behrman Co.* 148 App. Div. 37, 131 N. Y. Supp. 1083.

The plaintiff did not come into equity with clean hands.

Michigan Pipe Co. v. Fremont Ditch, Pipe Line & Reservoir Co. 49 C. C. A. 324, 111 Fed. 287.

The bill of complaint should have been dismissed, as the plaintiff had an adequate remedy at law.

26 Cyc. 1583; 16 Am. & Eng. Enc. Law, 1110; *Warschauser v. Brooklyn Furniture Co.* 159 App. Div. 81, 144 N. Y. Supp. 257; *Woody v. Brush*, 178 App. Div. 698, 165 N. Y. Supp. 867; *Scott v. Prudential Outfitting Co.* 92 Misc. 195, 155 N. Y. Supp. 497; 16 Am. & Eng. Enc. Law, 2d ed. 283; *Ray v. Haines*, 52 Ill. 485; *Wright v. McLarinnan*, 92 Ind. 103; *Judkins v. Walker*, 17 Me. 38, 35 Am. Dec. 229; *Wilhelm v. Hardman*, 13 Md. 140; *Dube v. Beaudry*, 150 Mass. 448, 6 L.R.A. 146, 15 Am. St. Rep. 228, 23 N. E. 222; *Medbury v. Watrous*, 7 Hill, 110; *McCoy v. Huffman*, 8 Cow. 84; *Nashville & C. R. Co. v. Elliott*, 1 Coldw. 611, 78 Am. Dec. 506; *Phoenix Mut. L. Ins. Co. v. Bailey*, 13 Wall. 623, 20 L. ed. 503; *Manchester Fire Assur. Co. v. Stockton Combined Harvester & Agri. Works*, 38 Fed. 378; *Dickinson v. Lewis*, 34 Ala. 638; *Turnbull v. Crick*, 63 Minn. 91, 65 N. W. 135; *Terry v. Horne*, 59 Hun, 492, 13 N. Y. Supp. 353; *Miller v. Myers*, 75 Misc. 297, 135 N. Y. Supp. 73; *Doe ex dem. Moore v. Abernathy*, 7 Blackf. 442; *Brawner v. Franklin*, 4 Gill, 463; *Chadbourn v. Rackliff*, 30 Me. 354.

Mr. Nathan Burkan, for appellee:

Plaintiff was not guilty of such fraud, in connection with the subject-matter of this action, as would debar her from coming into a court of equity for relief.

Tucker v. Moreland, 10 Pet. 58, 9 L. ed. 345; 2 Kent, Com. 238; *Sims v. Everhardt*, 102 U. S. 300, 26 L. ed. 87; *Alfrey v. Colbert*, 93 C. C. A. 517, 168 Fed. 235; *Smith v. Ryan*, 191 N. Y. 455, 19 L.R.A. (N.S.) 461, 123 Am. St. Rep. 609, 84 N. E. 402, 14 Ann. Cas. 505; *McCarthy v. Bowling Green Storage & Van Co.* 182 App. Div. 21, 169 N. Y. Supp. 463; *Fairfield v. Gallatin County*, 100 U. S. 54, 25 L. ed. 544; *Whitmarsh v. Hall*, 3 Denio, 375; *Green v. Green*, 69 N. Y. 553, 25 Am. Rep. 233; *Sparman v. Keim*, 83 N. Y. 245; *International Textbook Co. v. Connelly*, 206 N. Y. 188, 42 L.R.A. (N.S.) 1115, 99 N. E. 722; *Blinn v. Schwarz*, 177 N. Y. 259, 101 Am. St. Rep. 806, 69 N. E. 542; *Medbury v. Watrous*, 7 Hill, 110; *Wood, Mast. & S. p. 13*; *Vent v. Osgood*, 19 Pick. 572.

Since an infant may avoid her contract by making a new contract, inconsistent with the former, it is not a fraudulent act for her to state at the time of making the new contract that she is free to make the same.

MacGreal v. Taylor, 167 U. S. 688, 42 L. ed. 326, 17 Sup. Ct. Rep. 961; *Tucker v. Moreland*, 10 Pet. 58, 9 L. ed. 345; *Sims v. Everhardt*, 102 U. S. 300, 26 L. ed. 87; *Jackson v. Carpenter*, 11 Johns. 539; *Jackson v. Burchin*, 14 Johns. 124; *Conroe v. Birdsall*, 1 Johns. Cas. 127; *Heath v. Mahoney*, 7 Hun, 102.

Rogers, Circuit Judge, delivered the opinion of the court:

The plaintiff seeks to have certain contracts declared void which she alleges that she made with the defendants during her minority, and she prays that an injunction be issued restraining the defendants from asserting that the contracts are valid and from interfering with her contract relations with any person, firm, or corporation in employing the plaintiff, and availing himself or itself of her services under any contract of employment entered into with her. Damages are also asked.

The court below has adjudged that the contracts were duly rescinded by her and have been null and void since July 15, 1918, and has issued a perpetual injunction as prayed, and awarded her damages in the sum of \$43,500.

The plaintiff is a moving picture

actress, and in her complaint alleges that at all the times mentioned therein she was and still is a citizen and resident of the state of California. The defendants are corporations organized under the laws of the state of New York, and are each engaged in the business of manufacturing and producing photo-plays.

The contract with the Fox Film Corporation, which is one of the contracts the plaintiff repudiated and asks to have declared void, provided employment for a period of one year, commencing October 17, 1919. The compensation agreed upon was \$175 per week. In consideration of \$1,300, which was to be paid in weekly instalments of \$25, an option was given to continue the employment for further periods of six months each until said employment extended over to October 17, 1921. The salary stipulated, if the options were exercised, was \$200 per week for the first year, \$225 per week for the first half of the second year, and \$250 per week for the second half of the second year until October 17, 1921, the termination of the contract.

The contract with the William Fox Vaudeville Company, which the plaintiff also repudiated, provided employment for six months with the option in the company to employ her for a further six months until the employment extended over to October 17, 1919. The salary, if the options were exercised, was \$125 per week for the first six months; \$150 per week for the second six months; \$200 per week the last six months and until the termination of the contract. The consideration for the several options was \$650 for each of the options.

Each of these contracts was executed on July 31, 1917, and in each of them the plaintiff is described as of the city of Los Angeles in the state of California.

Prior to the plaintiff's repudiation of the agreements above mentioned and while they had still several years to run, and on March 28, 1918,

a few months before she attained her majority, the plaintiff entered into a contract with the Frank A. Keeney Pictures Corporation for her exclusive appearance in motion pictures under its employment for a period of two years commencing on or about July 15, 1918. Under this agreement the Keeney Corporation was to pay to the plaintiff at the end of each week for forty-six consecutive weeks the sum of \$450. And for the first six months during the year commencing July 15, 1919, she was to be paid \$500 for each week, and for the last six months she was to be paid the sum of \$550 per week. The contract also gave to the Keeney Corporation an option on her exclusive motion picture services for one year commencing July 15, 1920, the corporation agreeing to pay her if it availed of the option \$600 per week for the first six months, and \$650 per week for the last six months. The contract also provided that the corporation should have a further option for her exclusive services for the year commencing July 15, 1921, her compensation to be \$700 per week for the first six months, and \$750 for the last six months. It granted the corporation a further option for the year commencing July 15, 1922, the compensation for the first six months to be \$800 per week, and for the last six months \$850 per week. It granted the corporation the further option for the year commencing July 15, 1923, her compensation to be \$1,000 per week for each and every week.

The negotiations leading up to the signing of the agreement with the Keeney Corporation were opened by Frank A. Keeney, the president of that corporation, who telegraphed the plaintiff asking whether she was open to an engagement. Her reply was that she was free to accept employment. Thereupon he sent to her the contract as prepared. It was submitted by her to her attorney in Los Angeles, and then was signed by her in California. At the time this contract was made Keeney

had no knowledge that the plaintiff had contracts with these defendants extending beyond July 15th, and if he had known the facts he would not have made any contract with her. When later on Keeney learned what the facts were, he having been informed by Fox that his corporations had contracts with the plaintiff which still had several years to run, he refused to recognize the contract which he had made or to proceed under it. He testified: "I would have entered into no negotiations with Miss Carmen unless I thought that she was absolutely free to come to me on July 15th, free and clear in every manner, shape, or form, without any technicalities."

He also testified: ". . . I wanted Miss Carmen's services, but I didn't want her services if there was any litigation about it; that is what I was trying to keep out of, that is, litigation."

It appears that defendants, on receipt of the plaintiff's notification of her repudiation of her contracts with them on the ground of her infancy, instructed their lawyers to inform the plaintiff that they intended to hold her to the performance of the contracts, and that they would seek adequate and proper relief to restrain the violation thereof. This information they communicated to her on July 17, 1918. And on July 12, 1918, the William Fox Vaudeville Company, through its attorneys, had informed Keeney as follows:

"We hereby serve you with notice that we still claim our rights to her services under her contract, and that we will hold her strictly to the performance of her contract, and will hold you if you permit her to breach her contract by performing any services for you.

"We are giving this notice to you in advance of her rendering any services for you, so that, if you engage her services after this notice, you will do so with full knowledge of all the facts."

On September 19, 1918, the William Fox Vaudeville Company and

the Frank A. Keeney Pictures Corporation and Frank A. Keeney entered into an agreement wherein the Keeney Corporation and Frank A. Keeney agreed to refrain from engaging the services of the plaintiff pending the determination of the rights of the respective parties, and the Fox Company agreed to indemnify and save harmless the Keeney Corporation and Keeney himself from any damage they might suffer by reason of any action the plaintiff might bring against them.

The plaintiff in her complaint alleged that the contracts with the defendants were signed, executed, and delivered to the plaintiff by the defendant in the city and state of New York. The answer does not deny this allegation. But the defendants claim that in fact the contracts were executed in California, and that under the law of that state they were binding upon her, as in California a young woman becomes of age at eighteen. Under the New York law a young woman does not become of age until she reaches twenty-one. The court below, in view of the allegation in the complaint and the failure in the answer to deny it, has held that the contracts between the plaintiff and the defendants were New York contracts and governed by the New York law, and therefore voidable, as under New York law the plaintiff was not of age when she signed them. It is contended that this was error, and that the capacity of parties to contract is to be determined by the law of the domicil, or, according to some authorities, by the law of the place of performance. In the view we take of this case it is not material whether the contract was binding and breached, or voidable and avoided. In either case the conduct of the plaintiff

Infant—relief in equity against contract.

has been such as entitles her to no relief in this court. According to her own allegations in her complaint, she was a minor when she entered into the contract with

Keeney, and she misled him into making the contract by representing that she was free to make it, when in fact she was morally not free to make the contract, and there was doubt whether she was legally free to make it. If the contracts with defendants were valid, she was under a legal and moral obligation not to make the contract with the Keeney corporation. And if the contracts were voidable because of her infancy, then, while she was under no legal obligation to recognize them, she was under a moral obligation to abide by them, and good faith required her to continue to render the services she had agreed to give. In either case her action in repudiating her pledged word was misconduct of which no person of honor and conscience would have been guilty. That no action could be brought against her at law because of what she did does not alter the moral character of her act. And when she comes into a court of conscience and asks its affirmative aid to assist her in carrying into effect the inequitable arrangement into which she unfaithfully entered, the appeal falls on deaf ears. One who comes into equity must come with clean hands, and her hands are not clean. The testimony discloses that reliance cannot be placed upon her agreements which the law does not oblige her to keep, and that for a money gain to herself she unscrupulously disregarded her express contracts.

In Story's Equity Jurisprudence, 14th ed. vol. 1, § 99, the rule is laid down as follows: "Equity imperatively demands of suitors in courts fair dealing and righteous conduct with reference to the matters concerning which they seek relief. He who has acted in bad faith, resorted to trickery and deception, or been guilty of fraud, injustice, or unfairness, will appeal in vain to a court of conscience, even though in his wrongdoing he may have kept himself strictly 'within the law.' Misconduct which will bar relief in a court of equity need not neces-

sarily be of such a nature as to be punishable as a crime or to constitute the basis of a legal action. Under this maxim, any wilful act in regard to the matter in litigation, which would be condemned and pronounced wrongful by honest and fair-minded men, will be sufficient to make the hands of the applicant unclean. Both courts and text-writers have repeatedly spoken upon this subject in no uncertain language."

In Pomeroy's Equity Jurisprudence, 3d ed. vol. 1, § 398, it is said: "Whatever may be the strictly accurate theory concerning the nature of equitable interference, the principle was established from the earliest days that, while the court of chancery could interpose and compel a defendant to comply with the dictates of conscience and good faith with regard to matters outside of the strict rules of the law, or even in contradiction to those rules, while it could act upon the conscience of a defendant and force him to do right and justice, it would never thus interfere on behalf of a plaintiff whose own conduct in connection with the same matter or transaction had been unconscientious or unjust, or marked by a want of good faith, or had violated any of the principles of equity and righteous dealing which it is the purpose of the jurisdiction to sustain. While a court of equity endeavors to promote and enforce justice, good faith, uprightness, fairness, and conscientiousness on the part of the parties who occupy a defensive position in judicial controversies, it no less stringently demands the same from the litigant parties who come before it as plaintiffs or actors in such controversies."

The maxim that one who comes into equity must come with clean hands expresses rather a principle of inaction than one of action. It means that equity will refuse its aid in any manner to one seeking its active interposition if he has been guilty either of unlawful or

inequitable conduct respecting the subject-matter of the litigation.

An illustration of the maxim is found in the attitude of courts of equity in the matter of specific performance. A court of equity always refuses specific performance of a contract which has been obtained by the plaintiff by sharp and unscrupulous practices, by overreaching, by concealment of important facts, even though not actually fraudulent. The contract may be a legal one, against which no defense could be set up at law, and one which a court of equity would not cancel. But if it has been procured by unconscientious means a court of equity refuses specific performance. Pom. Eq. Jur. 3d ed. § 400.

The right which one seeks to enforce in a court of equity must be one which in and of itself appeals to the conscience of a chancellor. Mr. Justice Brewer, speaking for the court in *Deweese v. Reinhard*, 165 U. S. 386, 390, 41 L. ed. 757, 759, 17 Sup. Ct. Rep. 340, 341, said: "A court of equity acts only when and as conscience commands, and if the conduct of the plaintiff be offensive to the dictates of natural justice, then, whatever may be the rights he possesses and whatever use he may make of them in a court of law, he will be held remediless in a court of equity."

In *T. B. Harms & Francis, Day & Hunter v. Stern*, 145 C. C. A. 531, 534, 231 Fed. 648, this court said: "The plaintiffs are in a court of equity, which is a court of conscience, which within the scope of its powers is governed by its own rules. It stays its hand and withholds its aid whenever it is asked to do that which it deems to be against conscience."

In *Weegham v. Killefer* (D. C.) 215 Fed. 168, the complainants sought an injunction to restrain the defendant from playing baseball with any club other than their own. It was found by the court that he was a player of unique, exceptional, and extraordinary skill. But complainants, knowing that he had en-

tered into an unenforceable agreement to play as a member of another club, had induced him, by the offer of a larger salary, to break his agreement and play with their own club. Then he was induced to repudiate the agreement with the complainants and to enter into a new agreement to play with the club with which he had originally contracted. An injunction was sought by complainants to restrain him from doing so. This was refused on the ground that complainants' conduct in inducing him to break his unenforceable agreement was such misconduct in regard to the matter in litigation as honest and fair-minded men would condemn and pronounce wrongful, and, although insufficient to constitute the basis of legal action, was quite sufficient to bar relief in equity. The complainants' hands were not clean. The case was appealed to the circuit court of appeals for the sixth circuit and was affirmed, L.R.A.1915A, 820, 131 C. C. A. 558, 215 Fed. 289.

In *Michigan Pipe Co. v. Fremont Ditch, Pipe Line & Reservoir Co.* 49 C. C. A. 324, 111 Fed. 284, relief was refused because of bad faith, sharp practice, and unconscionable acts. It was said that a suit in equity is an appeal for relief to the moral sense of the chancellor, and that a court of equity is the forum of conscience. "A court of equity," it was said, "will leave to his remedy at law—will refuse to interfere to grant relief to—one who, in the matter or transaction concerning which he seeks its aid, has been wanting in good faith, honesty, or righteous dealing. While in a proper case it acts upon the conscience of a defendant, to compel him to do that which is just and right, it repels from its precincts remediless the complainant who has been guilty of bad faith, fraud, or any unconscionable act in the transaction which forms the basis of his suit."

In 1859 in a case before the court of appeal in chancery, *Nelson v. Stocker*, 4 De Gex & J. 458, 464, 45 Eng. Reprint, 178, Lord Justice

Turner, in commenting on the fact that the defendant had represented himself to be of age when he was not of age, said: "It is too much to call upon the court to believe that this defendant could really have thought himself to be of age at the date of the settlement, when he was under eighteen years of age; and if he did not so think, the representation he made to the solicitor was false and fraudulent. Infants are no more entitled than adults are to gain benefits to themselves by fraud."

In 1816 a case came before Vice Chancellor Plumer, *Cory v. Gertken*, 2 Madd. Ch. 40, 56 Eng. Reprint, 250, in which an infant who was nearly of age prevailed upon his trustees to transfer to him certain stock to which he was entitled on coming of age, and represented

to them that they ran no risk in doing it. After coming of age he assigned his rights to an assignee, and suit was brought against the trustees on the ground that payment to an infant was bad. The bill was dismissed and the Vice Chancellor said: "The concealment of his infancy, under such circumstances, certainly was a fraud, and precludes him, or his assigns, who stand precisely in his situation, from calling for a repayment."

The fact that a contract has been dishonestly or dishonorably obtained is a bar to relief in equity.

Decree reversed.

Petition for writ of certiorari denied by the Supreme Court of the United States February 28, 1921 (U. S. Adv. Ops. 1920-21, p. 444) — U. S. —, 65 L. ed. —, 41 Sup. Ct. Rep. 323.

ANNOTATION.

Right of infant to enjoin other party to contract from asserting its validity.

The effect of misrepresentation as to age at the time of entering into a contract as estoppel to plead infancy when suing in equity is discussed at pp. 423 et seq. of the annotation to *La Rosa v. Nichols* in 6 A.L.R. 416. It will be observed that in the reported case (*CARMEN v. FOX FILM CORP.* ante, 1209) the relief sought went beyond a mere prayer that the contract be declared void, and included a prayer for injunction restraining defendant from asserting that the contract was valid. In that respect the reported case seems to be without an exact precedent. However, the principle underlying the cases cited in the note referred to, as holding that an infant who has induced a contract by fraudulent representations that he was of full age may not demand relief from a court of equity, would seem to support the decision in the reported case, accepting its view of the inequitable conduct of the plaintiff. It may be observed, however, that in some cases, if not in the case at bar, the refusal of a court to grant relief might have nearly the

same practical effect, though of course quite a different legal effect, as would a decision holding the contract valid, since the defendant's freedom to assert the validity, or even the fact of the agreement, might prevent the plaintiff from securing employment with others in the field in which his talents lie, and thus practically force him, under the alternative of idleness, to the performance of an agreement which he may have made inadvisedly and unwisely, and which in any event, by hypothesis, was made at a time when, in the eyes of the law, he was conclusively presumed to lack the necessary discretion and judgment to enter into contracts. Doubtless a court of equity, in granting or refusing affirmative relief, will be influenced by the circumstances of the particular case, including the fairness of the contract viewed as of the time when it was made, the comparative experience or inexperience of the respective parties to it, the degree of moral fault, viewed in the light of his age and inexperience, to be imputed to the

infant in entering into the contract in question, in repudiating it, and in attempting to deal with others in disregard of it. It will be observed that the court in the reported case applies

the familiar maxim, "he who comes into equity must come with clean hands." That maxim is the subject of an extensive annotation in 4 A.L.R. 44. G. V. I.

CENTRAL OREGON IRRIGATION COMPANY
v.
PUBLIC SERVICE COMMISSION OF OREGON et al.

Oregon Supreme Court (In Banc) — April 5, 1921.

(— Or. —, 196 Pac. 832.)

Public Service Commission — jurisdiction over maintenance fees of Carey Act improvement.

1. A water system constructed by one who contracts to reclaim a tract of land for settlement under the Carey Act is not a public utility so that the maintenance fee fixed by the settlers' purchase contracts is brought within the jurisdiction of the Public Service Commission, and therefore such Commission cannot authorize a raising of the fee, although the one fixed is too low to furnish adequate return on the investment.

[See note on this question beginning on page 1227.]

Public lands — Carey Act — maintenance fee for water rights — right to raise.

2. The maintenance fee for the water right, which becomes a part of the pur-

chase price which a settler, under the Carey Act, agrees to pay for his land, cannot be raised without impairing the obligation of his contract.

PETITION for a writ of mandamus to compel the defendant Commission to proceed with and complete the hearing upon petitioner's application for increase of maintenance fees, and to determine the amount of such fees. *Petition dismissed.*

Statement by Johns, J.:

The plaintiff, an Oregon corporation which hereafter will be referred to as the Company, filed its petition in this court for an order to compel the Public Service Commission of Oregon, defendant, which hereafter will be referred to as the Commission, to proceed with and complete the hearing of the Company upon its application before the Commission for an increase of what are known as the "maintenance fees" of its irrigation system, and to hear and determine the amount of such fees to be paid by the "settlers" under their respective contracts. By § 5817, Oregon Laws, after July 1, 1915, the "Railroad

Commission of Oregon" is designated "Public Service Commission of Oregon." Under § 6035, Oregon Laws, "the Railroad Commission of Oregon is vested with power and jurisdiction to supervise and regulate every public utility in this state, and to do all things necessary and convenient in the exercise of such power and jurisdiction." The lands involved are now in Deschutes county, and were formerly in Crook county, and lie under and are to be reclaimed by and irrigated from the waters of the Deschutes river.

On March 3, 1877, Congress passed a law entitled "An Act to Provide for the Sale of Desert Land in Certain States and Territories,"

known as the Carey Act, which was amended on March 3, 1891, and again amended on August 18, 1894. Section 4685, United States Compiled Statutes of 1916, reads as follows: "That to aid the public land states in the reclamation of the desert lands therein, and the settlement, cultivation and sale thereof in small tracts to actual settlers, the Secretary of the Interior with the approval of the President, be, and hereby is, authorized and empowered, upon proper application of the state to contract and agree, from time to time, with each of the states in which there may be situated desert lands as defined by the act," etc., "binding the United States to donate, grant and patent to the state free of cost for survey or price such desert lands, not exceeding 1,000,000 acres in each state, as the state may cause to be irrigated, reclaimed, occupied, and not less than 20 acres of each 160-acre tract cultivated by actual settlers, within ten years next after the passage of this act, as thoroughly as is required of citizens who may enter under the said Desert Land Law." [28 Stat. at L. 422, chap. 301, § 4, 8 Fed. Stat. Anno. 2d ed. p. 698.]

Before the application of any state is allowed, or any contract is executed, or any land is drawn from the public domain, "the state shall file a map of the said land proposed to be irrigated, and shall exhibit a plan showing the mode of the contemplated irrigation, which plan shall be sufficient to thoroughly irrigate and reclaim said land and prepare it to raise ordinary agricultural crops, and shall also show the source of the water to be used for irrigation and reclamation." The Secretary of the Interior may make necessary regulations which "shall be of no force whatever if such map and plan shall not be approved." Subdivision 3 of § 4685 provides: "Any state contracting under this section is hereby authorized to make all necessary contracts to cause the . . . lands to be re-

claimed, and to induce their settlement and cultivation in accordance with and subject to the provisions of this section; but the state shall not be authorized to lease any of said lands or to use or dispose of the same in any way whatever, except to secure their reclamation, cultivation and settlement."

Subdivision 4 enacts that as fast as any state shall furnish satisfactory proofs "that any of said lands are irrigated, reclaimed and occupied by actual settlers, patents shall be issued to the state or its assigns for said lands so reclaimed and settled," and that the states "shall not sell or dispose of more than 160 acres of said lands to any one person."

Under the provisions of this law, the state of Oregon, through its desert land board, applied to the Secretary of the Interior and filed its map to have about 140,000 acres of land then in Crook county and now in Deschutes county, withdrawn from the public domain and set aside to be reclaimed as desert lands, and, as reclaimed, that patents therefor should be issued to the state of Oregon or its assigns. Based upon such application and the showing made, the lands were withdrawn and placed under the provisions of the Carey Act. Following this, the legislature of the state of Oregon on February 28, 1901 (Laws 1901, p. 378), passed a law entitled: "An Act to Provide for the Acceptance for the State of Oregon of Certain Lands, and for the Reclamation and Disposal of the Same."

Pursuant to such proceedings, the Pilot Butte Development Company, an Oregon corporation, filed its application with the state land board for a contract to reclaim 84,707.74 acres of the land so withdrawn, and on May 31, 1902, a contract was made between that company and the state land board, in and by which it was agreed that the company, for and in consideration of the reclamation of such

lands, should have a lien thereon for \$848,577. Among other things, the contract recites that in compliance with the Carey Act and the Oregon statute, the development company had filed with the state land board an application for a contract to reclaim certain specified desert lands, and had agreed to build and construct an irrigation system in substantial compliance with certain plans which were submitted and approved, and that it was to furnish an ample supply of water to reclaim the lands described in the contract, in compliance with the acts of Congress by which the lands were granted to the state of Oregon.

The state land board fixed and agreed upon the sum of \$1 per acre for each acre of land reclaimed in each and every subdivision as and for the annual maintenance charge of the irrigation system, and for interest thereon at the rate of 6 per cent per annum, and created a lien thereon "valid on and against the separate legal subdivisions of the land reclaimed for the amounts due as agreed upon, and interest thereon at the rate of 6 per cent per annum from date of reclamation until said lien shall have been satisfied." The contract of the Pilot Butte Development Company with the state land board was later assigned to the Deschutes Irrigation & Power Company, also an Oregon corporation. On June 17, 1907, another and supplemental contract was entered into between the Deschutes Irrigation & Power Company and the state of Oregon, for a portion of the remaining lands, which provides that the power company shall have a lien for the amount due it for the reclamation of the lands specified in the lists marked "A" and "B," the amount of which shall be apportioned to each 40-acre tract; that as to all land which can be cultivated and irrigated by gravity flow the reclamation lien shall be \$40 per acre, and for nonirrigable land, \$2.50 per acre. This agreement provides for the sale of water rights to qualified applicants for

said lands, and that such rights shall be approved and fixed to each smallest legal subdivision, and that they shall be perpetual in nature, and shall convey a proportionate interest in the reclamation works embraced in the contract, and that one water right should be sold for each acre of irrigable land susceptible of irrigation by gravity flow from the canal system in each and every list of lands hereafter opened for entry and sale. It further provides for the sale of all of the right, title, and interest of the power company in the whole irrigation system "to a corporation of water users ten years from the date of the contract, provided that such corporation shall have been duly and legally organized and have the approval of the state land board." The contract recites: "The rights of the settler are transferable only with the land, and the covenants of the contract run with the land, and the payments specified are a first lien and are appurtenant to the land and binding upon each party."

The water is to be deeded and become appurtenant to the specific land described in the contract, and none other, and the "settler" agrees to pay the amount of the lien due the company for reclamation as fixed by the contract with the state of Oregon, with accrued interest. The petitioner Company has acquired and is now the successor in interest of all the rights, contracts, and franchises of the Deschutes Irrigation & Power Company. After obtaining the contracts with the state land board for the reclamation of the lands therein described, the Company then entered into the written contracts with the "settlers," reciting all of the preliminary proceedings, and, among other things, providing for a "maintenance fee" of either 80 cents or \$1 per irrigable acre. To obtain a contract the "settler" must be a citizen of the United States and of lawful age, and must not have made any previous filing under the Carey Act which, with his present application,

would exceed 160 acres of land. The "settler" applies to the Company for all of a certain described tract of land containing so many acres "and for the release of a lien thereon owned and held by the Company for the reclamation thereof, which said lien was created by the terms of a contract between the state land board and the Company." "In consideration thereof and of the delivery and possession of said land to the applicant prior to date of reclamation of the amounts herein agreed to be paid, he promises and agrees to pay the sum of \$ ———, the amount of the lien due the Company for reclamation as evidenced by the contract of the Company with the state of Oregon." Provision is made for the payment of a certain amount in cash at the signing of the contract, and that the amount remaining shall be paid in future instalments at different times, with interest on deferred payments at the rate of 6 per cent per annum, which "shall be evidenced by the promissory notes of the 'settler' in favor of the Company, its order, or assigns." The notes contain a provision for the payment of "reasonable attorney's fees," and "express upon their face that they are executed to evidence the said deferred payments mentioned in the application and agreement, and that they are subject to the terms hereof." The agreement further recites, if such notes are not paid as provided for in the "application and agreement," the Company may proceed to collect them "as it may be advised," "and may foreclose this application and agreement in the manner provided by law for the foreclosure of contracts for the purchase and sale of real property or otherwise." The Company agrees: "Upon the payment of the reclamation lien above mentioned, in accordance with the terms and conditions herein expressed, to release said reclamation lien on the land above described and authorize the state land board of the state of Oregon to deed to the first party

the above-described tract free from the reclamation lien thereon held by the second party and subject to the annual maintenance charge of \$1 per acre mentioned in the contract between the state of Oregon and the second party."

One form of contract provides that the lien for the maintenance charge will be released upon the payment of \$6 per acre. Although in other respects the three forms of the "settlers'" contracts are somewhat different, yet in all of them the "settler" undertakes and agrees to pay a certain sum for the reclamation of a particular tract of land, and, in addition thereto, to pay a fixed maintenance charge of either 80 cents or \$1 per irrigable acre. When all payments have been made and the required proofs filed, the "settler" then becomes entitled to and receives a deed from the state to the land described in his contract. It is stipulated that about 340 "settlers" signed for contracts on form No. 1, and that upon forms No. 1 and No. 2 contracts were signed for about 26,000 acres of irrigable land, and that upon all three forms about 1,250 contracts were signed, covering about 44,000 irrigable acres, all of which are now outstanding. By its articles of incorporation the petitioner is empowered:

(1) "To acquire, take over, hold, operate and manage the property, contracts, and irrigation system heretofore owned, held, enjoyed or operated by the Deschutes Irrigation & Power Company," etc.

(2) "To reclaim arid lands by irrigation in the state of Oregon, under the acts of Congress known as the Carey Act or otherwise . . . and to make and enter into such contract or contracts with the state of Oregon, its desert land board, the United States of America and any of its departments," and for such purposes to construct ditches, canals, flumes, irrigation and drainage systems, and to do and perform all acts necessary to carry out its objects and purposes.

(3) To divert, appropriate, and use the waters of springs, streams, and lakes, and to convey and distribute same.

(4) To appropriate, use, divert, and furnish such waters in the state of Oregon for general rental, sale, distribution, or for irrigation use, household and domestic purposes, the watering of live stock upon the dry lands of the state, and to collect rates or compensation for such sale, supplies, and use thereof, to all persons whose lands lie adjacent to or within reach of the line of the ditch, canal, or flume without discrimination other than priority of contract.

(5) To furnish water to towns, cities, or municipalities, or to distribute for fire protection, or for any other use, public or private.

Other powers are conferred, which are immaterial to this case.

"In October, 1915, the Central Oregon Irrigation Company Water Users' Association, a co-operative association," filed its complaint against the Company in the instant case, with the Public Service Commission of Oregon, in which it was alleged that the irrigation system of the Company is insufficient in size and capacity to provide a reasonable service; that it has failed and refused "to repair such structure or provide for adequate maintenance of its system, although the water users have contributed large sums for that purpose; and that the defendant has discriminated unjustly in the distribution of water." To that proceeding the petitioner here, in an original proceeding in this court, "applied for a writ of prohibition, restraining the Commission from proceeding to hear and determine any matters pertaining to the defendant's operations." A demurrer to the petition was interposed and sustained on the ground that the supreme court had no jurisdiction. "A similar writ was sought in the circuit court of the state of Oregon for Marion county. A demurrer to the petition was sustained on the grounds that

the Company had an adequate remedy by instituting suit to restrain the enforcement of the Commission's order. Without waiving its objections to jurisdiction and reserving all its rights, the Company here filed an answer, denying all the material allegations of the petition, and pleaded want of jurisdiction and the failure of the water users of the Central Oregon Irrigation Company to pay 'maintenance fees.'" A public hearing was had at Bend, Oregon, and a "personal inspection of the irrigation system was made by the Commission," which found that it had jurisdiction and made numerous findings of fact, providing that certain improvements should be made and that a reserve fund should be created out of "maintenance fees," and that the moneys therein "shall be expended only for the purposes intended and according to plans which will be submitted to the Commission for its approval." This decision was rendered December 27, 1917. In June, 1919, the Company in the instant case filed with the Public Service Commission its petition for an increase of "annual maintenance fees," on the grounds and for the reasons therein alleged. The Central Oregon Irrigation District intervened in said proceedings, and filed a demurrer to said petition. On March 20, 1920, the Company filed an amended petition, answers to which were filed, and on April 1, 1920, at Redmond, a two-day hearing was had before the Commission, and testimony was taken, and the Commission, on the objection to jurisdiction made by the attorneys for the Central Oregon Irrigation District, submitted the question to the attorney general, and on June 15, 1920, the Commission made an order, dismissing the petition for want of jurisdiction. November 20, 1920, the plaintiff filed its original petition for writ of mandamus in this court against the Commission, in which it prays for an order that the Commission shall be commanded and directed "to complete the

hearing upon the petitioner's application for an increase in 'maintenance fees', and determine the same or show why it has not done so by due return of said writ." Based upon the petition, this court issued an alternative writ of mandamus, to which the Public Service Commission of Oregon filed a demurrer upon the following grounds:

(1) "That said writ of mandamus does not state facts sufficient to justify the issuance of said writ, nor facts sufficient to constitute cause of action or suit."

(2) "That the court has no jurisdiction of this proceeding."

(3) "That the proceeding has not been commenced within the time limited by law."

(4) "That there is a defect of parties defendant, in that the settlers under the Carey Act are necessary parties defendant."

Thereafter H. H. Dietrich and the Central Oregon Irrigation District applied to this court for leave to be made defendants in the instant case, and with the showing made tendered an answer, in which a full and complete history of the whole transaction from its inception is set forth and alleged, and copies of all the different contracts, including those with the "settlers," are attached to and made a part of the answer. They object "to the exercise by the supreme court of the state of Oregon of any jurisdiction in the premises, and pray that said alternative writ of mandamus may be dismissed, and that these defendants recover their costs and disbursements from the petitioner." To this the Central Oregon Irrigation Company filed a demurrer "on the ground that said answer does not state facts sufficient to constitute a defense or answer to said writ." Although the record is voluminous, yet in the final analysis two questions only are presented: First, Would the raising of the "maintenance fee" impair the obligation of the "settlers" contracts? Second, Does the Commission have jurisdiction of the subject-matter?

Messrs. Jesse Stearns, Denton G. Burdick, and Jay H. Upton, for petitioner:

Petitioner is a public utility.

Umatilla Irrig. Co. v. Barnhart, 22 Or. 389, 30 Pac. 37; Cookinham v. Lewis, 58 Or. 484, 114 Pac. 88, 115 Pac. 342; McMahan v. Olcott, 65 Or. 537, 133 Pac. 836; State v. Twin Falls Canal Co. 21 Idaho, 410, L.R.A.1916F, 236, 121 Pac. 1039; Nash v. Clark, 27 Utah, 158, 1 L.R.A.(N.S.) 208, 101 Am. St. Rep. 953, 75 Pac. 371, 1 Ann. Cas. 800, affirmed in 198 U. S. 361, 49 L. ed. 1085, 25 Sup. Ct. Rep. 676, 4 Ann. Cas. 1171; McCook Irrig. & Water Power Co. v. Burtless, 98 Neb. 141, L.R.A.1915D, 1205, P.U.R.1915C, 587, 152 N. W. 334; Francioni v. Soledad Land & Water Co. 170 Cal. 221, 149 Pac. 161; Burley v. United States, 33 L.R.A.(N.S.) 807, 102 C. C. A. 429, 179 Fed. 1; United States v. O'Neill, 198 Fed. 677; Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. Rep. 56; Gutierrez v. Albuquerque Land & Irrig. Co. 188 U. S. 545, 47 L. ed. 588, 23 Sup. Ct. Rep. 338; Kinney, Irrig. & Water Rights, 2d ed. p. 1910; Wiel, Water Rights, § 1260; Central Oregon Irrig. Co. v. Public Service Commission, 80 Or. 607, 157 Pac. 1070.

Contract rates of a public utility for service or maintenance may be changed during the term of the contract by the Public Service Commission.

Portland v. Public Service Commission, 89 Or. 325, P.U.R.1919A, 127, 173 Pac. 1178; Tampa Waterworks Co. v. Tampa, 199 U. S. 241, 50 L. ed. 170, 26 Sup. Ct. Rep. 23; Rutland R. Light & P. Co. v. Burditt Bros. — Vt. —, 111 Atl. 582.

Messrs. Charles W. Erskine, H. H. DeArmond, John R. Latourette, and Harrison Allen, for defendants:

Plaintiff is not a public utility, and whether or not it assumes to be such, or intends to engage partly in furnishing water to the general public, the furnishing of water to the lands in the segregations in question is not a public service, but under contract for the private advantage of the contracting parties, and the maintenance rates cannot be changed without the consent of the settlers.

Thayer v. California Development Co. 164 Cal. 117, 128 Pac. 27; Allen v. Railroad Commission, 179 Cal. 68, 8 A.L.R. 249, P.U.R.1919A, 398, 175 Pac. 467; DePauw University v. Public Service Commission, P.U.R.1918C, 274, 247 Fed.

183, 253 Fed. 848; *Eldredge v. Mill Ditch Co.* 90 Or. 598, 177 Pac. 939.

Even the avowed purpose in the articles of incorporation of the Central Oregon Irrigation Company does not fix the character of the corporation in its future activities, as being a public service corporation. Such declarations of purpose merely serve to give the corporation a capacity to engage in such public service if it so desire.

Del Mar Water, Light & P. Co. v. Eshleman, 167 Cal. 666, 140 Pac. 591, 948; *Anderson v. Smith Powers Logging Co.* 71 Or. 296, L.R.A.1916B, 1089, 139 Pac. 736.

Even a constitutional declaration cannot transform a private enterprise, or a part thereof, into a public utility and thus take private property for public use without condemnation and payment.

Bridal Veil Lumbering Co. v. Johnson, 30 Or. 205, 34 L.R.A. 368, 60 Am. St. Rep. 818, 46 Pac. 790; *Baines v. Marshfield & Suburban R. Co.* 62 Or. 516, 124 Pac. 672; *Grande Ronde Electrical Co. v. Drake*, 46 Or. 248, 78 Pac. 1031; *Apex Transp. Co. v. Garbade*, 32 Or. 582, 63 L.R.A. 513, 52 Pac. 573, 54 Pac. 367, 882; *Fanning v. Gilliland*, 37 Or. 369, 82 Am. St. Rep. 758, 61 Pac. 636, 62 Pac. 209; *Umatilla Irrig. Co. v. Barnhart*, 22 Or. 389, 30 Pac. 37.

Messrs. I. H. Van Winkle, Attorney General, and L. A. Liljeqvist also for defendants.

Johns, J., delivered the opinion of the court:

In the inception of the transactions out of which this litigation arose, the lands belonged to the public domain, and the title was in the United States government. Claiming that the lands were subject to reclamation under the terms and provisions of the Carey Act, the state filed its application with the Secretary of the Interior to have 140,000 acres set aside and reclaimed through irrigation, and the government made the order. This was followed by an act of the legislature of this state authorizing the making of the necessary contracts. Based upon such proceedings, the state land board entered into the different contracts with the Company and its predecessors in interest, in and by which they undertook

and agreed to construct, operate, and maintain an irrigating system, and through the means of canals, flumes, and ditches to furnish and provide the amount of water necessary to irrigate and reclaim a large portion of the entire tract of 140,000 acres which was set aside and withdrawn under the Carey Act, in consideration of which the contract provided that the Company should have what is known as a reclamation lien upon the lands embraced within its respective contracts, and that in addition thereto and as a part thereof it should have and charge what is known as a "maintenance fee." In the first instance this was an annual charge of 80 cents per acre. Thereafter it was fixed at \$1 per acre. After obtaining such contracts from the state, the Company proceeded to construct the irrigation system and divert the waters of the Deschutes river to and upon the lands described in its contracts. In this situation it went out among what is known as the "settlers" and procured contracts with them, in and by which each "settler" made application to the state of Oregon to purchase and acquire title to a specific portion of the land, which in no event was more than 160 acres to any one person, and as a part of such application each "settler" promised and agreed with the Company to pay it a stipulated reclamation fee of about \$50 per acre for each acre of irrigable land, and in addition thereto and as a part thereof to pay the Company the stipulated "maintenance fee" of either 80 cents or \$1 per acre as the contract provided.

The contracts between the state and the Company provide that the Company shall have a lien upon the lands for the full amount of both the reclamation fee and the "maintenance fee," and such provisions are carried into and made a part of the contracts between the Company and the "settlers," and no "settler" can acquire title from the state to his particular land without first having paid the full amount of both of such

fees which are charges upon his land. Although the Carey Act provides for payment of the reclamation lien as one of the conditions upon which title to land may be acquired, nothing whatever is said in the act about a lien or the payment of a lien for a "maintenance fee," yet under the "settlers'" contracts, provision is made for the payment of a "maintenance fee" and a lien is given to insure its collection.

It is contended by the Company that it is a public utility, that the use of the water by the "settlers" is a public use, and that their contracts come under the terms and provisions of the Public Utilities Act (Or. Laws §§ 6030-6108), and that the Commission not only has the power, but that it is its duty, to hear and determine what is a reasonable "maintenance fee" which the Company should charge and receive for the use of water distributed to the "settlers," and that the "maintenance fee" provided for in the contracts is not a reasonable or just compensation, and that the amount of such fee should be increased so as to provide the Company a fair return on its investment.

The defendants contend that it is not a matter within the jurisdiction of the Public Service Commission, that the use of such waters is not a public use, and that the increase of the "maintenance fee" would impair the obligation of a contract. The "settler" must be a citizen of the United States over twenty-one years of age, and in no event can a contract be made for more than 160 acres. In the event of a previous contract to obtain land under the Carey Act in another project, the "settler" is then limited to the amount of land which would remain out of a total of 160 acres. In the instant case it is confined to a specified portion of the land which was set aside and withdrawn for this particular project, and a "settler's" contract could not be made to acquire title to a portion

of any other or different land. At the time the application to purchase is made, the "settler" is required to pay a certain percentage in cash and to execute promissory notes for the amount of the deferred payments, with interest from date. Provision is made in the notes in the event of suit or action, for the payment of reasonable attorneys' fees. The amount of the reclamation fee and the annual "maintenance fee" is made a charge and lien upon the land, and the agreements to pay the amount of such charges are covenants running with the land, and title cannot be acquired without the payment of such charges and liens. Such contracts must be made with the company, and are subject to the approval of the state land board, and no valid or binding contract can be made without such approval. By the terms of his contract, the "settler" agrees to pay a certain stipulated amount, with accrued interest, as one of the conditions upon which he receives his deed and acquires title. The "maintenance fee" is a lien, and is made one of the fixed charges which enter into and are a part of the consideration for the purchase price. To raise or to lower the amount of that fee would be to increase or decrease the agreed purchase price of the land. When analyzed, the "settlers'" contracts are nothing more than an agreement to buy and sell certain described real estate, with an appurtenant water right attached to and running with each tract of land, and the contract expressly provides that the water shall be used upon the specific land described in the contract, and that it cannot be used upon any other or different land.

The land is the subject-matter of the contract. It is that which is bought and sold. Upon the completion of his contract, the purchaser obtains title to the land itself. He does not contract for, and never does acquire, title to the water. In that particular, his agreement is confined and limited to the use of

the water upon the specific land described in his contract, and the right to such use is appurtenant to and runs with the land. In other words, the right of the "settler" to the use of the water is contingent upon his contract to purchase and acquire title to the land, without which he would never have any right to the use of the water, and the annual "maintenance fee" is one of the considerations which enter

into and are a part of the agreed purchase price of the land. To change the "maintenance fee" by either the raising or the lowering of it would increase or decrease the agreed purchase price of the land, and would impair the obligation of a contract to buy and sell real estate with an appurtenant water right.

The remaining question is the jurisdiction of the Commission. Section 5777, Oregon Laws, provides that: "The use of the water of the lakes and running streams of the state of Oregon, for general rental, sale, or distribution, for purposes of irrigation, and supplying water for household and domestic consumption, and watering live stock upon dry lands of the state, is a public use, and the right to collect rates or compensation for such use of said water is a franchise. A use shall be deemed general within the purview of this act when the water appropriated shall be supplied to all persons whose lands lie adjacent to or within reach of the line of the ditch or canal or flume in which said water is conveyed, without discrimination other than priority of contract, upon payment of charges therefor, as long as there may be water to supply."

Section 5788 enacts: "This act may at any time be amended by the legislative assembly, and commissioners for the management of water rights and the use of water may be appointed, and rates for the use of water may be fixed by the legislative assembly or by such commis-

sioners; but rates shall not be fixed lower than will allow the net profits of any ditch or canal or flume or system thereof to equal the prevailing legal rate of interest on the amount of money actually paid in and employed in the construction and operation of said ditch or canal or flume, or system thereof."

Laws of 1901, pp. 378, 381, § 4, provides: "The state land board shall by said contract fix the amount due the person, company of persons, association or incorporated company for the reclamation of said land, and the annual charge for the maintenance of the irrigation system."

Section 6030, Oregon Laws, says: "The term 'public utility,' as used herein, shall mean and embrace all corporations, companies, individuals, associations of individuals, their lessees, trustees or receivers (appointed by any court whatsoever), that now or hereafter may own, operate, manage or control, any plant or equipment or part of a plant or equipment in this state for the conveyance of telegraph or telephone messages, with or without wires, or for the transportation of persons or property by street railroad as common carriers, or for the production, transmission, delivery or furnishing of heat, light, water or power, and any and all whether either directly or indirectly to or for the public, and whether said plant or equipment or part thereof is wholly within any town or city, or not. No plant owned or operated by a municipality shall be deemed a public utility under or for the purposes of this act."

Under the above sections and its articles of incorporation, the Company contends that it is a public utility, and that the use of the water by the "settlers" under their respective contracts, is a public use, and that the state land board has fixed the amount of "the annual charge for the maintenance of the irrigation system," that the state has the right to change the contract with the Company and increase the "maintenance fee," and that the Commis-

Public lands—
Carey Act—
maintenance
fee for water
rights—right to
raise.

sion is acting for and represents the state, and that it not only has the power, but that it is its duty, to increase the amount of the "maintenance fee," so that the receipts therefrom would "equal the present legal rate of interest on the amount of money actually paid in and employed in the construction and operation of said ditch, canal, or flume, or system thereof."

If the plaintiff is a public utility and the use of the waters by the "settlers" is a public use, and if the amount of the "maintenance fee" was only a question between the petitioner on one side and the state of Oregon or one of its legal subdivisions on the other, the contention of the Company would have to be sustained. That is the legal force and effect of the decision of this court in *Woodburn v. Public Service Commission*, 82 Or. 114, L.R.A. 1917C, 98, P.U.R.1917B, 967, 161 Pac. 391, Ann. Cas. 1917E, 996, where it is held: "When an owner devotes his property to a use in which the public has an interest, he must submit to be regulated and controlled by the public for the common good." "The regulation of rates for the purpose of promoting the public health, comfort, safety, and welfare is an exercise of the police power of the sovereign." "When the state exercises its police power, it does not work any impairment of obligation of the contract; the possibility of the exercise of such power being an implied term of the contract."

This decision was followed in the case of *Portland v. Public Service Commission*, 89 Or. 325, P.U.R. 1919A, 127, 173 Pac. 1178, where it was held: "It is primarily the duty of the state in the interests of the public to see that all concerns that serve the public be content with and are entitled to receive reasonable compensation for their services;" that the "regulation of rates of the fares of a street railway is within the police power of the state;" and that the order of the Public Service Commission, changing

the rate of fare specified in the franchise, is not void for impairment of the obligation of a contract "because of depriving the city and its inhabitants of property and rights without due process of law;" and that the Public Service Commission, as an agent of the state, "could agree to change in the franchise allowing company an increased rate of fare."

This legal principle was later followed and approved by this court in *Hillsboro v. Public Service Commission*, 97 Or. 320, 187 Pac. 617, 192 Pac. 390. Those decisions have become and are the settled law of this court. From an examination of the exhaustive notes in the *Virginia-Western Power Co. v. Clifton Forge*, 125 Va. 469, 9 A.L.R. 1148, P.U.R.1919E, 766, 99 S. E. 723, it will be found that such legal principles are sustained by the decided weight of authority. In the first case which was before it, on the petition of the water users' association, and over the vigorous protest of the petitioner here, the Commission held that it had control of and authority over the moneys derived from the "maintenance fees," and from which ruling no appeal was taken, and that decision became final. In the second case, based upon the petition of the Company here to raise the "maintenance fee," and after an inspection of the premises and the taking of some testimony, and upon the objection of the "settlers," the Public Service Commission held that it did not have any jurisdiction over the subject-matter, and for such reason made an order dismissing it, from which no appeal was ever taken, and that decision became final.

Its last ruling is founded upon a decision of Judge Robert S. Bean of the United States district court of Oregon, in *De Pauw University v. Public Service Commission*, P.U.R. 1918C, 274, 247 Fed. 183, in which, among other things, the syllabus says: "A corporation, and its predecessor, engaged in the sale of irri-gable land, which acquired a source

of water supply and installed an irrigation system, entering into contracts with the purchasers to furnish water for irrigation, is not subject to regulation under the Oregon Public Utilities Act (Or. Laws 1911, p. 483), for § 1, defining a 'public utility' as including corporations which shall own, operate, manage, and control any plant or equipment for the delivery or furnishing of water or power directly or indirectly to the public, does not extend the act to mere private corporations."

Upon the facts therein stated, the opinion holds that "neither the Luse Company nor its predecessor in interest comes within this definition; for they were not engaged in furnishing or selling water to or for the public, but only to such parties as they might select," and further says that the "distinction between a public service irrigation company and a private concern is so fully covered by the supreme court of California in *Thayer v. California Development Co.* 164 Cal. 117, 128 Pac. 21, and *Del Mar Water, Light & P. Co. v. Eshleman*, 167 Cal. 666, 140 Pac. 591, 948, that it would be useless for me to attempt to add anything thereto."

The case of *Thayer v. California Development Co.* supra, is exhaustive and well considered, and holds: "Where an irrigation company which appropriated water from a river to irrigate a named county, organized subsidiary corporations for the purchase of the land in that territory, and transferred to them perpetual water rights for the irrigation of land owned by them, there was no dedication of the water right to public use; the essential feature of a public use being that it shall not be confined to privileged individuals, but open to the indefinite public, while in this case not every landowner could use water.

"As Const. art. 14, § 1, which has been in force for over thirty years, and which provides that the use of the water now appropriated for sale, rental, or distribution is a public

use, has never been construed as declaring that water taken for the irrigation of a fixed tract is appropriated for the public use, and it has been expressly declared by statute that such water rights are appurtenant to the land, the mere appropriation of water for the purpose of sale to given individuals is not a dedication or appropriation to public use."

To the same effect is the decision of that court in *Mound Water Co. v. Southern California Edison Co.* — Cal. —, 194 Pac. 1014.

Although under its articles of incorporation, it has other powers, the primary purpose of the Company was the reclaiming by means of irrigation of certain arid lands in Oregon under the Carey Act. That was the real purpose for which the corporation was organized. It was for such reason that it made the contracts with the state of Oregon, founded upon which it entered into the numerous and different contracts with the "settlers." The theory of the whole scheme was that the Company would furnish the water to reclaim the land, and that by the use of such water and a compliance with their respective contracts the "settlers" would acquire title to the specific portions of the land therein described, and that in consideration of furnishing the water the Company was to have and receive the agreed reclamation fee and the annual "maintenance fee." To obtain a contract, the "settler" must be a citizen of the United States, and the application is subject to the approval of the company and the state land board. Although it does embrace all of that class, yet the fact remains that the right to a contract to purchase and acquire title to land is confined and limited to a certain specified class of persons, and that it is not inherent in the "settlers," and does not exist as a matter of public right.

"It is a well-established proposition that a water system of this character, so owned and controlled, is not a public utility, and that the

water owned, held, and used in that manner is not dedicated to public use." *Mound Water Co. v. Southern California Edison Co. supra.*

As to its contracts made by the "settlers," the Company was not a public utility, and the use of the waters by them was not a public use.

Under the stipulated facts it appears that the Company is supplying water for irrigation and domestic use for about 5,000 acres of land which are outside of the lands within the Carey Act, that it is also furnishing a certain amount of water for use in the cities of Bandon and Redmond and to the town site of Deschutes, and that it has also furnished water for irrigation and domestic use to certain private persons who are not under the Carey Act. In *Mound Water Co. supra*, the opinion says: "It has been held that a water company may devote a part of its water supply to private use and the excess thereof to public use, or it may dedicate a portion of its water to a public use, and reserve the remainder, if any, for some private use, although it cannot, after dedicating any part to public use, transform any of that part into a private use, without the consent of the proper public authority."

It may be true that as to all of such matters the Company is a public utility, and is acting as such, and that the use of such waters is a public use; but as the opinion in the California case says that question was not before the court, and it is not before this court, and upon that point we decline to express an opinion. Again, the contract between the Deschutes Irrigation & Power

Company and the state, executed on June 17, 1907, contemplates and provides that the land and appurtenant water rights may be turned over to the purchasers "free from any perpetual charge or lien for maintenance;" and that the owner of each tract of land subject to certain reservations shall have his pro rata share in the whole irrigation system, "and shall hold his lands free of any maintenance charge." The "settler's" contract recites that "in the event that the company shall transfer the said irrigation system to a water users' association to be formed pursuant to the provisions of said contract of June 17, 1907, shares of stock in said corporation shall be delivered by the Company in lieu of the conveyance of water rights hereinbefore provided for."

Upon a compliance with the terms, the contracts clearly indicate that the "settler" has a right to become an owner in the whole irrigation system in proportion to the amount of his payments.

We hold that in the making of its contracts with the "settlers" the Company was not a public utility, and that the use of the waters by them under their contracts is not a public use, and that the increase of the agreed "maintenance fee" would impair the obligation of contract. The demurrer is sustained, and the petition for the writ is dismissed.

Burnett, Ch. J., and Brown, J., took no part in the consideration of this case.

Petition for rehearing denied.

Public Service
Commission—
jurisdiction
over main-
tenance fees of
Carey Act
improvement.

ANNOTATION.

Irrigation company as a public utility.

- I. Scope: subject as related to question of eminent domain, 1228.
- II. Irrigation companies as public service corporations, in general, 1228.
- III. Mutual and private companies in general, 1229.

- IV. Sale of land with water rights, 1231.

- V. Change from private to public use, or vice versa; effect of incorporation, 1232.

- VI. Effect of charter provisions or provisions of statute under which company is incorporated, 1232.
- VII. Effect on remainder, of dedication to public use of part of water supply, 1232.
- VIII. Effect of voluntary submission to utilities commission, 1232.
- IX. Effect of decision of utility commission as to public nature of irrigation company, 1233.

I. Scope: subject as related to question of eminent domain.

This annotation is supplementary to the annotation on the same question appended to *Allen v. Railroad Commission*, 8 A.L.R. 268, the more recent cases only being included herein.

Where a water company was formed under a statute which conferred authority to exercise the power of eminent domain, the court in *Traber v. Railroad Commission* (1920) — Cal. —, P.U.R.1921A, 67, 191 Pac. 366, in holding that the company, in view of other considerations, was a public utility, said that a taking under eminent domain would be a taking of private property for public use, and that of necessity the property so taken would be dedicated to public use, and to that extent, at least, the corporation taking it would be a public utility administering a public service. But it did not appear in this case that the irrigation company had taken any of its property by eminent domain; and the court said it might be conceded that the statute could be reasonably so construed as to authorize the formation of corporations to appropriate and distribute water without dedicating it to a public use. The view, therefore, finds support in this case, that an irrigation company is not necessarily a public utility, subject to regulation of rates by a state public service commission, merely because it is organized under a statute which confers authority on irrigation and other companies formed thereunder to take property by eminent domain, if it has not acquired any of its property in this manner.

II. Irrigation companies as public service corporations, in general.

(Supplementing annotation in 8 A.L.R. 271.)

It was said in the recent case of *Van Hoosear v. Railroad Commission* (1920) — Cal. —, 194 Pac. 1003, that the test to be applied in determining

whether one who supplies water for irrigation purposes is engaged in operating a public utility is whether or not he holds himself out, expressly or impliedly, "as engaged in the business of supplying water to the public as a class, not necessarily to all of the public, but to any limited portion of it, such portion, for example, as could be served by his system, as contradistinguished from his holding himself out as serving or ready to serve only particular individuals, either as a matter of accommodation or for other reasons peculiar and particular to them."

And the fact that the water company offered to sell, and in fact sold, water rights to any who would sign the form of contract prepared by it, making no limitation as to the persons who should buy except such as were necessary for the convenient delivery of the water from its canals to the land of purchasers, was apparently the main consideration on which the court relied in holding that the company was a public utility, in *Traber v. Railroad Commission* (Cal.) *supra*.

An unusual case on this question is that decided by the California court in *Van Hoosear v. Railroad Commission* (Cal.) *supra*, where the court held that one who built an irrigation plant to supply water for use on his own farm, and as a matter of accommodation supplied water to five of his neighbors, and finally attempted to discontinue the service because he had sold his farm, was a public utility, and could not discontinue service without the permission of the state railroad commission, although all of his consumers had agreed that he might discontinue in case he sold. The decision is based on the ground that two years prior to the proceeding in question the farm owner had himself petitioned the commission for leave to discontinue the service, which leave was refused, with the result that he continued the

service thereafter without anything to indicate that he did not do so in acquiescence with the order of the commission, and, the court said, in the character of a public utility operator which he and the commission assumed he had. The court said that if it were not for this circumstance it was exceedingly doubtful if the present order of the commission, which directed the landowner to resume service, could be sustained, but that it saw no escape from the conclusion, and it was not an unreasonable inference that by himself requesting leave of the commission to discontinue, and then, when this leave was refused after opposition, continuing the service, he held himself out as engaged in a public business. This conclusion was reached even though the former order of the commission denying the request to discontinue did not expressly find that he was engaged in a public utility business, but merely assumed this point.

Where stockholders of an investment company, which had acquired certain water rights and a tract of land for subdivision and sale, organized a water company, which by contract with the investment company undertook as agent of the latter to distribute water for a fixed annual charge per acre to those who purchased the land, the California Railroad Commission in *Re Empire Water Co.* (1920; Cal.) P.U.R.1920E, 611, held that the water company was a public utility, since the land was intended to be, and was, offered for sale and sold to the public generally, and the water company, having no ownership in either the land or the water, undertook by contract to deliver for compensation water to that portion of the public which thereafter became the owners of the lands. It was unsuccessfully contended that the water company was not a public utility, because it delivered water under contract only. In this case the investment company, by deed, conveyed to the water company certain ditches and rights of way, and the court said it was a proper conclusion from the evidence that the water company was organized, and properties were transferred to it, and

ditches constructed for it, by the investment company, for the purpose of creating a corporation which would perform the service of taking the water from its sources or points of diversion, and delivering it to the land to which it was appurtenant.

Community acequias are "public acequias," within the meaning of the New Mexico Code. *State ex rel. Black v. Aztec Ditch Co.* (1919) 25 N. M. 590, 185 Pac. 549.

Where an owner of a 20-acre orchard tract irrigated from a well upon it, during the development period of the orchard, supplied surplus water to neighbors, but subsequently, because of the growth of his own orchard and the reduction in supply of water, sought to discontinue the service to others, the California Railroad Commission in *Ticer v. Phillips* (1920; Cal.) P.U.R.1920E, 582, held that while, technically, he had been operating on a public utility basis in supplying water to consumers for compensation when there was more than sufficient to supply his own demands, he should not be required to continue to act as a public utility for longer than a reasonable period in which the other consumers might procure other service.

A rehearing in *Garson v. Steamboat Canal Co.* (1919) 43 Nev. 298, 185 Pac. 801, which held that a canal company engaged in distributing water through its canal for irrigation purposes was a public utility within the meaning of the Nevada statute (see this case in 8 A.L.R., on pages 277, 278), was denied in (1920) 43 Nev. 319, 185 Pac. 1119.

Without discussion of the nature of the particular irrigation companies concerned, the court in *Edinburg Irrig. Co. v. Paschen* (1920) — Tex. Civ. App. —, 223 S. W. 329, said that they were quasi public service corporations, and as such were required to perform their duty to the public when paid for the service.

III. Mutual and private companies in general.

(Supplementing annotation in 8 A.L.R. 280.)

The court in *Stratton v. Railroad*

Commission (1921) — Cal. —, 198 Pac. 1051, said that it was settled in that state that water taken by a mutual water company and distributed to its stockholders is not taken for a public use, but that such a corporation is but the joint instrumentality of its stockholders, by means of which each diverts and has brought to him the water to which he, in his own private right, is entitled. See this case also under IV. and IX., *infra*.

In *Kennedy v. Abbott* (1921; Cal.) P.U.R.1921C, 354 (abstract), the California commission held that "an individual who has sold surplus water to his neighbors, with the express understanding that such service will continue only so long as he has water to spare, and who has never held himself out as a water utility nor dedicated the water from his well for public use, is not a public utility water company, and is not within the jurisdiction of the railroad commission."

The proposition that under the California Constitution, declaring that "the use of all water appropriated for sale, rental, or distribution," is a public use, all water which is distributed among a number of persons is, from that fact alone, not to be considered as devoted to a public use, is stated in the recent case of *Mound Water Co. v. Southern California Edison Co.* (1921) — Cal. —, 194 Pac. 1014, following the decision in *Hildreth v. Montecito Creek Water Co.* (1903) 139 Cal. 22, 72 Pac. 395, which is cited in the annotation in 8 A.L.R., on p. 282.

And it was held in *Mound Water Co. v. Southern California Edison Co.* (Cal.) *supra*, that a corporation organized for the purpose of supplying water to its stockholders for use on their lands, the water rights being appurtenant to the respective tracts of land, and no other land being supplied unless from surplus water, was a mutual water company, and not a public utility subject to the jurisdiction of the railroad commission.

The rule was laid down, also, in *Mound Water Co. v. Southern California Edison Co.* (Cal.) *supra*, that a statutory definition of a public utility,

or of the conditions under which water shall be deemed to have been devoted to public use, can have no effect whatever upon private property or water devoted to private use prior to the enactment of the statute.

It was held by the Arizona Corporation Commission in *Re Tucson Farms Co.* (1919; Ariz.) P.U.R.1920B, 624, that a land company was not a public service corporation, although it owned a majority of the stock in water companies which were public corporations. The court said that its ownership of the majority of the stock was only because of the fact that it owned the greater part of the land in the tracts of the irrigation companies, and that its ownership in those companies did not place it in a different light in any respect, except as to its land holdings, from any other stockholder.

The California Railroad Commission in *Ellis v. Schmidt* (1919; Cal.) P.U.R.1920C, 137, held that one who contracted with those receiving water from his irrigation system to operate it at cost until such time as a mutual corporation was organized, was not operating a public utility as defined by the statutes in that state, so as to subject it to the jurisdiction of the Commission.

And in *Steele v. Sierra Verduga Water Co.* (1920; Cal.) P.U.R.1920C, 140, the California Railroad Commission held that where one purchased a tract of land, built a water system and placed the land on the market, and organized a water company which delivered water only to members at cost, the corporation was a mutual water company, and not a public utility subject to the jurisdiction of the commission.

Evidence that the owner of a reservoir permitted two individuals to obtain water from it, which they conducted therefrom in a small ditch maintained by them, was held by the California commission in *Pastorino v. Lang* (1921; Cal.) P.U.R.1921C, 347, not sufficient to show a dedication of the water to a public use, so as to confer jurisdiction on the commission to order a continuance of the service.

The court said that it was apparent that the complainants, the consumers, in this case, had relied upon the continued use of the water to develop their lands, orchards, etc., and that these improvements were made with the knowledge of the defendants; but that whether or not an estoppel resulted was a question to be determined only by the courts.

IV. Sale of land with water rights.

(Supplementing annotation in 8 A.L.R. 283.)

See *Re Empire Water Co. (Cal.)* under II. *supra*.

CENTRAL OREGON IRRIG. CO. v. PUBLIC SERVICE COMMISSION (reported herewith) *ante*, 1216, in holding that an irrigation company which contracted with the state and with "settlers" for the reclamation of land under the Carey Act, and the furnishing of water to irrigate such land, was not a public utility under the Oregon statutes, so as to subject it to the jurisdiction of the Oregon Public Service Commission, is in line with a number of authorities cited in the earlier note on this question, particularly on page 283 of 8 A.L.R. In the **CENTRAL OREGON IRRIG. CO. CASE**, the court said that the "settlers' " contracts were nothing more than an agreement to buy and sell certain described real estate, with an appurtenant water right attached to and running with each tract of land, the contract expressly providing that the water should be used upon the specified lands, and that it could not be used upon any other lands. It will be observed that the court also took the view that even if, as to water furnished by the Irrigation Company to lands not within the Carey Act, and as to water furnished for domestic use in cities, the company was a public utility, this did not necessarily result in a devotion to public use of the water furnished to settlers under the act.

It was held in *Stratton v. Railroad Commission* (1921) — *Cal.* —, 198 Pac. 1051, that a water company was not a public utility, so as to bring it within the jurisdiction of the railroad

commission, where, having been organized and owned by a land company which desired to subdivide and sell a tract having riparian rights as the chief source of water supply, and having received by transfer the land company's stock in a mutual water company, it agreed to distribute to the land the water which it was authorized to divert as the agent of the land company, for an annual charge of \$1 per acre. The riparian rights were retained by the land company, which, in making sales, represented to purchasers that every acre had a perpetual water right attached to it, for which no charge in addition to the price of the land was made, the annual charge of \$1 per acre being for the purpose only of maintaining the irrigation system. The sales contracts and deeds also provided that with each acre went a riparian right to its pro rata of the water to which the entire tract was entitled. The court said: "The affirmative point advanced to sustain the position of the water company is that the service performed by it is merely that of carrying the water, and that, since it carries the water for all the landowners within a certain district, the service is of a public character. . . . It might be that under some circumstances, possibly under circumstances closely resembling those of the present case, the carriage of water would be a public service. Where a company is performing a service for a number of people of a certain class, and obligates itself to serve those who come within that class, as is the case here, it is not always easy to determine whether the service is rendered as service to a limited public, and therefore a public service, although the class served is but a limited one, or is merely an aggregate of purely private services rendered to each of a number of persons. In such a case the view of the parties themselves, or the intention with which the company undertook the service, may well be of weight in determining the true nature of the service. In the present case it is fairly plain that the water company was not organized and did not

enter upon its task of serving the landowners with any intent of doing so as a public utility, but just the contrary. . . . It is, perhaps, also worthy of note that in the case before us the water company did not agree, or hold itself out as ready, to transport any and all water for even the limited number of persons it was undertaking to serve. The only water which the company agreed to carry was the water deliverable upon the stock of the mutual water company and that which the landowners, as riparian owners, had the right to take from the Kings river. In other words, even for the limited class it agreed to serve, the water company did not agree to convey any water that might be offered to it. Our conclusion, then, is that under the arrangement shown the relation between the water company and the landowners was private in character, and not that of a public utility and consumers."

V. Change from private to public use, or vice versa; effect of incorporation.

(Supplementing annotation in 8 A.L.R. 284.)

It was held in *Mound Water Co. v. Southern California Edison Co.* (1921) — Cal. —, 194 Pac. 1014, that where water was appropriated by a mutual water company for the private use of its stockholders, the fact that the water system was transferred to a company which was a public service corporation would not, as to the water so appropriated for the stockholders, change the character of its use from private to public, unless the stockholders consented.

VI. Effect of charter provisions or provisions of statute under which company is incorporated.

(Supplementing annotation in 8 A.L.R. 286.)

In so far as an irrigation company derived its powers from the California Statute of 1862, providing that corporations could be formed for certain purposes, among which was irrigation, and that such corporations should have power to establish rates which should be subject to regulation by the board of supervisors, such a corporation has been held to be neces-

sarily a public utility. *Traber v. Railroad Commission* (1920) — Cal. —, P.U.R.1921A, 67, 191 Pac. 366, which approves *Price v. Riverside Land & Irrigating Co.* (1880) 56 Cal. 431, set out in the annotation in 8 A.L.R., on page 288.

VII. Effect on remainder, of dedication to public use of part of water supply.

(Supplementing annotation in 8 A.L.R. 288.)

It was held in *Mound Water Co. v. Southern California Edison Co.* (Cal.) supra, that a company organized for the purpose of supplying water for irrigation to stockholders for their own land, with water rights appurtenant to the land, did not become as to such water a public utility, even if it may have devoted the surplus water to a public use and in supplying others after the demand of the stockholders was satisfied. The court said that it had been held that a water company might devote a part of its water to private use and the excess to public use; and that while the company might, perhaps, dispose of its surplus to whoever should apply for it, and would be thereby devoting such surplus to public use, this would not affect the part of the water appropriated to the preferred private use of the stockholders.

In *Re Lake Hemet Water Co.* (1920; Cal.) P.U.R.1920E, 186, the California Railroad Commission held that, in furnishing water to other consumers than those who were as matter of private right entitled to it under water certificates, an irrigation company was rendering a public utility service, and the commission, as to this portion of the service, had jurisdiction to fix rates.

VIII. Effect of voluntary submission to utilities commission.

(Supplementing annotation in 8 A.L.R. 289.)

See *Van Hoosear v. Railroad Commission* (Cal.) under supra, II., where the California court held that a landowner who supplied a few of his neighbors with water was a public utility, in view of his action several years previously in petitioning the

state railroad commission for leave to discontinue, which had been refused.

IX. Effect of decision of utility commission as to public nature of irrigation company.

It was held in *Stratton v. Railroad Commission* (1921) — Cal. —, 198 Pac. 1051, that the status of a water company as a public utility was not fixed by a decision of the railroad commission, in a proceeding brought by certain landowners for an order respecting distribution of the water, that the company was a public utility, but denying the relief sought, so as to make the decision *res judicata* in proceedings in the courts. And this was held true notwithstanding the fact that the Public Utilities Act provided that "all . . . collateral proceedings the orders and decisions of the commission which have become final shall be conclusive." The court said: "The commission decided that the company was a public utility, but denied the relief asked for. The claim now is that this decision as to the character of the company is *res judicata*. There is more than one answer to this, but one alone need be given. It is that the commission is not a judicial tribunal in the strict sense, although many of its functions are quasi judicial, so that its orders are not judgments, and in particular its findings of fact are not adjudications, and facts found by it are not *res judicata* and as such finally and conclusively established between the parties for all purposes. The commission is essentially an administrative and legislative tribunal, and not a court. It frequently has to hear evidence and determine for its own guidance questions of fact,—just, for example, as a board of supervisors frequently has to do,—but that it must do these and similar things as a court does them does not make it a court, or change the character of its decrees from administrative or legislative orders into judicial judgments. Their character in this respect is not affected by the provision of § 65 of the Public Utilities Act . . . that 'in all . . . collateral proceedings the orders and decisions of the commission which have

15 A.L.R.—78.

become final shall be conclusive.' There may possibly be some doubt as to just what the full effect of this statutory provision is, but, giving it the fullest effect to which it can reasonably be claimed it is entitled, it goes no further than providing that the orders and decisions of the commission are conclusive for the purposes for which they are made. The point here is that they are not made for the purpose of adjudicating between litigants. For example, assuming that the statute should have full effect, it would follow that the previous order of the commission could in no wise be attacked or its operation prevented in the present proceedings. The point is that it is not sought to do this, and our ruling that the water company is not a public utility does not do it. That order stands, and it would stand even if it had been an order directing the company as a public utility to do something. But the operation of the order and its full recognition as a final, existing, and effective order does not involve or mean more, as to questions of fact determined by the commission in making the order, than that such questions are conclusively determined for the purposes of the validity of the order. If the previous decision of the commission that the water company involved here was a public utility had been necessary for the order which it made, which it was not, that fact, assuming that the fullest effect should be given to the statute, would be deemed conclusively established so far as questioning the validity of the order or its effective operation is concerned, but no farther. The peculiar effect of a determination of fact operating to conclude the question for other purposes than those of the very proceeding in which the determination is made is confined to strictly judicial determinations alone, and an order of the commission is not of that character."

The court in *Stratton v. Railroad Commission* (Cal.) *supra*, held, also, that it was immaterial that the landowners acquiesced in the determina-

tion in the prior proceeding before the commission that the water company was a public utility, since this might only be material where by reason of the commission's order and the acquiescence of the parties in it, the relation between the company and the landowners was changed; whereas, in the prior decision, the commission, al-

though holding that the water company was a public utility, had denied the relief asked, and the company and the consumers had thereafter proceeded as before under the previously existing arrangement between them, without change in their respective rights or relations. R. E. H.

ANNA T. WILLIAMS, Admr., etc., of George R. Williams, Deceased, Plff.
in Err.,

v.

SOUTHERN SURETY COMPANY.

Michigan Supreme Court—September 30, 1920.

(211 Mich. 444, 179 N. W. 272.)

Insurance — sickness — chronic — length of time.

That the fatal illness of the holder of a policy insuring against sickness extends over a period of four months before death does not render it chronic within an exception in the policy.

[See note on this question beginning on page 1239.]

ERROR to the Circuit Court for Kent County (Brown, J.) to review a judgment reversing a judgment of a justice of the peace in plaintiff's favor in an action brought to recover the amount alleged to be due on a sick benefit policy. *Reversed.*

The facts are stated in the opinion of the court.

Mr. Charles G. Turner, for plaintiff in error:

The policy in question should be construed in favor of insured.

De Lancey v. Rockingham Farmers' Mut. F. Ins. Co. 52 N. H. 581; *Potter v. Ontario & L. Mut. Ins. Co.* 5 Hill, 147; *Barlow v. Scott*, 24 N. Y. 40; *Utter v. Travelers' Ins. Co.* 65 Mich. 545, 8 Am. St. Rep. 913, 32 N. W. 812; *May, Ins.* 175; *Wood, Ins.* 2d ed. 60-62; *Allen v. St. Louis Ins. Co.* 85 N. Y. 473; *Grand Rapids Electric Light & P. Co. v. Fidelity & C. Co.* 111 Mich. 151, 69 N. W. 249; *Anderson v. Fitzgerald*, 4 H. L. Cas. 484, 10 Eng. Reprint, 551, 17 Jur. 995; *Turner v. Fidelity & C. Co.* 112 Mich. 425, 38 L.R.A. 529, 67 Am. St. Rep. 428, 70 N. W. 898; *Zantow v. Old Line Acci. Ins. Co.* 103 Neb. 685, 173 N. W. 693; 29 Cyc. 148; *Wadsworth v. Jewelers & Tradesmen's Co.* 132 N. Y. 540, 29 N. E. 1104; *Laker v. Royal Fraternal Union*, 95 Mo. App. 353, 75 S. W. 705; 1 Bacon, Life & Acci. Ins. 4th ed. 219; *Anderson v. Aetna L. Ins. Co.* 75 N. H.

375, 28 L.R.A. (N.S.) 730, 74 Atl. 1041; *Miller v. Mutual Ben. L. Ins. Co.* 31 Iowa, 216, 7 Am. Rep. 122.

Messrs. Jewell & Smith, for defendant in error:

The rule for strict construction against the insurer has its proper application only where there is a doubt as to the meaning of the clause by which an exception is granted, and is not useful unless the insured is first able to bring himself within the terms of the policy.

Richards, Ins. L. 3d ed. p. 537, § 384.

Moore, Ch. J., delivered the opinion of the court:

George R. Williams became a member of the Phoenix Accident & Sick Benefit Association of Benton Harbor, Michigan, on the 4th day of February, 1898. For the following twenty years he paid premiums on his policy of insurance. He began suit on the 8th day of February,

1919, to recover for sick benefits from September 26, 1918, to February 8, 1919, at \$40 a month. The policy issued by the Phoenix Accident & Sick Benefit Association was taken over by the defendant, who assumed all liabilities on said policy. The case was begun in justice court, and appealed by said defendant to the circuit court, where it was tried by the circuit judge without a jury, who rendered judgment in favor of the defendant, for the reason that he thought the proofs disclosed that the disease with which Mr. Williams was afflicted was chronic, and came within the exceptions mentioned in the application.

Mr. Williams died April, 1919, and his widow, Anna T. Williams, was appointed administratrix of his estate, and the case was revived according to the rules. The trial judge made findings of fact and law. Amendments to his findings were duly filed, proper exceptions were taken, and the case is here by writ of error.

The policy reads in part as follows:

"In consideration of the covenants, agreements, and warranties contained in the application for membership, bearing even number herewith, which application, together with the by-laws of this association, is hereby made a part of this contract and the payment of \$1 in advance on or before the first day of each and every month during the continuance of this policy, the Phoenix Accident & Sick Benefit Association accepts as a member George R. Williams. . . . Said member shall be entitled to the following benefits, during the time this policy is maintained in full force and effect:

" . . . Forty dollars per month or at that rate for any part of a month after membership of without delinquency prior to the beginning of sickness, should the member become sick from any disease not caused by narcotics, intoxicants, excesses, or immoral actions on his

part, and be wholly incapacitated from transacting any and every kind of work or business pertaining to his occupation, and as a result thereof be entirely confined to the house or bed. And under the charge of some regularly qualified and registered physician, after the first five days from the time he is so confined to the house. Provided the total length of time to be paid for during any one illness shall not exceed one year. . . .

"In addition to the above will pay for sickness caused by any of the following diseases."

Then follows the names of forty diseases, including inflammation of the lungs, the section concluding with the words "and all other diseases not specifically prohibited."

The application for membership reads in part as follows: "Having carefully examined the principles, objects, classifications, and policy of the Phoenix Accident & Sick Benefit Association, I hereby make application for membership, and agree to pay the monthly dues."

Then follow twenty-six questions and answers. Between the twelfth and thirteenth questions there is interjected in very small type various provisions, agreements, and exceptions, the existence of which it is stated shall avoid the policy. We quote: "I, the applicant, do hereby agree that this application and all statements, answers, and agreements herein contained, together with the constitution and by-laws of this association, with all amendments heretofore or hereafter made, are hereby made part of any policy that may be issued hereon."

The words printed between these two answers cover a page and a half of the printed record. Among them is the following: "And I further understand and agree that the benefits of membership in this association shall not extend to nor cover disability or death resulting wholly or partly, directly or indirectly, from any of the causes restricted in the by-laws of this association, nor from any of the following causes,

viz.: Any disease commencing or existing, or the cause of which existed or commenced at or prior to the date of the beginning of membership, in this association."

And then follows a long list of causes which will relieve the company from liability, among them all chronic diseases.

We again quote: "I, the applicant, here hereby warrant that all statements, answers, and agreements herein contained on both sides of this application, whether printed or written by me, or any other person, are my answers; and I understand and agree that the person soliciting or taking this application is my agent as to all statements, answers, and agreements contained in application; that no statements or agreements made or received by any person, or to the association, shall be binding upon said association, unless said statements or agreements are embodied in this application in writing. . . . I hereby expressly waive all provisions of law now existing, or that may hereafter exist, preventing any physician who has attended me or who may attend me hereafter, from disclosing all information which he may hereby acquire."

Counsel for the appellee say in their brief: "This policy was issued before the passage of the Standard Provision Law, requiring the application to be printed on the policy in order for the defendant to use the provisions of the application as a defense."

It was probably contracts like the one before us which led the legislature to provide that policies shall be plainly printed in type not smaller than long primer, and that the exceptions to the liability created by the policy shall be printed with the same prominence as the benefits to which such exceptions apply. See § 9371, 2 Comp. Laws, 1915.

It is also probable that it was contracts of a similar character which the supreme court of New Hampshire had in mind when it rendered the opinion in *De Lancey*

v. Rockingham Farmers' Mut. F. Ins. Co. 52 N. H. 581. In explaining the nature of the mischief intended to be remedied by the legislature of that state in 1855, the opinion reads in part as follows:

"The principle act of precaution was to guard the company against liability for losses. Forms of applications and policies [like those used in this case], of a most complicated and elaborate structure, were prepared, and filled with covenants, exceptions, stipulations, provisos, rules, regulations, and conditions, rendering the policy void in a great number of contingencies. These provisions were of such bulk and character that they would not be understood by men in general, even if subjected to a careful and laborious study; by men in general they were sure not to be studied at all. The study of them was rendered particularly unattractive, by a profuse intermixture of discourses on subjects in which a premium payer would have no interest. The compound, if read by him, would, unless he were an extraordinary man, be an inexplicable riddle, a mere flood of darkness and confusion. Some of the most material stipulations were concealed in a mass of rubbish, on the back side of the policy and the following page, where few would expect to find anything more than a dull appendix, and where scarcely anyone would think of looking for information so important as that the company claimed a special exemption from the operation of the general law of the land relating to the only business in which the company professed to be engaged. As if it were feared that, notwithstanding these discouraging circumstances, some extremely eccentric person might attempt to examine and understand the meaning of the involved and intricate net in which he was to be entangled, it was printed in such small type, and in lines so long and so crowded, that the perusal of it was made physically difficult, painful, and injurious. Seldom has the art

of typography been so successfully diverted from the diffusion of knowledge to the suppression of it. There was ground for the premium payer to argue that the print alone was evidence, competent to be submitted to a jury, of a fraudulent plot. It was not a little remarkable that a method of doing business not designed to impose upon, mislead, and deceive him by hiding the truth, practically concealing and misrepresenting the facts, and depriving him of all knowledge of what he was concerned to know, should happen to be so admirably adapted to that purpose. As a contrivance for keeping out of sight the dangers created by the agents of the nominal corporation, the system displayed a degree of cultivated ingenuity, which, if it had been exercised in any useful calling, would have merited the strongest commendation. . . .

"When a premium payer met with a loss, and called for the payment promised in the policy which he had accepted upon the most zealous solicitation, he was surprised to find that the voluminous, unread, and unexplained papers had been so printed at headquarters, and so filled out by the agents of the company, as to show that he had applied for the policy. This, however, was the least of his surprises. He was informed that he had not only obtained the policy on his own application, but had obtained it by a series of representations (of which he had not the slightest conception), and had solemnly bound himself by a general assortment of covenants and warranties (of which he was unconscious), the number of which was equaled only by their variety, and the variety of which was equaled only by their supposed capacity to defeat every claim that could be made upon the company for the performance of its part of the contract. . . .

"With increased experience came a constant expansion of precautionary measures on the part of the companies. When the court held

(*Marshall v. Columbian Mut. F. Ins. Co.* 27 N. H. 157; *Campbell v. Merchants' & F. Mut. F. Ins. Co.* 37 N. H. 35, 72 Am. Dec. 324; *Clark v. Union Mut. F. Ins. Co.* 40 N. H. 383, 77 Am. Dec. 72) that the agent's knowledge of facts not stated in the application was the company's knowledge, and that an unintentional omission or misrepresentation of facts known to the company would not invalidate the policy, the companies, by their agents, issued new editions of applications and policies, containing additional stipulations, to the effect that their agents were not their agents, but were the agents of the premium payers; that the latter were alone responsible for the correctness of the applications; and that the companies were not bound by any knowledge, statements, or acts of any agent, not contained in the application."

In the fourth edition of *May on Insurance*, at § 174 it is said: "Having indemnity for its object, the contract is to be construed liberally to that end, and it is presumably the intention of the insurer that the insured shall understand that in case of loss he is to be protected to the full extent which any fair interpretation will give. The spirit of the rule is that where two interpretations, equally fair, may be given, that which gives the greater indemnity shall prevail. And to the same spirit is due the rule that conditions and provisos will be strictly construed against the insurers because they have for their object to limit the scope and defeat the purpose of the principal contract; and apparently contradictory clauses will be so construed, if possible, as to reconcile them with each other, and to give to each its due force in furtherance of the main purpose of the contract."

In *Grand Rapids Electric Light & P. Co. v. Fidelity & C. Co.* 111 Mich. 148, 69 N. W. 249, it is said in part:

"In *Anderson v. Fitzgerald*, 4 H. L. Cas. 484, 10 Eng. Reprint, 551, in speaking of the policy in that case,

it was said: 'It ought to be framed with such deliberate care that no form of expression by which, on the one hand, the party assured can be caught, or by which, on the other, the company can be cheated, shall be found upon the face of it.'

"In *First Nat. Bank v. Hartford F. Ins. Co.* 95 U. S. 673, 24 L. ed. 563, speaking of the policy in that case and the rule here stated, the court said: 'The company cannot justly complain of such a rule. Its attorneys, officers, or agents prepared the policy for the purpose, we shall assume, both of protecting the company against fraud, and of securing the rights of the assured under a valid contract of insurance. It is its language which the court is invited to interpret, and it is both reasonable and just that its own words should be construed most strongly against itself.'"

In *Turner v. Fidelity & C. Co.* 112 Mich. 425, 38 L.R.A. 529, 67 Am. St. Rep. 428, 70 N. W. 898, Justice Long, speaking for the court, said in part "As was said in *Bonenfant v. American F. Ins. Co.* 76 Mich. 657, 43 N. W. 682: 'Forfeiture is not favored either in law or equity, and a provision for it in a contract will be strictly construed; and courts will find a waiver of it upon slight evidence when the equity of the claim is, under the contract, in favor of the assured.' See also *Lyon v. Travelers' Ins. Co.* 55 Mich. 146, 54 Am. Rep. 354, 20 N. W. 829, and cases there cited; *Peoria, M. & F. Ins. Co. v. Hall*, 12 Mich. 202; 2 May, Ins. § 488; *German F. Ins. Co. v. Carrow*, 21 Ill. App. 631; *Thompson v. Phenix Ins. Co.* 136 U. S. 287, 34 L. ed. 408, 10 Sup. Ct. Rep. 1019. . . .

"If this language in the policy is ambiguous and susceptible of two constructions, then the question must be solved in favor of the insured; for it is well settled in this state that, where a stipulation or exception to a policy, emanating from the insurer, is capable of two meanings, the one is to be adopted which is the most favorable to the in-

sured; that it ought to be framed with such deliberate care that no form of expression, by which, on the one hand, the party insured can be caught, or by which, on the other, the company can be cheated, should be found on the face of it. *Utter v. Travelers' Ins. Co.* 65 Mich. 545, 8 Am. St. Rep. 913, 32 N. W. 812; *Grand Rapids Electric Light & P. Co. v. Fidelity & C. Co.* 111 Mich. 148, 69 N. W. 249."

See *Utter v. Travelers' Ins. Co.* supra; *Laker v. Royal Fraternal Union*, 95 Mo. App. 353, 75 S. W. 705; *Northwestern Mut. L. Ins. Co. v. Hazelett*, 105 Ind. 215, 55 Am. Rep. 192, 4 N. E. 582; *Allen v. St. Louis Ins. Co.* 85 N. Y. at page 477; *Zantow v. Old Line Acci. Ins. Co.* 103 Neb. 685, 173 N. W. 694; *Teutonia F. Ins. Co. v. Mund*, 102 Pa. 94; *Wadsworth v. Jewelers' & Tradesmen's Co.* 132 N. Y. 540, 29 N. E. 1104; *Miller v. Mutual Ben. L. Ins. Co.* 31 Iowa, 216, 7 Am. Rep. 122; *Moulor v. American L. Ins. Co.* 111 U. S. 342, 28 L. ed. 447, 4 Sup. Ct. Rep. 466.

In 2 Words & P. at page 1151, it is said: "Chronic. In order to distinguish a disease as 'chronic' it is necessary that it should have been of long standing as applied to diseases of a body. 'Chronic' and 'acute' are the antithesis of each other. An acute disease is one usually attended with violent symptoms, while a chronic disease is deep-seated and obstinate, threatening a long continuance. *Jones v. Yarborough*, 2 Ala. 524, 525."

In the instant case it is not probable that Mr. Williams had any knowledge of what was contained in the fine print between questions 12 and 13 in the application; but if it be conceded that the application and the policy are to be regarded as one contract, if we apply the rule of law to be deduced from the authorities we have cited to the instant case what must be the result? For more than twenty years Mr. Williams had been proceeding upon the theory that he had a policy that would entitle him to \$40 a month if he became

sick from any disease not caused by narcotics, intoxicants, excesses, or immoral actions on his part. It is clear from the evidence that he was sick, and that his disease was not caused by narcotics, intoxicants, excesses, or immoral actions on his part. After he had been sick for a time he applied to the agent of the defendant company for money. He was told there was no liability, and one gets the impression from reading the testimony of the agent that it was because the agent thought at first that he was not sick enough to entitle him to pay. It is now claimed that because he got worse, and his illness continued till his death, therefore his illness must have been a chronic illness, and there can be no recovery.

We have already quoted a definition of chronic illness. This suit was commenced in justice court before Mr. Williams died, to recover for four months of illness which he had suffered up to that time. The

policy upon its face states, "Provided the total length of time to be paid for during any one illness shall not exceed one year."

This is a pretty fair indication that no one supposed that when a disease had run but four months it had reached such chronic stage that there was no liability. Under the undisputed record the plaintiff should have had a judgment for the full amount of \$160 and interest.

The judgment is reversed, and a new trial is ordered, with costs to the plaintiff.

Fellows, Clark, Sharpe, Bird, and Brooke, JJ., concur with Moore, Ch. J.

Stone, J.:

I concur in the result on the ground that the contract is ambiguous and the provision in the policy should prevail over that in the application.

Steere, J., concurs with Stone, J.

ANNOTATION.

Health insurance: provisions excluding or limiting liability in case of chronic diseases.

The earlier cases of *Strickland v. Peerless Casualty Co.* (1914) 112 Me. 100, 90 Atl. 974; *American Life & Acci. Ins. Co. v. Nirdlinger* (1916) 113 Miss. 74, 4 A.L.R. 871, 73 So. 875; and *Kingkade v. Continental Casualty Co.* (1912) 35 Okla. 99, 128 Pac. 683, are treated in 4 A.L.R. 875, to which the present note is supplementary merely.

The reported case (*WILLIAMS v. SOUTHERN SURETY Co.* ante, 1234) seems to have been the only one to have passed upon the question of the meaning of the term "chronic" as used in a health insurance policy since the compilation of the earlier annotation. In this case a provision of health insurance policy exempting the insurer from liability for "all chronic diseases" was held not to apply to a fatal illness merely because of the fact that it extended over a period of four months before death.

In view of the dearth of judicial authority as to the meaning of the term "chronic disease or sickness" as used in health policies, it has been deemed advisable to include a few other cases which a search has disclosed as having passed upon the meaning of the word "chronic" as used in other instruments.

Thus, in *Blumenthal v. Berkshire L. Ins. Co.* (1908) 134 Mich. 216, 104 Am. St. Rep. 604, 96 N. W. 17, it was held, in construing the phrase "chronic or persistent" as used in an application for life insurance, that the quoted phrase did not differ materially from the phrase "chronic and persistent," the word "chronic" in effect meaning "persistent."

And with respect to the time necessary for a disease to be characterized as "chronic," the court in *Jones v. Yarborough* (1841) 2 Ala. 524, said: "The circuit judge, in his charge to

the jury, seems to have supposed that in order to distinguish a disease as 'chronic,' it is necessary that it should have been of long-standing. As applied to diseases of the body, chronic and acute are the antithesis of each other. An acute disease is one usually attended with violent symptoms, promising speedily to attain a crisis; while a chronic disease is deep-rooted and obstinate, threatening a long continuance. Now it may be true, that it usually requires some time after a disease has manifested itself, to discover that it is chronic; yet as the reverse may be, and sometimes is, the case, it was not permissible to instruct the jury that if the negro in question had a chronic disease of the chest on the 25th of December, 1838, that it was scarcely possible that he was sound a few weeks previously,

when he was sold." And in *Chicago v. Fitzgerald* (1897) 75 Ill. App. 174, it was said that the commonly accepted meaning of "chronic" was "long-standing," but that it was sometimes used to mean "inveterate or slow of progress." And in *State Medical Bd. v. McCrary* (1910) 95 Ark. 511, 30 L.R.A.(N.S.) 783, 130 S. W. 544, Ann. Cas. 1912A, 631, the court defined "chronic" as follows: "The word 'chronic' is the antithesis of acute, and a 'chronic and incurable' disease is generally understood to be one of long-standing, deep-rooted, obstinate, persistent, and unyielding to treatment."

In *Leavitt v. Morris* (1908) 105 Minn. 170, 17 L.R.A.(N.S.) 984, 117 N. W. 393, 15 Ann. Cas. 961, "chronic inebriety" was said to mean "habitual drunkenness." G. J. C.

LEOTA W. THOMAS

v.

LOCOMOTIVE ENGINEERS' MUTUAL LIFE & ACCIDENT INSURANCE ASSOCIATION.

MARGARET BARR HOPKINS et al., Interveners, Appts.

Iowa Supreme Court — July 14, 1921.

(— Iowa, —, 183 N. W. 628.)

Insurance — who can question procedure of change.

1. The beneficiary in a benefit certificate cannot take advantage of the fact that, in an attempt to change the beneficiary, the holder of the certificate did not account for the loss of the old certificate by affidavit as required by the by-laws of the society, if the society itself has waived that provision.

[See note on this question beginning on page 1260.]

Appeal — hearing de novo — case heard as equity case.

2. Although the court formally refuses to transfer to equity an interpleader proceeding in which equitable issues were tendered because the parties had agreed to try the case to the court, the appellate court may entertain the case as one triable de novo before it if the trial court in fact heard the case as though it was in equity.

Equity — attempted change of beneficiary in benefit certificate.

3. An issue that the claimant of a

benefit under a mutual benefit certificate was entitled to the fund because the holder of the certificate had done all he could to change the beneficiary in favor of claimant, but did not effect the change before his death, should be tried in equity.

Insurance — mutual benefit certificate — vested interest.

4. A beneficiary named in a mutual benefit certificate has no vested interest which will be effective against an actual change of beneficiary.

[See 19 R. C. L. 1292.]

— waiver of by-laws as to change of beneficiary.

5. A mutual benefit society may waive the provisions of its by-laws as to the method of change of beneficiary. [See 19 R. C. L. 1297.]

— waiver of provision of by-law.

6. A mutual benefit society waives the provision of its by-laws with respect to the form of request for change of beneficiary, by the act of its divisional secretary, who conducts the business between certificate holder and home office, requesting definite information in writing, without notifying him that it must be in the form of an affidavit on a form furnished by the society.

— change by all that holder can do.

7. A change of beneficiary is effected by the holder of the certificate giving the benefit society all the information necessary to effect the change and paying the requisite fee as required by the society's divisional secretary, although the information is not furnished by affidavit as required by the by-laws, and the change is not in fact made before his death, if the society waives the requirement of affidavit.

[See 19 R. C. L. 1298, 1299.]

— who may be beneficiary.

8. A mutual benefit society cannot create a fund for persons other than the

class specified in the law authorizing its organization.

[See 19 R. C. L. 1280.]

— right of person not designated in statute.

9. A benefit cannot be paid by a mutual benefit society to a divorced wife of the certificate holder, where the statute provides that payment of benefits shall be confined to certain specified persons not including a divorced wife, although the certificate was issued in her favor while she was the wife of the certificate holder.

[See 9 R. C. L. 501, 502; 19 R. C. L. 1291.]

— necessity of new designation upon re-engagement.

10. A wife designated as beneficiary in a mutual benefit certificate, and then divorced, cannot re-establish her right to the benefit by re-engaging to marry the certificate holder, without a new designation of her as beneficiary.

— recovery by administrator.

11. The administrator of the certificate holder cannot recover the proceeds of his benefit certificate upon the designated beneficiary becoming ineligible, where the certificate provides for payment in the alternative to the lawful heirs of the certificate holder.

[See 19 R. C. L. 1313, 1314.]

APPEAL by interveners from a judgment of the District Court for Polk County (Wilson, J.) in favor of plaintiff in an action brought to determine ownership of the proceeds of a certificate of insurance. *Reversed.*

Statement by Arthur, J.:

The cause tried was to determine the ownership of the proceeds of a certificate issued by the defendant insurance association. The insurance association paid the money into court on interpleading for determination between plaintiff and interveners as to the ownership. Plaintiff claimed the fund as the original beneficiary. Intervener Margaret Barr Hopkins claimed the fund as the new beneficiary, alleging that insured had made a change of beneficiary from plaintiff to her, and also she claimed the fund as the only heir at law of the insured. Intervener W. T. Barr, administrator of insured's estate, also claimed to be entitled to the insurance money. The facts appear in the opinion.

Messrs. Lee & Garfield, for appellant intervener Hopkins:

Where the sole remaining issues in a case are equitable issues, or where a determination of those issues will completely dispose of the case, the same should be transferred to equity.

Elk Point-School Dist. v. Bennett Bank, — Iowa, —, 168 N. W. 292; Olmstead v. Taylor, 177 Iowa, 186, 158 N. W. 587; Tinker v. Farmers State Bank, 178 Iowa, 972, 160 N. W. 349; Irwin v. Deming, 142 Iowa, 299, 120 N. W. 645; Blough v. Van Hoorbeke, 48 Iowa, 40; Thomas Plumbing Co. v. Hippee, — Iowa, —, 159 N. W. 169; Balch v. Ashton, 54 Iowa, 128, 6 N. W. 146; Harrison v. Palo Alto County, 104 Iowa, 383, 73 N. W. 872; Ryan v. Heenan, 76 Iowa, 589, 41 N. W. 367; Fritzler v. Robinson, 70 Iowa, 500, 31 N. W. 61, 17 Mor. Min. Rep. 105; McCormick v. Lundburg, 74 Iowa, 558, 38 N. W. 409;

Watt v. Robbins, 160 Iowa, 587, 142 N. W. 387.

A beneficiary of a certificate of fraternal benefit insurance has no vested interest in the benefit provided for by the certificate.

Wandell v. Mystic Toolers, 130 Iowa, 639, 105 N. W. 448; Bush v. Modern Woodmen, 182 Iowa, 515, 162 N. W. 59; Hicks v. Northwestern Mut. L. Ins. Co. 166 Iowa, 532, L.R.A.1915A, 872, 147 N. W. 883; Schmidt v. Northern Life Asso. 112 Iowa, 41, 51 L.R.A. 141, 84 Am. St. Rep. 323, 83 N. W. 800; Schmidt v. Iowa K. P. Ins. Asso. 82 Iowa, 304, 11 L.R.A. 205, 47 N. W. 1032; Cooper v. Order of Railway Conductors, 156 Iowa, 481, 137 N. W. 472; Townsend v. Fidelity & C. Co. 163 Iowa, 713, L.R.A.1915A, 109, 144 N. W. 574.

Provisions of by-laws as to the method of change of beneficiaries are for the benefit of the association, and it may waive them. Neither the plaintiff nor the administrator is entitled to object to the failure to comply with the formalities required by the by-laws as to the manner of change of beneficiary.

Wood v. Brotherhood of American Yeoman, 148 Iowa, 400, 126 N. W. 949; Simcoke v. Grand Lodge, A. O. U. W. 84 Iowa, 383, 15 L.R.A. 114, 51 N. W. 8; Holden v. Modern Brotherhood, 151 Iowa, 673, 132 N. W. 329; Delaney v. Delaney, 175 Ill. 187, 51 N. E. 961; Fischer v. Malchow, 93 Minn. 396, 101 N. W. 602; 29 Cyc. 135; Lentz v. Fritter, 92 Ohio St. 186, 110 N. E. 637; Wandell v. Mystic Toolers, 130 Iowa, 639, 105 N. W. 448.

By interpleading and paying the money into court, the association waived strict compliance with the provisions of its by-laws as to a change of beneficiary, and the court is free to award the fund to this intervener.

Holden v. Modern Brotherhood, 151 Iowa, 673, 132 N. W. 329; Modern Brotherhood v. Matkovitch, 56 Ind. App. 8, 104 N. E. 795; Knights of Maccabees v. Sackett, 34 Mont. 357, 115 Am. St. Rep. 532, 86 Pac. 423; Delaney v. Delaney, 175 Ill. 187, 51 N. E. 961; Taylor v. Hair, 112 Fed. 913; 29 Cyc. 136.

There are well-recognized exceptions to the rule that the provisions of the by-laws are to be observed in effecting a change of beneficiary.

Holden v. Modern Brotherhood, 151 Iowa, 673, 132 N. W. 329; Wandell v. Mystic Toolers, 130 Iowa, 639, 105 N. W. 448; Wood v. Brotherhood of American Yeoman, 148 Iowa, 400, 126 N. W. 949; Hayden v. Modern Brotherhood,

173 Iowa, 395, 155 N. W. 830; Simcoke v. Grand Lodge, A. O. U. W. 84 Iowa, 383, 15 L.R.A. 114, 51 N. W. 8; Schmidt v. Iowa K. P. Ins. Asso. 82 Iowa, 304, 11 L.R.A. 205, 47 N. W. 1032; Townsend v. Fidelity & C. Co. 163 Iowa, 713, L.R.A.1915A, 109, 144 N. W. 574; Adams v. Police & Firemen's Ins. Asso. 103 Neb. 552, 172 N. W. 755; Supreme Conclave R. A. v. Capella, 41 Fed. 1; Robinson v. Robinson, 121 Ark. 276, 181 S. W. 300; Modern Brotherhood v. Matkovitch, 56 Ind. App. 8, 104 N. E. 795; Fischer v. Malchow, 93 Minn. 396, 101 N. W. 602; Allgemeiner Arbeiter Bund v. Adamson, 132 Mich. 86, 92 N. W. 786; Grand Lodge, A. O. U. W. v. Child, 70 Mich. 163, 38 N. W. 1; Marsh v. Supreme Council, A. L. H. 149 Mass. 512, 4 L.R.A. 382, 21 N. E. 1070; Grand Lodge, A. O. U. W. v. Noll, 90 Mich. 37, 15 L.R.A. 350, 30 Am. St. Rep. 419, 51 N. W. 268.

Where a certificate of fraternal benefit insurance is made payable to a person as wife, when she ceases to be wife she no longer remains the beneficiary, and removes herself from the class of persons entitled to receive the proceeds.

Bush v. Modern Brotherhood, 182 Iowa, 515, 162 N. W. 31, 162 N. W. 59; Palmer v. Welch, 132 Ill. 141, 23 N. E. 412; Tyler v. Odd Fellows' Mut. Relief Asso. 145 Mass. 134, 13 N. E. 360; Brotherhood of R. Trainmen v. Taylor, 29 Ohio C. C. 171; Griffin v. Grand Lodge, A. O. U. W. 99 Neb. 589, 157 N. W. 113; Dworak v. Supreme Lodge, W. B. F. Asso. 101 Neb. 297, 163 N. W. 471, Ann. Cas. 1918D, 1153; Dahlin v. Knights of Modern Maccabees, 151 Mich. 644, 115 N. W. 975; Green v. Green, 147 Ky. 608, 39 L.R.A.(N.S.) 370, 144 S. W. 1073, Ann. Cas. 1913D, 683; Larkin v. Knights of Columbus, 188 Mass. 22, 73 N. E. 850; Lawson v. United Benev. Asso. — Tex. Civ. App. —, 185 S. W. 976.

The administrator is not entitled to recover, for the reason that he was not named as beneficiary in the policy, and is not a proper party to be awarded this fund.

Warner v. Modern Woodmen, 67 Neb. 233, 61 L.R.A. 603, 108 Am. St. Rep. 634, 93 N. W. 397, 2 Ann. Cas. 660; Devaney v. Ancient Order, H. L. I. F. 122 Minn. 221, 142 N. W. 316; 29 Cyc. 161; Bomash v. Supreme Sitting, O. I. H. 42 Minn. 241, 44 N. W. 12; Fisher v. Donovan, 57 Neb. 361, 44 L.R.A. 383, 77 N. W. 778; Finn v. Walsh, 19 N. D. 61, 121 N. W. 766; Leavitt v. Dunn, 56

N. J. L. 309, 44 Am. St. Rep. 402, 28 Atl. 590.

Even conceding plaintiff had been engaged to be remarried to insured, that would not entitle her to recover, because she was only designated as beneficiary as the wife of insured. She ceased to be his wife and was never again designated as beneficiary.

Green v. Green, 147 Ky. 608, 39 L.R.A. (N.S.) 370, 144 S. W. 1073, Ann. Cas. 1913D, 683.

Mr. Bert B. Welty for appellant, intervener-administrator.

Mr. W. H. McHenry, for appellee:

This cause was not transferable to equity, but the one equitable issue presented was triable in equity and was so tried.

Tinker v. Farmers State Bank, 178 Iowa, 972, 160 N. W. 349.

A beneficiary designated in a life insurance certificate valid in its inception remains valid although the insurable interest may have terminated. This rule controls in the case of a divorced wife, and she is entitled to the proceeds of the certificate unless there has been an actual change of beneficiary.

White v. Brotherhood of American Yeoman, 124 Iowa, 293, 66 L.R.A. 164, 104 Am. St. Rep. 323, 99 N. W. 164; Schmidt v. Hauer, 139 Iowa, 531, 111 N. W. 966; Brown v. Grand Lodge, A. O. U. W. 208 Pa. 101, 57 Atl. 176; Overhiser v. Overhiser, 14 Colo. App. 1, 59 Pac. 75; Courtois v. Grand Lodge, A. O. U. W. 135 Cal. 552, 87 Am. St. Rep. 137, 67 Pac. 970; Hayden v. Modern Brotherhood, A. 173 Iowa, 395, 155 N. W. 830.

The terms of the contract must be fully complied with, and the insured must have done all of the things necessary to be performed by him; until this is done, the beneficiary in the old certificate continues entitled to the proceeds of the policy.

Shuman v. Ancient Order U. W. 110 Iowa, 642, 82 N. W. 331; Wandell v. Mystic Tollers, 130 Iowa, 639, 105 N. W. 448; Modern Woodmen v. Little, 114 Iowa, 109, 86 N. W. 216; Berg v. Damkoehler, 112 Wis. 587, 88 N. W. 606; Abbott v. Supreme Colony U. O. P. F. 190 Mass. 67, 76 N. E. 234; Hayden v. Modern Brotherhood, 173 Iowa, 395, 155 N. W. 830.

Upon the death of Barr, the beneficiary acquired a vested right, which could not be changed by any subsequent act of anybody.

Wandell v. Mystic Tollers, 130 Iowa,

639, 105 N. W. 448; Shuman v. Ancient Order U. W. 110 Iowa, 642, 82 N. W. 331.

Arthur, J., delivered the opinion of the court:

There is practically no dispute concerning the facts involved in this case.

Defendant, Locomotive Engineers' Mutual Life & Accident Insurance Association, was a corporation, organized and existing under the laws of Ohio, engaged in business as a mutual benefit insurance company. On June 20, 1904, the defendant association issued a certificate of membership to J. F. Barr in the amount of \$1,500. The policy provided: "All payments or benefits that may accrue or become due by virtue of this policy shall be payable to Margaret Barr, sister, or his lawful heirs."

On May 24, 1905, insured in the meantime having married plaintiff in this case, applied for a change of beneficiary, and a new certificate was issued to him, which provided that the payments were to be payable to "Leota W. Barr, wife, or the insured's lawful heirs."

On April 30, 1908, the plaintiff and insured were granted a decree of divorce by the district court of Polk county, Iowa.

On November 9, 1916, J. F. Barr died intestate, never having remarried, without issue, and leaving no parents surviving him.

On the trial plaintiff introduced evidence tending to show that Barr and she had become reconciled and were engaged to be remarried at the time of Barr's death.

Defendant association interpleaded, admitting its liability on the policy sued on; that it did not know to which of claimants the proceeds of the policy should be paid; that it had no claim on the proceeds of the certificate; and that it had paid the money to the clerk of the district court to be awarded as the court, under the facts, should direct.

Fifteen days before the death of J. F. Barr, on October 25, 1916, and after Barr had undergone the first

of two critical surgical operations, he wrote the insurance secretary of the division to which he belonged, requesting that the beneficiary in his insurance policy be changed from his former wife, Leota W. Thomas, to his sister, Mrs. P. F. Hopkins, and that his former wife had the policy in her possession, and asking if he had to send in the policy, and inclosing \$1 as fee for making the change.

On October 29, 1916, the secretary of the insurance company, answering Barr's letter of October 25th, wrote Barr, acknowledging receipt of his letter and inclosure of \$1, and telling Barr that it was necessary for him to return the old policy; that, if he could not get the old policy it was necessary for him to make a request to him (Canney, secretary), explaining the reason he could not produce the old policy, so that he could send his letter of explanation with his request for the change desired.

On October 31, 1916, ten days before he died, in reply to the secretary's letter of October 29th, Barr wrote the secretary that his former wife had the old policy, and that he could not get it; that he was divorced from his former wife; and that he wanted the policy made out to his sister, Mrs. Margaret Barr Hopkins.

Testimony was introduced showing that it required about four and one half hours for a letter to go from Des Moines to Ottumwa, where the secretary had his office, and that it required about thirty-six hours for a letter to go from Des Moines to Cleveland, Ohio, the home office, and would take a little less than thirty-six hours for a letter to go from Ottumwa to Cleveland, Ohio.

Section 24 of the constitution and by-laws of the defendant provides as follows: "Any member wishing to change his beneficiary in his policy or policies can do so by returning, through the insurance secretary of the division to which he belongs, the policy or policies in his posses-

sion, with a written request over his own signature, giving full name and relationship of present beneficiary or beneficiaries, and those of the new beneficiary or beneficiaries who must be in one of the classes designated in § 1. Being unable to return old policy or policies, duplicates will be granted by members making affidavit of the facts on a form supplied by the home office, executed before an officer authorized by law to administer oaths, and waiving all benefits or rights to himself and his beneficiaries named in former policy or policies held by him, such change to be effective from the date borne by the request, providing the new beneficiaries are in one of the classes designated in § 1, for which a fee of 25 cents will be charged for each policy changed."

The information regarding loss of the policy was not furnished on the form provided by the home office. No blank form, as required by the by-laws of the defendant, on which to write the information as to the loss of the old policy, was ever furnished Mr. Barr, but information as to the loss of the policy was furnished in the letter written by Barr to the secretary of date of October 31, 1916.

Section 1 of the by-laws of defendant order contained the following regarding the payment of benefits: "The object of this association is to pay to the 'family, heirs, relatives by blood, marriage or legal adoption, affianced wife, or to a person or persons dependent upon the members' of said association, stipulated amounts of \$1,500, \$3,000, and \$4,500."

At the time of the adoption of the constitution and by-laws of the defendant the above contained within the double quotations was an exact copy of the laws of the state of Ohio. This is shown by a portion of the by-laws which reads as follows: "Benefits must be limited to the classes named in § 1 of the by-laws, which is a verbatim copy of the laws of Ohio under which we are incorporated."

In 1911 the laws of Ohio were changed so as to read as follows: "The payment of death benefits shall be confined to the wife, husband, relative by blood to the fourth degree, father-in-law, mother-in-law, daughter-in-law, stepfather, step-mother, stepchildren, children by legal adoption, or to a person or persons dependent upon the members."

This change in the law of Ohio removed an affianced wife from the class of persons permitted to receive payment of death benefits.

Defendant association on an interpleading was ordered to and did pay into court the proceeds of the policy, with interest thereon, and on its motion was discharged from liability.

The Ohio court, in the case of *Brotherhood of R. Trainmen v. Taylor*, reported in 29 Ohio C. C. 173, holds: "The effect of divorce seems to be to terminate the relation of 'wife' under a mutual benefit certificate, so that, if a wife is designated and she obtains a divorce, she loses her right to claim any part of the fund," and, "having secured a divorce subsequent to the issuance of the certificate, that fact precluded her from recovering benefits as wife or beneficiary."

This is from the syllabus.

It further appears in evidence that the insured did not have the certificate in suit in his possession; that plaintiff, whom Barr charged with having in her possession the certificate, testified upon the trial that she did not have the policy, or that she did not know where the policy was, and did not know what became of it.

Plaintiff bases her right to the avails of the insurance policy which had been paid into court upon conclusions asserted: That J. F. Barr, insured, made no valid change of beneficiary from the plaintiff to Margaret Barr Hopkins, intervener; that there never was a change of beneficiary; that there was no waiver by defendant company; that upon the death of J. F. Barr she became vested in her right to the

fund; that Barr never did the things which the contract required him to do in order to make change of beneficiary from his former wife to his sister; that plaintiff being eligible at the time the certificate was issued, to be a beneficiary under the certificate, she remains the beneficiary until the certificate has been changed in the manner provided in the by-laws of the order; that the rights of the parties are governed by the laws of the state of Iowa; that by reason of a re-engagement of marriage she became eligible to be a beneficiary; that a change of the policy specifically making her the beneficiary was not necessary, for the reason that she was the identical person named in the policy, which had never been changed with respect to beneficiary.

Intervener Margaret Barr Hopkins's claims to the avails of the policy of insurance are, and she asserts conclusions under the facts, as follows: That by reason of the divorce the plaintiff ceased to be the beneficiary under the policy; that after the divorce was granted plaintiff and insured never became engaged to remarry; that, if there was a re-engagement, plaintiff would not be eligible as affianced wife to become beneficiary, because the laws of the state of Ohio after the year 1911 did not include an affianced wife as eligible to become a beneficiary, and that the laws of the state of Ohio governed in that matter; that J. F. Barr made an effective change of beneficiary in his policy from Leota W. Thomas, wife, to Margaret Barr Hopkins, sister; that, in attempting to make such change of beneficiary, insured failed to strictly and technically comply with the regulations of the order providing for change of beneficiary, in that he failed to account for his inability to return the old policy in an affidavit made out on the form furnished from the home office, but that he did everything in his power, under the circumstances, to comply with the rule, and did, in law and equity, effect such change, and effect

in equity a transfer of the proceeds of the policy to his sister, Margaret Barr Hopkins.

Intervener Margaret Barr Hopkins further avers that plaintiff, at the time she and insured were divorced, ceased to be beneficiary under the policy, and never afterwards became beneficiary; and that, even if the insured did not make her (Margaret Barr Hopkins) beneficiary, by his attempt so to do she is the only heir at law of the insured, and for that reason is entitled to the fund in court arising from the policy.

Intervener W. T. Barr administrator, asserts claims to the fund in controversy on the grounds that plaintiff ceased to be a beneficiary upon the granting of the divorce, and never afterwards became beneficiary by reason of being the affianced wife, if she did become engaged to remarry the insured, which he denies; and that intervener Margaret Barr Hopkins never became a beneficiary, because the attempt of J. F. Barr to make her his beneficiary was not effectual; and that he, as administrator of the estate of J. F. Barr, is entitled to the proceeds of the policy.

Such are the issues made under the facts and conclusions asserted by the three parties claiming the fund. We may properly first take up the matter of procedure.

II. Intervener Margaret Barr Hopkins, and also intervener W. T. Barr, administrator, assign as error the overruling of intervener Margaret Barr Hopkins's motion to transfer to equity.

After the issues were made up between plaintiff and the interveners, and the defendant association, under their interpleading, had paid into court proceeds of the policy involved, with interest thereon, and had been discharged from further liability, intervener Margaret Barr Hopkins moved to transfer the case to equity, and the court made the finding and order: "Parties having agreed to try this case to the court, for that reason motion is overruled; all parties except."

The view of the court as to which forum, law or equity, the case should be heard in, seems a little peculiar. A jury trial had been waived by all parties. The defendant insurance association had paid the avails of the policy into court on interpleader, and had been relieved of further liability.

Intervener Margaret Barr Hopkins had tendered an equitable issue by alleging facts which she claimed supported an equitable assignment to her of the policy, and praying that the court award to her the proceeds of the policy on the ground that in equity she was the owner of the policy. The pleading of Margaret Barr Hopkins unquestionably tendered an equitable issue between her and the plaintiff. Plaintiff's counsel recognized that, for he says in his brief: "There was no equitable issue in this cause, except the allegation of Margaret Barr Hopkins that there was an equitable transfer of beneficiary's right from Leota W. Thomas to Margaret Barr Hopkins."

Plaintiff's evidence was all received by the court upon this question. The court seems to have recognized that there was an equitable issue tendered by intervener, and that such issue must be heard in equity, for he says in his ruling: "Parties having agreed to try this case to the court, for that reason motion is overruled; and all parties except."

It seems to have been the thought of the court that, if the case was tried to the court without a jury, it would be the same kind of trial as would take place if the case were transferred to equity. The court did, in fact, try the case in exactly the same manner that he would have tried it if he had entered an order transferring the case to equity, and had tried it in equity. It appears from the record and also from the statement of counsel for plaintiff and counsel for interveners that no rulings were made by the court on evidence, and that all the evidence offered was received. In that sit-

uation of pleading and trial, this court may, we think, entertain the case as one triable de novo in this court.

Appeal—hearing
de novo—case
heard as equity
case.

It is manifest that intervener Margaret Barr Hopkins was entitled to have the issue which she tendered heard in equity, and that such issue should be first tried out. If this court cannot hear and try the case de novo on the record submitted, we must reverse the case and remand it with direction, anyway, that the issue tendered by intervener be tried in equity. However, we have concluded not to reverse the case on the ground that intervener was denied the transfer of the case to equity, and to try the case de novo upon the record presented.

Code, § 3435, provides: "Where the action has been properly commenced by ordinary proceedings, either party shall have the right, by motion, to have any issue heretofore exclusively cognizable in equity tried in the manner hereinafter prescribed in cases of equitable proceedings; and if all the issues were such, though none were exclusively so, the defendant shall be entitled to have them all tried as in cases of equitable proceedings."

That the pleading of intervener tendered an equitable issue, and that

Equity—at-
tempted change
of beneficiary
in benefit
certificate.

she was entitled to have the case transferred to equity, there can be no doubt. Elk Point I.

C. School Dist. v. Bennett Bank, — Iowa, —, 168 N. W. 292; Olmstead v. Taylor, 177 Iowa, 186, 158 N. W. 587. In Olmstead v. Taylor, supra, the court said: "But if, as a matter of law and principle, the equitable issue disposed of the full controversy, there is nothing left for trial at law, and that would be true in this case. If the defendants succeeded in establishing the allegations of their cross petition, there was no case left for the plaintiff to dispose of on the law side of the calendar."

We may try this case de novo, because there is an equitable issue.

All the evidence offered was admitted, and is now before us. The cause was tried below like an equity cause, that is, to the court without a jury, and all the evidence was admitted and no rulings made. Irwin v. Deming, 142 Iowa, 299, 120 N. W. 645; McCormick v. Lundburg, 74 Iowa, 560, 38 N. W. 409; Watt v. Robbins, 160 Iowa, 595, 142 N. W. 387.

Interveners have assigned errors as in a law case on appeal, and argued same under brief points, and plaintiff has responded to same. However, having decided to try the case de novo, we will examine the whole record, so far as required for decision of the case.

III. The first question that logically presents itself is whether or not there was a valid change of beneficiary, because, if the insured, J. F. Barr, by what he did, effected a change in beneficiaries,—that is, if by what he did he made his sister, Margaret Barr Hopkins, his beneficiary,—then that disposes of the case. Perhaps we should first inquire whether the plaintiff, who was named in the certificate, had a vested interest in the benefit provided for by the certificate that could not be disturbed. Unquestionably she had no vested interest that would be effective against an actual change of beneficiary. We take it that the rule is that as long as Barr lived he had the right, so far as plaintiff was concerned, of changing his beneficiary at will. That, as we understand it, is the rule as to change of beneficiary in a certificate of fraternal insurance; that the beneficiary has no vested interest in the benefit provided for by the certificate. Townsend v. Fidelity & C. Co. 163 Iowa, 713, L.R.A.1915A, 109, 144 N. W. 574.

Insurance—
mutual benefit
certificate—
vested interest.

There is no dispute in the facts relating to the attempted change of beneficiaries. Barr attempted to make his sister, Margaret Barr Hopkins, his beneficiary in place of his former wife, the plaintiff.

Now, what did he do, and what did he fail to do, and what is the effect, are the pertinent inquiries. There being no dispute in the facts, it resolves itself into a question of law under the undisputed facts.

On October 25, 1916, the insured, J. F. Barr, wrote to M. J. Canney, local secretary of the association, as follows: "I write you a few lines to let you know that I want to have my insurance policy changed from my wife to my sister, Mrs. P. F. Hopkins. Now my wife has the policy in her possession, but she says she hasn't. Does it make any difference or do you have to send the old one in? Well, write. I had an operation the other day and it came out all right, but will have to have another on the other side of my head soon as that one heals up. Now will send you \$1 in this letter. If that isn't enough, let me know and will make it right."

Answering Barr's letter of October 25, 1916, Canney wrote on October 29, 1916:

"I have your letter with \$1 inclosed, requesting a new insurance policy. It will be necessary to return old policy. If you cannot get it will have to make a request to me, giving a full explanation about your old policy and the reason it cannot be obtained, so I can send it with my request for the change desired, also the name in full of the person you want your new policy payable to.

"The grand office will refuse to make the change unless this information is furnished, as the insurance laws of the state must be fully complied with. I am glad to hear you are feeling so well after your first operation. I trust you will soon be able to leave the hospital."

Replying to Canney's letter of October 29, 1916, Barr wrote on October 31, 1916: "In regard to that policy I do not know whether she has it or not, but when we separated looked for it where I kept it and could not find it, but found all other papers which I kept with it, and I asked her what she done with

it, and she said she didn't know anything about it or didn't see it, but I think she has it and won't own up to it, because it could not have got lost, so I don't know I can get it or what to do about it. But I do not want her to have it, as we are divorced and she is nothing to me. Now the person I want it made out to is my sister, Mrs. Margaret Barr Hopkins."

Section 24 of the constitution and by-laws is as follows: "Any member wishing to change his beneficiary in his policy or policies can do so by returning, through the insurance secretary of the division to which he belongs, the policy or policies in his possession, with a written request over his own signature, giving full name and relationship of present beneficiary or beneficiaries, and those of the new beneficiary or beneficiaries, who must be in one of the classes designated in § 1. Being unable to return old policy or policies, duplicates will be granted by members making affidavit of the facts on a form supplied by the home office, executed before an officer authorized by law to administer oaths, and waiving all benefits or rights to himself and his beneficiaries named in former policy or policies held by him, such change to be effective from the date borne by the request, providing the new beneficiaries are in one of the classes designated in § 1, for which a fee of 25 cents will be charged for each policy changed."

It will be observed that § 24 requires, in order to change beneficiary in the policy, and "being unable to return the old policy, . . . duplicates will be granted by members making an affidavit of the fact on a form supplied by the home office, executed before an officer authorized by law to administer oaths, and waiving all benefits or rights to himself and his beneficiaries named in the former policy held by him, such change to be effective from the date borne by the request." All the information required in § 24 of the by-laws was furnished the insur-

ance secretary in Barr's letter of October 25th. In that letter he stated his desire to have the beneficiary changed from his former wife to his sister, Margaret Barr Hopkins. He further stated that his former wife (plaintiff) had the policy in her possession, but that she denied having it. He also sent in the fee required, and more. Canney, secretary, on October 29th acknowledged receipt of the fee, and advised Barr that it would be necessary for him to return the old policy, saying: "If you cannot get it you will have to make a request to me giving a full explanation about the old policy and the reason it cannot be obtained, so I can send it with my request for the change desired, also the name in full of the person you want your new policy payable to."

It will be observed that no reference is made in the secretary's letter of any requirement of an affidavit. All the secretary asked for was that Barr should make a request giving an explanation about the old policy, the reason it could not be obtained, and the full name of the person he desired to receive the money. Barr had given to the secretary, in his letter of October 25th, the name of his sister, whom he desired to have made beneficiary, as "Mrs. P. F. Hopkins," and in his letter of October 31st he gave to the secretary the full name "Mrs. Margaret Barr Hopkins." Barr did not have the policy in his possession. Barr was in the hospital recovering from a critical operation, and expecting that it would be necessary for him to submit to another operation, which he did. Barr did not have a copy of the constitution and by-laws. He took defendant, through its secretary, M. J. Canney, at its word, and in his letter of October 31st, his last letter, he gave the secretary all the information required of him by the secretary's letter of October 29th. Barr furnished the information, the facts, that the secretary asked him to furnish. He did not furnish the information in the form of an affidavit as required

by the by-laws. The only respect in which the by-laws of the defendant association were not complied with was that the information was not given in the form of an affidavit; the facts concerning the loss of the old policy were not supplied in the form of an affidavit supplied by the home office. The wishes of Barr are clearly and unequivocally expressed in his letters as to the change of beneficiary. The question remains: Does his failure to explain the loss of the old policy, his inability to return the old policy in an affidavit as required by the by-laws, defeat his effort to change his beneficiary from Leota W. Thomas to Margaret Barr Hopkins?

Provisions of by-laws as to the method of change

of beneficiary are
—waiver of
by-laws as to
change of
beneficiary.

the association, and it may waive them. Barr had furnished to the association, through its secretary, all the information required by the by-laws as to the certificate. He had stated in his letter of October 25th that he could not find the certificate, and that he thought it was in the possession of his former wife. Barr also stated in that letter whom he wanted as his beneficiary. In that letter Barr stated that he wanted his sister, Margaret Barr Hopkins, to be his beneficiary instead of his former wife, Leota W. Thomas. It was not required by the by-laws that the name of the changed beneficiary, the name of the person whom he wished to be his beneficiary, instead of the beneficiary named in the present certificate, should be communicated to the association by way of an affidavit. It is only the fact that the old certificate had been lost that the by-laws required to be communicated to the company by way of an affidavit. Having the facts stated as to loss of certificate is a precautionary measure rule for the protection of the association against having more than one certificate out at once for the same insurance. No person or persons, no one other than

the association, is interested or benefited or can be in any way affected by the manner in which the loss of a certificate shall be communicated to the association, as to whether it shall be in a letter, or through an affidavit made on a form furnished by the home office. The secretary, in his letter to Barr telling Barr how to account for the old policy, the reason it could not be obtained for returning to the association, said nothing about an affidavit,—said nothing about an affidavit on a form furnished by the home office, or on any other form. He simply wrote Barr: "If you cannot get it, will have to make a request to me, giving full explanation about your old policy and the reason it cannot be obtained."

After receiving this letter from the secretary, telling him just what to do, just what facts to furnish, the two things necessary, namely, that the old policy was lost and could not be returned, and the name of the beneficiary that he wanted substituted for Leota W. Thomas, his former wife, Barr furnished the facts required. As before stated, the by-law does not require that the communication to the association of the name of the new beneficiary should be in the form of an affidavit; but only the one thing is required by the by-law to be in the form of an affidavit; namely, that the old policy cannot be produced and the reason why. Now what difference does it make to anybody, except possibly the company, whether the association is told that he cannot find his old policy for the purpose of surrendering it and having a new policy made out in favor of a beneficiary other than the person named in the old policy, in a letter, or in an affidavit? Only the one thing is required to be stated in an affidavit, and that is the reason, the facts, about why the old policy cannot be returned. A statement made in an affidavit is of a more solemn character than a mere statement made not under oath. The requirement of

this statement as to loss of policy or why it cannot be returned to the association is not made for the benefit of the beneficiary or the insured. It is entirely for the benefit and purposes of the association.

In the instant case the association did not quibble, did not make any objection whatever to the noncompliance with any of its by-laws, but paid the certificate avails into court to be awarded to whom may be proven the owner.

We think neither the plaintiff nor the administrator is entitled to object because Barr, in bed, and having undergone one operation and soon having to have another, had notified the association in a plain, clear letter that he could not return the old policy because he did not have it in his possession and thought his former wife had it, instead of in the form of an affidavit furnished from the home office. *Wood v. Brotherhood of American Yeomen*, 148 Iowa, 400, 126 N. W. 949; *Holden v. Modern Brotherhood*, 151 Iowa, 673, 132 N. W. 329; *Fischer v. Malchow*, 93 Minn. 396, 101 N. W. 602; *Wandell v. Mystic Toolers*, 130 Iowa, 639, 105 N. W. 448.

It is announced in many cases that the rule requiring the surrender of a certificate when it is desired by the insured to change his beneficiary and have a new certificate issued with another beneficiary named in it, and in fact most of the rules with respect to making a change of beneficiaries,—that is, the technical rules of proceeding,—are intended for the benefit of the insurer. *Wood v. Brotherhood of American Yeomen*, supra; *Fischer v. Malchow*, 93 Minn. 396, 101 N. W. 602.

Barr did everything required by the by-laws to change his beneficiary from his divorced wife to his sister, Margaret Barr Hopkins. He did everything necessary to effect a change of beneficiary; that is, he told the association whom he wanted to be beneficiary, and why he could

—who can
question
procedure of
change.

not send in the old certificate. The only thing wanting was that the information, the fact that he could not obtain the old policy to return it, because his divorced wife, he thought, had it in her possession, was told in a letter instead of an affidavit. The by-laws say: "On a form supplied by the home office." If Barr had employed someone to write up an affidavit for him, containing the same facts stated in his letter as to why he could not return the old policy, and such affidavit was not "on a form furnished by the home office," there would not have been a strict compliance with the by-laws. There would have been a variance, and there would be about as much reason to insist that it was a fatal variance as there is in this case, where the required information was furnished by letter only.

Section 24 of the by-laws provides that any member has a right to change his beneficiary, and that the member should return his old policy to the insurance secretary of the division to which he belongs, making a written request for the change and giving the name and relationship of the beneficiary to whom the insurance is to be made; that, if the member is unable to return his old policy, he should make an affidavit of the fact on a form supplied by the home office. All the information required in § 24 of the by-laws of the order was furnished the insurance secretary of the division to which Barr belonged in Barr's letter of October 25th. In that letter he stated that it was his desire to have the beneficiary changed from his divorced wife to his sister, Margaret Barr Hopkins. He further stated that his divorced wife (plaintiff) had the policy in her possession, but she denied so having it. The fee required was sent. On October 29th, in answer to Barr's letter of October 25th, the insurance secretary acknowledged receipt of the fee for making the change of beneficiary, and advised Barr that it would be necessary for him to return the old policy, and said: "If

you cannot get it [the old policy], you will have to make a request to me, giving a full explanation about the old policy and the reason it cannot be obtained, so I can send it with my request for the change desired."

There is no reference in the secretary's letter of any requirement of the order as to any affidavit on any form of the home office. All the secretary asked Barr for was that he should make his request, giving an explanation about the old policy, the reason it could not be obtained, and the full name of the person he wanted the new policy payable to. But Barr did not have the policy in his possession. He thought the plaintiff had it. Barr had no copy of the constitution and by-laws. He was a laboring man on a sick bed. He followed the instructions given him by M. J. Canney, secretary of the company, and in his second written request Barr gave all the information required of him by Canney, secretary, in his letter to Barr of October 29th. In his former letter of October 25th Barr had told the secretary of the change he wanted made, and why he could not return the policy. He did not have the policy. But when he received the secretary's answer to the letter of October 25th he again wrote him, giving him the information that the secretary told him was required. In his second letter of October 31st he is very explicit in his statements concerning the old policy, and why he could not return it, saying that he looked for it when he and his divorced wife separated, and that he could not find it; that he believed his divorced wife had it. In that same letter Barr said: "But I do not want her to have it, as we are divorced and she is nothing to me. Now the person I want it made out to is my sister, Margaret Barr Hopkins."

The correspondence of Barr with the company through its secretary in the three letters shows clearly that Barr informed the secretary in his first letter that he wanted to change his beneficiary. The secre-

tary answered his letter and told him what he would have to do to effect a change; and in his second letter Barr furnished to the secretary the information required by the secretary's letter to him. The secretary said nothing to Barr about the required information having to be furnished in an affidavit, the form of which must be furnished from the home office. The secretary said nothing about an affidavit of any kind.

It seems to us that the requirements of § 24 of the by-laws of the defendant order as to furnishing the information on a blank furnished by the home office was a rule enacted for the benefit of that order, a rule for the convenience of the officers of the order. This has been recognized by this and other courts. *Wood v. Brotherhood of American Yeomen*, 148 Iowa, 400, 126 N. W. 949; *Holden v. Modern Brotherhood*, 151 Iowa, 673, 132 N. W. 329; *Fischer v. Malchow*, 93 Minn. 396, 101 N. W. 602; 29 Cyc. 135; *Wandell v. Mystic Toolers*, 130 Iowa, 639, 105 N. W. 448.

This court said in *Wood v. Brotherhood of American Yeomen*, supra: "The rule requiring the surrender of the certificate, and for that matter most of the rules with respect to changing beneficiaries, is intended for the benefit of the insurer."

The Illinois court in *Delaney v. Delaney*, 175 Ill. 187, 51 N. E. 961, says: "The provision that a new certificate may be issued upon the surrender of the old certificate is a provision which is made for the benefit of the association."

The Minnesota court in *Fischer v. Malchow*, 93 Minn. 396, 101 N. W. 602, says: "The rules were made for the benefit of the association and to protect it, and not beneficiaries or others claiming the money to be paid upon the death of a member."

The law is well stated in 29 Cyc. 135, where the rule is laid down as follows: "It is generally held that the regulations concerning the method of changing beneficiaries

are prescribed for the protection of the society, and that, if the society has by waiver or estoppel lost its right to object to a change of beneficiary, no one else may raise that objection."

The provision of the by-law was not made for the benefit of Leota W. Thomas or W. T. Barr, administrator, but was solely for the convenience and benefit of the association. The requirements of § 24 of the by-laws were for the association's benefit, and it could waive the strict and literal compliance therewith, and the association did waive the strict and literal compliance therewith by not insisting thereon and paying the proceeds of the certificate into court. Barr did comply with the spirit of the requirement in furnishing all the information which was asked for in the by-laws, only he furnished such information in a letter written on his own stationery instead of in an affidavit on a form furnished by the home office. Granting that the defendant association would have been estopped to assert a lack of compliance with the by-law had it cared to urge such objection, it never did urge any objection as to such lack of compliance. The association waived compliance with the technicalities of its by-law when its divisional secretary, who conducted the business between Barr and the home office, wrote Barr requesting certain specific information, and made no mention of any affidavit or any form to be furnished by the

-waiver of
provision of
by-law.

home office, and by failing to furnish the form. We think there can be no question of Canney's authority to waive the requirements of the by-law. He was a divisional officer of defendant order. He was the officer who conducted the defendant's business with all members of defendant order located within his division. The very by-law which it is complained by plaintiff was not strictly complied with provided that the information to be furnished should be furnished through the

divisional secretary. We think that Canney, divisional secretary, had authority to write the letter he wrote to Barr on October 29th, and had authority to waive strict compliance with the by-laws.

The fact that the insurance company brought the money into court and never claimed that Canney had exceeded his authority shows conclusively that this officer had and was accorded the power and authority to bind the company. The letter of October 29th from Canney to Barr, and of October 21st from Barr to Canney, shows on its face that specific information was requested in Canney's letter and furnished in Barr's letter in the manner requested. No intimation was made by the secretary in his letter of October 31st of any affidavit or any form of affidavit to be used by Barr in making change of beneficiary. Barr gave the secretary the facts, and he gave him all the facts he asked for. Had the insurance company come into this case and denied liability to Margaret Barr Hopkins, which it did not do, another issue would have been presented. But that is not the situation in this case. Leota W. Thomas, the divorced wife, who Barr says had the policy in her possession and prevented him from returning it to the company, makes the objection that the by-law of the order was not strictly and literally complied with by accounting for the old certificate in an affidavit written on a form furnished by the home office. We think it does not lie in her mouth to complain because Barr accounted for his inability to return the old policy in a letter instead of in an affidavit on a form furnished by the home office. By interpleading and bringing the money into court, the company waived technicalities required in the by-law. This proposition is recognized in many cases. Supporting this proposition, see *Holden v. Modern Brotherhood*, 151 Iowa, 673, 132 N. W. 329; *Modern Brotherhood v. Matkovitch*, 56 Ind. App. 8, 104 N. E. 795; 29 Cyc. 136.

The effect of the defendant's depositing the fund in court was to say to the court that it did not care to rely on the technicalities of its by-laws, and desired the court to award the fund to whomever the deceased intended should receive it. That is what the company did say in its petition of interpleader. The defendant company having waived strict compliance with the by-law in the manner of accounting for the old certificate, we think it is established by the authorities that it does not lie in the mouth of Leota W. Thomas or the administrator to complain of the manner in which the old certificate was accounted for.

The doctrine that no one as a rule, other than the insurer, can assert the provisions of the by-laws, is well stated in *Lentz v. Fritter*, 92 Ohio St. at page 194, 110 N. E. 639, where the supreme court of Ohio says: "It cannot be claimed, however, that a beneficiary . . . named in such a policy or certificate of such association has any vested interest therein until the death of the insured, and hence, in the absence of prohibitory legislation, the beneficiary may be changed at will by the insured, upon a manifestation of his intention and designation of a new beneficiary. . . . It being true that no one else had a vested interest in this certificate, why should anyone else be permitted to complain of the manner in which it was made?"

See also *Fischer v. Malchow*, 93 Minn. 396, 101 N. W. 603. In 29 Cyc. 136, it is said: "The society may, in the lifetime of the member, waive provisions in its laws or in the certificate governing the method of changing beneficiaries, or estop itself from insisting thereon, and when it has done so no one else can as a rule take advantage of non-compliance with such provisions."

We think it clear and an unavoidable conclusion that neither the plaintiff nor W. T. Barr, administrator, can be heard to say that intervenor Margaret Barr Hopkins is not entitled to recover because

J. F. Barr, the insured, instead of furnishing the information of his inability to return the old certificate on a blank to be supplied by the home office, furnished the information in a letter on his own stationery.

The rule in some of the older cases was, and it is the general rule, that a change of beneficiary, in order to be effectual, must be in accordance with the provisions of the by-laws of the insurer; in other words, that the person desiring to have the beneficiary changed must pursue the course pointed out in the constitution and by-laws of the order.

It seems to us that the case before us may well be considered as falling within the rule announced in *Supreme Conclave, R. A. v. Cappella* (C. C.) 41 Fed. 1. In that case there was a request in writing, signed by the insured, that the beneficiary be changed. This request was received by the secretary at the home office the day before the death of insured. The certificate was not surrendered as provided by the by-laws of the order, and insured died before surrendering the old certificate, or having a new certificate issued to him. The court held nevertheless that there was a valid change of beneficiaries for the reason that assured had done all that was within his power to do. This case lays down three exceptions to the rule of strict compliance with the by-laws, which are as follows:

(1) Where the society has waived compliance or estopped itself to assert noncompliance.

(2) Where it is beyond the power of the member to comply literally with the regulations.

(3) If the insured has pursued the course pointed out in the by-laws and has done all in his power to change the beneficiary, but before the new certificate is actually issued he dies, a court of equity will act as if the new certificate had been issued.

Perhaps the *Cappella Case* is the leading case on this subject. The

facts are nearly identical with those in the case at bar. The old certificate was not surrendered as required by the by-laws, but the court held that this would not defeat the insured's wishes, for the reason that he had done all within his power to do. In the instant case did not the insured, J. F. Barr, under his situation and under the directions given him by the divisional secretary, do all within his power to change his beneficiary from Leota W. Thomas, his divorced wife, to Margaret Barr Hopkins, his sister? It is to be remembered that Barr started to effect a change of beneficiaries fifteen days before his death, and that he was in a hospital and underwent two surgical operations, and that the order, through Canney, secretary, knew that Barr was in a hospital and undergoing a surgical operation. Barr did everything that Canney, secretary, directed him to do. What more could Barr have done in his situation? Did not Barr, in following the written directions of the divisional secretary, in his situation of illness and ignorance of the technical rule provided in the by-law, the technical manner of communicating to the order the reason why he could not return the old policy, accomplish all that lay in his power to do? It may be urged that Barr was bound to know the rule contained in the by-law, that he must account for his inability to return the old policy by making an affidavit, on a form furnished by the home office, of the fact that he thought his former wife had the certificate, and that he was unable to obtain it. Yes, the by-laws of the order are part of the contract of insurance. Barr did not have a copy of the by-laws. Perhaps he should have had. It does not appear whether Canney, secretary, had a copy of the by-laws or not. But Canney assumed to tell Barr exactly what to do to make the change he desired; and Canney said nothing about the rule in the by-law; said nothing about Barr's having to account for his inability to

return the old certificate in an affidavit. This man, confined in a hospital, sought the advice of Canney, secretary, and when he received it followed his directions. Must it be said that, because Barr did not know more about the technical rule in the by-law on the question of how to account for the old certificate than Canney, secretary, revealed to him in answering Barr's direct question of what to do, Barr failed to do all within his power to effect a change of beneficiaries? The instant case is different from any of the reported cases in that the insured asked the divisional secretary just what to do and how to do it to effect a change of beneficiaries, and religiously followed the secretary's direction, doing not less and not more, but all that the secretary in his letter of October 29th explicitly told him to do. And this was ten days before Barr died. There was plenty of time for the secretary to have furnished Barr with a form of an affidavit from the home office, on which he could make an affidavit. But Barr knew nothing about this requirement of an affidavit. The secretary likely did, but he evidently thought the requirement not absolutely necessary, and that it might be waived by the company. Anyway, he did waive it for the company. He did all he could to waive it for the company by assuming to tell Barr just what to do, without mentioning an affidavit on the company's form or any other form. Under Barr's situation it was clearly beyond his power, we think, to literally comply with the regulations, but he did comply with them so far as it was within his power to do.

It may be conceded, as appellee contends, that the general rule is that a strict construction should be given to the rule of law for making change of beneficiary. Appellant has cited cases in support of that theory, and there are numerous decisions of many courts, which, in substance, hold that, where the by-laws or constitution of a mutual

benefit society provide a method of making a change of beneficiary, that method must be pursued by a member making such change or designation. While that is true, there are well-defined exceptions to the general rule, as set forth in the Cappella Case, and in 29 Cyc. 133, above quoted, and other cases. *Holden v. Modern Brotherhood*, 151 Iowa, 673, 132 N. W. 329; *Wandel v. Mystic Toilers*, 130 Iowa, 639, 105 N. W. 448; *Wood v. Brotherhood of American Yeomen*, 148 Iowa, 400, 126 N. W. 949; *Hayden v. Modern Brotherhood*, 173 Iowa, 395, 155 N. W. 830; *Simcoke v. Grand Lodge, A. O. U. W.* 84 Iowa, 383, 15 L.R.A. 114, 51 N. W. 8; *Schmidt v. Iowa K. P. Ins. Asso.* 82 Iowa, 304, 11 L.R.A. 205, 47 N. W. 1032; *Townsend v. Fidelity & C. Co.* 163 Iowa, 713, L.R.A.1915A, 109, 144 N. W. 574; *Adams v. Police & Firemen's Ins. Asso.* 103 Neb. 552, 172 N. W. 755; *Robinson v. Robinson*, 121 Ark. 276, 181 S. W. 300; *Modern Brotherhood v. Matkovitch*, 56 Ind. App. 8, 104 N. E. 795; *Fischer v. Malchow*, 93 Minn. 396, 101 N. W. 602; *Allgemeiner Arbeiter Bund v. Adamson*, 132 Mich. 86, 92 N. W. 786; *Grand Lodge, A. O. U. W. v. Child*, 70 Mich. 163, 38 N. W. 1; *Marsh v. Supreme Council, A. L. H.* 149 Mass. 512, 4 L.R.A. 382, 21 N. E. 1070; *Grand Lodge, A. O. U. W. v. Noll*, 90 Mich. 37, 15 L.R.A. 350, 30 Am. St. Rep. 419, 51 N. W. 268.

The holding in the recent case of *Taylor v. Grand Lodge, A. O. U. W.* — N. D. —, 178 N. W. 130, of the North Dakota court, supports the exceptions to the general rule. There the by-laws of the order provided that the beneficiary might be changed by filling out the blank form on the back of the certificate, having the signature of the insured attested by the recorder of the lodge and the seal of the lodge attached thereto, and by delivering the certificate with the form properly filled in to the recorder of the lodge, with a fee of 50 cents. The insured filled out the blank form, but the signature was not attested by the record-

er of the lodge nor by anyone else, nor were the other requirements of the by-laws complied with. Furthermore, the certificate with the insured's request for a change was not delivered to the insurance order, nor was the insured's intention of requesting the change made known to the order until after the death of insured. The court said: "In this case, however, the lodge makes no complaint. So far as it is concerned, it assumes sufficient compliance with the regulations providing for the change of beneficiary has been accomplished. It does not object that compliance with its regulations has not taken place. It brings the money into court, and is willing that such beneficiary shall have it as the court may say is entitled to it. We think, therefore, the lodge has waived any failure of compliance with its regulations in regard to the change of beneficiary.

. . . In cases such as this no iron-clad rule can be enunciated. The most and the best that can be said in such a case is that, if the insured has done all in his power to comply with the regulation of the order, in such a matter as designating a change of beneficiary, but has not done all that the order requires, and it is equitable to give effect to his partially completed efforts to make such change, and if it plainly would result in great injustice if his partially completed acts were not regarded as completed, equity should regard that as done which ought to have been done; and we think that condition applies to this case, for equity is with the plaintiff."

We are constrained to hold that Barr did all within his power to effect the change of beneficiary in the insurance certificate from Leota W.

Thomas, his former wife, to Margaret Barr Hopkins, his sister, and that what he did effectuated such change, and made out an equitable transfer of the fund in controversy to intervenor Margaret Barr Hopkins.

IV. Another issue of law, the

facts being undisputed, is presented by the claim of plaintiff that she is entitled to the fund in controversy based on the theory that a beneficiary designated in a life insurance certificate valid in its inception remains valid although the insurable interest may have terminated, and that this rule controls in case of a divorced wife, and that she is entitled to the proceeds of the certificate unless there has been an actual change of beneficiary. Plaintiff cites cases from our court and other courts to sustain her position. *White v. Brotherhood of American Yeomen*, 124 Iowa, 293, 66 L.R.A. 164, 104 Am. St. Rep. 323, 99 N. W. 1071, 2 Ann. Cas. 350; *Schmidt v. Hauer*, 139 Iowa, 531, 111 N. W. 966; *Brown v. Grand Lodge, A. O. U. W.* 208 Pa. 101, 57 Atl. 176; *Overhiser v. Overhiser*, 14 Colo. App. 1, 59 Pac. 75; *Courtois v. Grand Lodge, A. O. U. W.* 135 Cal. 552, 87 Am. St. Rep. 137, 67 Pac. 970.

On the other hand, intervenor Margaret Barr Hopkins contends that, where a certificate of fraternal benefit insurance is made payable to a person as wife, when she ceases to be wife she no longer remains the beneficiary, and removes herself from the class of persons entitled to receive the proceeds. Supporting her position, see Acts of the Ohio General Assembly 1911 (Code, title 9, div. 3, subd. 1, chap. 4, § 9463); *Tyler v. Odd Fellows' Mut. Relief Asso.* 145 Mass. 134, 13 N. E. 360; *Bush v. Modern Woodmen*, 182 Iowa, 515, 152 N. W. 31, 162 N. W. 59; *Brotherhood of Railroad Trainmen v. Taylor*, 29 Ohio C. C. 171; *Giffin v. Grand Lodge, A. O. U. W.* 99 Neb. 589, L.R.A. 1916D, 1168, 157 N. W. 113; *Dahlin v. Knights of Modern Maccabees*, 151 Mich. 644, 115 N. W. 975; *Green v. Green*, 147 Ky. 608, 39 L.R.A. (N.S.) 370, 144 S. W. 1073, Ann. Cas. 1913D, 683; *Lawson v. United Benev. Asso.* — Tex. Civ. App. —, 185 S. W. 976.

It is an accepted proposition that a fraternal benefit insurance cor-

poration has no power to create a fund for persons other than the class specified in the law authorizing its organization and maintenance, and the fund will not be paid outside of such class. The Ohio statute (Page & A. Gen. Code, § 9467) which was pleaded by intervenor provides: "The payment of death benefits shall be confined to the wife, husband, relative by blood to the fourth degree, father-in-law, mother-in-law, son-in-law, daughter-in-law, stepfather, stepmother, stepchildren, children by legal adoption, or to a person or persons dependent upon the member."

It will be observed that by its wording the Ohio statute confines the payment of death benefits to the wife and others, not including a divorced wife. The Ohio statute differs from the Iowa statute in this respect,—the Ohio statute reads that the payment of death benefits shall be confined to persons of a certain class. Payment to persons outside of the classes enumerated in the Ohio statute would be a violation of the law of the state which gave defendant company the right to exist. The Iowa statute (Code, § 1824) provides: "No fraternal association created or organized under the provisions of this chapter shall issue any certificate of membership to any person under the age of fifteen years, nor over the age of sixty-five years, nor unless the benefit under said certificate shall be the husband, wife, relative, legal representative, heir or legatee of such member."

The Iowa statute merely says that no membership shall be issued to any person unless the beneficiary is in the class therein mentioned, while the Ohio statute prohibits the payment of death benefits to any person unless he belongs to the class therein mentioned. This distinction has been recognized by the courts. *Bush v. Modern Woodmen*, 182 Iowa, 515, 152 N. W. 31, 162 N. W. 59. In the *Bush Case* the insured sought to name as beneficiary a niece by marriage. In a contest over the pro-

ceeds of the insurance we held that the person sought to be made beneficiary was not entitled to recover, for the reason that the defendant corporation had no power to create a fund for persons other than the class specified in the law authorizing its organization and maintenance. We said: "It is almost the universal holding that a society of this kind can waive the enforcement of a requirement embodied in the by-law, but it is elementary that a corporation such as this has no power to create a fund for persons other than the class specified in the law authorizing its organization and maintenance, and, as the corporation has no authority to create a fund for any other purpose, a member cannot direct that the fund be paid to a person outside of such class."

It is to be noted that the defendant order in the *Bush Case* was an Illinois corporation. In that case we further said: "The statute of Illinois is the organic law of this society. It is under this law that it lives, moves, and has its being. From this law it gets its right to do business, and by this law it is regulated and controlled. It must be borne in mind that, as to these societies, the purpose and intent of the legislature in creating and recognizing them is not that they may do a general insurance business, but a fraternal business. It has been recognized that there lies in the legislature the power to limit the class which may be beneficiaries of the society. We take it that those who join these societies and receive certificates therein do this in recognition of this reserved power in the legislature from which the society gets its life, and under whose restrictions it operates its business. It does not lie in the power of the society to make by-laws in conflict with the organic law under which it exists. The society could not, in the first place, have made eligible as beneficiaries those who, under the organic law, were not eligible to be beneficiaries."

It will be observed that the court lays no stress upon the place where the contract was made, but emphasizes the provisions of the law upon which the society is organized, which provisions become a part of every contract into which the society enters. The defendant company is bound by the Ohio law just as the court held in the Bush Case that the society was bound by the laws of Illinois, for it was under that law it lived, moved, and had its being.

The insurance certificate in the instant case provided that "the proceeds were payable to "Leota W. Barr, wife, or to the insured's lawful heirs." It appears without dispute that the plaintiff and the insured were divorced in April, 1908. She was the plaintiff in the divorce proceedings. Upon being divorced plaintiff ceased to be the wife of insured. It is the position of intervenor Margaret Barr Hopkins that the proceeds could not be paid to Leota W. Barr, wife, as the policy itself provided, because Leota W. Barr, by her own act, had removed herself from the class of persons permitted to receive payment of death benefits under the laws of the state of Ohio.

Plaintiff relies upon *White v. Brotherhood of American Yeomen*, supra, and *Schmidt v. Hauer*, 139 Iowa, 531, 111 N. W. 966, for her right to recover as the divorced wife of insured, and these cases seem to support her position. We are inclined to think, however, that these cases may be distinguished by reason of the difference in the Ohio and Iowa statutes. The statutes of Iowa limit the class of persons who may become beneficiaries, and do not limit the class of persons to whom payment of benefits shall be confined, as does the Ohio statute. In the *White Case* and also in the *Schmidt Case* we referred to the *Tyler Case* with approval, but did not consider it in point. In the *Schmidt Case* we said: "There the divorced wife of a member, named as beneficiary in the policy, was denied a recovery, but on the ground that the statutes

of the state governing fraternal insurance associations, under which statute the defendant there charged was organized, as well as the laws of the association, forbade payment of benefits except 'for the purpose of defraying the expenses of the sickness and burial of its members, and rendering pecuniary aid to the families of the deceased members, or to their heirs.'"

The facts of the *Tyler Case* are precisely the same as the facts in the case before us. The controversy in the case was between the divorced wife, who prior to the divorce had been named as beneficiary, and the only heir at law of insured. The by-laws of the association provided that the benefits should be paid to the family of deceased persons or to their heirs. The Massachusetts court held that the divorced wife was precluded from claiming benefits because she was not within the class of those intended to be benefited as shown by the by-laws of the association and the statute of the state of Massachusetts under which the association was organized. The Massachusetts statute provided that such corporation should be formed for the purpose of "assisting widows, orphans, or other relatives of deceased members, or any person dependent upon deceased members." The Massachusetts court said: "Assuming, then, but not deciding, that the validity of a designation is to be determined at the outset with reference to the relation then existing between the member and his beneficiary, we think, to make it available, after his death, there must then be a relation to the deceased such as is contemplated by the agreement of association and the by-laws relating to payment. And this view is strengthened by a consideration of the statute under which the association was organized."

The *Tyler Case* was really approved by us in the *White Case* and the *Schmidt Case*, but we said in the *Schmidt Case* it was not in point for the reasons there stated.

A divorced wife is not included

among the classes to which benefits are payable; the Ohio statute specifically providing that "the payment of death benefits shall be confined to the wife, husband," etc. The holding of the Ohio court is in conformity with this view. *Brotherhood of Railroad Trainmen v. Taylor*, 29 Ohio C. C. 171. This is the case which is pleaded and introduced in evidence upon the trial by intervenor Margaret Barr Hopkins. The Ohio court in this case held that upon the granting of a divorce the divorced wife ceased to be a beneficiary. In the course of the opinion the following is quoted from *Overhiser v. Overhiser*, 14 Colo. App. 1, 59 Pac. 75: "It will be seen at a glance that there is a wide distinction between a requirement that a certificate shall issue to only one of a certain class of persons, and one that payment can be made only to one of a certain class."

This we deem pertinent to the discussion at hand. This case makes clear the distinction between the Iowa statute and the Ohio statute. In the *White Case*, which plaintiff largely relies on, the insurance corporation was organized under the laws of Iowa, and was governed by the laws of Iowa in the payment of benefits. In that case there was no attempt on the part of the member to change the beneficiary following the divorce, and in that case the wife was named as the beneficiary in her individual capacity, and not as wife, as was the plaintiff in the case at bar. In the opinion we refer to the rule contended for by counsel for plaintiff in the instant case, and then we say: "This rule has been held not to obtain, however, where the beneficiaries are restricted to the family, relations, or dependents, as was the case in *Tyler v. Odd Fellows' Mut. Relief Asso.* 145 Mass. 134, 13 N. E. 360, relied upon by the appellee. There it was stipulated that payment should be made to the person designated by the member, 'provided that such person was an heir or member of decedent's family.' This limitation was held to be

controlling; and the wife, who was named as beneficiary and had been divorced, not being an heir or member of the family of the deceased at the time of his death, was held incompetent as a beneficiary, and recovery was for that reason alone denied. Had the certificate before us been in terms payable to the wife or to the widow of the deceased, we think a divorce would have excluded the then wife, because of the absence of such relationship at the time of death, but we have an entirely different case to deal with."

In the instant case the law of Ohio, as well as the constitution of the order, restricted the payment of benefits to those belonging to the classes named, and plaintiff does not fall within any of the persons permitted to receive payment of benefits either under the law of the corporation, or the Constitution of the order. In the *Schmidt Case*, relied upon by counsel for plaintiff, the defendant order was an Iowa corporation, and, as we have already adverted, the statutes of Iowa merely limit the class of persons who may become beneficiaries, and do not name the classes of persons who are permitted to receive payment of death benefits, and prohibit payment to others than the members of those classes. In the *Schmidt Case* there was no attempt at change of beneficiaries as there was in the case at bar. The *Tyler Case*, from the Massachusetts court, is identical in its facts with the instant case. The holdings in the two cases cited from our court and relied upon by plaintiff, the *White Case* and the *Schmidt Case*, do not disagree with the holding in the *Tyler Case*, for the reason that the Massachusetts law under which the corporation was organized forbade payment of benefits to any except the classes named. So, in the instant case the Ohio law forbids payment of benefits to any except the named classes. Since the plaintiff falls outside of any of the named classes, the *Schmidt Case* is clearly not in point

as authority for plaintiff's contention, and we there ^{—right of person not designated in statute.} so say. In the instant case we hold the divorce defeats plaintiff's recovery, even if there was not an effectual change of beneficiary.

V. In the pleadings and evidence there is presented another issue of fact and law, by the claim of the plaintiff that, after she obtained a divorce from the insured, she and insured again became engaged to be married, and that she is entitled to recover as an affianced wife. Plaintiff offered testimony tending to show a re-engagement. Even conceding that plaintiff was engaged to be remarried to the insured, that would not entitle her to recover because she was designated as beneficiary as the wife of insured. She ceased to be his wife by divorce, and was never again designated as beneficiary. In such

a case there must ^{—necessity of new designation upon re-engagement.} be not only a promise to marry, but a new designation of the affianced wife as the beneficiary of the policy. *Green v. Green*, 147 Ky. 608, 39 L.R.A. (N.S.) 370, 144 S. W. 1073, Ann. Cas. 1913D, 683.

VI. The claim of intervener W. T. Barr, administrator, to the fund in controversy, may be disposed of

by adverting to the certificate upon the life of J. F. Barr, which provides: "All payments that may accrue or become due by virtue of this certificate will be payable to Leota W. Barr, wife, or insured's lawful heirs."

It is here to be observed that the policy provides for payment in the alternative to the lawful heirs of J. F. Barr. It does not provide for the payment to the administrator of his ^{—recovery by administrator.} estate, but to his heirs. It follows that, if the heirs are to be awarded this fund, they must recover as beneficiaries, and not by descent. The intervener W. T. Barr, administrator, claims this fund, not as trustee for the heirs, but claims the fund in his official capacity as administrator of the estate of J. F. Barr as assets of his estate. Intervener Margaret Barr Hopkins, without dispute in the record, is the only heir at law of J. F. Barr, deceased, and she is in court claiming this fund, and we hold she is entitled to same as such heir.

The decree of the lower court is reversed, and cause is remanded for decree in harmony with this opinion, or decree may be entered in this court.

Evans, Ch. J., and Stevens, Faville, and Weaver, JJ., concur.

ANNOTATION.

What rights are waived by insurer who pays money into court.

This annotation is supplementary to that in 2 A.L.R., beginning at page 1680, and collates the recent decisions as to the rights waived by an insurer who pays the amount of the policy into court. The few recent cases on that subject all involve the waiver of the right to question a change of beneficiary.

In the reported case (*THOMAS v. LOCOMOTIVE ENGINEERS' MUT. LIFE & ACCI. INS. ASSO.* ante, 1240), it is held that an insurer, by paying the fund into court, waives the objection to the failure of the insured to furnish an affidavit, which was made, by the by-laws, prerequisite to a change of beneficiary.

So, in *Shinholser v. Henry* (1921)

— Ga. —, 106 S. E. 719, it was held that a fraternal order, by filing a petition for the interpleader of the original and a substituted beneficiary and paying the amount of the policy into court, waived the right to urge that under its by-laws the beneficiary first named was ineligible.

But in *Grand Lodge, A. O. U. W. v. Martin* (1919) 118 Me. 409, 108 Atl. 355, it was held that the deposit of the amount of the policy in court did not waive the objection that a change of beneficiary was not signed in the presence of an officer of the insurer as required by its by-laws, the court saying that the provision was for the benefit of the beneficiary.

W. A. S.

NATHAN HARLE et al., Plffs. in Err.,
v.
BRUFF HARLE et al.

Texas Supreme Court — June 28, 1918.

(109 Tex. 214, 204 S. W. 317.)

Descent — children of adopted child.

Children of an adopted child are not descendants of children of the adopter, so as to be entitled to inherit from the adopter in case of the prior death of their parents, nor are they entitled to inherit through the deceased under a statute conferring upon the adopted child the rights and privileges of a legal heir, where adoption does not give the adopted person the legal status of a child, and the statute denies the right of inheritance to any person whatsoever other than a child or lineal descendant of the intestate, unless they are in being and also capable in law to take as heirs at the time of the death of the intestate.

[See note on this question beginning on page 1265.]

ERROR to the Court of Civil Appeals to review a judgment reversing a judgment of the District Court for Navarro County (Daviss, J.) in favor of plaintiffs in a suit brought to try title to certain land. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. McClellan & Prince for plaintiffs in error.

Mr. W. W. Ballew, for defendants in error:

The children of an adopted child inherit after the death of the adopted child whatever interest such adopted child would have inherited from the adopting parents' estate.

Power v. Hafley, 85 Ky. 671, 4 S. W. 683; Eckford v. Knox, 67 Tex. 200, 2 S. W. 372; Gray v. Holmes, 57 Kan. 217, 33 L.R.A. 207, 45 Pac. 496; Warren v. Prescott, 84 Me. 483, 17 L.R.A. 435, 30 Am. St. Rep. 370, 24 Atl. 948; Sanders, Justinian, 103, 105, 107; Vidal v. Commagere, 13 La. Ann. 516.

Under the law authorizing the adoption, the legal status of the adopted child is fixed by the act of adoption, and the adopted child thereby becomes the legal child of the adopting parent, and stands, as to the property of the adopting parent, in the same light as a child born in lawful wedlock, save in so far as the exceptions in the statute authorizing the adoption declare otherwise.

Humphries v. Davis, 100 Ind. 280, 50 Am. Rep. 788; Wagner v. Varner, 50 Iowa, 532; Barnes v. Allen, 25 Ind. 222; Ross v. Ross, 129 Mass. 243, 37 Am. Rep. 321; Vidal v. Commagere, 13 La.

Ann. 519; Power v. Hafley, 85 Ky. 671, 4 S. W. 683; Pace v. Klink, 51 Ga. 220; Warren v. Prescott, 84 Me. 483, 17 L.R.A. 435, 30 Am. St. Rep. 370, 24 Atl. 948; Gray v. Holmes, 57 Kan. 217, 33 L.R.A. 207, 45 Pac. 496; Van Matre v. Sankey, 148 Ill. 536, 23 L.R.A. 665, 39 Am. St. Rep. 196, 36 N. E. 628; Quinn v. Quinn, 5 S. D. 328, 49 Am. St. Rep. 875, 58 N. W. 808; Re Williams, 102 Cal. 70, 41 Am. St. Rep. 163, 36 Pac. 407; Re Newman, 75 Cal. 213, 7 Am. St. Rep. 146, 16 Pac. 887; Morrison v. Sessions, 70 Mich. 297, 14 Am. St. Rep. 500, 38 N. W. 249; Rowan's Estate, 132 Pa. 299, 19 Atl. 82; Johnson's Appeal, 88 Pa. 346; Hockaday v. Lynn, 200 Mo. 456, 8 L.R.A.(N.S.) 117, 118 Am. St. Rep. 672, 98 S. W. 585, 9 Ann. Cas. 775; Eckford v. Knox, 67 Tex. 200, 2 S. W. 372; Hartwell v. Tefft, 19 R. I. 644, 34 L.R.A. 500, 35 Atl. 882; Pearce v. Rickard, 18 R. I. 142, 19 L.R.A. 472, 49 Am. St. Rep. 755, 26 Atl. 38; Fosburgh v. Rogers, 114 Mo. 122, 19 L.R.A. 201, 21 S. W. 82; Tirrell v. Bacon, 3 Fed. 62; Clarkson v. Hatton, 143 Mo. 47, 39 L.R.A. 748, 65 Am. St. Rep. 635, 44 S. W. 761; Butterfield v. Sawyer, 187 Ill. 598, 52 L.R.A. 75, 79 Am. St. Rep. 246, 58 N. E. 602; Cofer v. Scroggins, 98 Ala. 342, 39 Am. St. Rep. 54, 13 So. 115; Parsons v.

Parsons, 101 Wis. 76, 70 Am. St. Rep. 894, 77 N. W. 147; *Reinders v. Koppelman*, 94 Mo. 338, 30 Am. St. Rep. 802, 7 S. W. 288; *Lynn v. Hockaday*, 162 Mo. 111, 85 Am. St. Rep. 485, 61 S. W. 885; *Barnhizel v. Ferrell*, 47 Ind. 335; *Schafer v. Eneu*, 54 Pa. 304.

Mr. H. S. Melear also for defendants in error.

Greenwood, J., delivered the opinion of the court:

The material facts showed that in 1879 Nathan Harle, who was then the husband of Gracie Ann Harle, and Freeman Slaughter, who was then the husband of Amanda Slaughter, acquired by purchase the 160 acres of land in controversy. By a marriage prior to that with Gracie Ann Harle, Nathan Harle had three children named Bruff Harle, John Harle, and Amanda Slaughter. Under a partition between Nathan Harle and Freeman Slaughter, 40 acres of the land was set apart to Freeman Slaughter, and the remaining 120 acres was set apart to Nathan Harle. Out of the 120 acres Nathan Harle and Gracie Ann Harle conveyed 60 acres to John Harle. Gracie Ann Harle had no children, but she adopted, in compliance with the Texas statute, Mary Ann Richardson, who married Wash McGriff, and Wash McGriff and his three children by Mary Ann McGriff are termed herein the McGriff heirs. Mary Ann McGriff died intestate, and at a later date Gracie Ann Harle also died intestate.

This suit was brought in the district court of Navarro county by Nathan Harle against Bruff Harle, John Harle, and Freeman Slaughter to try the title to the entire 160 acres of land. The McGriff heirs and the children of Amanda Slaughter, deceased, intervened in the suit. On a verdict directed by the court Freeman Slaughter recovered the 40 acres, which had been partitioned to him, subject to the rights of the children of Amanda Slaughter; John Harle recovered the 60 acres, which had been conveyed to him; and Nathan Harle recovered the re-

mainder of the land sued for. The court of civil appeals affirmed the judgment of the trial court, save as to the McGriff heirs, and, with respect to them, that court reversed the judgment of the trial court and rendered judgment in their favor for an undivided half of the land adjudged below to Nathan Harle. — Tex. Civ. App. —, 166 S. W. 674. Writs of error were granted the several applicants because this court was of the opinion that there was probable error in the judgment of the court of civil appeals in favor of the McGriff heirs.

The land in controversy, being a part of the community estate of Nathan Harle and Gracie Ann Harle, passed under article 2469 of the Revised Statutes, on the dissolution of the marriage relation between Nathan Harle and Gracie Ann Harle by the latter's death, to Nathan Harle as survivor, unless descendants of a child or children of Gracie Ann Harle survived her. The court of civil appeals concluded that the mother of the McGriff heirs, as the adopted heir of Gracie Ann Harle, acquired the legal status of a child, and that hence the McGriff heirs were descendants of a child, within the meaning of article 2469.

It seems clear to us that the words "child" or "children of the deceased or their descendants," as used in article 2469, cannot be interpreted to include adopted heirs and their issue. For, as was said in *Burgess v. Hargrove*, 64 Tex. 117: "The Revised Statutes require that 'the ordinary signification shall be applied to words, except words of art or words connected with a particular trade or subject-matter, when they shall have the signification attached to them by experts in such art or trade, or with reference to such subject-matter.' The words 'child or children' are not technical terms to require the evidence of an expert to define them; and the subject-matter in reference to which they are used does not demand that they shall receive other than their

ordinary signification. That hardship may result from such construction is not for the courts, but for the legislature, to take into consideration."

The ordinary signification of child is a male or female descendant in the first degree. As the mother of the McGriff heirs was not descended from Gracie Ann Harle, but from some other mother, she was not in fact a child of Gracie Ann Harle, under the ordinary signification of the word "child," and therefore the McGriff heirs were not in fact descendants of a child of Gracie Ann Harle. *Cochran v. Cochran*, 43 Tex. Civ. App. 259, 95 S. W. 732.

In *Morse v. Osborne*, 75 N. H. 487, 30 L.R.A.(N.S.) 914, 77 Atl. 403, Ann. Cas. 1912A, 324, an adopted person was held not to be "issue" of his adopter, within the meaning of a statute of descent of New Hampshire, though the supreme court of that state gave to the word "issue" the meaning of "child, grandchild, or other lineal descendant."

The supreme court of Illinois reached a similar conclusion when it said in *Keegan v. Geraghty*, 101 Ill. 40: "An adopted child is not a child in fact, nor is an adopted child, having the rights of a child, a child in fact."

The supreme court of Vermont was called upon to determine the status of one Amanda M. Pennock, who had been constituted by an act of the legislature "heir at law of John B. and Sally Dunbar . . . in as full and perfect a manner as if she had been the daughter of the said John B. and Sally Dunbar born in lawful wedlock," and it was held that "she is merely made heir at law of Mr. and Mrs. Dunbar, to share as their child. It is not enacted that she is their child, or that she is to be considered, and taken in law, to be their child. . . . We cannot go farther than the statute, which merely authorizes her to take directly as heir from Mr. and Mrs.

Dunbar." *Moore v. Moore*, 35 Vt. 101.

The same court, in construing another legislative enactment constituting John Chancey Chandler "heir at law" of John Bullock, declared: "It cannot be said that the act under and by virtue of which he [John Chancey Chandler] was adopted, made him the child or issue of John Bullock. The words 'child' or 'issue' are defined to mean progeny or offspring." *Stanley v. Chandler*, 53 Vt. 624.

As announced in *Eckford v. Knox*, 67 Tex. 200, 2 S. W. 372, adoption under our statutes does not constitute the adopted person a member of the family of the adopter, and does not confer the privileges nor impose the duties which arise from the relation of parent and child, as was the case under the civil law, but, on the contrary, the complete effect of compliance with article 1 is, as declared in article 2, to put the adopted person in the same position with respect to succession to the estate of the adopter on his death as a child would occupy, except that as against a child born in lawful wedlock the adopted person cannot take more than one fourth of the estate. It necessarily follows that adoption in Texas does not give the adopted person the legal status of a child. The opinion of Chief Justice Willie in *Eckford v. Knox* has been followed in the case of *State ex rel. Walton v. Yturria*, 109 Tex. 220, L.R.A.1918F, 1079, 204 S. W. 315, this day decided by this court, wherein it was determined that an adopted person was not a direct lineal descendant of his adopter, and that such person did not acquire the status of a child of his adopter. The doctrine announced in *Eckford v. Knox* had previously been reaffirmed in *Taylor v. Deseve*, 81 Tex. 249, 16 S. W. 1008.

Under our construction of the statutes, we do not deny the adopted person any of "the rights and privileges, both in law and equity, of a legal heir of the party so adopting

him," to which he is entitled under article 2, Rev. Stat.; but we do not extend the statute so as to confer rights and privileges in the estate of the adopter on others than the person adopted. The right to inherit from Gracie Ann Harle was given to the person she adopted. When that person died before Gracie Ann Harle, the latter's estate could not pass to her. The adopted person acquired no right, through her adoption, to be represented by her heirs in the distribution of the adopter's estate. For it is the settled law in Texas that, when children of a deceased child inherit from a parent of such child, under our statutes of descent, they take, not through or by representation of the parent, but directly from the deceased. Chief Justice Gaines, in delivering the opinion in *Powers v. Morrison*, 88 Tex. 139, 28 L.R.A. 521, 53 Am. St. Rep. 738, 30 S. W. 853, said that the following is an accurate, terse, and forcible statement of the law, viz.: "The grandchildren of an intestate take by substitution, not through, but paramount to, their parent. The law designates them as a person to take a title, derived not from the parent, but immediately from the intestate. The property never was in the parent, and consequently they did not inherit from him what he had not."

Article 2466, Rev. Stat., appears to expressly forbid recognizing any right of inheritance in the McGriff heirs, they not being "children or lineal descendants of the intestate;" for the article denies the right of inheritance to any persons whatsoever other than to children or lineal descendants of the intestate, unless they are in being and unless they are also "capable in law to take as heirs" at the time of the death of the intestate; and we have no statute conferring any right of inheritance in the estate of an adopter on the children or descendants of the adopted person. Yet "the right of succession in this state is the creature of statutory law." *Powers v.*

Morrison, 88 Tex. 137, 28 L.R.A. 521, 53 Am. St. Rep. 738, 30 S. W. 852.

There are decisions of other states upholding the right of children of an adopted person to inherit from the adopter. But, as pointed out in *Bernero v. Goodwin*, 267 Mo. 427, 184 S. W. 75, cited in behalf of defendants in error, these decisions are in the main based on one of the two following propositions: (1) That "under the civil law the children of an adopted child stood in the position of grandchildren of the adopting parent," and "since adoption was a creature of the civil law and unknown to the common law, the courts would look to the civil law for aid in construing the respective statutes;" and (2) that the term "heir," when used in an adoption statute, "'implies representation', and that therefore upon the death of an adopted child her children succeeded to her rights as heir of the adopting parent."

In our opinion, neither of these propositions should have controlling weight in construing our statutes. As pointed out in *Eckford v. Knox*, the civil law doctrine was so modified by the terms of our adoption statute as to preclude giving children of an adopted person the status of grandchildren of the adopter. And it would be utterly inconsistent with the principles enunciated in *Powers v. Morrison* to extend to the children of adopted persons, by means of representation, a right of inheritance in the estate of their parent's adopter.

We have considered the assignments of all parties, and find no error in the action of the district court or court of civil appeals, save as indicated above. We fully appreciate the importance of this decision, and have given it commensurate consideration.

The judgment of the Court of Civil Appeals is reversed, and that of the District Court is affirmed.

Descent-
children of
adopted child.

ANNOTATION.

Right of children of adopted child to inherit from the adopting parent.

As to right of children of an adopted child to take the share which the parent would have taken under a will if he had survived the testator, see annotation in 8 A.L.R. 1012. And as to right of child adopted after testator's death to take under will, see annotation in 5 A.L.R. 1280.

As to whether or not the use of the term "issue" includes adopted children, see annotation in 2 A.L.R. 974.

The great majority of Statutes of Adoption and of Descent and Distribution which have been construed have been held to entitle the children of an adopted child who has predeceased the adoptive parent to inherit from the adopter as though the adopted child had been a child by blood; or, in other words, the decisions pass the status and rights of the adopted person on to his children so as to permit them to inherit from the adopting parent. The following cases so hold:

Georgia.—*Pace v. Klink* (1874) 51 Ga. 220.

Kansas.—*Gray v. Holmes* (1896) 57 Kan. 217, 33 L.R.A. 207, 45 Pac. 596.

Kentucky.—*Power v. Hafley* (1887) 85 Ky. 671, 4 S. W. 683, followed in *Atchison v. Atchison* (1890) 89 Ky. 488, 12 S. W. 942.

Minnesota.—*Fiske v. Lawton* (1913) 124 Minn. 85, 144 N. W. 455.

Missouri.—*Bernero v. Goodwin* (1916) 267 Mo. 427, 184 S. W. 75. *Williams v. Weber* (1917) 271 Mo. 150, 195 S. W. 1009; *Re Cupples* (1917) 272 Mo. 465, 199 S. W. 556.

Ohio.—*Kroff v. Armhein* (1915) 5 Ohio App. 37, affirmed in (1916) 94 Ohio St. 282, 114 N. E. 267.

Pennsylvania. — *Webb's Estate* (1915) 250 Pa. 179, 95 Atl. 419.

Vermont.—*Re Walworth* (1912) 85 Vt. 322, 37 L.R.A.(N.S.) 849, 82 Atl. 7, Ann. Cas. 1914C, 1223.

And that under the Roman law the effect of an adoption was to make the children of the adopted person grandchildren of the adopter, see *Vidal v. Commagere* (1858) 13 La. Ann. 516.

In a number of the cases which 15 A.L.R.—80.

support the general rule the conclusion has evidently been largely influenced by the fact that adoption is a creature of the civil law, which permitted the children of an adopted child to stand in the position of grandchildren to the adopting parent. Thus in *Power v. Hafley* (Ky.) *supra*, where the adopting act made the adopted child capable of taking and holding by descent as if born the adopter's lawful child, in holding that the words "kindred" and "children," as used in the Kentucky Statutes of Descents were not necessarily confined to blood relations, but could be so construed as to take in adopted children, so that one, by adopting another, might make that other his own heir and enable the children of the adopted person to inherit from him, the court said: "The common law made no provision for adopting children. Hence, we get no light from that law to guide us in the present investigation. Most of the states of the Union have, within the last few years, enacted general laws providing for the adoption of children, and making them the legal heirs of the adopting parents. Of course, the laws of these states are not uniform in substance—the laws of each more or less limit and restrict the legal status of the adopting parent and the adopted child. And while the reported adjudications of these states construing the adopting statutes are sparse, yet they nearly all agree in fixing the legal status of the adopted child as follows: That it is the event of adoption that fixes, under the law authorizing the adoption, the legal status of the adopted child; and the child, by the event of adoption, becomes the legal child of the adopting parent, and stands, as to the property of the adopting parent, in the same light as a child born in lawful wedlock, save in so far as the exceptions in the statute authorizing the adoption declare otherwise. And when the statute authorizes a full and complete

adoption, the child adopted thereunder acquires all the legal rights and capacities, including that of inheritance, of a natural child, and is under the same duties. . . . By the request of Frederick Hafley, the legislature made Sylvania his legal heir, and invested her with as full capacity to take and hold his estate by descent as if she was his natural child. Thus was her legal status fixed by a law operating directly upon her and Hafley, and which contained no restrictions or limitations whatever. She was made a full legal heir, and was put precisely upon the same footing, so far as taking and holding Hafley's property by descent was concerned, as a natural child. So, it would seem to follow, as a logical sequence, that the children of Sylvania, she having died before Hafley, take under our laws of descent as her direct representatives." And in *Gray v. Holmes* (1896) 57 Kan. 217, 33 L.R.A. 207, 45 Pac. 596, in refuting the contention that adoption conferred upon the adopted persons' heirs no right to inherit from the adopter, because the Statute of Descents in the use of the word "children," referred only to children by blood, it was held that such reasoning was inconsistent with the fair interpretation of the Statute of Adoption, in view of its having been adopted from the civil law. In this connection the court said: "The adoption of children is an invention usually accredited to the civilians. It is not of common-law origin. It is now common in Europe, and is recognized and regulated in most of the states of our Union by statute. In *Vidal v. Commagere* (1858) 13 La. Ann. 516, it is stated, on the authority of the Digest, that 'under the Roman law, the person adopted entered into the family, and came under the power of the person adopting him. And the effect was such that the person adopted stood not only himself in relation of child to him adopting, but his children became the grandchildren of such person.' . . . In the construction of a statute founded upon a principle of the Roman law, we are authorized to appeal to that law as

an aid in the interpretation of the statute. And we think it plain, from the language of our statutes, construed in the light of the adjudged cases and the principles of the civil law, that the widower and the child of Alice Ann inherited, through her, an interest in the estate of Adam Huffman."

And in Pennsylvania it has been held that the Adoption Statute by the use of the term "heir" entitles the children of a deceased adopted parent to inherit from the adopting parents the share which their parent would have taken if alive. Thus in *Webb's Estate* (1915) 250 Pa. 179, 95 Atl. 419, the court adopted the theory that the term "heir" in the Pennsylvania statute, providing that an adopted child "shall have all the rights of a child and heir of such adopting parent," implied representation in case of death of such adopted parent by his or her issue, saying: "By the terms of the Act of May 9, 1889, the person adopted thereunder as the child of another becomes entitled to all the rights of a child and heir of the adopting parent. The rights thus conferred are, of course, strictly legal rights, such as are created by law; and in this particular instance the only right involved relates to property. What right—that is to say, what enforceable claim or title—has one born in lawful wedlock to the property of the parent? Just as we measure the right of such an one, so we must measure the right of Mrs. Beckwith, the parent of the claimant, in the estate of this intestate. Only by so doing can we accord to her the full benefit of the statute under which she became a child by adoption. It is a mere truism that no right in the child to any of the property of the parent arises out of the mere parental relation, so long as the parent survives. It is the right of the parent to do with the property as he or she sees fit, and it is only when the parent's dominion over it is terminated by death that anybody succeeds to that right. If the parent, who has the legal right to appoint a successor in right, die without making

such appointment, in such case the law appoints as the successor the surviving child, or children if more than one, and the issue, if any, of any deceased child. It is only at this point of time, the death of the parent, that the law gives the child any right, title, or claim to the property of the parent. If the child be not then living, his right must be taken to have died with him. So then, Mrs. Beckwith having died prior to the death of Mrs. Webb, the intestate, it may be argued, and is, that notwithstanding she never came into possession of any property of her adopting parent, she nevertheless enjoyed every property right in connection therewith that would have been hers had she been a natural instead of an adopted child, and that nothing in the way of right survived to her children. The argument against such proposition is, of course, that once made a child by the law the legal incidents to the parental relation attached, among them the right of representation under the intestate laws of the state. Certainly, as thus stated, the question as to what was the legislative purpose would be at least debatable, as the present controversy abundantly shows, a circumstance which lends force, as we think, to the view we are about to express. If the Act of May 9, 1889, had done no more than invest the adopted person with the rights of a child, this debatable question would have been the determining one, and unavoidable in any such controversy as we have here. It was to obviate any such question and make clear the legislative purpose that the act proceeds further and invests the adopted party, not only with the rights of a child, but with the rights of an heir. The language of the act is, 'Shall have all the rights of a child and heir of such adopting parent.' The two words 'child' and 'heir' do not have the same meaning. The employment of the two, if there were nothing else, is sufficient to indicate that to each was given a meaning of its own. By the word 'heir' we are to understand the person appointed by law to succeed in cases of intestacy to the estate in

question. One manifest distinction is this,—that where as the word 'child' may import succession, having in mind the provisions of our intestate laws, the word 'heir' certainly does so import. No one can be the heir of a living person; so when the act declares that the adopted person shall be the heir of the adopting parent, the reference must be to death of the parent," and it is to be read just as though it said in terms that upon the death of the adopting parent the child adopted shall become his or her heir; that is to say, shall be the person in case of intestacy to succeed to the estate of the parent. While a gift to an adopted child would be held to lapse in case where he or she died in the lifetime of the adopting parent, except as the children of such an one should bring themselves within the designation of grandchildren of the adopting parent—the exact question suggested above—yet in a gift to the heir or heirs, no matter whether in the singular or plural, the reference is to a class of persons who take by succession from generation to generation. . . . It is quite enough to know that by the act of her adoption Mrs. Beckwith became invested with the right, upon the death of Mrs. Webb, to become her heir at law, and, with this investment, went the right of succession in her legal heirs, so that in case she were not living at the death of Mrs. Webb, as was the case, her own heirs would succeed as she herself would have done if living. Therefore it is that into the discussion as to whether her children can be brought into the relation of grandchildren of the adopting parent so as to entitle them to take under the intestate law we need not enter. We rest our conclusion on the fact that Mrs. Beckwith was made the heir of the adopting parent by law." And in *Re Walworth* (1912) 85 Vt. 322, 37 L.R.A.(N.S.) 849, 82 Atl. 7, Ann. Cas. 1914C, 1223, where the Statute of Adoption created the same rights of inheritance between the parties as though the person adopted had been the legitimate child of the person

making the adoption, and the Statutes of Descent provided that an intestate's estate should descend to his "children" unless he had married and left no "issue," it was held that the words "children" and "issue" are not limited to natural children born in lawful wedlock, but include adopted children and their legal representatives, so that the child of an adopted daughter, deceased, was entitled to inherit through her by right of representation, and share in the adoptive father's intestate estate. This was upon the theory that the word "adoption" establishes the relationship of parent and child with all the consequences of that relationship, including the right of inheritance, which right extends to the issue of the adopted child in case the adopted parent dies intestate prior to the death of the adopting parent whose estate is to be distributed. The opinion in this case also contains an extended discussion of the early history of adoption, including the rights attached thereto as established by the Romans.

In Missouri, where the courts have reached a similar conclusion, it has been held (*Bernero v. Goodwin* (1916) 267 Mo. 427, 184 S. W. 75) that resort neither to the precepts of civil law nor to the implication of representation springing from the word "heir" discussed in the *Webb Case* (1915) 250 Pa. 179, 95 Atl. 419, *supra*, was necessary, but that sufficient reason for holding that the natural child of an adopted child (the adopted child having predeceased the adopting parent) inherits from the adopting parent could be found in the Missouri statutes and decisions. The court said: "We have reached the conclusion that in this state the natural child of an adopted child (the adopted child having predeceased the adopting parent) inherits from the adopting parent for the following reasons: Section 1671, Mo. Rev. Stat. 1909, provides that a person may by deed 'adopt any child or children as his or her heir,' etc. The deed of adoption in the present case was in compliance with that statute. Section 332, Rev. Stat. 1909, being one of the statutes of descent of

the estate of an intestate, provides, among other things, that the estate 'shall descend and be distributed in parcenary, to his kindred, male and female, subject to the payment of his debts and the widow's dower, in the following course: First, to his children, or their descendants, in equal parts.' It has been held by this court that an adopted child was a child within the meaning of the above-quoted statute on descents (*Fosburgh v. Rogers* (1893) 114 Mo. 133, 19 L.R.A. 20, 21 S. W. 82), and also that an adopted child is a child within the meaning of other sections of the descent laws (*Moran v. Stewart* (1894) 122 Mo. 299, 26 S. W. 962). The above-mentioned portion of the statutes on descent as construed, therefore, means the same as if it read: 'First, to his children [either natural born or adopted], or their descendants, in equal parts.' Since Emanuel C. Bernero (the adopted child) was the inheriting child of Theresa Bernero (the adopting parent), within the meaning of the foregoing Statute of Descent, and since Louis Bernero, appellant here, was the blood child, and therefore unquestionably the descendant, of said Emanuel, deceased, we think it inevitably follows that, under the Statute of Descent, Louis is entitled to the said distributive share in said estate in the event said Theresa died intestate. As we have gathered it from the briefs and oral argument, respondent's main contention is that the appellant, the blood child of the adopted child, must receive its right to a distributive share, if any, solely under the deed of adoption executed by his natural father and the adopting parent, and that, since the Adoption Statute makes no provision for the descendants of the adopted child, and since the rights created by the deed of adoption are personal between the contracting parties, and not such as extend to other parties, the appellant can receive no share in the estate of the adopting parent. The error of the above position, as it appears to us, is in assuming that the right of appellant to claim a distributive share in the estate is

limited solely to the adoption laws and deed of adoption, to the exclusion of all rights given by the statute on descents. . . . In the present case appellant, the natural child of the adopted child, does not, in a proper sense, take under the deed of adoption. The deed of adoption created the status of an inheriting child in appellant's father, and the right of appellant to represent his father is given him by the Statute of Descents, by use of the words 'or their descendants.' So, as in the first instance, it is not necessary to refer to the civil law to ascertain whether an adopted child in Missouri is thereby given the right to be an heir,—this because the Missouri Adoption Statute expressly says he is an heir, neither is it necessary, in the second instance, to look to the implication of representation arising from the use of the word 'heir' in the Adoption Statute—this because the Statute of Descent takes hold of the matter when once the status of an inheriting child is given the adopted child, and provides for representation or succession by use of the words 'or their descendants.' The fact that the courts of other states have reached the same conclusion as herein reached, but by a different process of reasoning, but strengthens the soundness of the result herein reached."

And in *Williams v. Weber* (1917) 271 Mo. 150, 195 S. W. 1009, in answer to the question whether the children of an adopted child who died before her adopting parents can take under the Statute of Descent the same estate which their mother would have taken had she outlived her adopting parents, the court said: "This question is determinable by a consideration of the first clause of the Statute of Descents, viz., 'first to his children, or their descendants' (Rev. Stat. 1909, § 332), which has been interpreted in *Bernero v. Goodwin* (1916) 267 Mo. 454 et seq., 184 S. W. 74, to include, under the terms 'to his children' in the first subdivision thereof, an adopted child as well as a natural child. It necessarily follows from that ruling that the alternative terms of said statute, viz., 'or their descendants,' likewise em-

brace the children of an adopted, as well as a natural, child. Hence, in case of the death of an adoptive child prior to the death of the adopting parent, such child stands in the same relation of heirship to the estate possessed by the adopting parent at the time of his or her death that a natural and lawfully born child would occupy under similar circumstances. Applying this principle to the facts in the instant case, the result is that the Cline children, whose mother was lawfully adopted both by Thomas F. Ackerman and his wife Susan, are entitled to inherit the undisposed estate of either of her adopting parents at the time of their respective deaths, just as if they were natural and lawful grandchildren of the adopting parents of their mother. There was no residuary clause in the will of Thomas F. Ackerman; neither did his wife Susan Ackerman make any testament. It follows that the personal estate which was devised absolutely to his wife under the will of Thomas F. Ackerman descended, upon the death of his wife, to the Cline children as the lawful 'descendants' of Mary Cline, the adopted daughter of the deceased wife."

And in Ohio, a similar conclusion has been reached seemingly in reliance only on the terms of the statutes. Thus in *Kroff v. Armhein* (1915) 5 Ohio App. 37, affirmed in (1916) 94 Ohio St. 282, 114 N. E. 267, it was held that real estate of an adoptive parent descended to the child of a deceased adopted daughter by virtue of statutes making an adopted child, "the child and legal heir of the person so adopting him or her, entitled to all the rights and privileges" of a child "begotten in lawful wedlock." And the supreme court, in affirming the decision of the appellate court, further held that this investment of the adopted child with all the rights and privileges of a blood child was not cut down by a subsequent provision of the statute, to the effect that, on decease of the adopting parent and the subsequent decease of the adopted child without issue, the property of the adopting parent shall descend to

his or her kin rather than to the kin of the adopted child, the theory being that such limitation clearly did not apply to a case where there was issue of the adopted child, as in the case under consideration.

In *Pace v. Klink* (1874) 51 Ga. 220, where the special statute under consideration had changed the name of the child, and expressly entitled him to all the rights and privileges of a blood child, and made him capable of taking, receiving, and inheriting all manner of property under the Statute of Distribution so far as related to the estate of the adopter, it was held that the children of the adopted child, who had predeceased the adopter, stood in the place of and represented their father, so as to take whatever of the estate of the adoptive parent the adopted child would have taken if living.

But in Texas a contrary conclusion has been reached. Thus in the reported case (*HARLE v. HARLE*, ante, 1261) it was held that, although the Texas statutes put the adopted per-

son in the same position with respect to the succession to the estate of the adopter, on his death, as a child would occupy, except that as against a child born in lawful wedlock, the adopted child could not take more than one quarter of the estate, which limitation, however, necessarily showed that adoption in Texas did not give the adopted person the full legal status of a natural child, the Statute of Descent and Distribution could not be interpreted to include adopted children and their issue within the words "child" or "children of the deceased or their descendants," so as to permit an extension of the statute which would confer rights and privileges in the estate of the adopter upon the children of an adopted child who predeceased the adopting parents. In reaching this conclusion it will be remembered that the court expressly refused to look either to the civil law for aid in construing the statute, or to adopt the so-called Pennsylvania theory of right of inheritance by representation.

G. J. C.

PAUL OLSON, Respt.,

v.

GRAND LODGE, ANCIENT ORDER OF UNITED WORKMEN OF
NORTH DAKOTA, Appt.

North Dakota Supreme Court—July 5, 1921.

(— N. D. —, 184 N. W. 7.)

Insurance — effect of cause of death.

1. The provisions in a beneficial certificate of insurance, which limits the liability of the beneficial order if the insured member shall engage in the occupation of a soldier in time of war, engage in military service in time of war, or shall enter in the service of the United States Army, state grounds of a status, and not of causation as a test, where no provisions otherwise indicate.

[See note on this question beginning on page 1280.]

— war risk — waiver.

2. The failure of a beneficial order to demand or secure from its insured member an application for war permit and the payment or refusal of an extra war premium provided by its regulations for its members engaged in military

service, and the reception of regular assessments and lodge dues while knowing that the insured member was in the service, do not constitute, for reasons stated in the opinion, waiver or grounds of estoppel.

[See 11 A.L.R. 1110.]

Headnotes by BRONSON, J.

(Grace, J., dissents.)

(— N. D. —, 184 N. W. 7.)

APPEAL by defendant from a judgment of the District Court for Stark County (Crawford, J.) in favor of plaintiff in an action brought to recover the amount alleged to be due on a life insurance policy. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. J. J. Mulready and W. F. Burnett for appellant.

Messrs. L. A. Simpson and J. W. Lee for respondent.

Bronson, J., delivered the opinion of the court:

This is an action upon a policy of life insurance. Trial was held before the court upon stipulated facts. On April 6, 1918, the defendant, a fraternal beneficial association, issued its policy of \$1,000 upon the life of the insured, payable to his father, the plaintiff. Then the insured was a blacksmith at Tolna, North Dakota, aged twenty-one and unmarried. The application for insurance, signed by the insured, contained an agreement that if he "should hereafter enter the occupation of" "a soldier in time of war" his membership in the order would become null and void, and the rights of himself and his beneficiary in life insurance waived; further, that he agreed to be subject at all times to all laws, rules, and regulations of the Grand Lodge, existing or thereafter to be adopted. Law 200 of the order provides that no person shall be admitted to membership who "is engaged in the occupation of" "soldier in time of war." Law 222 provides that any member who shall hereafter enter any of the prohibited occupations enumerated in law 200 shall forfeit his membership, and that "his beneficiary certificate shall become null and void without the action of any lodge or officer thereof."

At the time when the policy was issued there was in force a regulation (adopted pursuant to a resolution of the advisory board of the Grand Lodge on September 1, 1917), which provided that any insured member, if he shall enter the service of the United States Army may keep his insurance certificate in force and effect to the extent and upon the terms mentioned in three options: (1) That any member

may, after first receiving a war permit, continue in force his entire insurance (not exceeding \$2,000) upon the payment of an extra war premium of \$50 per \$1,000; (2) any such member, after first receiving a war permit, may continue his insurance (not exceeding \$2,000) to the extent of 20 per cent of the amount thereof; (3) any such member may avail himself of option 1 as to \$1,000 and option 2 as to another \$1,000.

It also provided that any such member desiring to avail himself of the options shall make, within thirty days after he has been mustered into the service of the United States, application to the grand recorder for a war permit, upon blanks to be provided by the Grand Lodge; and that any such member who failed to avail himself of such options would forfeit all of his rights and benefits for himself or his beneficiary, notwithstanding the fact that he might continue to pay regular assessments and lodge dues and the Grand Lodge may have known of his entry into such service.

Attached to the beneficiary certificate, issued to the insured member, appears the following: "This beneficiary certificate is issued and accepted upon the express consent of the member that in the event he engage in military, naval, submarine, or aërial service in time of war, without first obtaining a permit signed by the grand master workman and grand recorder, and availing himself of one of the options adopted by the advisory board of said Grand Lodge at its meeting, held in September 1, 1917 (numbered 1, 2, or 3) the amount payable upon this beneficiary certificate in the event of his death during such service shall be the reserve actually maintained by the Grand Lodge in respect to this beneficiary certificate."

On June 23, 1918, the insured

through the Selective Service Law became a private in Company B, 313th Engineers, of our Army, while at war with Germany. He went to France with his company. On July 29, 1918, Mr. Kiland (apparently a local officer of the order) wrote the plaintiff, as follows: "I am in receipt of money order from you for \$2.92, being for assessment No. 6 and lodge dues. This will serve as a receipt. Being that Henry is in the service he will have to sign the inclosed application for war permit, which they require to hold. As I do not know his address, I wish that you would send it to him and have him sign it and return to us as soon as possible."

The insured did not present nor sign the application for a war permit. The extra war premium was not paid.

On October 8, 1918, the insured, while in France in a hospital under the control of our government, afflicted with influenza, died, without ever having been in the zone of hostilities. Up to the time of his death all regular and other assessments and dues upon his insurance certificate and due the lodge had been paid. On November 11, 1918, the advisory board of the Grand Lodge adopted a resolution which provided that the board recommended to the finance committee the allowance of all claims in behalf of members in the service who had not received war permits upon the basis of 20 per cent under option 2.

The plaintiff duly submitted proofs of the insured's death, and demanded payment of \$1,000. The defendant offered to pay \$200 in settlement of the policy, and also judgment in such amount, with costs. The plaintiff rejected the offer. Pursuant to an order of the trial court without findings, judgment for the full amount of the policy was entered. The defendant has appealed therefrom.

The sole legal question involved in this case is whether the insured at the time of his death was subject, concerning his insurance contract,

to the regulations of defendant restricting and concerning liability upon engaging in the occupation of a "soldier in time of war," upon engaging in military service, or upon entering the service of the United States Army. The plaintiff contends that three months before the death of the insured the order had notice and knew that the insured was in the service; that it thereafter received payment of assessments and lodge dues of the insured, and thereby waived the rules and regulations upon which it relies, and is estopped from urging the same; that under the regulations providing for a war permit and the payment of an additional war premium the order made provisions for the signing of an application upon a blank to be furnished by it, and that thereunder it was incumbent upon the order to establish that an opportunity was accorded to the insured to make such application while the order continued to receive the payment of the insured's regular assessments and dues; that the record does not disclose that the death of the insured was occasioned by any increase of hazard through his entrance into military service or being a soldier in time of war; and that, pursuant to the decisions of this court in *Myli v. American L. Ins. Co.* — N. D. —, 11 A.L.R. 1097, 175 N. W. 631, and *Gorder v. Lincoln Nat. L. Ins. Co.* — N. D. —, 11 A.L.R. 1080, 180 N. W. 514, the plaintiff is entitled to recover the entire amount of the insurance.

When the insured, while a civilian, became a member of the order with beneficial insurance, there was then in force the rules of the order concerning the options concerning which he agreed, and notice whereof was attached to the beneficial certificate issued to him. This regulation, accepted by the insured, provided that if he should enter the service of the United States Army or should engage in military service he could continue his entire insurance in force by the payment of an additional war premium of \$50 and

(— N. D. —, 184 N. W. 7.)

securing a war permit, or in force to the extent of 20 per cent of the face thereof, upon securing a war permit only. The validity of that

**Insurance—war
risk—waiver.**

rule, on grounds of public policy or otherwise, is not attacked. It formed a part of the insurance contract. We are of the opinion that no acts of waiver, nor such as to create an estoppel, are shown. The order knew that the insured was in the service; it sent to his father, the beneficiary, a blank application for a war permit, with the request that it be sent to the insured for signature and return as soon as possible, the order stating that it did not know the address of the insured. The father, as the record shows, did pay one assessment and lodge dues for the insured; the stipulated facts do not show that the insured paid any of such assessments or lodge dues after he entered the service. The necessity of a war permit has been voluntarily waived by the order. The failure of the order to demand or secure from the insured direct the payment of the extra war premium, and this application for a war permit, did not operate to make option 1, effective, in the absence of express acts of waiver. Neither the insured nor his father, the beneficiary, made any attempt to exercise option 1. The assessments and lodge dues were paid so as to invoke and make applicable option 2. The order has not attempted to claim or enforce a forfeiture of the policy. On the contrary, they assert a continuance of the policy under the limited liability of option 2. The knowledge of the order that the insured was in the service, and its continued acceptance of the assessments and lodge dues, operated, therefore, neither as a waiver nor an estoppel. See *Huntington v. Fraternal Reserve Assn.* — Wis. —, 181 N. W. 819; *Miller v. Illinois Bankers' Life Assn.* 138 Ark. 442, 7 A.L.R. 378,

212 S. W. 310. The limited liability under the rules of the order therefore ^{—effect of cause of death.} applies, unless the provisions concerned, upon interpretation and construction, establish as grounds for the limitation causation, and not status.

In *Myli v. American L. Ins. Co.* supra, where the policy provided that if, within five years from date, the death of the insured shall occur while engaged in military or naval service in time of war, the company's liability shall be limited, etc. This court held, upon construction of other provisions of the policy, that such provision did not exempt from liability where the death of the insured was not occasioned by extra hazard incident to military or naval service; further, that where status or occupation is not clearly the basis for exemption from liability, and where the language employed indicates a desire to rely only against an extra hazard, the policy will be construed to avoid forfeiture of the insurance. The court, in such opinion, further stated that if the provision of the insurance policy in question had stated: "If within five years from date the insured shall enlist or become inducted into the military or naval service without having obtained a permit therefor, etc., then status would clearly have been the test."

In *Gorder v. Lincoln National L. Ins. Co.* supra, where the insured was required to obtain permission from the insurer to engage in military or naval service in time of war and to pay an extra premium, and, upon failure so to demand, and in the event of death of the insured in consequence of such service, there was a stipulated limitation of liability not greater than the legal reserve on the policy, this court recently held that the provision concerned limited the liability of the company only where death occurred in consequence of military or naval service. In other words, the char-

acter of the service, again, not the status, was the test. Those cases have quite fully discussed the test of status or causation. In some recent cases status has been recognized as the test of limited liability as follows: Where the insured shall die while serving in any branch of the United States Army or Navy (*McQueen v. Sovereign Camp, W. W.* — S. C. —, 106 S. E. 32); if the insured shall engage in the occupation of a soldier in the regular Army in time of war (*Huntington v. Fraternal Reserve Asso. supra*); if insured shall engage in military or naval service in time of war (*Bradshaw v. Farmers & B. L. Ins. Co.* 107 Kan. 681, 11 A.L.R. 1091, 193 Pac. 332); where insurance policy excepts military and naval service in time of war (*Ruddock v. Detroit L. Ins. Co.* 209 Mich. 638, 177 N. W. 242); if insured shall engage in military or naval service in time of war (*Field v. Western Life Indemnity Co.* — Tex. Civ. App. —, 227 S. W. 530); where policy exempts death while in the service of the Army or the Navy of the government in time of war (*Miller v. Illinois Bankers Life Asso. supra*. But, see *Long v. St. Joseph Life Ins. Co.* — Mo. App. —, 225 S. W. 106. Do the provisions applicable to the insurance contract involved establish status as a test? We are of the opinion that the provisions "engaged in military service in time of war," "engage in the occupation of a soldier in time of war," and "enter the service of our United States Army," fixed and were intended to establish the status of the insured, and not the character of the service, as the test of the restriction of liability. We are unable to discover any provisions that indicate the contrary. The judgment accordingly is reversed, with directions to enter judgment for the plaintiff as offered by the defendant. The defendant will recover costs of this court.

Robinson, Ch. J., and Englert and Coffey, District Judges, concur.

Christianson and Birdzell, JJ., being disqualified, did not participate; **Englert and Coffey, District Judges,** sitting in their stead.

Grace, J., dissenting:

This action is one to recover on a life insurance policy. The trial was to the court upon stipulated facts. On the 6th day of April, 1918, the defendant, a fraternal benefit association, issued its policy, in the sum of \$1,000, on the life of the insured, payable at death to his father, the plaintiff. Insured was twenty-one years of age and unmarried.

We are of the opinion, the judgment should be affirmed, and this principally for three reasons:

Firstly. The following provision in the certificate, relied on by the defendant to avoid liability, is void, as being against public policy, and as tending in some degree to deter enlistments in military service in time of war. The provision is as follows: "This beneficiary certificate is issued and accepted upon the express consent of the member that in the event he engage in military, naval, submarine, or aerial service in time of war, without first obtaining a permit signed by the grand master workman and grand recorder, and availing himself of one of the options adopted by the advisory board of said Grand Lodge at its meeting held on September 1, 1917 (No. 1, 2, or 3), the amount payable upon this beneficiary certificate in the event of his death during such service shall be the reserve actually maintained by the Grand Lodge in respect to this beneficiary certificate."

If, for example, one of military age possess a beneficiary certificate for \$2,000 at the time war was declared by the United States against Germany, and he at that time understood that, if he enlisted in military service without the consent of the insurance company, the certificate would become void, or largely

so, it can hardly be doubted that he would in some degree be deterred from enlisting; or, even after the passage of the Selective Service Act, he might for the same reason hesitate to comply with its requirements, knowing, in the circumstances, that his act might avoid the certificate.

If such, in some degree, should be the effect, it cannot well be denied that such provision is void. It would perhaps be otherwise if the certificate provided that, in the event of his entrance into military service, or in any of the various branches of it mentioned in the provision, a stated sum, over and above the regular assessment, would be charged as additional premium for extra hazard incurred during each year he was in military service, and that such sum should be and remain a charge against the amount named in the policy; or if there were a provision contained in the certificate that, if this extra premium were not paid within a reasonable time after the termination of the military service, then, in that event, the certificate would be void; or even if it provided that the certificate would be void after service of notice by the defendant on the insured and his beneficiary that, if the extra premiums demanded were not paid within a reasonable time after they became due, as, for instance, within six months, the policy would be of no further effect; but such is not the tenor of the provision we are here considering. Furthermore, it is unreasonable, in that it seeks to make the status of military service, regardless of the increase of hazard, the sole cause for limiting or avoiding liability on its certificate.

In other words, if the insured should enlist in the military service, in the defense of his country, whether there was any increase in hazard or not, by his so doing his certificate of insurance is absolutely void, unless he first gets permission from the insurance company, and pays the extra premium, etc.

Assume, for instance, that in a real estate mortgage there was a provision that, if the mortgagor, a person of military age, should engage in military service in time of war, such act would constitute a default, and be sufficient authority for the mortgagee to foreclose the mortgage. Can anyone believe, or reasonably contend, that such a provision would not be against public policy, and for that reason void? We think not. And so we might further illustrate by numberless contracts of different nature, but it would seem unnecessary to do so.

An insurance certificate or policy is nothing but just an ordinary contract. There is no reason why such a provision should be regarded any more favorably in an insurance contract than if it occurred in any other form of contract. The entire contract is to be construed to determine its purpose and effect, and, when so construed in the light of what has above been said, the defendant cannot, on account of the provision above mentioned, avoid its liability.

Secondly. The death of the insured being caused by influenza, and not by any increased hazard because of military service, the prohibition contained in the provision is not effective to relieve the defendant of liability.

In the case of *Myli v. American L. Ins. Co.* — N. D. —, 11 A.L.R. 1097, 175 N. W. 632, which was an action to recover on an insurance policy, where the insured died while in military service, not, however, from any extra hazard occasioned thereby, but from the disease of influenza, this court, speaking through Mr. Justice Birdzell, construed the following provision contained in the policy: "If, within five years from date hereof, the death of the insured shall occur while engaged in military or naval service in time of war without previously having obtained from the company a permit therefor, the company's liability shall be limited

to the cash premiums paid hereon for the three years from date of issuance and thereafter to the legal reserve on this policy."

The identity of meaning between that provision and the one presented for our consideration in the present case is indeed exceedingly marked.

Of the provision under consideration in the Myli Case, we said:

"The argument is that the above provision reduce liability to a return of the premium in this case by reason of the fact that the insured was at the time of his death an enlisted man in the naval service. It is contended that the effect of the provision is to automatically cancel the life insurance stipulated in the policy the moment the policy holder becomes enlisted or inducted into the military or naval service without having previously obtained a permit therefor, and without complying with whatever provisions (not named in the policy) the company might wish to require concerning additional premiums. As against this contention the respondent asserts that it is the evident purpose of the stipulation to provide only against the consequences of extra hazard incident to actual service in connection with hostilities.

"Before the harsh construction in the direction of forfeiture can be supported it must be found to result necessarily from the provisions of the policy. The policy must be read in the light of the obvious purpose of the particular provision, and it must be found that the exemption falls clearly and directly within its terms. It seems clear to us, upon a view of the whole policy and the evident purpose underlying the particular stipulation, that the circumstances of this case do not bring the defendant within the exemption contracted for. . . .

"Reading the whole policy, we deem the intention of its various provisions with regard to the restrictions concerning military or naval service to be clear. The ex-

press intention does, in reality, conform to the purpose of the provision as stated in the deposition of an officer of the company, namely, to except the policy from applying where the insured has come to his death from a hazard connected with military or naval service. In short, the status of the insured is not made the test, but the character of the service. The important words in the clause relied upon and those which signify its correlation with the other provisions hereinbefore referred to are 'while engaged in military or naval service.' These words are descriptive of two forms of hazardous service that are not intended to be covered, and it is only while the insured is engaged in such service that the exemption is applicable. It is idle to say that because one's status is such that he must respond to orders from military or naval authority, he is in military or naval service within such a provision, when in fact there is nothing about his daily activities that suggests the least physical danger that would enhance an insurance risk."

That language and reasoning is directly applicable to the case now before us. It is idle to say that, because the insured here died in the hospital, from influenza, his death was caused by military service.

Thirdly. The defendant had notice and knew that the insured was in military service, and thereafter it received payment of assessments and lodge dues, with full knowledge of this fact. Hence it waived any defense, if any it had, with reference to the insured entering the prohibited occupation of military service, unless under conditions specified in the foregoing provision. It is therefore estopped to assert that defense.

For the foregoing reasons, the court did not err in refusing to render judgment for the plaintiff for the sum of \$200 as requested by the defendant and appellant, and did not err in ordering judgment for the plaintiff in the sum of \$1,145.90.

The judgment appealed from should be affirmed. The effect of provisions in life or accident policy in relation to military service, are subject of the annotation following. MARKS v. SUPREME TRIBE, B. H. post, 1280.

NOTE.

The validity, construction, and ef-

ISAIAH MARKS and Wife, Appts.,

v.

SUPREME TRIBE OF BEN HUR.

Kentucky Court of Appeals — May 6, 1921.

(191 Ky. 385, 230 S. W. 540.)

Insurance — exemption from liability for death in military service — public policy.

1. A contract exempting an insurer from liability for death of one in the military service of the United States is not against public policy.

[See note on this question beginning on page 1280.]

— effect of acceptance of dues.

2. Mere acceptance of dues on a mutual benefit certificate, with knowledge that insured had entered the military service, does not waive provisions of

the contract relieving the insurer from liability for death in such service, since the dues received do not cover the greater hazards.

[See 11 A.L.R. 1110.]

APPEAL by plaintiffs from a judgment of the Circuit Court for Henderson County in favor of defendant in an action brought to recover the amount alleged to be due on a life insurance policy. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. McClain & Pentecost, for appellants:

A rider restricting or limiting the military services of the insured, attached to a beneficial certificate of insurance, after the insured member of the society was inducted into military service of his country, is void and inoperative.

9 Cyc. 481, ¶ c; 13 C. J. 429; St. Louis Mut. L. Ins. Co. v. Graves, 6 Bush, 269; Sovereign Camp, W. W. v. Landrum, 158 Ky. 841, 166 S. W. 598; Sovereign Camp, W. W. v. Ethridge, 166 Ky. 795, 179 S. W. 1022; Bindell v. Kenton County Assessment F. Ins. Co. 128 Ky. 391, 17 L.R.A. (N.S.) 189, 129 Am. St. Rep. 303, 108 S. W. 825.

Mr. W. A. Wells, for appellee:

The policy insured the deceased while in the military or naval service within the continental limits of the United States; the deceased was killed in France. Under the terms of the contract this is not a case of violation of contract, but one wherein the contract

of insurance does not cover the liability.

Miller v. Illinois Bankers' Life Asso. 138 Ark. 442, 7 A.L.R. 378, 212 S. W. 310; La Rue v. Kansas Mut. L. Ins. Co. 68 Kan. 539, 75 Pac. 494; Malone v. State L. Ins. Co. 202 Mo. App. 499, 213 S. W. 877; Redd v. American Cent. L. Ins. Co. 200 Mo. App. 383, 207 S. W. 74; Kelly v. Fidelity Mut. L. Ins. Co. 169 Wis. 274, 4 A.L.R. 845, 172 N. W. 152.

Defendant received one or two monthly dues after insured went beyond the territorial limits of the United States, which fact, however, does not amount to a waiver or estoppel to deny liability on its part.

Miller v. Illinois Bankers' Life Asso. supra; Malone v. State L. Ins. Co. 202 Mo. App. 499, 213 S. W. 877; Jett v. Jett, 171 Ky. 548, 188 S. W. 669; Rudd v. Matthews, 79 Ky. 479, 42 Am. Rep. 231; Lasley v. Lackey, 4 Ky. L. Rep. 896; Kenyon Realty Co. v. National Deposit Bank, 140 Ky. 133, 31 L.R.A.

(N.S.) 169, 130 S. W. 965; *Torbitt & Castleman v. Middlesboro Grocery Co.* 147 Ky. 343, 144 S. W. 16.

The beneficiaries were not entitled to receive anything under the terms of contract, unless it be a return of the monthly dues paid.

Knights of Maccabees v. Shields, 157 Ky. 35, 49 L.R.A. (N.S.) 860, 162 S. W. 778.

Quin, J., delivered the opinion of the court:

Gurvis E. Marks on June 1, 1917, applied to appellee for life insurance in the sum of \$1,000, and a certificate was issued to him on the 5th of that month.

The laws, rules, and regulations of the society prohibited members from engaging in the military or naval service unless a permit was attached to insured's certificate, and such permit, grantable only to those becoming members after April 6, 1917, was limited to service within the territorial limits of the United States. The certificate made no distinction between a voluntary and an involuntary enlistment.

April 29, 1918, insured was inducted into the military service of the United States, was sent to France, where he was killed October 23, 1918. Some time during September, 1918, and while insured was in the Army, his father and mother (appellants), in compliance with a notice in the official publication issued by appellee, forwarded their son's certificate to the home office for the purpose of obtaining an enlistment permit. They were not advised as to the nature of the permit, nor did they know its contents until a date subsequent to the time they received word their son had been killed. By its terms the insurance was not payable if insured died or was killed while in the military service and beyond the borders of the states.

The regular monthly assessments were paid as they became due. Having received notice of insured's death, the society tendered the beneficiaries the total dues paid under the certificate from its date, but this the beneficiaries declined to receive

and suit was instituted on the certificate. A trial was had, and at the conclusion of defendant's evidence the court ordered a directed verdict for the society.

It is urged with great earnestness that the prohibition against enlistment in the military service of the government is contrary to public policy, and therefore void. It is argued that this is especially true in the case of an involuntary enlistment, as where insured is inducted into the service under the Federal draft laws. The claim is made that insured's entry into the military service was involuntary; not his act, but the act of the government, for which he was in no way responsible in any greater degree than he would have been for an act of God. However, text-writers and the decisions, with striking unanimity, agree that such conditions are valid. *Joyce, Ins. § 2237.*

An insurance company or benefit society has the right to select the particular risks it is willing to assume, and there is no public policy against a contract of this sort exempting the insurance company in advance from liability for the death of insured while in the military or naval service of the government. The provision of the certificate merely provides for an exemption from liability under certain circumstances and conditions, which holds out no inducement to the insured from refraining from enlistment in the country's service, and does not constitute in any sense an incentive or agreement not to enlist or a reason to evade the draft laws.

At the time the certificate was issued this country had entered the World War, a fact well known to the insurer and the insured. The latter was of draft age, a single man, in good health, and both parties to the contract well knew he was subject to be called by the government to do military service. With this knowledge on the part of

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exemption from
liability for
death in
military
service—
public policy.

both, this contract of insurance was entered into. The government to which both owed allegiance had the right to call deceased into its service, nor do we perceive that public policy prevented the parties from contracting that in the event insured should be inducted into the service the society would not be bound if death occurred while so engaged. *Miller v. Illinois Bankers' Life Asso.* 138 Ark. 442, 7 A.L.R. 378, 212 S. W. 310; *Ruddock v. Detroit L. Ins. Co.* 209 Mich. 638, 177 N. W. 242; *Long v. St. Joseph L. Ins. Co.* — Mo. App. —, 225 S. W. 106.

The question of the want of patriotism prompting such action on the part of appellee's officers, and which is presented with so much fervor, is a matter which unfortunately does not affect the validity of the contract.

It is provided in the application signed by decedent, that he agreed for himself and the beneficiaries to abide by the laws, rules, and regulations of the Supreme Tribe and the beneficial certificate therein, together with all amendments thereto; and if he should change his occupation from that stated in the application he would so notify the Supreme Tribe in writing. Applicant also agreed that, should he thereafter engage in any occupation prohibited by the laws of the Supreme Tribe, from and after the date of his so engaging in such prohibitive occupation, his right, as well as the rights of the beneficiaries, to participate in the benefit fund of the order, should cease, and insured should stand suspended as a member; furthermore, that during the period of such suspension payment of dues by the insured, or the receipt therefor by any officer of the court to which insured belonged, or to the Supreme Tribe, should not be binding upon the order until insured had been reinstated as provided by the laws of the society.

According to another provision in the laws and regulations, where

a member engaged in a prohibitive employment, all payments made by him while so engaged are to be returned to him, or to his legal representative. Appellant contends there was a waiver of these provisions of the application and rules, in that the district manager, with the knowledge of the fact that insured was in the military service and outside the constitutional limits of the United States, accepted dues under said certificate.

It is not clear said officer was apprised of this fact, but, if he was so advised, it would not alter the situation:

First. Because the record is silent as to the duties of the district manager and as regards his relation to either the Supreme Tribe or the local court. Although the constitution and rules of the Supreme Tribe name the various officers of the order and define their duties, nowhere do we find any reference to such an office as district manager. Nor does it appear that any official had any knowledge that insured was in the army in France.

Second. Granting that the district manager did have the authority to so bind the company, there could be no recovery on the certificate. The provision in the certificate as to the prohibited employment was merely an exemption from liability on account of death occurring under certain circumstances. It was not contemplated the dues would cover the greater hazard incident to military or naval service. This is not a case where an acceptance of the dues with knowledge of the violation of the contract constitutes a recognition of the continued valid existence of the certificate. Nor do the facts of the case bring it within the principle that the forfeiture is waived where an insurance company entering into a contract has knowledge, through any of its authorized agents, of facts that would work a forfeiture. The society had the right to stipulate under what

—effect of
acceptance of
dues.

circumstances it would be liable. Insured and his parents had the right to pay the dues and continue the certificate in force while he was engaged in the military service, notwithstanding the exemption from liability for death occurring during service in foreign lands. There was nothing in the payment of dues inconsistent with keeping the certificate alive. The duration of his stay in France was problematical. Had the certificate been allowed to lapse and insured not died in the country's service, conditions may have arisen to prevent his procuring

insurance. He may have then ceased to be an insurable risk. It is therefore not improbable insured was desirous of maintaining his certificate regardless of the exemption. The mere acceptance of dues by the society, with the knowledge that insured was so engaged in the military service of the government, did not constitute a waiver of the stipulations referred to.

It therefore follows the lower court did not err in directing the jury to find its verdict for the society, and the judgment is accordingly affirmed.

ANNOTATION.

Insurance: validity, construction, and effect of provision in life or accident policy in relation to military service.

I. Validity, 1280.

II. Construction and effect:

- a. Commencement and termination of period, 1280.
- b. Character and nature of risks contemplated, 1281.
- c. Persons contemplated; manner of induction, 1282.
- d. Effect of incontestable clause, 1283.
- e. Miscellaneous, 1283.

III. Waiver or estoppel, 1284.

This annotation is supplementary to the notes in 4 A.L.R. 848; 7 A.L.R. 382; and 11 A.L.R. 1103, on the above subject.

I. Validity.

(Supplementing annotation in 4 A.L.R. 848, and 11 A.L.R. 1103.)

The rule adhered to in the cases in the earlier annotation, that provisions exempting an insurer from full liability in case of the insured's death while engaged in military service are not void as against public policy, has been affirmed in later decisions, even though the insured was drafted into the service. *Railey v. United Life & Acci. Ins. Co.* (1921) — Ga. App. —, 106 S. E. 203; *MARKS v. SUPREME TRIBE, B. H.* (reported herewith) ante, 1277.

And the validity of such a provision was apparently assumed by the majority of the court in *OLSON v. GRAND*

LODGE A. O. U. W. (reported herewith), ante 1270. Grace J., however, in a dissenting opinion, took the view that a provision that, in the event the insured engaged in military service in time of war without obtaining a permit and availing himself of one of the insurer's options, the amount payable should be the reserve value, would deter enlistment, and was void for the reason that it was against public policy, and also because it was unreasonable, in that it sought to make the status of military service, regardless of the increase of hazard, the sole cause for limiting liability.

II. Construction and effect.

(Supplementing annotation in 4 A.L.R. 848; 7 A.L.R. 382, and 11 A.L.R. 1104.)

a. Commencement and termination of period.

When a man enters his name on a list of the Army or Navy, he is an "enlisted man," whether he enlisted or was drafted, within the meaning of a provision that if the insured dies while serving in the Army or Navy as an officer or enlisted man outside the boundaries of the United States only a limited amount shall be recoverable, and where the insured was drafted and was killed while engaged in military service in France, and failed

to notify the insurer or pay an extra premium, the latter was liable only for the limited amount. *McQueen v. Sovereign Camp W. W.* (1921) — S. C. —, 106 S. E. 32.

In *Hagelin v. Commonwealth L. Ins. Co.* (1921) — Neb. —, 183 N. W. 108, it was held that the fact that the insured engaged in military service in time of war did not ipso facto work a forfeiture of the policy and relieve the insurer from all liability thereunder for the insured's death while engaged in such service, there being no provision that the policy should be void in case the insured engaged in such service, but only a provision that it should be void if any premium was not paid when due, and a provision that in case of military service in time of war the company's written consent should be obtained and an extra premium paid, and also a provision making the policy incontestable after one year except for the nonpayment of premiums or a violation of the terms as to military service in time of war; and it was held that there being no specific provision for forfeiture in case the insured entered military service, the court would not write one in or permit the insurer to impose new conditions creating a forfeiture, without the insured's consent and without a new consideration.

See also *Nowlan v. Guardian L. Ins. Co.* (W. Va.) *infra*, II. c.

b. Character and nature of risks contemplated.

In *OLSON v. GRAND LODGE A. O. U. W.* (reported herewith) *ante*, 1270, the benefit certificate provided that it was issued and accepted upon the express consent of the insured that "in the event he engaged in military, naval, submarine, or aerial service in time of war," without first obtaining a permit, the amount payable "in the event of his death during such service" should be the reserve value; and the rules of the company provided that the insurance should become void if a member should "engage in the occupation of a soldier in time of war." It was held that these provisions intended to establish the status of the insured, and not the character of the service, as

the test of the restriction of liability, and that only a limited recovery could be had where the insured died of influenza in a hospital in France, without ever having gone into the zone of hostilities. *Grace, J.*, dissented in this case, and contended that the insured's death was not, under the circumstances, caused by military service, and that on the reasoning of the court in *Myli v. American L. Ins. Co.* — N. D. —, 11 A.L.R. 1097, 175 N. W. 632, which is set out in the earlier annotation, a recovery should be allowed for the face of the policy.

In *Huntington v. Fraternal Reserve Asso.* (1921) — Wis. —, 181 N. W. 819, where the certificate provided that if the insured should become a "soldier in regular Army in time of war" and "any claim accrues while insured is so occupied, whether resulting from such changed occupation or not, directly or indirectly, there shall be paid 40 per cent only of said claim," it was held that the beneficiary could not recover the full face value of the certificate upon the death of the insured while he was a soldier in the regular Army, although he died from natural causes, and not from any hazard peculiar to war.

In *Railey v. United Life & Acci. Ins. Co.* (1921) — Ga. App. —, 106 S. E. 203, where the insured had been drafted into the military service and was killed in the North Channel between Scotland and Ireland as a result of an accidental collision between a ship upon which he was being transported to Europe to take part in the World War and another ship under the same convoy, it was held that the insurer was liable only for the reserve value of the policy, which provided that in case of death resulting from or occasioned by the insured engaging in military or naval service in time of war without a written permit, only the reserve value should be paid, and which also provided that upon written request a war service permit to the amount of the single indemnity would be issued to cover additional risk of war conditions while the insured was engaged in military service within the confines of continental United States

and it was held that the same result would have been reached if the insured had obtained a permit under the latter provision.

c. Persons contemplated; manner of induction.

In *Nowlan v. Guardian L. Ins. Co.* (1921) — W. Va. —, 107 S. E. 177, a provision of a policy that if the insured should engage in military service in time of war, and should die while engaged in such service, the insurer's liability should be limited to stated fractional parts of the face of the policy, was held operative in case of involuntary as well as voluntary service in the Army; and the provision was also held not ambiguous and that the rule that provisions should be most strongly construed against the insurer was inapplicable. The court said: "The sole contention of the plaintiff is that she is not barred from recovering the full amount of the policy sued on by reason of the stipulations above recited. She says that that condition only operated to reduce the indemnity in case the insured voluntarily entered the military service, and that inasmuch as his service in the Army was involuntary the company is liable for the full indemnity provided by the policy. She insists that at the time the policy was written the Selective Service Act had not been passed; that in fact this country was not at that time engaged in war; and that the parties did not contemplate any such thing as involuntary military service, but only such service of that character as the insured entered upon of his own will. And it is also claimed that the provision in regard to the reduced indemnity is ambiguous in this regard, and that being so it should be most strongly construed against the insurance company and in favor of the insured. There is no doubt as to the correctness of this rule of construction, but before the courts can resort to construction there must be some ambiguity or uncertainty in the contract. Is there such uncertainty or ambiguity in the contract? The plaintiff's contention, that the parties could not at the time contemplate involuntary military service, is hard-

ly tenable, even if we could resort to such aids in construing language unambiguous upon its face. The insured was a citizen of the United States. The United States was not then at war with any foreign country, and while it may be true, as stated, that many American citizens were enlisting in the armies of different countries then engaged in war in Europe, it cannot be said that the parties to this contract contemplated any such service, for it is doubtful whether such an enlistment could be effected without a violation of the neutrality laws of the country. Certainly it can be argued with as great force that at the time this policy was written it was contemplated by at least very many people that the United States would become a participant in the European war. But even assuming that neither of the parties contemplated that the United States would enter the war, still it may be said that both of them knew that such a contingency might arise, and, in case it did, the government would have a right to call upon any or all of its citizens for military service, and require that service of them whether they desired or were willing to render it or not. It occurs to us, however, that the language used in this contract is perfectly clear, and is not susceptible of any two reasonable constructions. It is well known that insurance companies base their premiums upon the risks insured. The premium collected by the company, after deducting the expense of administration, is invested, and if the expectancy of life of those to whom policies are issued is correct, and each party meets the expectations of the company in that regard, the insured would simply get back the money he put in, with its earnings, less the cost of administration. It is well known, however, that many people who are insured die long before the time fixed by their expectancy of life, and the amounts that are paid in such cases in excess of the premiums and earnings must be made up from like premiums collected from those who exceed the span of life allotted to them. Of course, the ex-

pectancy of life of one engaged in war is different from that of one engaged in more peaceful pursuits, and it necessarily follows that the risk taken by the insurance company is therefore increased, and in order to make the same return to such a party a larger premium must be charged. The premium charged is based upon the risk assumed. One fifty years old is required to pay a higher premium than a man forty years of age, for the reason that it may be expected that he will not live as many years as a younger man; and so one engaged in a dangerous pursuit, such as carrying on war, is required to pay a much higher premium than one engaged in some pursuit not attended with such great risks to life. In this case the insurance company offered the insured the opportunity of paying an additional premium and carrying the full amount of the policy. He did not avail himself of this offer. Under the terms of the policy itself, it is provided that this difference in risk would be made up by decreasing the indemnity upon engaging in the more hazardous occupation. We do not think there is force in the plaintiff's contention that the language of the contract, that if the insured engaged in military or naval service he shall only receive the decreased indemnity, means a voluntary engagement in such service. Manifestly this provision was put in to relieve the insurance company of the obligation to pay the full indemnity for a more hazardous occupation than that on which the premiums paid were based. The hazard or risk from engaging in war would be just as great whether entered upon voluntarily or involuntarily, and there is no reason in the world for applying the limitation in one case that does not exist with equal force for its application in the other."

The court further stated that the word "engage" means to take part in or to be employed in, however the employment may arise, and that to attribute to this language the meaning claimed for it by the plaintiff would be to read into it something which the parties had not put there, and that

a recovery for the limited amount only was sustained.

In *Huntington v. Fraternal Reserve Asso.* (1921) — Wis. —, 181 N. W. 819, the term "regular Army" as used in a benefit certificate providing that, if the insured shall engage in the occupations of "railway switchmen, . . . soldier in regular Army in time of war," the insurer shall be liable only for a limited sum, was held to mean all soldiers in the military service of the United States in time of war, and to include a member of the National Guard while he was in the service of the United States in time of war; and that the term was not to be construed with reference to the Federal statutes classifying the military organizations of the United States.

d. Effect of incontestable clause.

In *Field v. Western Life Indemnity Co.* (1921) — Tex. Civ. App. —, 227 S. W. 530, where the policy provided that after one year it should be incontestable for any cause except for breach of warranty or fraud or non-payment of premiums, and further provided that the pecuniary liability of the insurer should be limited to the aggregate amount of premiums paid if the insured should, without the company's written permission, engage in military service in time of war, it was held that a recovery could be had only for the limited amount, it appearing that the insured, while in military service in France without the written permission of the insurer, committed suicide when insane.

e. Miscellaneous.

In *American Nat. Ins. Co. v. Turner* (1920) — Tex. Civ. App. —, 226 S. W. 486, where a statute provided that in case a loss occurred, and the insurer liable therefor should fail to pay the same within thirty days after demand, it should be liable to pay the holder of the policy, in addition to the amount of the loss, reasonable attorney's fees in collecting such loss, it was held that the attorney's fee could not be recovered when a demand was made for more than the claimant was entitled to recover, and that such fee could not be recovered where a de-

mand had been made for the face of the policy when the insurer was liable only for a limited sum provided for therein in case the insured should engage in military service in time of war.

In *Gillies v. Preferred Acci. Ins. Co.* (1920) 110 Misc. 489, 181 N. Y. Supp. 550, where there was a declaration in the classification of risks in an accident policy, that an Army officer in the field was not insurable, the court held that this was a notification to the insured that the company did not insure Army officers in field service, and held that the insured, whose occupation was stated to be that of soliciting agent and office employee, was engaged in an extrahazardous employment at the time he was killed while acting as a captain in active military service.

III. Waiver or estoppel.

In the reported case (*MARKS v. SUPREME TRIBE, B. H.*, ante 1277), the mere acceptance of dues on a mutual benefit certificate, with knowledge that the insured had entered the military service, was held not to waive provisions of the contract relieving the insurer from liability for death in such service, since the dues received did not cover the greater hazards.

And in *OLSON v. GRAND LODGE, A. O. U. W.* (reported herewith) ante, 1270, it was held that the failure of a beneficial order to demand or secure from an insured member, who was in the United States Army, an application for a war permit, and the payment of an extra war premium, provided for in a regulation allowing insurance for the face value of the policy upon payment of an extra premium by members engaged in military service, and the reception of regular assessments and dues, with knowledge that the insured was in the military service, did not constitute a waiver of the regulation requiring the payment of an extra premium to continue the entire insurance of one engaged in military service in force. Grace, J., however, dissented from the majority holding. The insurer in this case had voluntarily waived a regulation requiring a war permit in order to entitle a member to 20 per cent of the face of the policy, and confessed liability for the limited amount.

And in *Railey v. United Life & Acci. Ins. Co.* (1921) — Ga. App. —, 106 S. E. 203, it was held that neither the fact that the insurer knew when the policy was issued that the insured would probably engage in military service, nor the fact that it retained an unearned portion of the first premium after the insured's entry into the Army, was sufficient to constitute a waiver of a provision exempting the insurer from liability, except for the reserve value, in the event of death resulting from or occasioned by the insured engaging in military or naval service in time of war unless a written permit was issued by the company, or a further provision for extra premiums and permits, or a provision making the policy incontestable after one year except for nonpayment of premium and military service in time of war.

And in *American Nat. Ins. Co. v. Turner* (1920) — Tex. Civ. App. —, 226 S. W. 486, the insurer was held not estopped to deny liability for the face of the policy, by reason of the receipt of the regular premiums by the district superintendent, with knowledge that the insured was engaged in military service, the court holding that the case was not analogous to those providing that the doing or failing to do something should render the policy void, since the only provision in the policy in suit was that in case no additional premium was paid where the insured was engaged in the military service, only the reserve value should be payable.

And in *McCoy v. National L. Ins. Co.* (1921) — Iowa, —, 182 N. W. 659, where the policy provided that agents were not authorized to alter or modify the policy, the evidence was held insufficient to sustain the burden resting on the plaintiff of showing that the agents through whom the policy was obtained were general agents, and had authority to waive a provision requiring a written permit and payment of an extra premium in case the insured entered military service, there being testimony that one of the agents was a state agent having authority to appoint subagents, and that the other party connected with the issuing of

the policy was one employed to help solicit insurance in the place where the insured lived, although it appeared that the person last referred to told the wife of the insured, who was acting for the latter, that the policy was all right without obtaining a permit for military service or paying an additional premium.

And in *Huntington v. Fraternal Reserve Asso.* (1921) — Wis. —, 181 N. W. 819, where the by-laws of the insurer provided that officers of the local councils were agents of the members and not of the Supreme Council, it was held that the secretary of a local council had no power to bind the insurer by a statement that a certificate of a member in the Army did not require the payment of extra assessments as long as the insured was in the United States.

In *Bowman v. Surety Fund L. Ins. Co.* (1921) — Minn. —, 182 N. W. 991, the evidence was held sufficient to support a finding of a waiver of a provision making the policy void up-

on the entry of the insured into military service, there being testimony that the beneficiary forwarded to the insurer a copy of the notification of the insured's death, which she received from the War Department, and that the insurer sent her blanks for legal notification of death, and later blanks for final proofs of death, which were both filled out and sent to the insurer, which did not deny liability until after they were received.

And a finding was held justified in the *Bowman* Case that the waiver was not by an unauthorized agent within a provision of the policy that no agent of the company had power to change the contract or waive a forfeiture, or grant permits, where the letters received by the beneficiary inclosing blanks for notice and proof of death were signed in the company's name, by the secretary to the medical director, although the latter testified that it was not his secretary's duty to open letters and answer them as was done in this case. J. T. W.

RE CLAIM OF IRVING SKOITCHI
v.
CHIC CLOAK & SUIT COMPANY et al., Respts.
STATE INDUSTRIAL COMMISSION, Appt.

New York Court of Appeals — March 1, 1921.

(230 N. Y. 296, 130 N. E. 299.)

Workmen's compensation — officer of corporation acting as employee — right to compensation.

1. That one is a stockholder and officer of a corporation does not prevent his receiving compensation under the Workmen's Compensation Act for injuries received in the performance of services which he is employed to perform as an employee.

[See note on this question beginning on page 1288.]

— basis for compensation — wages as employee.

2. Compensation for injury to an officer of a corporation, injured while per-

forming the duties of an ordinary employee, must be based on wages received by him in the latter capacity.

APPEAL by the State Industrial Commission from an order of the Appellate Division of the Supreme Court, Third Department, reversing an award

by it and dismissing the claim in a proceeding under the Workmen's Compensation Act to recover compensation for an accidental injury received by claimant. *Modified.*

The facts sufficiently appear in the opinion of the court.

Mr. E. C. Aiken, with Mr. Charles D. Newton, Attorney General, for the State Industrial Commission:

The premium having been paid to the insurance carrier based upon the salary of the claimant, he was entitled to an award of compensation under subdivision 6 of § 54.

Bowne v. S. W. Bowne Co. 221 N. Y. 28, 116 N. E. 364; *Howard v. Howard*, 221 N. Y. 605, 117 N. E. 1072.

Mr. Alfred W. Meldon for respondents.

Hiscock, Ch. J., delivered the opinion of the court:

Upon evidence which sustained them, findings were made by the Industrial Commission to the effect that claimant owned 10 shares of a value of \$10 per share, out of 120 shares of the capital stock of a small corporation engaged in the clothing business, and was its president and treasurer; that in these capacities, however, he performed no substantial duties, the business being supervised by a general superintendent, and even the checks signed by another person; that he was "employed" as manager, and as such performed services in packing and shipping and selling and delivering goods; that while he was thus engaged in his regular work he met with an accident, which caused the injuries for which compensation was sought; that his "average weekly wage . . . was the sum of \$33.70."

On these and other appropriate formal findings an award was made. The appellate division, however, took the view that the award could only be sustained under the amendment made to § 54 of the Workmen's Compensation Law (Consol. Laws, chap. 67) in 1916, which permitted the insurance of "employers who perform labor incidental to their occupations," and, certain requirements of that amendment not having been complied with, it reversed the award and dismissed the claim.

We are of the opinion that the

appellate division erred in its view that the claim could only be established by virtue of the amendment in question. In fact, it may be a debatable question whether that amendment can be applied in the case of an employer which is a corporation. Of course, a corporation itself could not be injured, or draw compensation for injuries, as provided in the Compensation Law. In its case advantage could be taken of the provision for insurance of employers only by holding that the act covered the officers and agents of the employer, and permitted them to recover compensation. We refrain, however, from deciding this question at this time, because we do not regard it as being involved.

The amendment plainly was intended to cover the case of an employer who maintained his status as such, but who nevertheless did some work of the character usually performed by an employee. Such a situation would arise, for instance, in the case of a tailor who employed four or five men and did some work with them. He would remain an employer, and obviously could not become an employee of himself as an employer. If he received any compensation for injury, it would be as employer under the amendment in question. But all this would not preclude a person who was really an employee from securing compensation as such for injuries received in the course of his employment, even though he might hold a title as officer in a corporation. If he was actually employed to perform services as an employee, such as are contemplated by the Workmen's Compensation Law, there is no reason why he should not come within its benefits independent of the amendment of 1916.

A corporation is a complete enti-

Workmen's
compensation—
officer of cor-
poration acting
as employee—
right to
compensation.

ty, separate and distinguishable from its stockholders and officers, and if it sees fit to have one of the latter serve it in the capacity of an ordinary employee, we see nothing to prevent it from so doing. That seems to us to be the present case. The claimant was "employed" as general manager. The term "general manager" is somewhat ambiguous, and of itself might indicate either an executive and important officer, or a person performing ordinary duties of an employee. The evidence and findings in this case show that the position was of the latter class, and that the claimant performed ordinary detail and manual work, such as would be required of a typical employee. Under these circumstances we think that he was entitled to secure compensation as such for injuries under the general provisions of the Compensation Law, and that his case was not governed by or dependent upon the amendment of 1916.

There is nothing in our decision in the case of *Bowne v. S. W. Bowne Co.*, 221 N. Y. 28, 116 N. E. 364 (which curiously is stated by the attorney general in his brief to have been decided before the amendment of 1916 was adopted), which contravenes this view. On the other hand, the effect of what was said by Judge Pound in its entirety sustains the view which we are now taking of the facts presented on this appeal. In that case the claimant was the owner of a majority of the capital stock of a corporation of which he was the president. The commission found that he was "employed as president." His ordinary duties were those which pertained to the position of a managing executive officer, and the manual work in the course of which he was injured was merely a casual occurrence. He received as a stockholder and an executive officer substantial dividends and salary, which were in no wise abated or impaired by his accident. Under those circumstances

we said that it would be an unreasonable interpretation of the Compensation Law to regard him as an employee, such as was intended and provided for by that statute in awarding compensation for injured employees. It was fully recognized, however, that there was nothing to prevent a corporation, if it so desired, from hiring one of its officers to be and to perform the work of such an employee as was contemplated by the statute. We simply held that "the higher executive officers of a corporation are not, as such, its employees in the ordinary use of the word." 221 N. Y. 30.

We think, therefore, that it was erroneous for the appellate division to dismiss the claim on the theory that no recovery could be had. With some hesitation, however, we have reached the conclusion that it was proper to reverse the award, sending the claim back for further proceedings, instead of dismissing it.

A person holding the title of an executive managing official, and at the same time being an employee and performing the work of such, should be allowed only to draw compensation based on wages received by him in the latter capacity. The finding in this case states that the claimant received an average weekly wage of \$33.70, but it is not stated whether that was all received in his capacity as employee. In view of the evidence and other findings, it very probably may be that such was the fact, and that no part of this amount was apportioned to his position as president and treasurer. Nevertheless the evidence is so conflicting and unsatisfactory that we conclude that there should be a specific finding upon this subject, and that the claim should be remitted to the Industrial Commission for such further proceedings as may be necessary to that end.

The order of the Appellate Division, therefore, should be modified

—basis for
compensation—
wages as
employee.

by providing that the claim be re-mitted, and not dismissed, with costs to abide event.

Hogan, Cardozo, Pound, McLaughlin, Crane, and Andrews, JJ., concur.

ANNOTATION.

Workmen's compensation: interest in the business or in corporation or firm owning the business as affecting right to compensation.

The annotation purports to cover only that class of cases where the interest in the business is a financial one, directly affected by the earnings, or where the person is an officer of a corporation. It does not include cases involving merely subcontractors, foremen, and superintendents. See, for example, *Deyo v. Arizona Grading & Constr. Co.* (1916) 18 Ariz. 149, L.R.A. 1916E, 1257, 157 Pac. 371, holding that the use by the legislature of the word "workman" in a compensation act, stated by it to be intended to comply with a constitutional provision directing it to protect employees, will not prevent the application of the statute in favor of a superintendent.

American decisions.

The cases appear generally to hold that the mere fact that one is a stockholder, officer, or director of a corporation does not necessarily preclude recovery for his injury or death, as an employee of the company, under Workmen's Compensation Acts, but that he may be an employee, depending upon such factors as the nature of the work for which he receives pay, the proportion of the stock which he owns, and whether, in case he performs the work of an ordinary employee, this is not merely occasional or incidental, but is his regular work. *Re Raynes* (1917) 66 Ind. App. 321, 118 N. E. 387; *Dewey v. Dewey Fuel Co.* (1920) 210 Mich. 370, 178 N. W. 36; *SKOITCHI v. CHIC CLOAK & SUIT Co.* (reported herewith) ante, 1285; *Hubbs v. Addison Electric Light & P. Co.* (1921) 230 N. Y. 303, 130 N. E. 302, affirming (1920) 191 App. Div. 765, 182 N. Y. Supp. 152; *Beckmann v. J. W. Oelerich & Son* (1916) 174 App. Div. 353, 160 N. Y. Supp. 791; *Berman v. Reliance Metal Spinning & Stamping Co.* (1919) 187 App. Div. 816, 175 N. Y. Supp. 838;

Eagleson v. Harry G. Preston Co. (1919) 265 Pa. 397, 109 Atl. 154; *Millers' Mut. Casualty Co. v. Hoover* (1919) — Tex. Civ. App. —, 216 S. W. 475.

It was held in *SKOITCHI v. CHIC CLOAK & SUIT Co.* (reported herewith) ante, 1285, that recovery under the Workmen's Compensation Act could be had by one who was the president and treasurer of a small corporation engaged in the clothing business, who owned 10 shares out of 120 shares of its capital stock, and who was "employed" as its general manager, where he performed services as an ordinary employee in packing, shipping, selling, and delivering goods, and, while thus engaged in his regular work, met with an accident.

And, following the above case, the court in *Hubbs v. Addison Electric Light & P. Co.* (1921) 230 N. Y. 303, 130 N. E. 302, affirming (1920) 191 App. Div. 765, 182 N. Y. Supp. 152, held that an award under the Workmen's Compensation Act should be sustained where it was found that the claimant "owned a large proportion of the capital stock of a comparatively small electric light and power company, and was its secretary and treasurer; that he was employed as a general manager and as such 'performed manual labor at his employer's plant . . . and away from the plant;' that his weekly wage as such general manager was the sum of \$25." The court said that the finding, which was conclusive upon it, showed that the claimant was "employed" as general manager; that in such capacity he performed various manual services, such as an ordinary employee might perform; but for his services in this particular capacity he received a certain weekly wage; and that in

this latter respect the findings differed from other cases to which reference had been made, in that they showed just what his wages were in his capacity of employee.

And it was held in *Eagleson v. Harry G. Preston Co.* (1919) 265 Pa. 397, 109 Atl. 154, that the fact that one who was employed as a salesman by a company at a weekly wage, and who was accidentally killed while engaged in his work as salesman, was also a director of the corporation, but received no salary or income as such, would not prevent recovery for his death under the Workmen's Compensation Act, providing that "the term 'employee' . . . is declared to be synonymous with servant, and includes all natural persons who perform services for another for a valuable consideration," with certain specified exceptions.

So, in holding that the mere fact that one is an officer of a corporation does not prevent recovery under the Workmen's Compensation Act for injury to him as an "employee," the court in *Re Raynes* (Ind.) supra, said: "It appears to us as sound that compensation under Workmen's Compensation Acts cannot be denied one simply because he happens to be the president or other executive or managing officer of the corporation that employs him, and that that fact alone is not sufficient to eliminate him from among those regarded as employees within the meaning of such acts. If the corporation is great and powerful, with extensive financial resources; if an official is a large stockholder, and his time is occupied in the discharge of the usual duties of his office, and his salary is fixed because of the discharge of such duties, it would seem apparent that he could not be regarded as an employee under such an act. But in another corporation of humbler proportions such an official might serve in a dual capacity; that is, as an officer and also as a workman. It is not unreasonable to conceive of a case where the discharge of the official duties would constitute but a small portion of the services rendered by him to the corporation. Such an

officer might be hired in fact to perform manual labor in connection with other employees, and his time in the main be occupied in performing such service, and regular wages paid him accordingly. Such an official, in his capacity as a workman, might measure up in all respects to the conception of an employee within the meaning of the act as we have hereinbefore developed it, and in such capacity we believe that he should be regarded as an employee within the meaning of Compensation Acts."

And it was held in *Re Raynes* (Ind.) supra, that the term "employee" included one who was secretary-treasurer of a small corporation engaged in the sale of merchandise, who was one of its three stockholders and, as such, a member of the board of directors, where, in addition to performing the regular duties as an officer of the company, he served also as buyer, as salesman, and collector for it, receiving for his services \$50 per week, the injury occurring, as it was contended, while he was attempting to collect accounts for the company.

A provision in the statute that the president, vice president, secretary, or other officers and "directors" of corporations accepting the act should not be deemed or held to be employees within the meaning of the statute, was held in *Millers' Mut. Casualty Co. v. Hoover* (1919) — Tex. Civ. App. —, 216 S. W. 475, to apply only to officers and directors as such, and not to preclude recovery under the statute for the death of one who was a director in the employer corporation, but who would otherwise have been regarded as serving as an employee at the time of the accident.

And in *Millers' Mut. Casualty Co. v. Hoover* (Tex.) supra, it was held that recovery could be had under the statute for the death of one who, although a director in a milling company, was also its superintendent and head miller, his duties being in general to direct the operation of the machinery, the making of flour, overlook and direct its affairs, and at times to do the actual work in connection with

such matters, where it appeared that he was without authority to employ and discharge servants, although exercising that authority at times to a limited extent, that he received a salary of \$165 per month, although it did not appear whether any part of this sum was paid him as a director, and that he was accidentally killed at the mill while engaged in the performance of his duties as superintendent and head miller.

Regarding the proposition that the mere fact that one was a director would not preclude recovery under the statute, the court in *Millers' Mut. Casualty Co. v. Hoover* (Tex.) supra, said: "The provisions of the quoted article, which exclude officials of the corporation from participating in the benefits of the act, we are convinced refer to them as such; that is to say, while they are engaged in the performance of the duties conferred on them by law, as, for example, as to directors, the general management and direction of the corporate affairs, and as to the officers, the exercise of those duties and powers conferred on them by the directors or the by-laws of the corporation. The article purports to deal with them in that respect only. It neither directly nor inferentially denies the right of such officials to have other and different relations with the corporation. Conceivably, and not unnaturally, officers and directors of corporations might be employed in the performance of duties of a character wholly distinct from and unrelated to those ordinarily exercised as such officials. The act as a whole neither denies them the right to serve in the capacity of an ordinary servant or employee, nor denies the corporation the right to engage their services in that particular. If, as matter of fact, they are so otherwise employed, and that the employment is such as to bring them within the definition of 'employee' contained in the act, and while so engaged they are injured, they are, in our opinion, entitled to the benefits of the act."

And the fact that the deceased was a stockholder in and president of the defendant fuel company was held in

Dewey v. Dewey Fuel Co. (1920) 210 Mich. 370, 178 N. W. 36, not to preclude recovery for his death under the Workmen's Compensation Act, as an "employee" of the company, where he served as president without salary, and had accepted a place in the yard as "yardman" at \$2 per day, his work being principally to assist drivers in loading their wagons, was subject to the orders of the manager, and, when killed, was on his way to perform work in obedience to the manager's orders.

It was held also in *Berman v. Reliance Metal Spinning & Stamping Co.* (1919) 187 App. Div. 816, 175 N. Y. Supp. 838, that recovery could be had under the Workmen's Compensation Act for injury to one "employed as manager" of a stamping company, who at the time of the accident was engaged in instructing an employee in the use of a machine, and was concededly in the discharge of his ordinary duties, although he was the owner of a "considerable number" of shares of stock in the company, was its treasurer, and received a salary of \$5,000 per year; it being said, however, that his duties as treasurer appeared to be comparatively unimportant. The court said that no question was raised as to the general character of the claimant's employment; and that the *Bowne Case* (1917) 221 N. Y. 28, 116 N. E. 364, reversing (1916) 176 App. Div. 131, 162 N. Y. Supp. 244, *infra*, was distinguishable, as in that case it was found that the claimant was "employed as president" and was injured while temporarily assisting laborers, and that it was entirely obvious from the facts in that case that the claimant was not employed in a hazardous occupation, and there was nothing in his duties as president requiring him to perform the work at which he was injured; in other words, he was not, so far as appeared, employed for such a purpose; but that in the case before it, the claimant is "a high-priced laborer, the superintendent of the plant, and he is injured while in the discharge of the duties in which he is regularly employed, and of course is entitled to the same protection which comes to

any other man actually employed in a hazardous work." The court said further: "It is not the fact that a man is a stockholder and officer of the corporation that determines; it is the character of his employment. If the claimant had been employed as treasurer of the corporation, at a fixed salary as such treasurer, and he was employed for that purpose and such duties as should be incident to such employment, he would not be entitled to compensation if he went out into the factory and undertook other employment, because he would not be employed for such a purpose; would not be within the contemplation of the insurance. But this man was included in the insurance as superintendent or manager of the plant, and while engaged in his regular employment he was within the letter and the spirit of the act."

And the fact that one was vice president and a stockholder in the company was held in *Beckmann v. J. W. Oelerich & Son* (1916) 174 App. Div. 353, 160 N. Y. Supp. 791, in no way to affect his status as an employee, within the meaning of the Workmen's Compensation Act, where it appeared that he worked at a weekly wage, in the various industries of the corporation the same as other workmen, and was doing the work of an ordinary employee at the time he was injured, although he was the general foreman and was the owner of 7 out of 100 shares of stock of the corporation.

But the occasional performance of menial services, such as were performed by ordinary employees, in a ginning mill, it was held in *Millers' Indemnity Underwriters v. Cook* (1921) — Tex. Civ. App. —, 229 S. W. 598, would not transform a director and general manager of the mill,—who as such, under the statute, was not entitled to compensation,—to an employee, so as to permit recovery under the statute for injury incurred while performing such services; and it was held that this was true even if the corporation had agreed to pay him only for the labor which he performed. The statute provided: "The presi-

dent, vice president or vice presidents, secretary, or other officers thereof provided in its charter or by-laws, and the directors of any corporation which is a subscriber to this act, shall not be deemed or held to be an employee within the meaning of that term as defined in the preceding section here of." In this case the injured party was the owner of one third of the stock of the company, was a director and secretary-treasurer, as well as general manager or superintendent, "and had full charge of everything pertaining to the management of said gin, and took the place and did the work of any absent employee, and had authority to and did employ, pay off, and discharge labor." He received a salary varying from \$62 to \$100 per month at different times in the year. The statement of facts included the proposition that he received no salary by virtue of his being a director and secretary and treasurer, but that the salary was for labor performed in and about the gin; it appearing that, in addition to the performance of his duties as an officer, he assisted in repairing or other work requiring extra or temporary help, when occasion required it, and took the place, when necessary, of any absent employee. The court said that the legislature never conceived of the idea of conversion of an officer of a corporation into an employee, to be protected by the Compensation Act, through the crude expedient of paying him for trivial and occasional manual labor; that if the performance of such menial services, occasionally rendered, could transform a director or general manager into an employee, within the spirit of the law, a means of evading its provisions were so simple and easily adopted that a virtual repeal of the law was secured; and that no such subterfuges or evasions should be recognized by the courts. And the court in distinguishing the case from *Millers' Mut. Casualty Co. v. Hoover* (1919) — Tex. Civ. App. —, 216 S. W. 475, *supra*, called attention specially to the fact that in the latter case the injured party, although a director, was

without authority to employ and discharge servants, but that there was above him a general manager, who had the authority to discharge the party himself.

And it was held in *Kolpien v. O'Donnell Lumber Co.* (1921) 230 N. Y. 301, 130 N. E. 301, reversing (1920) 191 App. Div. 764, 182 N. Y. Supp. 155, that an award of compensation under the Workmen's Compensation Act should be reversed, where the findings showed that the claimant was president and treasurer of a corporation and held a majority of its capital stock; that he was "employed" as manager, in which capacity he performed manual labor, such as an ordinary employee might perform, and that it was while engaged in the performance of these duties that he was injured; and that his "average weekly wage" was approximately \$46. The court said that the extent of the claimant's stockholdings were much more important than in the *SKOITCHI CASE*, ante, 1285, and that there was no finding that he did not discharge any duties as president or treasurer, or that his compensation was received by him in the capacity of an employee, but that if it were permitted to look to the evidence for the purpose of trying to find testimony sustaining an additional finding that his wages were thus received, it should find, to the contrary, that he received a salary of \$2,500 a year as president and as manager.

It was held, also, in *Bowne v. S. W. Bowne Co.* (1917) 221 N. Y. 28, 116 N. E. 364, reversing (1916) 176 App. Div. 131, 162 N. Y. Supp. 244, that an award under the Workmen's Compensation Law should be reversed, where the claimant was the president and majority stockholder of a manufacturing corporation, was its principal executive officer, whose salary was \$70 a week, and whose stock dividends in the preceding year amounted to \$30,000, although the accident occurred while he was performing manual labor, assisting other employees of the corporation in handling lumber. The court said: "Conceding that a corporation may employ its officers as

workmen, to handle lumber, operate lathes, or set brakes, or to act as superintendents and foremen, it must also be conceded that the higher executive officers of a corporation are not, as such, its employees in the ordinary use of the word, nor are they expected to perform manual labor. The question is plainly presented whether the principal executive officer of a corporation is an employee within the definition of the word contained in the Workmen's Compensation Law. . . . The title of the Workmen's Compensation Law is as follows: 'An Act in Relation to Assuring Compensation for Injuries or Death of Certain Employees in the Course of Their Employment.' . . . Section 2 provides for compensation to employees. Section 3 defines employer and employee as follows: . . . 'Employee' means a person who is engaged in a hazardous employment in the service of an employer carrying on or conducting the same upon the premises or at the plant, or in the course of his employment away from the plant of his employer; and shall not include farm laborers or domestic servants. . . . The statutory definition speaks of one 'in the service' of an employer. In a broad sense the officers of a corporation serve it, but in common speech they are not referred to as its servants or employees. . . . The words of the statute, construed in the light of the legislative purpose, do not justify the conclusion that the distinction between the higher executive officers of the corporation and its workmen was obliterated. . . . The short title of the act, the limitation thereof to employers employing workmen, the evil to be remedied, the method of remedying the evil, the obvious incongruity of applying the law to the principal executive officer of a corporation as an accident insurance at the maximum rate of not to exceed \$20 a week based on loss of earning power,—all point conclusively to a distinction between such an officer and other employees, which the court should not disregard." As distinguishing this case, see *Berman v. Reliance Metal Spinning &*

Stamping Co. (1919) 187 App. Div. 816, 175 N. Y. Supp. 838, *supra*.

And under the rulings of the New York court, a son is not an employee of his father within the meaning of the Compensation Act, where the son was the practical manager of the business, and did not receive a stated salary, but drew from the business, with the consent of the father, from time to time, such moneys as he desired, the amount for the year preceding his death exceeding \$10,000. *Re Howard* (1917) 221 N. Y. 605, 117 N. E. 1072, reversing, without opinion, a judgment of the appellate division reported in (1917) 176 App. Div. 940, 162 N. Y. Supp. 1124, in which the appellate division, without opinion, unanimously affirmed an award of the compensation commission.

One who owned 95 per cent of the stock of the employer company, and had previously been its president, but at the time of the accident held no office in it, was held an employee of the company within the meaning of the Workmen's Compensation Law, in *Kennedy v. Kennedy Mfg. & Engineering Co.* (1917) 177 App. Div. 56, 163 N. Y. Supp. 944, there being the additional circumstance that the insurer had treated the claimant as an employee and included his salary as the basis for the premium. But the decision was reversed on rehearing, without opinion, in (1918) 182 App. Div. 907, 168 N. Y. Supp. 1114, on the authority of *Bowne v. S. W. Bowne Co.* and *Re Howard* (N. Y.) *supra*.

Workmen's compensation acts have been held inapplicable in the case of a partner seeking compensation for injuries from the firm of which he is a member. For English cases on this point, see *infra*.

Thus, in *Cooper v. Industrial Acci. Commission* (1918) 177 Cal. 685, 171 Pac. 684, it was held that there could be no recovery under the statute for the death of a partner in a mining company who was killed while inspecting a mine belonging to the company, to which he had been sent under an agreement for payment of his expenses on the trip and an allowance of \$5 per day for his time, as the deceased was

not an employee of the firm of which he was a member within the meaning of the act. It was said: "The Workmen's Compensation Act clearly does not contemplate such a mixed relation as that existing between partners, wherein each member of the partnership is at the same time principal and agent, master and servant, employer and employee; and wherein each, in any services he may render, whether under his general duty as a partner or under a special agreement for some particular service, is working for himself as much as for his associates in carrying on the business of the firm. The obvious intent of the act was to substitute its procedure for the former method of settling disputes arising between those occupying the strict relationship of master and servant, or employer and employee, by means of actions for damages. . . . The law relative to compensation as between master and servant, or employer and employee, for injuries suffered by the latter, contemplates two persons standing in this opposed relation, and not the anomaly of one person occupying the dual relation of master and servant, employer and employee, plaintiff and defendant, person entitled to a judgment or award in his favor and person bound to pay a part thereof out of his own proportionate share of the partnership property, and the balance, amounting possibly to the whole thereof, out of his own individual estate. Evidently the Workmen's Compensation Act did not contemplate these anomalies in its ample and detailed provisions for compensation to injured workmen and to those dependent upon them."

It has been frequently held, said the court in *Rockefeller v. Industrial Commission* (1921) — Utah —, 197 Pac. 1038, that partners are not employees within the purview of Compensation Acts, and that this is so even though the partner is paid a specific amount per day or week; that upon principle these decisions are sound if for no other reason than that one cannot at the same time be employer and employee or master and servant.

In *Reddy v. National Excavating & Foundation Co.* (1917) 178 App. Div. 943, 164 N. Y. Supp. 1110, the appellate division, without opinion, unanimously affirmed an award of the commission, in which Lyon, Commissioner, said that the question in the case, which was answered in the affirmative, was as follows: "Can a man who has been successful in business, and who has acquired skill and reputation in that business, but who has met with business reverses, so that he is unable to transact business in his own name, incorporate a company in which such good will as he has gathered to himself by his past success in business, and his skill and experience, can be availed of, and place himself in the position of an employee in that corporation, in such wise as to be covered for compensation under the terms of the New York Compensation Law?" 10 N. Y. Off. Dept. R. 621.

Cases such as *Pendergast v. Yandes* (1890) 124 Ind. 159, 8 L.R.A. 849, 24 N. E. 724, and *Weatherby v. Saxony Woolen Co.* (1894) — N. J. Eq. —, 29 Atl. 326, on the question whether corporate officers are "laborers" or "employees," within the meaning of statutes giving a preference to laborers' claims, belong to a class which is not, of course, within the scope of the annotation, but of possible interest in this connection.

English decisions.

The English decisions on the question under annotation turn upon the construction of those provisions of the English Workmen's Compensation Statute defining the term "workman," and excluding from the benefits of the act members of the crew of fishing vessels who are remunerated by a share in the profits or gross earnings of the vessel.

Under the English Workmen's Compensation Act of 1897 the term "workman" included every person who was engaged in an employment to which the act applied, "whether by way of manual labor or otherwise."

The term "workman" has been held not to include a graduate in science, who entered the employment of a dye and chemical manufacturing company,

under a written agreement for five years' service, and upon terms with regard to salary, commission on profits of inventions or improvements in manufacturing discovered by him, restrictions as to employment after the termination of his engagement, and disclosure of matters relating to the business of the company and his own researches, although his employment involved manual labor on his part. *Bagnall v. Levinstein* [1907] 1 K. B. 531, 76 L. J. K. B. N. S. 234, 96 L. T. N. S. 184, 23 Times L. R. 165. The position was taken that the governing factor in determining whether the man was a "workman" within the meaning of the act was the question what he was employed to do, and that the performance of manual labor had been erroneously treated by the lower court as conclusive that he was a "workman."

And it was held in *Simpson v. Ebbow Vale Steel, Iron & Coal Co.* [1905] 1 K. B. 453, 74 L. J. K. B. N. S. 347, 53 Week. Rep. 390, 92 L. T. N. S. 282, 21 Times L. R. 209, that the term "workman" did not include the certified manager of a coal mine, who was paid a yearly salary, and who, although his duties required his presence in the mine, was not required to engage in manual labor.

It was held, also, in *Ellis v. Ellis* [1905] 1 K. B. 324, 74 L. J. K. B. N. S. 229, 53 Week. Rep. 311, 92 L. T. N. S. 718, 21 Times L. R. 182, that a member of a partnership was not entitled to compensation for injuries received while working for the partnership, since he was not a "workman" within the meaning of the statute. For American cases involving relations of partnership, see *supra*. See also *Jamieson v. Clark* (Scot.) *infra*.

And in other cases the facts have been such as to show that the man was a coadventurer, and not a workman.

Thus, it was held that there was no contract of service between the owner of a vessel and the master, where the owner agreed to furnish the vessel and gear and repairs, and the master was to hire the crew and pay all other expenses, and go to what port he liked, and was to be paid by taking two

thirds of the gross freight. *Boon v. Quance* [1910] 102 L. T. N. S. 443, 3 B. W. C. C. 106.

Similar in its facts to the last case, and decided upon its authority, is *Hughes v. Postlethwaite* (1910) 4 B. W. C. C. 105.

It was held, also, in *Cole v. Shrub-sall & W. Bros.* [1912] W. C. Rep. 226, 5 B. W. C. C. 337, that the master of a barge who receives one half the net earnings as his wages, out of which he has to pay the mate, is not a workman.

And it has been held that there can be no compensation recovered for the death of a mate who was to receive a share of the freight of the voyage. *Hoare v. The Cecil Rhodes* (1911) 5 B. W. C. C. 49.

It has been held, also, that there is no "contract of service" within the meaning of the English statute, where a taxicab driver takes a cab from the owner's yard by the day, and pays over 75 per cent of the daily receipts to the owners, and retains 25 per cent, less the price of his petrol. *Doggett v. Waterloo Taxi-Cab Co.* [1910] 2 K. B. 336, 102 L. T. N. S. 874, 79 L. J. K. B. N. S. 1085, 26 Times L. R. 491, 54 Sol. Jo. 541, 3 B. W. C. C. 371; *Smith v. General Motor Cab Co.* [1911] A. C. 188, 80 L. J. K. B. N. S. 839, 27 Times L. R. 370, 105 L. T. N. S. 113, 55 Sol. Jo. 439, 4 B. W. C. C. 249, 1 N. C. C. A. 576.

And it was held in *Beck v. Hill & Sons* (1915) 8 B. W. C. C. 592, that the county court judge might find that there was no contract of service between the captain of a canal boat and the owners, where he was working under a system whereby he took two thirds of the gross receipts of voyages in one direction, and three quarters in the other, paying for all labor and current expenses out of his portion, and he had power to refuse any cargo offered by the owners as unremunerative, and on the voyage the boat was absolutely under his control.

But it has been held that one does not cease to be a workman, within the meaning of the English statute, merely because his remuneration is a share of the profits. *Smith v. Horlock*

[1913] W. C. & Ins. Rep. 441, 109 L. T. N. S. 196, 6 B. W. C. C. 638, holding that a contract of service existed between the owner of a sailing barge and the master, where the owner fixed the rates and directed to what dock it was to be taken, although the master's remuneration consisted of a half share of the profits, out of which he was to engage a mate and pay part of the wages of the third hand.

And it was held in *Sharpe v. Carswell* [1910] S. C. 391, 47 Scot. L. R. 335, 3 B. W. C. C. 552, that a person who owns ten sixty-fourths shares of a trading vessel, and who is employed as master by the managing owner, is a workman and entitled to compensation when injured in the course of his employment.

So, it was held in *Jamieson v. Clark* [1909] S. C. 132, 46 Scot. L. R. 74, 2 B. W. C. C. 228, that payment by a percentage of the gross earnings did not of itself indicate partnership. And in this case it was held that the act was applicable to a member of a crew of a small cargo boat whose remuneration consisted of a specified share of the gross earning; the man not being a partner, but a workman.

And in *Jones v. The Alice & Eliza* (1910) 3 B. W. C. C. 495, it was held that the mere fact that the master was remunerated by the payment of two thirds of the gross receipts was not sufficient to enable the court to draw the inference that the master was not the servant of the owners, where the master's wife swore that he was the servant of the owners, and the latter declined to give any evidence upon the subject.

The owners of a vessel, it was held in *Standing v. Eastwood & Co.* [1912] W. C. Rep. 200, 106 L. T. N. S. 477, 5 B. W. C. C. 268, are not estopped from denying that a mate was employed by them, by the fact that compensation was given him for several months, which was paid through an insurance company with which the owners had insured both the captain and the mate, it being shown that the mate was engaged by the captain, and paid by him on the sharing system out of the profits of the voyage.

The English statute expressly provided that "this act shall not apply to such members of the crew of a fishing vessel as are remunerated by shares in the profits or the gross earnings of the working of such vessel." Attention is called to the following cases involving the construction or application of this provision:

Gill v. Aberdeen Steam Trawling & Fishing Co. [1908] S. C. (Scot.) 328, holding that the provision was applicable to the mate or first fisherman of a steam trawler, whose sole remuneration was a certain proportion of the net balance of the gross price of the fish obtained on a trip, after deducting certain specified expenses, which did not include the wages of other members of the crew;

Admiral Fishing Co. v. Robinson [1910] 1 K. B. 540, 79 L. J. K. B. N. S. 551, 102 L. T. N. S. 203, 26 Times L. R. 299, 54 Sol. Jo. 305, 3 B. W. C. C. 247, holding that an engineer upon a steam fishing boat, who was paid by a share in the profits upon a guaranty that they should never amount to less than a certain sum, was "remunerated by a share" in the profits, and therefore not entitled to compensation;

Whelan v. Great Northern Steam Shipping Co. [1909] W. N. 135, 78 L. J. K. B. N. S. 860, 100 L. T. N. S. 913, 25 Times L. R. 619, holding that a "share hand" on a trawler was not entitled to compensation for injuries, although he was at the time engaged in work on one of the employer's steam cutters, for which he received a fixed sum;

Jamieson v. Clark (Scot.) *supra*, holding that a flatboat engaged in carrying barrels of fish from the fishing station to vessels, and empty barrels back from the vessels to the station, was not a fishing boat, within the provision above quoted, so as to exclude a workman on the boat who received a share of the profits from the protection of the statute;

Costello v. Kelsall Bros. & Beeching (1912) 56 Sol. Jo. 720, 5 B. W. C. C. 667, affirmed in [1913] A. C. 407, 82 L. J. K. B. N. S. 873, 108 L. T. N. S. 927, 29 Times L. R. 595, 57 Sol. Jo. 609, [1913] W. N. 187, 50 Scot. L. R. 976,

[1913] W. C. & Ins. Rep. 410, 6 B. W. C. C. 480, holding that a boatswain on a steam fishing trawler, who was remunerated by maintenance and poundage, dependent upon the profits of the fishing expedition, was within the above provision and excluded from the benefits of the statute, although he also received wages;

Burman v. Zodiac Steam Fishing Co. [1914] 3 K. B. 1039, 30 Times L. R. 651, [1914] W. N. 329, 83 L. J. K. B. N. S. 1683, 7 B. W. C. C. 767, holding that, under the above provision, members of a crew of a fishing vessel were not entitled to compensation for injuries, where they received, in addition to their regular wages, a share of "stocker," which is money received from the sale of the tails of fish, roes, shellfish, etc., and "liver money," which is a share of the proceeds of the livers cleaned from the fish, since they received a part of the gross earnings of the working of the vessel;

Buchan v. Scottish Steam Herring Fishing Co. [1917] S. C. 565, 54 Scot. L. R. 482, [1917] W. C. & Ins. Rep. 302, 10 B. W. C. C. 726, holding that money realized from a sale of the "scum," a part of the catch of fish that escape and are recovered, was a remuneration from the gross earnings of the working of the vessel, and that consequently one who was to receive a share of the "scum" and "stocker" as a part of his remuneration was excluded from the benefits of the Workmen's Compensation Act.

It was held, also, in *Burman v. Zodiac Steam Fishing Co.* (Scot.) *supra*, that if a member of a crew of a fishing vessel, as a matter of fact, received a share of the money received from the sale of fish tails, roes, shellfish, etc., and of the "liver money," he received a share of the gross earnings of the vessel, although in the running agreement, required by another statute, the column in the agreement headed "Share of Fishing Profits" was struck through in the space opposite the applicant's name to show that it did not apply to him.

And in *Stephenson v. Rossall Steam Fishing Co.* (1915) 84 L. J. K. B. N. S. 677, 112 L. T. N. S. 891 [1915] W. C.

& Ins. Rep. 121, [1915] W. N. 70, 8 B. W. C. C. 209, it was held that a deck hand on board a steam trawler, who was paid weekly wages and received in addition a share of "stocker" or inedible fish, was "remunerated by a share in the profits or gross earnings," and that his dependents were not entitled to compensation for his death, although, at the time that the vessel was lost with all on board, no stocker had been taken.

It was held, also, in *Stephenson v. Rossall Steam Fishing Co.* supra, that, although the written contract of employment of a deck hand on a fishing vessel stated only that the remuneration was to be 20s. a week, and board and lodging, it might nevertheless be inferred that he was to receive a share of the stocker or inedible fish, where, by the custom of the port, a deck hand was entitled to such shares, and the hand in question had received a share of the stocker upon the preceding trip.

But it has been held that in cases where the share of the profits made by the fisherman is so small as to be negligible, the county court judge may find that he is not remunerated by a share of the gross profits so as to be excluded from the statute. *Williams v. The Duncan* (1914) 3 K. B. 1039, 30 Times L. R. 651, [1914] W. N. 329, 83 L. J. K. B. N. S. 1683, 7 B. W. C. C. 767; *McCord v. The City of Liverpool* [1914] 3 K. B. 1039, 30 Times L. R. 651, [1914] W. N. 329, 83 L. J. K. B. N. S. 1683, 7 B. W. C. C. 767.

Under the provision above quoted, it has been held that a bonus paid to members of a fishing crew in the event that the vessel make gross earnings of a certain amount is not a share in the "profits or the gross earnings" of the vessel, where the amount of the bonus is fixed and definite, depending upon the gross profits amounting to a certain sum, and is not an amount varying according to the gross profits. *Duck v. North Sea Steam Trawling Co.* [1915] W. C. & Ins. Rep. 529, 9 B. W. C. C. 83, holding that a member of a fishing crew who receives a fixed sum per day, and also receives a fixed sum if the profits made by the vessel amount to £100, is not remunerated

by a share "in the profits or the gross earnings" of the working of the vessel.

And it has been held that it is immaterial that the bonus increases as the gross profits increase, where in each case the bonus is a fixed amount, and the next larger amount is paid only when the gross profits reach a certain additional sum. *Newstead v. The Labrador* [1916] 1 K. B. 166, 85 L. J. K. B. N. S. 93, 114 L. T. N. S. 29, [1915] W. C. & Ins. Rep. 519, [1915] W. N. 360, 9 B. W. C. C. 63.

The decision of the House of Lords in *Costello v. Kelsall Bros. & Beeching*, supra, must be considered as overruling the decision of the court of session, in which it was held that a member of a fishing crew who was paid a weekly wage, and received in addition a certain sum per pound sterling on the gross value of the fish, was not remunerated by a share of the profits or gross earnings, so as to be excluded from the benefits of the act. *Colquhoun v. Woolfe* [1912] S. C. 1190, 49 Scot. L. R. 911, [1912] W. C. Rep. 343.

Although the amount of compensation may, it seems, be important in determining whether one is an employee within the meaning of Compensation Acts, it may be observed that there are English cases on the question of the status of one as an employee as dependent upon the amount of wages received, which are not within the scope of the annotation. For example, attention is called to *Griffith v. The Penrhyn Castle* [1917] 1 K. B. 474, 86 L. J. K. B. N. S. 449, 116 L. T. N. S. 169, 10 B. W. C. C. 114, which construes the provision of the English act, that the term "workman" should not include any person whose remuneration exceeded £250 a year. It was held in this case that the earnings for the entire year should be taken into consideration in determining whether or not the wages exceeded £250 a year, and that in this instance a retired master mariner was an employee, although at the particular time he was earning at the rate of more than £250 per year. R. E. H.

JOSEPH GOLDSTEIN, Appt.,

v.

LILLIAN M. SACHS, by Next Friend.

(— Md. —, 114 Atl. 593.)

*Maryland Court of Appeals — May 6, 1921.***Breach of promise — refusal of girl to marry away from home — effect.**

1. A man is not justified in breaking his engagement to marry a girl by the fact that, after having promised to marry him away from her home, where they at the time were, she changes her mind and determines not to do so in the absence of her parents and without their consent, since her home is, by custom, the place for the marriage.

[See note on this question beginning on page 1303.]

— when marriage to be performed.

2. When, upon engagement to marry, no time for the wedding is fixed, the marriage is to be performed within a

reasonable time, according to the circumstances of each particular case.

[See 4 R. C. L. 147.]

APPEAL by defendant from a judgment of the City Court of Baltimore (Gorter, J.) in favor of plaintiff in an action brought to recover damages for alleged breach of promise to marry. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. Arthur L. Jackson for appellant.

Messrs. Hope H. Barroll and L. Wethered Barroll, for appellee:

The mere fact that plaintiff allowed herself to be persuaded to name days for her wedding which she later changed, continuing all the time her intent to marry, does not constitute any legal or moral justification for defendant breaking the engagement.

Kelly v. Renfro, 9 Ala. 325, 44 Am. Dec. 441; 4 R. C. L. 167; Wanecek v. Kratky, 69 Neb. 770, 66 L.R.A. 798, 96 N. W. 651; Parkinson v. Murphy, — R. I. —, 107 Atl. 235; Lewis v. Tapman, 90 Md. 307, 47 L.R.A. 385, 45 Atl. 459.

Boyd, Ch. J., delivered the opinion of the court:

This is an appeal from a judgment rendered by the Baltimore city court in favor of the appellee against the appellant for the sum of \$1,500 in a suit for breach of promise to marry,—the case having been submitted to the court without a jury. The plaintiff was twenty years of age on October 15, 1919, and lived with her parents in Chestertown, Maryland, and the defendant lived in Baltimore. It is

conclusively shown, and not denied by the defendant (appellant), that he promised to marry the plaintiff (appellee). They first became acquainted in September, 1919, although the defendant had seen her at her father's house in the latter part of August. Their acquaintance soon developed into a love affair, but according to her understanding, and apparently his also, they did not become engaged until November of that year. It was the week before Thanksgiving, on the 21st of the month, according to the evidence of the defendant and his sister-in-law. That evening he gave her a valuable ring, which seemed to be treated as the evidence of their engagement. The defendant testified that on October 21st Mr. Sachs, the father of the plaintiff, asked him what his intentions were towards Lillian, his daughter, and in that conversation spoke of getting her clothes, a seal-skin coat, etc., and was very friendly. He said that later Mr. Sachs said: "When can we arrange for

the engagement, and we decided it was for Christmas."

He also stated that the plaintiff had said it would be of great help to her if she had her ring, as she could come to Baltimore as often as she wanted and have more privileges. So he determined to get the ring and testified: "If I became engaged now, or became engaged around Christmas, it was immaterial; and if that was the girl's pleasure, it was all right to me. I went to the jeweler's on Friday and procured the ring," which he gave to her the night of November 21, 1919, at his brother's house. He further testified that she "immediately called up her father, and said she was engaged, and said she had gotten the ring, and he congratulated her, and asked her to call me to the phone, and congratulated me."

He and his brother and sister-in-law went to Chestertown the following Sunday. At that time Mr. Sachs told him that he was surprised at the engagement being so soon, and that he did not know enough about him. The defendant went to see the plaintiff from time to time at the week end, and on one of these occasions Mr. Sachs said to him: "'Now that you are engaged, I want to know when you are going to get married,' in that tone. So I said, 'Mr. Sachs, as far as getting married, it is hard to get a proper house, etc., and it will take a little time; but as soon as I get everything straightened out I will let you know,' with the results of it was Mr. Sach said to me, 'Well, it only takes a couple of days to get married, if you have no home of any kind you can—' Mr. Sachs says, 'Well, if you haven't any place, you can stay with your mother, or you can get a couple furnished rooms.' I says, 'Mr. Sachs, I wouldn't start out that way, it has always been my pleasure to get a home, or small apartment, like everybody I know, and I would like to start out, and start out right, and not that way,' and her sister

Sophia said, 'If you get an apartment, are you going to get a spare room?' I says, 'Not as I know of.' That ended it that evening."

That was in the early part of December. He said he felt hurt at something Mr. Sachs said in Baltimore, and did not go back to Chestertown any more, but that Lillian wrote to him about not coming down, and said she tried to get away for Christmas; that her clothes were in poor condition, and her father would not fix them for her, and would not give her anything. Her father was a merchant, and she spent part of the time in his store. She went to Baltimore on December 31st, when he took her to the theater and afterwards to a dance. He said that after they got back they talked matters over, and concluded it was best to go over to Washington and get married. The next morning they went to Washington, and when they got there she said she would like to talk with her uncle. She saw him, and told him they were going to get married. Her uncle said: "If he found he had time, he would try to go to Chestertown to see her father, and see if he couldn't straighten the matter out in nice sort of way, and we get married in the proper way," etc.

They left her uncle and went to his son's house, that she changed her mind five or six times—saying that she would get married and then saying that she would not. The next day, Friday, January 2d, they returned to Baltimore. He said that on Monday, January 5th, Lillian told him that her father had called her up from Washington, saying he and his wife were coming to Baltimore, and asked them to meet them at the station. They went to meet them, but they had taken an earlier train, and they found that they were at her aunt's. They went there, and Mr. Sachs did not speak to them, and they went into the kitchen where her mother was. She welcomed them, and he sat down in the kitchen. Mr. Sachs

came in there and said: "Why did you want to go away and get married to Lillian? I said to him, 'Well, it isn't any use to go into all these things again, but the sole purpose of our agreeing to get married together was that you were not providing Lillian with the clothes you promised to give her, you always interfered in our plans,' etc., 'and furthermore,' I said, 'Mr. Sachs, it is pretty hard for a young man that wants to do the right thing, and has always been known to do the right thing, and when a father comes to the city and asked a young man his intentions, promising to do this, not asking for all these little things, it is a pleasure to the young fellow to know that he is getting a father-in-law that really is a gentleman, and there is your wife at this present moment with the sealskin coat on her back that you had promised to give your daughter.' It hurt my feelings and that ended it."

Later that evening, he and Lillian agreed that the best thing for them to do was to get married. She was to go to her sister's house the next morning, and she and her sister were to go up town; he was to give them the money and let them buy whatever they wanted, and "by the time they were through, if it was in the afternoon, and if it was time to get a license, I would be willing to marry her." That was Monday night, and they were to be married Tuesday, January 6th. She did not go to the house, and he did not hear from her until 1 o'clock that day, Tuesday. He said: "She called me up, and she says, 'I got good news now.' I was glad to hear it. She says, 'Father has apologized for the way he spoke last night, and they were out buying some things,' and we would be married at Chestertown. I said, 'Was that all arranged unknown to me, and hadn't we made other arrangements the night before?' So she said, 'Is that the way you feel about it,' and with that she hung up her receiver, and

with that I hadn't heard any further from her. Later on I heard that they had left town, not calling me up, saying, 'I am going to leave town; good-bye'—something of that kind; nothing was said to me, nothing whatever. So that made me feel more hurt. Then I sat down and wrote the letter which was before you, and which will describe my meaning of the letter."

He wrote the following letter:

Baltimore, Maryland, January 7th, 1920.

My Dear Lillie:

Upon the decision of your mother and father, and more so myself, especially after having left the city unknown to me, after our conversation on the telephone yesterday, I now take for granted that in view of the treatment accorded you as well as myself after our engagement, under the unfilled promise of your father, that you have chosen your choice under the unusual circumstances accorded me that I am this evening returning you the little presents which I don't feel to keep—and I can safely say that in the manner your father eluded me after my promise to him as a gentleman is sufficient to warrant the return of the engagement ring—regretting very much and wishing you success for the future, I beg to close for ever,

Yours,
Joe.

St. Paul 2215.

We have thus stated quite fully the testimony of the defendant, as the parties agree as to some of the material questions, although they differ in some respects. The plaintiff testified: That they went to Washington twice; that the first time he did not mention marriage, but on the second trip he said: "How about our getting married while here?" She said she was very nervous, and did not know what to do—that she would say that she would marry him, and in five minutes would change her mind, and say she would not. Fi-

nally she told him that, if she married him in Washington, she would never be forgiven by her parents, and she would never be allowed to come home again; that she would be disowned; and she wanted her mother present when she was married, but that she would marry him at home. She said that she and the defendant talked the matter over after they went back to her cousin's house, after they had been to the theater, and he offered her a check and told her that her cousin would go out with her to buy her trousseau; but she told him that she had never taken money from anybody and did not intend to take any from him until after they were married, and said: "I will not be married until we go home."

The evidence seems to indicate that she was struggling between what she would like to do—to get married in Washington—and what she thought was her duty to her parents, and although she was thus undecided for some time, she finally reached the conclusion stated above. There is nothing to suggest that she did not then marry him because her affection for him had in any degree lessened, but it was because she did not think it was proper for her to do so under the circumstances, and she manifested a commendable pride when she declined to accept money from him with which to purchase her trousseau, when her father was able and had promised to give it to her.

Then, when she returned to Baltimore, and her father and mother came there from Washington, where they had gone from Chestertown to see if she had been married (as they had heard from her sister that she was to be), she did not refuse to marry the defendant, but wanted to be married at her home. She testified that, when they returned from Washington, this defendant told her to stay in Baltimore for about two weeks, until he could get ready to marry her; that he could not leave his business for about that time. She also said she

telephoned him before she left Baltimore: "I only told him—I told him I was out with my father doing shopping, and that my father was buying my trousseau, and then he flashed up, saying he didn't want me to take anything whatsoever from my father; he was going to buy my trousseau, and he would take care of everything, and he told me not to have anything to do with my father. I told him, 'I am going to leave for home; I will write you just as soon as I get home;' and he said, 'Don't you dare go home; you stay in the city and do as I say; don't do what your father says.' Then I said, 'I must go home; mother is very ill; I must take her home; it is her wish I take her; I always want to obey my parents, and I am doing it; I am going home.' And I told him good-bye; I would write to him as soon as I arrived home."

That was followed by his letter of the 7th of January. She said she was made nervous and sick by that letter, and was advised to take a trip to see her sister, which she did, but returned home in a few days, as she thought she might hear from the defendant. On January 27th, nearly three months before this suit was brought, she wrote to him, assuring him of her love for him, and that she was willing to leave her parents and become his wife, concluding her letter as follows:

Oh, well, dear, let's forget everything that has happened and think of our wonderful future that we had planned. I am willing to forget and forgive, so that we might be happily married. Let's start up our correspondence again, and be real sweet and loving to each other, like we always were. Hoping to hear from you by return mail. Remember me to all the folks.

As ever yours,
Lillian.

When the engagement ring was given, on November 21, 1919, it was not pretended that any time was

fixed for the wedding. The law is that, when no time is fixed, the marriage is to be performed within a reasonable time according to the circumstances of each particular case. 4 R. C. L. 147; 9 C. J. 330; 4 Am. & Eng. Enc. Law, 890. Where no place is fixed, the home of the bride is *prima facie*, by the custom of society, the place for the marriage. 4 Am. & Eng. Enc. Law, 892; 4 R. C. L. 148; 9 C. J. 331.

If a young girl, at the instance of her lover, agrees when they are away from her home to marry

—refusal of girl
to marry away
from home—
effect.

where they are, and then on further reflection determines not to do so, in the absence of her parents and without their consent, but does not refuse to marry him later, it certainly cannot be said that her refusal to then get married could justify her lover in breaking the engagement. Even when the date has been fixed, it is stated in 4 R. C. L. 149, that "a postponement of the performance of a contract of marriage from the date fixed therefor, by one party without the consent of the other, does not constitute an actionable breach of the contract, if based upon good and sufficient reason."

Or, as stated in 9 C. J. 333: "A mere postponement of the marriage, or failure to marry on the day set therefor, does not necessarily constitute a breach, as the contract is deemed to continue in force until one or the other of the parties, either by words or by conduct, shows that he or she is unwilling to fulfil the contract, and if the party postponing the marriage has a good and sufficient reason therefor, the postponement does not amount to a breach, even though the other party does not consent thereto."

So, if we assume that the defendant's version is the correct one, as to what took place in Baltimore after their return from Washington, we cannot hold that there was

any breach on the part of the plaintiff, which justified the defendant in writing the letter of January 7th, and in taking such action as he did in demanding the return of the ring, suing her for it, etc. The plaintiff's father was, as far as appears in the record, fully able to provide her with a trousseau, or such clothes as were necessary, and if, after being persuaded by the defendant, she agreed to let him provide clothes for her, and then, on further reflection, concluded not to do so, she only did what any girl, who had proper respect for herself and her father, would likely do, after giving the matter consideration, and when she was not under the immediate influence of her lover to have a hasty marriage, regardless of the feelings of her mother. The plaintiff testified that her mother had been made sick by hearing that they were married in Washington.

The defendant is not without fault, if a change of mind is evidence of it, as he seems to have changed several times. When her father said he would get his daughter nice clothes and a sealskin coat, the defendant seemed to be well satisfied, but later told the plaintiff that he did not want her to accept anything from her father, although he says he was hurt when he saw her mother have on the sealskin coat which the daughter was to have. At first he was greatly pleased at the reception given him by the family, including her father, but later changed his mind. It is said in the appellant's brief: "It is perfectly apparent from the entire record that her father particularly was doing his best to prevent the marriage, and also it is clear that he had succeeded, and had taken the plaintiff back to Chestertown with him for that very purpose."

If he was the parsimonious man he was represented to be by the defendant, it is not made clear why he would have opposed the marriage, if the defendant was going

to save him from the expense of a trousseau and was able to provide for his daughter. But a father and mother cannot be censured for urging their daughter to be married in the way which evidently was originally intended and expected, and, as they were all of the Jewish faith, probably in their accustomed way, instead of hastily marrying away from home in Washington or Baltimore,—especially as the defendant had told her father in December that he was not then in condition to marry.

Under the evidence there can be no doubt that the first and second prayers were properly rejected. It is said in 9 C. J. 350, that "where plaintiff has established a promise and a breach, with loss, a *prima facie* case is made out, thus throwing on defendant the burden of vindicating himself."

And when we recall that no time or place had been fixed for the mar-

riage when they became engaged, and consider the authorities cited above, the burden might well be placed on him; but, regardless of that, we can have no doubt that the third and fifth prayers of the defendant were, under the circumstances of the case, properly rejected. Both of them ignored the reasons given by the plaintiff for changing her mind. Just why the defendant's fourth and sixth prayers were granted in the shape they are does not appear, but the appellant cannot complain of that action.

We do not understand the motion to dismiss the appeal to be pressed, and hence we will not discuss it, but will overrule it. It follows from what we have said that the judgment must be affirmed.

Motion to dismiss the appeal overruled, and judgment affirmed; the costs to be paid by the appellant.

ANNOTATION.

Differences as to the time, place, or other circumstances of proposed marriage as defense to action for breach of promise to marry.

The general questions as to time for performance of the marriage, and as to the effect of repeated postponements of the marriage ceremony as a breach of the contract are not within the scope of the note.

While no reported case on all fours with the reported case (*GOLDSTEIN v. SACHS*, ante, 1298) has been found, the decision in that case, that the refusal of a woman to be married away from home, in the absence of her parents and without their consent, does not justify a breach of the marriage contract, finds substantial support.

Refusal to marry on the day set for the ceremony does not constitute an actionable breach of marriage promise, where the date inadvertently fixed is a day belonging to the holy season of the faith to which both parties belong, during which, by the rules and customs of their church, marriage is forbidden and cannot be performed. *Stone v. Appel* (1883) 12 Ill. App. 582. The

court said: "When parties enter into mutual promises to marry, and expressly agree that their marriage shall be celebrated under and in accordance with the rules and customs of a particular religion or church, but, by inadvertence or accident, they happen to fix upon a day for that purpose, which turns out to be one on which such ceremony, by the rules and customs of the religion or church referred to, is prohibited and cannot be performed, then, if either party should on that account decline or refuse to be married at such prohibited time, or in a manner other than that agreed upon, but be willing and offer to be married at any reasonable or proper time after such period of prohibition is passed, such party so declining or refusing could not, in our opinion, be held liable in damages by reason of the premises as for a breach of promise of marriage. Although the law of this state does not make any religious ceremony in-

dispensable to a valid marriage, yet such is the liberality of its spirit that it recognizes the right of every person to follow the dictates of his or her own conscience or the teachings of the church to which he or she may belong, or even a mere whim in that regard, and to provide in the marriage contract that it shall be consummated in accordance with rites of some particular church designated by the parties, and its rules and customs. When that is done, the reference by the contract to such rules and customs makes such rules and customs a part of the contract, and a refusal by one of the parties to be married in contravention of them cannot be considered as inconsistent with such party's promise, or amount to a breach of it."

A mere request for a postponement of the marriage ceremony for an expressed and reasonable cause does not, in law, amount to a repudiation or renunciation of the contract. *Walters v. Stockberger* (1898) 20 Ind. App. 277, 50 N. E. 763.

So, where a man of sixty-six years of age had promised to marry a woman about twenty-four years of age, it did not amount to a breach of the contract that he desired a postponement of the marriage ceremony from the date fixed, in order that he might, if he could, reconcile to the marriage his children who were opposing it. *Ibid*.

Although the day is set for concluding the marriage, it is evident circumstances may occur to make it entirely improper to proceed or render it expedient to delay the consummation. *Kelly v. Renfro* (1846) 9 Ala. 325, 44 Am. Dec. 441.

So, a man engaged to marry, in whom there subsequently appears without any intervening fault on his part, a loathsome venereal and contagious disease, which renders it unsafe or improper for him to marry, is entitled to postpone the marriage until he is cured, if the disease is of a temporary character, and this even though the woman is unwilling to have the ceremony postponed. *Trammell v. Vaughan* (1900) 158 Mo. 214, 51 L.R.A. 854, 81 Am. St. Rep. 302, 59 S. W. 79. The court said: "The idea

that the ceremony should be performed and the consummation of the marriage postponed until he is cured is not only intolerable, but obnoxious to a proper subservience of the public interests and morals. This, too, whether the woman knows his condition and consents to such an arrangement or not; for though she may be willing to waive the defect, or be indifferent to the condition or its consequences to her and her children, the third party to the contract, the state, has a right to and does object. If the disease is of a temporary character, such as was the case here, and could be easily cured, the defendant is entitled to postpone the marriage until he is cured."

In *Waneczek v. Kratky* (1903) 69 Neb. 770, 66 L.R.A. 798, 96 N. W. 651, it appears that plaintiff and defendant had agreed to be married upon a certain date by a certain priest. On the day of the ceremony defendant failed to appear, and, upon being asked for an explanation, gave as an excuse that the priest had stated to the mother of plaintiff that he, defendant, was not a good Catholic and was not strong enough in the faith, and so he declined to have the ceremony performed by that priest, but stated that he was willing to be married by any other priest or at the courthouse or by anyone authorized to perform the ceremony. It was held that this action of defendant, without just cause, amounted to a breach of the contract on his part, and that plaintiff was justified in electing at the time to consider the contract ended and sue for damages.

And in *Falk v. Burke* (1914) 93 Kan. 93, L.R.A.1915B, 279, 143 Pac. 498, both parties were communicants of the Roman Catholic Church, a rule of which prescribed that a baptismal certificate be demanded from the parties if they had been baptized in another parish. In this case the defendant had been baptized in Ireland, and it being apparent that he would be unable to obtain a certificate in time for the day fixed for the wedding, the priest prepared a paper to be signed and sworn to by the mother, which defendant refused to permit his mother to sign. Defendant failed to appear at the

church on the day set for the ceremony, apparently because of the demand for a baptismal certificate or a sworn statement and his refusal to have it signed by his mother, and the court said that plaintiff had an undoubted right, if she had seen fit, to consider the contract as breached on the day fixed for the ceremony. In this case, however, it was held that she had waived the breach by opening negotiations for a marriage at a later date.

So, too, in *Kelly v. Renfro* (Ala.) supra, where on the day of the ceremony defendant sent a note to plaintiff's father to the effect that he had concluded that it would be better to postpone the ceremony, and requested the father to so notify his daughter, it was held that such action would have fully warranted plaintiff in considering the engagement as terminated, as soon as her suitor's note was communicated to her. J. H. B.

MERCHANTS' LOAN & TRUST COMPANY, Trustee, etc., of Arthur Ryerson, Deceased, Plff. in Err.,

v.

JULIUS F. SMJETANKA, Formerly United States Internal Revenue Collector for the First District of the State of Illinois.

United States Supreme Court — March 28, 1921.

(— U. S. —, 65 L. ed. —, 41 Sup. Ct. Rep. 386.)

Internal revenue — profit in sale by testamentary trustee.

1. A gain or profit derived from the sale by a testamentary trustee of personal property of the estate which has appreciated in value over its market value on March 1, 1913, the testator having died prior to that date, and the property being among the assets which came to the trustee, is taxable under the Act of September 8, 1916, § 2a, as amended by the Act of October 3, 1917, which defines the income of a taxable person as including gains, profits, and income derived from sales or dealings in property, whether real or personal, growing out of the ownership or use of, or interest in, real or personal property, or gains or profits and income derived from any source whatever.

[See note on this question beginning on page 1311.]

Appeal — Federal question — Constitutionality of income tax.

2. The Federal Supreme Court has jurisdiction of a writ of error to a district court to review a judgment which sustained a demurrer to a declaration in assumpsit to recover back Federal income taxes, where the claim to recover is based upon the contention that the fund taxed was not income within the scope of U. S. Const., 16th Amend., and that the effect given by the lower court to the Federal legislation under which such taxes were imposed renders it unconstitutional and void.

[See 27 R. C. L. 72.]

Internal revenue — income — accretions of selling values.

3. A testator cannot, by declaring in his will that accretions of selling values shall be considered principal, and not income, render such items nontaxable under Federal income tax legislation, if the terms of such legislation are broad enough to include them.

— income tax — taxable persons — testamentary trustee.

4. A testamentary trustee is, by the express provisions of the Income Tax Acts of September 8, 1916, § 2b, and October 3, 1917, § 1204 (1) (c), a taxable person.

—income—definition.

5. The word "income" must be given the same meaning in all of the Income Tax Acts of Congress that was given to it in the Federal Corporation Excise Act.

—income tax—accretions of selling values.

6. The gain derived from a single, isolated sale of personal property which has appreciated in value during a series of years is income within the meaning of the 16th Amendment to the Federal Constitution.

[See 26 R. C. L. 148.]

ERROR to the District Court of the United States for the Northern District of Illinois to review a judgment sustaining a demurrer to a declaration filed to recover back Federal income taxes. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Albert M. Kales and Walter L. Fisher, for plaintiff in error:

The mere increase in the value of capital assets (prior to any conversion or redemption) is not income.

Eisner v. Macomber, 252 U. S. 189, 64 L. ed. 521, 9 A.L.R. 1570, 40 Sup. Ct. Rep. 189; Gray v. Darlington, 15 Wall. 63, 21 L. ed. 45; Lynch v. Turrish, 247 U. S. 221, 62 L. ed. 1087, 38 Sup. Ct. Rep. 537.

The conversion by the trustee in the case at bar does not cause the increase in the value of capital assets to be income.

Smith v. Hooper, 95 Md. 16, 51 Atl. 844; Stewart v. Phelps, 71 App. Div. 91, 71 N. Y. Supp. 526, affirmed in 173 N. Y. 621, 66 N. E. 1117; Guthrie v. Akers, 157 Ky. 649, 163 S. W. 1117; Boardman v. Mansfield, 79 Conn. 634, 12 L.R.A.(N.S.) 793, 118 Am. St. Rep. 178, 66 Atl. 169; Connolly's Estate, 198 Pa. 137, 47 Atl. 1125; Kemble's Estate, 201 Pa. 523, 51 Atl. 310; Re Kernochan, 104 N. Y. 618, 11 N. E. 149; Re Armitage [1893] 3 Ch. 337, 63 L. J. Ch. N. S. 110, 7 Reports, 290, 69 L. T. N. S. 619; Bulkeley v. Worthington Ecclesiastical Soc. 78 Conn. 526, 12 L.R.A.(N.S.) 785, 63 Atl. 351; Wilberding v. Miller, 88 Ohio St. 609, L.R.A.1916A, 718, 106 N. E. 665; Graham's Estate, 198 Pa. 216, 47 Atl. 1108; McKeown's Estate, 263 Pa. 78, 106 Atl. 189; Thayer v. Burr, 201 N. Y. 155, 94 N. E. 604; Re Stevens, 111 App. Div. 773, 98 N. Y. Supp. 29, 187 N. Y. 471, 12 L.R.A.(N.S.) 814, 80 N. E. 358, 10 Ann. Cas. 511; United States Trust Co. v. Heye, 224 N. Y. 242, 120 N. E. 645; Re Gerry, 103 N. Y. 445, 9 N. E. 235; Devenney v. Devenney, 74 Ohio St. 96, 77 N. E. 688; Whittingham v. Schofield, 24 Ky. L. Rep. 2444, 67 S. W. 846.

The gain or increase has not been derived, that is, received or drawn by

the recipient (the taxpayer) for his separate use, benefit, and disposal.

Eisner v. Macomber, 252 U. S. 189, 64 L. ed. 521, 9 A.L.R. 1570, 40 Sup. Ct. Rep. 189.

Even where the legal and beneficial owner of capital assets sells them at a profit as a single, isolated transaction (he not being in any sense in the business of buying and selling for profit), and ascertains the gain in cash, and uses the same as he pleases, the gain is not income.

Ibid.; Gray v. Darlington, 15 Wall. 63, 21 L. ed. 45; Lynch v. Turrish, 247 U. S. 221, 62 L. ed. 1087, 38 Sup. Ct. Rep. 537; Lynch v. Hornby, 247 U. S. 339, 62 L. ed. 1149, 38 Sup. Ct. Rep. 543; Peabody v. Eisner, 247 U. S. 347, 62 L. ed. 1152, 38 Sup. Ct. Rep. 546; Tebrau (Johore) Rubber Syndicate v. Farmer [1910] S. C. 906, 5 Tax Cas. 658; Hudson Bay Co. v. Stevens, 5 Tax Cases, 424; Assets Co. v. Inland Revenue, 24 S. C. Sess. Cas. 4th series, 578.

The Act of 1916, as amended by the Act of 1917, by its proper construction does not permit the assessment of any tax upon the increase in value of the capital assets in question.

Gray v. Darlington, 15 Wall. 63, 21 L. ed. 45; Lynch v. Turrish, 247 U. S. 221, 62 L. ed. 1087, 38 Sup. Ct. Rep. 537; Towne v. Eisner, 245 U. S. 418, 62 L. ed. 372, L.R.A.1918D, 254, 38 Sup. Ct. Rep. 158; Maryland Casualty Co. v. United States, 251 U. S. 342, 64 L. ed. 297, 40 Sup. Ct. Rep. 155; First Trust & Sav. Bank v. Smietanka, — C. C. A. —, 268 Fed. 230; Gould v. Gould, 245 U. S. 151, 62 L. ed. 211, 38 Sup. Ct. Rep. 53; Treat v. White, 181 U. S. 264, 45 L. ed. 853, 21 Sup. Ct. Rep. 611.

Mr. William L. Frierson, Solicitor General, for defendant in error:

Gains derived from the conversion

of capital assets constitutes income which Congress may constitutionally tax.

Eisner v. Macomber, 252 U. S. 189, 64 L. ed. 521, 9 A.L.R. 1570, 40 Sup. Ct. Rep. 189; Stratton's Independence v. Howbert, 231 U. S. 399, 58 L. ed. 285, 34 Sup. Ct. Rep. 136; Doyle v. Mitchell Bros. Co. 247 U. S. 179, 62 L. ed. 1054, 38 Sup. Ct. Rep. 467.

Ever since the passage of the Act of 1909, the administrative department of the government has construed the word "income" as including profits derived from the conversion of capital assets.

Doyle v. Mitchell Bros. Co. 247 U. S. 179, 62 L. ed. 1054, 38 Sup. Ct. Rep. 467.

Gray v. Darlington, 15 Wall. 63, 21 L. ed. 45, is not authority for the contention that profits derived from the sale of capital assets are not income.

Hays v. Gauley Mountain Coal Co. 247 U. S. 189, 62 L. ed. 1061, 38 Sup. Ct. Rep. 470; United States v. Cleveland, C. C. & St. L. R. Co. 247 U. S. 195, 62 L. ed. 1064, 38 Sup. Ct. Rep. 472.

The fact that, under the laws of most of the states, gains derived from the profitable sale of capital assets are, as between a life tenant and a remainderman, treated as principal, and not as income, cannot operate to prevent such gains being income when clearly included in the definition of income as adopted by an act of Congress.

Mr. Justice Clarke delivered the opinion of the court:

A writ of error brings this case here for review of a judgment of the district court of the United States for the northern district of Illinois, sustaining a demurrer to a declaration in assumpsit to recover an assessment of taxes for the year 1917, made under warrant of the Income Tax Act of Congress, approved September 8, 1916 (39 Stat. at L. chap. 463, p. 756), as amended by the act approved October 3, 1917 (40 Stat. at L. chap. 63, p. 300, Comp. Stat. § 6336aa, Fed. Stat. Anno. Supp. 1918, p. 336). Payment was made under protest, and the claim to recover is based upon the contention that the fund taxed was not "income" within the scope of the 16th Amendment to the Con-

stitution of the United States, and that the effect given by the lower court to the act of Congress cited renders it unconstitutional and void. This is sufficient to sustain the writ of error. Towne v. Eisner, 245 U. S. 418, 62 L. ed. 372, L.R.A.1918D, 254, 38 Sup. Ct. Rep. 158.

Appeal—Federal question—constitutionality of income tax.

Arthur Ryerson died in 1912, and the plaintiff in error is trustee under his will, of property the net income of which was directed to be paid to his widow during her life, and after her death to be used for the benefit of his children, or their representatives, until each child should arrive at twenty-five years of age, when each should receive his or her share of the trust fund.

The trustee was given the fullest possible dominion over the trust estate. It was made the final judge as to what "net income" of the estate should be, and its determination in this respect was made binding upon all parties interested therein, "except that it is my will that stock dividends and accretions of selling values shall be considered principal, and not income."

The widow and four children were living in 1917.

Among the assets which came to the custody of the trustee were 9,522 shares of the capital stock of Joseph T. Ryerson & Son, a corporation.

It is averred that the cash value of these shares, on March 1, 1913, was \$561,798, and that they were sold for \$1,280,996.64, on February 2, 1917. The Commissioner of Internal Revenue treated the difference between the value of the stock on March 1, 1913, and the amount for which it was sold on February 2, 1917, as income for the year 1917, and upon that amount assessed the tax which was paid. No question is made as to the amount of the tax if the collection of it was lawful.

The ground of the protest, and the argument for the plaintiff in error here, is that the sum charged as "income" represented appreciation in the value of the capital as-

sets of the estate which was not "income" within the meaning of the 16th Amendment, and therefore could not, constitutionally, be taxed without apportionment, as required by § 2, clause 3, and by § 9, clause 4, of article 1 of the Constitution of the United States.

It is first argued that the increase in value of the stock could not be lawfully taxed under the act of Congress because it was not income to the widow, for she did not receive it in 1917, and never can receive it; that it was not income in that year to the children, for they did not then, and may never, receive it; and that it was not income to the trustee, not only because the will creating the trust required that "stock dividends and accretions of selling value shall be considered principal, and not income," but also because, in the "common understanding," the term "income" does not comprehend such a gain or profit as we have here, which, it is contended, is really an accretion to capital, and therefore not constitutionally taxable under *Eisner v. Macomber*, 252 U. S. 189, 64 L. ed. 521, 9 A.L.R. 1570, 40 Sup. Ct. Rep. 189.

Internal
revenue—~~income~~
—accretions of
selling values.

The provision of the will may be disregarded. It was not within the power of the testator to render the fund nontaxable.

Assuming for the present that there was constitutional power to tax such a gain or profit as is here involved, are the terms of the statute comprehensive enough to include it?

Section 2 (a) of the Act of September 8, 1916 (39 Stat. at L. 757, chap. 463, Comp. Stat. § 6336b, Fed. Stat. Anno. Supp. 1918, p. 312, 40 Stat. at L. 300, 307, § 212, chap. 63, Comp. Stat. § 6336½m, Fed. Stat. Anno. Supp. 1918, p. 349), applicable to the case, defines the income of "a taxable person" as including "gains, profits, and income derived from . . . sales, or dealings in property, whether real or personal, growing out of the ownership or

use of or interest in real or personal property . . . or gains or profits and income derived from any source whatever."

Plainly the gain we are considering was derived from the sale of personal property, and very certainly the comprehensive last clause, —profit in sale by testametary trustee. "gains or profits and income derived from any source whatever," must also include it, if the trustee was a "taxable person" within the meaning of the act when the assessment was made.

That the trustee was such a "taxable person" is clear

from § 1204 (1) —income tax—
(c) of the Act of —taxable persons
October 3, 1917 (40 —testamentary
trustee.

Stat. at L. 331, chap. 63, Comp. Stat. § 6336h, Fed. Stat. Anno. Supp. 1918, p. 320), which requires that "trustees, executors . . . and all persons, corporations, or associations, acting in any fiduciary capacity, shall make and render a return of the income of the person, trust, or estate for whom or which they act, and be subject to all the provisions of this title which apply to individuals."

And § 2 (b) of the Act of September 8, 1916, supra, specifically declares that the "income received by estates of deceased persons during the period of administration or settlement of the estate, . . . or any kind of property held in trust, including such income accumulated in trust for the benefit of unborn or unascertained persons, or persons with contingent interests, and income held for future distribution under the terms of the will or trust shall be likewise taxed, the tax in each instance, except when the income is returned for the purpose of the tax by the beneficiary, to be assessed to the executor, administrator, or trustee, as the case may be."

Further, § 2 (c) clearly shows that it was the purpose of Congress to tax gains derived from such a sale as we have here, in the manner in which this fund was assessed, by providing that, "for the purpose of

ascertaining the gain derived from the sale or other disposition of property, real, personal, or mixed, acquired before March 1, 1913; the fair market price or value of such property as of March 1, 1913, shall be the basis for determining the amount of such gain derived."

Thus, it is the plainly expressed purpose of the act of Congress to treat such a trustee as we have here as a "taxable person," and, for the purposes of the act, to deal with the income received for others precisely as if the beneficiaries had received it in person.

There remains the question, strenuously argued, whether this gain in four years of over \$700,000 on an investment of about \$500,000 is "income" within the meaning of the 16th Amendment to the Constitution of the United States.

The question is one of definition, and the answer to it may be found in recent decisions of this court.

The Corporation Excise Tax Act of August 5, 1909 (36 Stat. at L. 11, 112, chap. 6), was not an income tax law, but a definition of the word "income" was so necessary in its administration that in an early case it was formulated as "a gain derived from capital, from labor, or from both combined." *Stratton's Independence v. Howbert*, 231 U. S. 399, 415, 58 L. ed. 285, 292, 34 Sup. Ct. Rep. 136.

This definition, frequently approved by this court, received an addition, in its latest income tax decision, which is especially significant in its application to such a case as we have here, so that it now reads: "Income may be defined as the gain derived from capital, from labor, or from both combined, *provided it be understood to include profit gained through sale or conversion of capital assets.*" *Eisner v. Macomber*, 252 U. S. 189, 207, 64 L. ed. 521, 528, 9 A.L.R. 1570, 40 Sup. Ct. Rep. 189.

The use made of this definition of "income" in the decision of cases arising under the Corporation Excise Tax Act of August 5, 1909, and under the Income Tax Acts is, we

think, decisive of the case before us. Thus, in two cases arising under the Corporation Excise Tax Act:

In *Hays v. Gauley Mountain Coal Co.* 247 U. S. 189, 62 L. ed. 1061, 38 Sup. Ct. Rep. 470, a coal company, without corporate authority to trade in stocks, purchased shares in another coal mining company in 1902, which it sold in 1911, realizing a profit of \$210,000. Over the same objection made in this case, that the fund was merely converted capital, this court held that so much of the profit upon the sale of the stock as accrued subsequent to the effective date of the act was properly treated as income received during 1911, in assessing the tax for that year.

In *United States v. Cleveland, C. & St. L. R. Co.* 247 U. S. 195, 62 L. ed. 1064, 38 Sup. Ct. Rep. 472, a railroad company purchased shares of stock in another railroad company in 1900, which it sold in 1909, realizing a profit of \$814,000. Here, again, over the same objection, this court held that the part of the profit which accrued subsequent to the effective date of the act was properly treated as income received during the year 1909, for the purposes of the act.

Thus, from the price realized from the sale of stock by two investors, as distinguished from dealers, and from a single transaction, as distinguished from a course of business, the value of the stock on the effective date of the tax act was deducted, and the resulting gain was treated by this court as "income" by which the tax was measured.

It is obvious that these decisions in principle rule the case at bar if the word "income" has the same meaning in the Income Tax Act of October 3, 1913 [38 Stat. at L. 166, chap. 16, 4 Fed. Stat. Anno. 2d ed. p. 236], that it had in the Corporation Excise Tax Act of 1909, and that it has the same scope of meaning was in effect decided in *Southern P. Co. v. Lowe*, 247 U. S. 330, 335, 62 L. ed. 1142, 1147, 38 Sup. Ct. Rep. 540, where it was assumed, for the purposes of decision, that

there was no difference in its meaning as used in the Act of 1909 and in the Income Tax Act of 1913. There can be no doubt that the word must be given the same meaning and content in the Income Tax Acts of 1916 and 1917 that it had in the Act of 1913. When to this we add that in *Eisner v. Macomber*, *supra*, a case arising under the same Income Tax Act of 1916 which is here involved, the definition of "income" which was applied was adopted from *Stratton's Independence v. Howbert*, *supra*, arising under the Corporation Excise Tax Act of 1909, with the addition that it should include "profit gained through sale or conversion of capital assets," there would seem to be no room to doubt that the word must be given the same meaning in all of the Income

—income—
definition.

Tax Acts of Congress that was given to it in the Corporation Excise Tax Act, and that what that meaning is has now become definitely settled by decisions of this court.

In determining the definition of the word "income" thus arrived at, this court has consistently refused to enter into the refinements of lexicographers or economists, and has approved, in the definitions quoted, what it is believed to be the commonly understood meaning of the term which must have been in the minds of the people when they adopted the 16th Amendment to the Constitution. *Doyle v. Mitchell Bros. Co.* 247 U. S. 179, 185, 62 L. ed. 1054, 1059, 38 Sup. Ct. Rep. 467; *Eisner v. Macomber*, 252 U. S. 189, 206, 207, 64 L. ed. 521, 528, 529, 9 A.L.R. 1570, 40 Sup. Ct. Rep. 189. Notwithstanding the full argument heard in this case and in the series of cases now under consideration, we continue entirely satisfied with that definition, and, since the fund here taxed was the amount realized

—income tax—
accretions of
selling values.

from the sale of the stock in 1917, less the capital investment as determined by the trustee as of March 1, 1913, it is palpable

that it was a "gain or profit" "produced by," or "derived from" that investment, and that it "proceeded," and was "severed" or rendered severable, from it, by the sale for cash, and thereby became that "realized gain" which has been repeatedly declared to be taxable income within the meaning of the constitutional Amendment and the acts of Congress. *Doyle v. Mitchell Bros. Co.* and *Eisner v. Macomber*, *supra*.

It is elaborately argued in this case, in No. 609, *Eldorado Coal & Min. Co. v. Mager* [— U. S. —, 65 L. ed. —, 41 Sup. Ct. Rep. 390], submitted with it, and in other cases, since argued, that the word "income," as used in the 16th Amendment and in the Income Tax Act we are considering, does not include the gain from capital realized by a single isolated sale of property, but that only the profits realized from sales by one engaged in buying and selling as a business—a merchant, a real estate agent, or broker—constitute income which may be taxed.

It is sufficient to say of this contention, that no such distinction was recognized in the Civil War Income Tax Act of March 2, 1867 (14 Stat. at L. 471, 478, chap. 169), or in the Act of August 27, 1894 (28 Stat. at L. 509, 553, chap. 349), declared unconstitutional on an unrelated ground; that it was not recognized in determining income under the Excise Tax Act of 1909, as the cases cited *supra* show; that it is not to be found, in terms, in any of the income tax provisions of the Internal Revenue Acts of 1913, 1916, 1917, or 1919 [February 24, 1919, 40 Stat. at L. 1057, chap. 18, Comp. Stat. § 6371½a]; that the definition of the word "income," as used in the 16th Amendment, which has been developed by this court, does not recognize any such distinction; that in departmental practice, for now seven years, such a rule has not been applied; and that there is no essential difference in the nature of the transaction, or in the relation of the profit to the capital involved, whether the sale or conversion be a single,

isolated transaction or one of many. The interesting and ingenious argument, which is earnestly pressed upon us, that this distinction is so fundamental and obvious that it must be assumed to be a part of the "general understanding" of the meaning of the word "income," fails to convince us that a construction should be adopted which would, in a large measure, defeat the purpose of the Amendment.

The opinions of the courts in dealing with the rights of life tenants and remaindermen in gains derived from invested capital, especially in dividends paid by corporations, are of little value in determining such a question as we have here, influenced, as such decisions are, by the terms of the instruments creating the trusts involved, and by the various rules adopted in the various jurisdictions for attaining results thought to be equitable. Here the trustee, acting within its powers, sold the stock, as it might have sold a building, and realized a profit of \$700,000, which at once became assets in its possession, free for any disposition within the scope of the trust, but, for the purposes of taxation, to be treated as if the trustee were the sole owner.

Gray v. Darlington, 15 Wall. 63, 21 L. ed. 45, much relied upon in argument, was sufficiently distinguished from cases such as we have here in Hays v. Gauley Mountain

Coal Co. 247 U. S. 189, 191, 62 L. ed. 1061, 1062, 38 Sup. Ct. Rep. 470. The differences in the statutes involved render inapplicable the expressions in the opinion in that case (not necessary to the decision of it) as to distinctions between income and increase of capital.

In Lynch v. Turrish, 247 U. S. 221, 62 L. ed. 1087, 38 Sup. Ct. Rep. 537, also much relied upon, it is expressly stated that, "according to the fact admitted, there was no increase after that date (March 1, 1913), and therefore no increase subject to the law." For this reason the questions here discussed and decided were not there presented.

The British income-tax decisions are interpretations of statutes so wholly different in their wording from the acts of Congress which we are considering that they are quite without value in arriving at the construction of the laws here involved.

Another assessment on a small gain realized upon a purchase, made in 1914, of bonds which were duly called for redemption and paid in 1917, does not present any questions other than those which we have discussed, and therefore it does not call for separate consideration.

The judgment of the District Court is affirmed.

Mr. Justice Holmes and Mr. Justice Brandeis, because of prior decisions of the court, concur only in the judgment.

ANNOTATION.

Income tax: accretions of value determined by sale as income.

The decision in the reported case (MERCHANTS' LOAN & T. CO. v. SMİETANKA, ante, 1305) seems to definitely settle the important question whether or not accretions of value, as determined by a sale of property, are taxable income under the Federal Income Tax Acts, in accordance with the view that a gain or profit derived from such a sale is income within the meaning of the 16th Amendment, and not a mere accretion of capital assets, so

that it can be and is taxable under provisions which define the income of a taxable person as including gains, profits, and income derived from sales or dealings in property, whether real or personal, growing out of the ownership or use of, or interest in, real or personal property, or gains or profits and income derived from any source whatever. This conclusion was held necessarily to follow from the decisions in Hays v. Gauley Mountain

Coal Co. (1918) 247 U. S. 189, 62 L. ed. 1061, 38 Sup. Ct. Rep. 470, and United States v. Cleveland, C. C. & St. L. R. Co. (1918) 247 U. S. 195, 62 L. ed. 1064, 38 Sup. Ct. Rep. 472, in both of which the United States Supreme Court, over similar objections, held that the part of the profit which accrued from a sale of personal property subsequent to the effective date of the Corporation Excise Tax Act of 1909 was properly treated as income received during the year in which the sale was made. And on the authority of the *MERCHANTS' LOAN & T. CO. CASE*, a similar decision was made in the companion cases of *Eldorado Coal & Min. Co. v. Mager* (U. S. Adv. Ops. 1920-21, p. 449) — U. S. —, 65 L. ed. —, 40 Sup. Ct. Rep. 390; *Goodrich v. Edwards* (U. S. Adv. Ops. 1920-21, p. 450) — U. S. —, 65 L. ed. —, 40 Sup. Ct. Rep. 390; and *Walsh v. Brewster* (U. S. Adv. Ops. 1920-21, p. 451), — U. S. —, 65 L. ed. —, 40 Sup. Ct. Rep. 392, all of which precisely presented the question.

But, as regards personal property acquired before March 1, 1913, an important interpretation of the general doctrine that taxable income includes the gain derived from the sale of personal property which has appreciated in value during a series of years over its market value on March 1, 1913, if acquired before that date, is found in *Goodrich v. Edwards* and *Walsh v. Brewster* (U. S.) *supra*, in both of which it was held that only where, and to the extent that, a gain over the original investment is realized upon a sale of property acquired before March 1, 1913, and worth less on that date than when acquired, can there be any taxable income arising out of such sale, assessable under the Income Tax Act of September 8, 1916, as amended by the Act of October 3, 1917. In other words, the court in these cases, proceeding upon the theory that the Income Tax Acts by defining income as including gains, profits, and income derived from sales or dealings in property, or gains or profits and income from any source whatever, plainly impose the tax on the proceeds of sales of personal property to the extent

only that "gains" are derived therefrom by the vendor, and have rendered § 2 (c) of the Act of 1916, which provided that, for the purpose of ascertaining the gain derived from the sale or other disposition of property acquired before March 1, 1913, the fair market price or value of such property as of March 1, 1913, shall be the basis for determining the amount of such gain derived, applicable only where a gain over the original capital investment has been realized after March 1, 1913, from a sale or other disposition of property. Consequently, in determining what portion of the sale price of property is taxable as income, the market value of the property as of March 1, 1913, cannot be taken into consideration unless the sale price exceeds the original cost price, in which case the taxable income is the ultimate gain to the owner in excess of the market value as of March 1, 1913. To illustrate: on stock purchased in 1906 for \$1,000, but worth on March 1, 1913, \$1,500, and sold in 1918 for \$2,000, the taxable income would be \$500; whereas, if the stock had been purchased in 1906 for \$2,000, and had been worth but \$500 on March 1, 1913, there would be no taxable income, even though it was sold in 1918 for \$1,500. This, of course, creates the somewhat anomalous situation in which the increase in value over the market as of March 1, 1913, as determined by sale, is, in one case, taxable income, whereas, in another case, a similar increase is not taxable income, although the act itself provides that such value shall be the basis for determining the amount of gain derived by the sale.

The reported case (*MERCHANTS' LOAN & T. CO. v. SMIETANKA*, ante, 1305) also is authority for the proposition that the gain derived from a single isolated sale of personal property which has appreciated in value during a series of years is income within the meaning of the 16th Amendment to the Federal Constitution. In reaching this conclusion the court overruled the contention that the word "income" included only the

profits realized from sales by one engaged in buying and selling as a business,—such, for instance, as by a merchant, agent, or broker,—pointing out that there is no essential difference in the nature of the transaction, or in the relation of the capital to the profit

involved, whether the sale or conversion be a single, isolated transaction, or one of many. A similar conclusion was also reached in *Eldorado Coal & Min. Co. v. Mager*; *Goodrich v. Edwards*; and *Walsh v. Brewster* (U. S.) *supra*.
G. J. C.

UNITED STATES OF AMERICA, Plff. in Err.,
v.
PHILADELPHIA KNITTING MILLS COMPANY.

United States Circuit Court of Appeals, Third Circuit — June 13, 1921.

(273 Fed. 657.)

Tax — evidence showing salary was division of profits.

1. The jury may find that an increase of the salary of the president of a corporation who owns the controlling interest in the stock, and whose duties, because of advancing years, were merely nominal, to correspond with that of the acting manager of the business, was a division of profits, and not payment of salary, and therefore could not be deducted from income in determining the excise tax upon the corporation.

[See note on this question beginning on page 1316.]

— corporation — inquiry into amount of salaries paid officers.

2. The government cannot, in fixing the tax upon the income of a corporation under a statute permitting deduction of ordinary and necessary expenses, inquire into and determine whether payments of salaries to officers of the corporation are proper as compared with services performed by them, but may attack the payment on the theory that it is not payment of salary, but a division of profits.

Evidence — burden of proof — showing that payments to officers were profits.

3. To overcome the presumption that money paid officers of a corporation by the directors, for services rendered, was salary, the government has the burden of showing that some portion of it was profits, and therefore subject to taxation as income of the corporation.

ERROR to the District Court of the United States for the Eastern District of Pennsylvania (Dickinson, Dist. J.) to review a judgment in favor of defendant in an action brought for the collection of additional corporation excise taxes. *Reversed*.

The facts are stated in the opinion of the court.

Argued before Buffington, Woolley, and Davis, Circuit Judges.

Messrs. T. Henry Walnut, Edward S. Kremp, Charles D. McAvoy, Carl A. Mapes, and Ellis Manning, for the United States:

Under the Corporation Excise Tax Act of August 5, 1909, permitting the deduction by a corporation of all ordinary and necessary expenses paid in the maintenance and operation of the

business and properties of such corporation, the corporation is limited in respect to salaries paid to officers to a deduction on that account of an amount representing fair, just, and reasonable compensation for services actually rendered.

People ex rel. Caldwell v. Saratoga County, 45 App. Div. 42, 60 N. Y. Supp. 1122; *Chicago & A. R. Co. v. House*, 172 Ill. 601, 50 N. E. 151; *Brown v.*

Corry, 175 Pa. 528, 34 Atl. 854; Baltimore v. Chesapeake & P. Teleph. Co. 92 Md. 692, 48 Atl. 465; Haines v. Lake Shore & M. S. R. Co. 129 Mich. 475, 89 N. W. 349; Glassey v. Sligo Furnace Co. 120 Mo. App. 24, 96 S. W. 310; Gillespie v. Ashford, 125 Iowa, 729, 101 N. W. 649; Goodwin v. Central of Georgia R. Co. 2 Ga. App. 470, 58 S. E. 688; Jacobs & Davies v. Anderson, 143 C. C. A. 87, 228 Fed. 505; Gregg v. Moss, 14 Wall. 564, 20 L. ed. 740; Atlantic & P. Teleph. Co. v. Philadelphia, 190 U. S. 160, 47 L. ed. 995, 23 Sup. Ct. Rep. 817; United States v. Freeman, 3 How. 564, 11 L. ed. 727; Alexandria v. Alexandria, 5 Cranch, 7, 3 L. ed. 20.

Messrs. Saul, Ewing, Remick, & Saul for defendant in error.

Woolley, Circuit Judge, delivered the opinion of the court:

In ascertaining taxable net income under the Corporation Excise Tax Act of August 5, 1909 (36 Stat. at L. 112, chap. 6), the Philadelphia Knitting Mills Company, in its returns for the years 1909 to 1912, inclusive, deducted from its gross income, as "ordinary and necessary expenses," salaries paid W. H. Bilyeu, its president, for the year 1909, \$12,500, and for each succeeding year, \$20,000. Regarding these salaries (in excess of \$5,000 per annum) as unreasonable with reference to the services rendered, and therefore not deductible, the Bureau of Internal Revenue demanded payment of the tax thereon, and upon refusal the United States brought this suit. At the trial the government proceeded on a right, which it claimed in itself, to determine what were reasonable salaries for the services rendered, and to limit the deductions thereto. Upon an indication by the trial judge that recovery could not be had on this theory, but could be had only on evidence which would sustain a finding that payments made ostensibly for salaries were, in whole or in part, distributions of profits, the government modified its theory of the case and thereafter proceeded on the line indicated. Coming to the motion for a nonsuit, the court, in entering judgment, ruled solely on the latter

question. On the motion to take off the nonsuit the government returned to its original position. This position it urges on this writ of error.

In view of the proceedings below, the question involved in the case is somewhat elusive. In our examination of these proceedings we find really two questions: one raised by the government and seemingly abandoned; the other raised by the court and ruled on.

The question on which the government seeks the opinion of this court is: Has the government the right, under the cited provision of the Corporation Excise Tax Act of August 5, 1909, to inquire and determine whether a salary, paid by a corporation and deducted in its return as an "ordinary and necessary" expense, is reasonable and fair compensation for the services rendered, and thereupon to revise the return and limit the deduction to what it considers a reasonable salary; and, in the event of dispute, to have a jury pass upon and decide the same?

Such a power in the government, if it exists, must have been conferred by the statute. The statute provided for a tax at a named rate upon the net income of a corporation, to be ascertained by deducting from its gross income "all ordinary and necessary expenses." Section 38. The statute did not specifically make a salary an allowable deduction, though it was so construed by the Bureau of Internal Revenue when the salary is a "reasonable and fair compensation for services rendered, regardless of the amount of stock such officer may hold." We are asked to approve this executive construction of the statute as though it were a part of it. In order not to beg the question, we must look to the statute alone to find the power which the government asserts.

Confining our inquiry to the statute, it appears that the basis on which a salary may be allowed as a valid deduction is that it was in fact

an "ordinary and necessary expense (of the corporation) actually paid . . . in the maintenance and operation of its business." To be a necessary expense it must have been paid for services actually rendered. *Jacobs & Davies v. Anderson*, 143 C. C. A. 87, 228 Fed. 506. Whether services were rendered, and whether also they were commensurate with the salary paid, are matters of judgment and discretion

reposed by general law in the board of directors of the corporation. As the board of directors

is charged with the duty and clothed with the discretion of fixing the salaries of the corporation's officers, the government has no right (until expressly granted by statute) to inquire into and determine whether the amounts thereof are proper; that is, whether they are too much or too little. But, while the amount of salary fixed by a board of directors is presumptively valid, it is not conclusively so, because the government may inquire whether the amount paid is salary or something else. Admittedly the government has a right to collect taxes on net income of a corporation, based on profits, after all ordinary and necessary expenses, including salaries, are paid. It has a right, therefore, to attack the action of a board of directors and show by evidence, not that a given salary is too much, but that, in the circumstances, the whole or some part of it is not salary at all, but is profits diverted to a stockholding officer under the guise of salary, and, as such, is subject to taxation.

Of the same opinion was the learned trial judge, though, in entering judgment of nonsuit, he raised and ruled upon a second question, which was not whether the salaries paid were commensurate with the services rendered, but whether there was evidence which would sustain a finding that the sums paid were not all salaries, but were part profits.

An inquiry of this kind is directed to a fact; and, as in all cases turning on a fact, the attention of the trial judge is directed to the sufficiency of the evidence to establish the fact. The question of fact here was whether the money paid was all salary or part profits. The presumption arising from the action of the board of directors was that it was all salary. In order to overcome this presumption the burden was on the government to produce evidence, not necessarily conclusive, but sufficient to raise a valid inference that some definite part of the compensation was not salary, but was profits. The evidence which in this respect the trial judge found insufficient was, briefly stated, as follows:

Philadelphia Knitting Mills Company was a close corporation with an outstanding capital of \$330,000, of which William H. Bilyeu, its president, owned in stock approximately \$240,000; his daughter, Mrs. Richards, \$30,000; and Charles Moller, its vice president, manager, and superintendent, \$60,000. The business of the corporation was started and its success established by Bilyeu at a time when Moller's connection with the company and his stockholding were small. As Bilyeu advanced in years and his activities in the business decreased, Moller's duties and interests correspondingly increased until, at the time in question, Bilyeu did almost nothing and Moller did almost everything in the management of the corporation's affairs.

In July, 1909,—a month before the Corporation Excise Tax Act was approved,—the board of directors increased the annual salary of Moller to \$10,000, and in 1913 to \$20,000. At the same meeting in 1909, the board of directors—the personnel of which was wholly controlled by Bilyeu's dominating stock ownership—increased his salary from \$7,500 to \$20,000 a year, at which figure it has ever since re-

Evidence—
burden of proof
—showing that
payments to
officers were
profits.

Tax—corporation—
inquiry into
amount of
salaries paid
officers.

maintained. It was testified that Bilyeu, being greatly advanced in years, had nothing to do with the operation of the plant or with the conduct of the business. He would come to the office, open the mail, sign checks, and make deposits, and then would sit around an hour or two, reading the newspaper until his chauffeur came to take him home. The only reason for the substantial increase in the salary of the president was given by Bilyeu himself. It was simply to the effect that, as Moller's salary was \$20,000, he thought his salary should be the same. In the corporation's tax returns both salaries were deducted from gross profits in ascertaining taxable net profits. The government raised no question about Moller's salary.

On this evidence we think a jury could find that, as the increase of Bilyeu's salary as president was made without a corresponding increase of service or business responsibility,—in fact, in the face of a progressive decrease of service and responsibility,—the amount paid him was not all for services rendered. Just how much of the annual compensation paid Bilyeu was salary and how much was profits would not be left for the jury to conjecture, for there was evidence of the amount of sal-

Tax—evidence showing salary was division of profits.

aries paid presidents of like concerns of relative output and earnings. This evidence was in no sense conclusive, but it was admissible and it had probative value. There was in addition evidence of the salary which the defendant corporation itself paid Bilyeu, its president, before it was increased without any reason except that Bilyeu thought his salary (for decreasing services) should keep apace with Moller's salary for steadily increasing services.

This evidence was, to be sure, only prima facie, and might have been overturned by evidence produced by the defendant corporation showing that its president, because of his position in the trade, his connection with the banks, or otherwise, rendered services to the corporation on which the board of directors had exercised a bona fide discretion in voting him this substantial salary. But until some evidence of this character was produced by the defendant, we think the evidence for the government was sufficient to sustain a finding by fair-minded men that a part, and a definite part, of the compensation paid Bilyeu as salary, was profits distributed to him by reason of his stockholding.

We are constrained to reverse the judgment below and direct a new trial.

ANNOTATION.

Deduction of salaries in computing excise or income tax of corporations.

As to income tax in respect of salaries of public officers and employees, see annotation following *Evans v. Gore*, 11 A.L.R. 519.

The reported case (*UNITED STATES v. PHILADELPHIA KNITTING MILLS CO.* ante, 1313) expressly holds that under the Corporation Excise Tax Act of 1909, which permitted a corporation, in fixing the tax on its income, to deduct ordinary and necessary expenses, the government cannot inquire into and determine whether payments of salaries to officers of the corporation

constitute a reasonable and fair compensation, but that it can attack the payment on the theory that it was not a payment of salary, but a division of profits under the guise of salary; and that to overcome the presumption that the money paid the officers was salary, the government has the burden of showing that some portion of it was profits, so as not to be deductible. Applying this rule it was held that a jury could find that an increase of the salary of the president of a corporation was a division of profits, and not a

payment of deductible salary, it appearing that he owned a controlling interest in the stock, that his duties, because of advancing years, were merely nominal, that the increase was substantial, and such as made his salary correspond to that of the acting manager, who did almost everything in the management of the corporation's affairs, and that the only reason assigned for the increase was to the effect that the recipient thought the salaries should be the same.

The only other case which seems to have passed upon the question under consideration in the present annotation is *Jacobs & Davies v. Anderson* (1915) 143 C. C. A. 87, 228 Fed. 505. Here two partners formed a corporation and agreed that each should receive a salary of \$6,000, plus a "compensation" consisting of a percentage of the net surplus earnings, to be divided according to an agreement which the court declared called for a division based upon the stockholdings of the parties, and it was held that the amount so divided could not be deducted as a business expense, but must be regarded as net profits, subject to the Federal Excise Tax of 1909. Coxe, Circuit Judge, said: "The amount paid to the partners as 'further compensation' was, during 1909, \$73,136, during 1910, \$204,810, and during 1911, \$114,986. The trial judge held that the parties, by a series of agreements, divided everything received as profits among themselves as though it were a case of partnership, and not of corporation assets. They called these sums 'compensation,' but the court held that they must be treated as income of the corporation. To enable the company to deduct these amounts it must appear that they were paid as salaries for services actually rendered. If the payments were based upon the stockholdings of the parties, as we think they were, they cannot be considered as expenses of administration. They were not compensation, because the salaries of both the parties are fully provided for in the agreement of April, 1909. It seems plain that they were profits of the

business, and as such were subject to the tax. Their payment did not depend on the services rendered. Whether the stock was distributed among a large number of holders or only two, it can hardly be maintained that the amount paid out in dividends should be deducted in order to ascertain the amount of the net income of the corporation. That must be determined by deducting from the gross amount of the income all ordinary and necessary expenses actually paid within the year. The distribution of surplus profits was not an ordinary and necessary expense paid in the maintenance and operation of the business."

However, the Treasury Department has had the question of compensation for personal services as allowable deductions under consideration in a number of instances, and has issued rulings thereon from time to time. For instance, Treasury Regulations, 45 (under the Revenue Act of 1918, which expressly authorized the deduction of "all the ordinary and necessary expenses . . . including a reasonable allowance for salaries or other compensation for personal services actually rendered"), article 105, states: "Among the ordinary and necessary expenses paid or incurred in carrying on any trade or business may be included a reasonable allowance for salaries or other compensation for personal services actually rendered. The test of deductibility in the case of compensation payments is whether they are reasonable and are in fact payments purely for services. This test and its practical application may be further stated and illustrated as follows: (1) Any amount paid in the form of compensation, but not in fact as the purchase price of services, is not deductible. (a) An ostensible salary paid by a corporation may be a distribution of a dividend on stock. This is likely to occur in the case of a corporation having few stockholders, practically all of whom draw salaries. If, in such a case, the salaries are based upon or bear a close relation-ship to the stockholdings of the offi-

cers or employees, it would seem likely that the salaries, if in excess of those ordinarily paid for similar services, are not paid wholly for services rendered, but in part as a distribution of earnings upon the stock. (b) An ostensible salary paid by a corporation may be in part a waste or appropriation of assets of the corporation. This may occur where salaried employees are in control of the corporation through holding, directly or indirectly, a majority of its stock, or, in the case of a large corporation with many stockholders, owning a substantial minority of its stock, and the tendency of the officers unduly to inflate their salaries must be taken into account. (c) An ostensible salary may be in part payment for property. This may occur, for example, where a partnership sells out to a corporation, the former partners agreeing to continue in the service of the corporation. In such a case it may be found that the salaries of the former partners are not merely for services, but in part constitute payment for the transfer of the business. (2) The form or method of fixing compensation is not decisive as to deductibility. While any form of contingent compensation invites scrutiny as a possible distribution of earnings of the enterprise, it does not follow that payments on a contingent basis are to be treated fundamentally on any basis different from that applying to compensation at a flat rate. Generally speaking, if contingent compensation is paid pursuant to a free bargain between the enterprise and the individual, made before the services are rendered, not influenced by any consideration on the part of the employer other than that of securing, on fair and advantageous terms, the services of the individual, it should be allowed as a deduction even though, in the actual working out of the contract, it may prove to be greater than the amount which would ordinarily be paid. (3) In any event, the allowance for compensation paid may not exceed what is reasonable in all the circumstances. It is, in general, just to assume that

reasonable and true compensation is only such amount as would ordinarily be paid for like services by like enterprises in like circumstances. The circumstances to be taken into consideration are those existing at the date when the contract for services was made, not those existing at the date when the contract is questioned." And article 106 in part is as follows: "As to the treatment of amounts ostensibly paid as compensation, but not allowed to be deducted as such, the following rules apply: (1) In the case of excessive payments by corporations, if such payments correspond or bear a close relationship to stockholdings, the amount of the excess should be treated as dividends, and would thus be exempt from the normal tax in the hands of the recipients; or, if such payments represent an appropriation of assets of the corporation by officers who control it and fix their compensation in violation of the rights of the corporation, the amount of the excess, while disallowed as a deduction by the corporation, should be treated as compensation of the individuals subject to the normal tax, compensation illegally secured being none the less subject to tax in all respects; or, if such payments constitute in part payment for property, the amount of the excess should be treated by the corporation as a capital expenditure, and by the recipient as part of the purchase price." Commenting upon the above quoted portions of the Revenue Act of 1918, Holmes, in his 1920 edition of *Federal Taxes*, says that these provisions seem to authorize the commissioner to disallow such part of any salary payments as appear unreasonable in view of the services rendered, notwithstanding that the salary may actually have been paid under a valid contract.

And under the earlier tax acts the Treasury Department ruled that only reasonable salaries were deductible as business expenses. See Treasury Decision, 1742, and Regulations No. 33, Revised, article 138. And that compensations based on stockholdings were not deductible, although

paid in lieu of salary or wages, see Regulations, No. 33, article 119, and Regulations, No. 33, Revised, article 138. But that, under the law of 1916, if an additional compensation con-

tract with a majority stockholder was approved by the directors and all other stockholders, it had the status of any other contract, see Treasury Decision, 2696.
G. J. C.

PEOPLE OF THE STATE OF NEW YORK EX REL. GEORGE A. STAFFORD, Appt.,

v.

EUGENE M. TRAVIS, State Comptroller, Respt.

New York Court of Appeals — May 31, 1921.

(231 N. Y. 339, 132 N. E. 109.)

Constitutional law — income tax as interference with commerce or impost duty.

1. A tax imposed by a state upon the income of a business carried on by a nonresident within its borders is not a tax upon interstate commerce or upon exports, or a levying of imposts or duties within the prohibition of the Federal Constitution, since it is not imposed upon the goods handled, nor upon the gross receipts.

[See note on this question beginning on page 1326.]

Tax — upon nonresident doing business in state.

2. A state may compel citizens of other states carrying on business within its borders to contribute in taxes to the support of its government.

[See 26 R. C. L. 144.]

Constitutional law — income tax on nonresident doing business in state — validity.

3. The tax upon the net income of a business transacted within the state by a nonresident is not for the privilege of carrying on the business, and if it is no greater in any respect than the tax imposed upon the conduct of such a business by a resident of the state, it is just and constitutional.

Statute — income tax — discrimination against nonresident — separable part of statute.

4. The invalidity of a discrimination against nonresidents in a law imposing a tax upon the incomes of persons doing business within the state, which denies them an exemption allowed residents, is separable from the re-

mainder of the statute, and when eliminated by the legislature, the tax may be collected; especially where the statute provides that if any portion of it shall be held to be unconstitutional, the ruling shall apply only to the portion of the act so affected.

Tax — income — retroactive — validity.

5. A retroactive income tax is not invalid when applied to the business conducted by a nonresident within the state, on the theory that it is a privilege or excise tax, since it is merely a distribution of the expense of government.

[See note in 11 A.L.R. 518.]

— tax on income from sale consummated in foreign countries.

6. A state cannot impose a tax upon the portion of the income of a business transacted by a nonresident commission merchant within its borders, represented by sales consummated by his traveling salesman in foreign countries, to fill which he procures and ships the goods.

APPEAL by relator from an order of the Appellate Division of the Supreme Court, Third Department, affirming a determination of the defendant comptroller, assessing an income tax against relator for the year 1919. *Reversed.*

The facts are stated in the opinion of the court.

Mr. Louis H. Porter, for appellant:

The respondent erred in assessing a tax upon net income of \$201,401.06, as derived by the relator from a business or trade or occupation carried on in New York. \$91,990.01 of said income was not derived from business in New York, and the tax imposed thereon is invalid.

Werle & Colquhoun, Surveyor of Taxes, 2 Tax Cas. 402; Thomas Turner v. Richman, High Court of Justice Q. B. D. 4 Tax Cas. 25; Macpherson v. Inland Revenue [1912] S. C. 1315, 6 Tax Cas. 107; Shaffer v. Carter, 252 U. S. 37, 64 L. ed. 445, 40 Sup. Ct. Rep. 221; Travis v. Yale & T. Mfg. Co. 252 U. S. 60, 64 L. ed. 460, 40 Sup. Ct. Rep. 228; People ex rel. Alpha Portland Cement Co. v. Knapp, 230 N. Y. 48, 129 N. E. 202.

A tax on the income of a nonresident of the state, derived by him from the direct exportation of goods to foreign countries, is a tax on exports, and is forbidden by § 10 of art. 1, of the Federal Constitution, and to the extent of 3 per cent on \$91,990.91 of income, the tax imposed in this case is invalid.

Kelley v. Rhoads, 188 U. S. 1, 47 L. ed. 359, 23 Sup. Ct. Rep. 259; Bacon v. Illinois, 227 U. S. 504, 57 L. ed. 615, 33 Sup. Ct. Rep. 299; Coe v. Errol, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 745; William E. Peck & Co. v. Lowe, 247 U. S. 165, 62 L. ed. 1049, 38 Sup. Ct. Rep. 432; United States Glue Co. v. Oak Creek, 247 U. S. 321, 62 L. ed. 1135, 38 Sup. Ct. Rep. 499, Ann. Cas. 1918E, 748; Pollock v. Farmers' Loan & T. Co. 158 U. S. 601, 39 L. ed. 1108, 15 Sup. Ct. Rep. 912; Thames & M. M. Ins. Co. v. United States, 237 U. S. 19, 59 L. ed. 821, 35 Sup. Ct. Rep. 496, Ann. Cas. 1915D, 1087; United States v. Hvoslef, 237 U. S. 1, 59 L. ed. 813, 35 Sup. Ct. Rep. 459, Ann. Cas. 1916A, 286; Fairbank v. United States, 181 U. S. 283, 45 L. ed. 862, 21 Sup. Ct. Rep. 648, 15 Am. Crim. Rep. 135; Brown v. Maryland, 12 Wheat. 419, 6 L. ed. 678; Turpin v. Burgess, 117 U. S. 504, 29 L. ed. 988, 6 Sup. Ct. Rep. 835; Cook v. Pennsylvania, 97 U. S. 566, 24 L. ed. 1015; Philadelphia & S. Mail S. S. Co. v. Pennsylvania, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118; Leloup v. Mobile, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; Welton v. Missouri, 91 U. S. 275, 23 L. ed. 347; Webber v. Virginia, 103 U. S. 344, 26 L. ed. 565; Crew Levick Co.

v. Pennsylvania, 245 U. S. 292, 62 L. ed. 295, 28 Sup. Ct. Rep. 126; Postal Teleg. Cable Co. v. Adams, 155 U. S. 688, 39 L. ed. 311, 5 Inters. Com. Rep. 1, 15 Sup. Ct. Rep. 268, 360; Atlantic & Pac. Teleg. Co. v. Philadelphia, 190 U. S. 160, 47 L. ed. 995, 23 Sup. Ct. Rep. 817.

The Act of 1920, in terms imposing a retroactive tax on the income of nonresidents received during the year 1919, is in conflict with art. 3, § 24, of the state Constitution, and with § 10 of art. 1, and the 14th Amendment to the Constitution of the United States, and the entire tax imposed in this case is invalid.

Travis v. Yale & T. Mfg. Co. 252 U. S. 60, 64 L. ed. 460, 40 Sup. Ct. Rep. 228; People ex rel. Alpha Portland Cement Co. v. Knapp, 230 N. Y. 60, 129 N. E. 202; Re Pell, 171 N. Y. 48, 57 L.R.A. 540, 89 Am. St. Rep. 791, 63 N. E. 789; Re Craig, 97 App. Div. 289, 89 N. Y. Supp. 971, affirmed without opinion in 181 N. Y. 551, 74 N. E. 1116; State Tax on Foreign-held Bonds, 15 Wall. 300, 21 L. ed. 179; United States v. Erie R. Co. 106 U. S. 327, 27 L. ed. 151, 1 Sup. Ct. Rep. 223; Michigan C. R. Co. v. Collector (Michigan C. R. Co. v. Slack), 100 U. S. 595, 25 L. ed. 647; Dewey v. Des Moines, 173 U. S. 193, 43 L. ed. 665, 19 Sup. Ct. Rep. 379; New York v. McLean, 170 N. Y. 374, 63 N. E. 380; Wilcox v. Rochester, 129 N. Y. 247, 29 N. E. 99; Hilton v. Fonda, 86 N. Y. 340; Mygatt v. Washburn, 15 N. Y. 316; Litchfield v. Vernon, 41 N. Y. 123; Dorwin v. Strickland, 57 N. Y. 492; Stewart v. Chrysler, 100 N. Y. 378, 3 N. E. 471; Maltbie v. Lobsitz Mills Co. 223 N. Y. 227, 119 N. E. 389; Barhyte v. Shepherd, 35 N. Y. 238; Pollock v. Farmers' Loan & T. Co. 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673, 158 U. S. 601, 39 L. ed. 1108, 15 Sup. Ct. Rep. 912; Delaware, L. & W. R. Co. v. Pennsylvania, 198 U. S. 341, 49 L. ed. 1077, 25 Sup. Ct. Rep. 669; Ayer & L. Tie Co. v. Kentucky, 202 U. S. 409, 50 L. ed. 1082, 26 Sup. Ct. Rep. 679, 6 Ann. Cas. 205; Morgan v. Parham, 16 Wall. 471, 21 L. ed. 303; Buck v. Beach, 206 U. S. 392, 51 L. ed. 1106, 27 Sup. Ct. Rep. 712, 11 Ann. Cas. 732; Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 50 L. ed. 150, 26 Sup. Ct. Rep. 36, 4 Ann. Cas. 493; Louisville & J. Ferry Co. v. Kentucky, 188 U. S. 385, 47 L. ed. 513, 23 Sup. Ct. Rep. 463.

Mr. James S. Y. Ivins, with Mr. Charles D. Newton, Attorney General, for respondent:

The relator's business is carried on within the state of New York, and he is taxable upon the net income therefrom.

Hovey v. DeLong Hook & Eye Co. 211 N. Y. 420, 105 N. E. 667; *E. T. Burrowes Co. v. Caplin*, 127 App. Div. 317, 111 N. Y. Supp. 498; *Cummer Lumber Co. v. Associated Mfrs. Mut. F. Ins. Corp.* 67 App. Div. 151, 73 N. Y. Supp. 668; *People ex rel. Southern Cotton Oil Co. v. Roberts*, 25 App. Div. 13, 48 N. Y. Supp. 1028; *People ex rel. Washington Mills Co. v. Roberts*, 8 App. Div. 201, 40 N. Y. Supp. 417, affirmed in 151 N. Y. 619, 45 N. E. 1134; *People ex rel. Seth Thomas Clock Co. v. Wemple*, 133 N. Y. 323, 31 N. E. 238; *People ex rel. Kellogg Newspaper Co. v. Roberts*, 30 App. Div. 150, 51 N. Y. Supp. 866; *People ex rel. Lembeck & B. Eagle Brewing Co. v. Roberts*, 22 App. Div. 282, 47 N. Y. Supp. 949; *People ex rel. H. B. Smith Co. v. Roberts*, 27 App. Div. 455, 50 N. Y. Supp. 355.

The tax on that part of relator's net income stated by him to have resulted from transactions in goods shipped abroad is constitutional.

William E. Peck & Co. v. Lowe, 247 U. S. 165, 62 L. ed. 1049, 38 Sup. Ct. Rep. 432; *United States Glue Co. v. Oak Creek*, 247 U. S. 321, 62 L. ed. 1135, 38 Sup. Ct. Rep. 499, Ann. Cas. 1918E, 748; *Kelley v. Rhoads*, 188 U. S. 1, 47 L. ed. 359, 23 Sup. Ct. Rep. 259; *Crew Levick Co. v. Pennsylvania*, 245 U. S. 292, 62 L. ed. 295, 38 Sup. Ct. Rep. 126; *Shaffer v. Carter*, 252 U. S. 37, 64 L. ed. 445, 40 Sup. Ct. Rep. 221; *Travis v. Yale & T. Mfg. Co.* 252 U. S. 60, 64 L. ed. 460, 40 Sup. Ct. Rep. 228.

The tax is not unconstitutionally retroactive.

Shaffer v. Carter, 252 U. S. 49, 64 L. ed. 455, 40 Sup. Ct. Rep. 221; *People ex rel. Alpha Portland Cement Co. v. Knapp*, 230 N. Y. 60, 129 N. E. 202.

Chase, J., delivered the opinion of the court:

In 1919 the legislature passed what is known as the Income Tax Law (Laws 1919, chap. 627), and it was added to the Tax Law (Consolidated Laws, chap. 60), as article 16. It went into effect May 14, 1919. It provides: "A tax is here-

by imposed upon every resident of the state, which tax shall be levied, collected and paid annually upon and with respect to his entire net income as herein defined. . . . A like tax is hereby imposed and shall be levied, collected and paid annually, . . . upon and with respect to the entire net income as herein defined, except as hereinafter provided, from all property owned and from every business, trade, profession or occupation carried on in this state by natural persons not residents of the state. Such tax shall first be levied, collected and paid in the year nineteen hundred and twenty upon and with respect to the taxable income for the calendar year nineteen hundred and nineteen, or for any taxable year ending during the year nineteen hundred and nineteen." § 351.

It also provides:

"The following exemptions shall be allowed to any resident taxpayer:

"1. In the case of a single person, a personal exemption of \$1,000, or in the case of the head of a family or a married person living with husband or wife, a personal exemption of \$2,000. . . ." § 362.

Other exemptions were also provided by the section. The time fixed in 1920 for filing returns and for the payment of the tax was March 15, but it was extended to June of that year. Thereafter the Yale & Towne Manufacturing Company brought an action in equity against the state comptroller in the district court of the southern district of New York for relief against the threatened action of the comptroller to enforce the provisions of the act, on the ground that the statute is illegal and unconstitutional. The action was tried August 6, 1919, and the decision is reported in (D. C.) 262 Fed. 576. In the opinion Judge Knox says: "By reason of the decision which I have determined should be made in this case, it will be unnecessary to enter upon a discussion of the enactment in its entirety."

After referring to several authorities he further says: "Tested by the standard of the principles set forth in the foregoing cases, does the failure to accord to nonresidents of the state the exemptions and immunities provided for to residents make this law, *or part of it*, invalid."

He further says:

"I am constrained to hold that the provisions of chapter 627 of the laws of the state of New York for the year 1919, in so far as they attempt to assess, lay, and collect a tax upon citizens of the United States who are not residents of the state of New York, and who are citizens of other states, without according them the privileges and immunities afforded by said act to citizens of the United States who are citizens of the state of New York and resident therein, are unconstitutional and void. Nothing herein, however, is meant to be decided as to the validity of the statute so far as it relates to residents of the state of New York.

"Neither that question nor the question as to the power of the state to lay a tax upon nonresident citizens of another state, based upon their earnings in this state for personal service rendered, need, in view of the basis of my decision, now be considered."

An appeal was taken from the judgment entered therein to the Supreme Court. The decision is reported in 252 U. S. 60, 64 L. ed. 460, 40 Sup. Ct. Rep. 230. In the report it is stated that the "appeal is from the district court of the United States for the southern district of New York" to review a decree enjoining the enforcement of the Income Tax Law of that state as against nonresidents. The decree was affirmed, but the court, in the opinion, says: "That the state of New York has jurisdiction to impose a tax of this kind upon the incomes of nonresidents arising from any business, trade, profession, or occupation carried on within its borders, enforcing payment so far as it

can by the exercise of a just control over persons and property within the state, as by garnishment of credits (of which the withholding provision of the New York law is the practical equivalent); and that such a tax, so enforced, does not violate the due process of law provision of the 14th Amendment, is settled by our decision in *Shaffer v. Carter*, 252 U. S. 37, 64 L. ed. 445, 40 Sup. Ct. Rep. 221, involving the Income Tax Law of the state of Oklahoma. That there is no unconstitutional discrimination against citizens of other states in confining the deduction of expenses, losses, etc., in the case of nonresident taxpayers, to such as are connected with income arising from sources within the taxing state, likewise is settled by that decision." P. 75.

The judgment in that case authoritatively determined that the act as passed in 1919 is unconstitutional so far as it then applied to the Yale & Towne Manufacturing Company, a nonresident corporation. Its determination was intended to be limited to the facts as they were found in that case and the statutes as they existed, with the unconstitutional discrimination as to exemptions, at the time the action was brought as stated. The decision in that case was rendered March 1, 1920. On April 14, 1920, the legislature of this state passed chapter 191 of the laws of that year, to take effect immediately, by which it amended said § 362 of the Tax Law by omitting the word "resident" in the first clause thereof. By the same act the legislature added § 351a, as follows: "The tax provided for in § 351 of this chapter, upon and with respect to income derived from all property owned and from every business, trade, profession or occupation carried on in this state by natural persons not residents of the state, is hereby reimposed with respect to the taxable income for the calendar year 1919 and for any taxable year ending during the year 1919, and for each year thereafter. Such tax

shall be levied, collected and paid for the year 1919, and returns with respect thereto shall be filed on or before June 30th, 1920, unless the time shall be extended as provided in this article."

The relator is and at all the times herein mentioned was a resident of the state of Connecticut. In 1919, and since, he has been engaged in business in the city of New York in purchasing cotton goods from manufacturers in other states, and selling them to customers, as herein-after stated. The relator did not make his return as provided by the Tax Law until after the decision in the Yale & Towne Manufacturing Company Case, and the enactment of chapter 191 of the Laws of 1920. His return was made on June 16, 1920, as of December 31, 1919, and he then paid his tax under protest. He thereupon applied to the comptroller by petition for a revision and readjustment of the accounts assessed for income tax against him for the year 1919, and a hearing upon his petition was granted, at which testimony was taken, and, after hearing counsel the comptroller decided that the relator was not entitled to have a readjustment of his accounts for income tax. A certiorari was obtained to review the action of the comptroller, and the appellate division of the supreme court, after a hearing, unanimously affirmed the determination of the comptroller. *People ex rel. Stafford v. Travis*, 195 App. Div. 635, 187 N. Y. Supp. 311. An appeal is taken to this court therefrom.

While a state may not prohibit the citizens of other states from carrying on legitimate business within its boundaries, it may require such nonresidents to contribute

Tax—upon non-resident doing business in state.

in taxes for the support of its government. Subdivision 1 of § 2 of article 4 of the Constitution of the United States provides: "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

Nonresidents are thereby protected from discrimination in favor of residents, but are not exempt from the burdens of taxation. In the *Shaffer v. Carter* Case, 252 U. S. 54, 55, 64 L. ed. 457, 458, 40 Sup. Ct. Rep. 226, it is said: "It is insisted, however, both by appellant in this case and by the opponents of the New York law in *Travis v. Yale & T. Mfg. Co.* 252 U. S. 60, 64 L. ed. 460, 40 Sup. Ct. Rep. 228, that an income tax is in its nature a personal tax, or a 'subjective tax imposing personal liability upon the recipient of the income;' and that as to a nonresident the state has no jurisdiction to impose such a liability. This argument, upon analysis, resolves itself into a mere question of definitions, and has no legitimate bearing upon any question raised under the Federal Constitution. For, where the question is whether a state taxing law contravenes rights secured by that instrument, the decision must depend not upon any mere question of form, construction, or definition, but upon the practical operation and effect of the tax imposed. *St. Louis Southwestern R. Co. v. Arkansas*, 235 U. S. 350, 362, 59 L. ed. 265, 271, 35 Sup. Ct. Rep. 99; *Mountain Timber Co. v. Washington*, 243 U. S. 219, 237, 61 L. ed. 685, 696, 37 Sup. Ct. Rep. 260, Ann. Cas. 1917D, 642, 13 N. C. C. A. 927; *Crew Levick Co. v. Pennsylvania*, 245 U. S. 292, 294, 62 L. ed. 295, 297, 38 Sup. Ct. Rep. 126; *American Mfg. Co. v. St. Louis*, 250 U. S. 459, 463, 63 L. ed. 1084, 1087, 39 Sup. Ct. Rep. 522. The practical burden of a tax imposed upon the net income derived by a nonresident from a business carried on within the state certainly is no greater than that of a tax upon the conduct of the business, and this the state has the lawful power to impose, as we have seen."

The tax imposed by the Act of 1919 upon and with respect to the net income from every business carried on in this state by persons not residents of the state is not for the privilege of carrying on a legiti-

mate business within the boundaries of the state, for that is a privilege granted by the Federal Constitution. It is the imposition of a tax upon business done by a nonresident in this state no greater in any respect than the tax imposed upon the conduct of such a business by a resident of the state. It is measured by a percentage on the net income from the business. Such a tax is just and constitutional. The au-

Constitutional law—income tax on nonresident doing business in state—validity.

thority of the state to lay a tax is necessarily dependent upon jurisdiction of the subject of the tax. Its jurisdiction, as far as it affects the relator, is over the business done by him in this state. *Maltbie v. Lobnitz Mills Co.* 223 N. Y. 227, 119 N. E. 389. The jurisdiction of the state in the collection of the tax may present questions independent of the question of jurisdiction to impose the tax itself. It is said in the *Shaffer Case* that the tax may be valid although the means adopted for its enforcement are not. It is further said in the *Shaffer Case*: "We deem it clear, upon principle as well as authority, that, just as a state may impose general income taxes against its own citizens and residents whose persons are subject to its control, it may, as a necessary consequence, levy a duty of like character, and not more onerous in its effect, upon incomes accruing to nonresidents from their property or business within the state, or their occupations carried on therein, enforcing payment, so far as it can, by the exercise of a just control over persons and property within its borders." 252 U. S. 52.

The Act of 1919 expressly provides: "If any clause, sentence, paragraph, or part of this act shall for any reason be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder of this act, but shall be confined in its operation to the clause, sentence, paragraph, or part

thereof directly involved in the controversy in which such judgment shall have been rendered." § 385, subd. 2.

The section relating to exemptions (362) improperly discriminated against nonresidents, but it was a separable part of the act which in no way affected its general purpose, and, although so long as the discrimination continued in the act it resulted in making the tax, as against a nonresident, uncollectable, as shown by the *Yale & Towne Manufacturing Company Case*, when the act was amended so as to eliminate the discrimination, the act, as expressly provided therein, remained in full force and effect, and the tax against the relator should be sustained as if the unconstitutional distinction therein as between resident and nonresident in the matter of exemption had never been in the act.

Statute—income tax—discrimination against nonresident—separable part of statute.

Even if the legislature had not expressly stated in the act that if any part thereof was adjudged invalid it should not impair or invalidate the remainder of the act, it cannot reasonably be contended that the legislature would have failed to pass the act had it not contained the provision in regard to exemptions discriminating against nonresidents, contained therein. See *State ex rel. Bolens v. Frear*, 148 Wis. 456, L.R.A.1915B, 569, 606, 134 N. W. 673, 135 N. W. 164, Ann. Cas. 1913A, 1147. It is unbelievable that a legislature willing to impose a tax with those items in would be unwilling that the tax should stand if those items were out. *People ex rel. Alpha Portland Cement Co. v. Knapp*, 230 N. Y. 48, 62, 129 N. E. 202.

Section 351a of chapter 191 of the Laws of 1920 provides that the tax provided for by § 351 of the Act of 1919 shall be levied, collected, and paid for the year 1919. It is unnecessary at the present time to consider the question as to whether the general reimposition of the tax,

as stated in said section, is a violation of § 24 of article 3 of the Constitution of the state of New York.

The relator objects that the tax is invalid because it is imposed upon interstate commerce, in violation of the United States Constitution (art. 1, § 8, subd. 3), and upon exports, in violation of the United States Constitution (art. 1, § 9, subd. 5), and consists of imposts or

Constitutional law—Income tax as interference with commerce or impost duty.

duties laid by the state on exports without the consent of Congress, in violation of the United

States Constitution (art. 1, § 10, subd. 2). These objections are without merit, because the tax is not imposed upon the goods which were handled by him in his business in this state nor upon the gross receipts from such business, but simply upon the net income of the business. Such a tax is sustainable even if, in the conduct of such business, goods are received by interstate transportation and are ultimately exported from the state of New York. *Shaffer v. Carter*, supra, 252 U. S. 57, 64 L. ed. 445, 40 Sup. Ct. Rep. 221. A tax upon net incomes, from whatever source arising, is but a method of distributing the cost of government; and, if there be no discrimination against interstate commerce either in the admeasurement of the tax or in the means adopted for enforcing it, it does not interfere with the power of Congress to regulate commerce among the states. *United States Glue Co. v. Oak Creek*, 247 U. S. 321, 62 L. ed. 1135, 38 Sup. Ct. Rep. 499, Ann. Cas. 1918E, 748.

The tax is upon the net income of the business carried on by relator in this state after all expenses and losses are adjusted and the exportation of the goods accomplished. The net income is, then, but the result of the business carried on or conducted, and such a tax is not laid on articles exported from any state within the meaning of the United States Constitution. *William E. Peck & Co. v. Lowe*, 247 U. S. 165, 62 L. ed. 1049, 38 Sup. Ct. Rep. 432.

The relator objects that the tax is invalid because it is retroactive. A part of the year 1919 had passed at the time the original act became a law. The amendment thereto was not passed, and the relator did not pay the tax, until 1920. The argument of the relator is based upon his claim that the tax as imposed, at least so far as it relates to nonresidents, is a privilege or excise tax.

As we have already shown, a non-resident has a constitutional right to engage in legitimate business in the state. The tax is not for a privilege already constitutionally provided, but to cast upon nonresidents a just proportion of the expenses of protecting residents and nonresidents in business in this state. That expense should be borne by the persons enjoying such protection. It is a tax upon business done in this state, first levied in 1920, but measured by the net income of a designated period, and, notwithstanding its

Tax—Income—retroactive—validity.

imposition, the relator, as a nonresident, enjoys the same privileges and immunities as residents of the state, and his constitutional rights are protected. *Brushaber v. Union P. R. Co.* 240 U. S. 1, 60 L. ed. 493, L.R.A.1917D, 414, 36 Sup. Ct. Rep. 236, Ann. Cas. 1917B, 713; *Stockdale v. Atlantic Ins. Co.* 20 Wall. 323, 22 L. ed. 348; *State ex rel. Bolens v. Frear*, supra.

The relator maintained an office in New York city, where he had samples of cotton goods, but not a sufficient quantity from which an order for goods could be filled. He employed traveling salesmen in different places in Europe, South America, and Australia, some of whom maintained offices where the name of G. A. Stafford & Company, under which the relator did business, may have been displayed. These salesmen solicited orders for cotton goods, and received from the relator a commission on the cotton goods for which they obtained orders, for their salary and expenses. The orders obtained by the sales-

men were sent by cable or mail to the relator (except as hereinafter stated) subject to his approval in New York city. When accepted by him, he would order the cloth to fill the order from a manufacturer or manufacturers in states in this country other than the state of New York. Such orders on the manufacturers would be boxed by them for foreign shipment, and then consigned to the relator in New York city, and be paid for by him. When received by the relator, he would employ draymen to take them from the cars on which they were received, and place them on steamships, where they were consigned to his foreign customers. In case of delay in obtaining vessels for shipment, the relator stored the cloth to await shipment by him. The purchases and the sales (except as hereinafter stated) were fully consummated in the city of New York. More than one-half of the orders received by the relator were received by him direct from commission merchants in the city of New York, who obtained the orders either from the same persons employed as salesmen by the relator in foreign countries, or from other sources. The orders received by the relator directly from commission merchants in the city of New York were filled by purchases by the relator from manufacturers, as stated above, and by delivery to such commission merchants in the city of New York. While it does not clearly appear from the record that any of the orders taken by the salesmen in foreign countries were accepted on behalf of the relator by such sales-

men, it is now so asserted by the relator, and substantially admitted by the respondent.

As counsel for respondent substantially concedes that some or all of the orders taken by the relator in foreign countries by traveling salesmen employed by him are, by authority of the relator, accepted for him by such salesmen, and there become consummated agreements of purchase and sale between the relator and such customers, it will be necessary to remand the proceedings to the comptroller of the state of New York for further hearing as to that part of the tax based upon the sales, if any, consummated by the traveling salesmen of the relator; and if he finds that such sales were consummated outside of the state of New York, then

—tax on income from sale consummated in foreign countries.

to adjust the amount of the net income of the relator from such sales according to the proportionate amount of business done in making the purchase of the goods, and forwarding the same in the city of New York, and the sales thereof, made, as asserted, outside of the state of New York.

The order of the Appellate Division and determination of the comptroller should be reversed, and the proceeding remitted to the comptroller of the state of New York, to proceed in accordance with this opinion, without costs to either party.

Hiscock, Ch. J., and Hogan, Cardozo, Pound, McLaughlin, and Andrews, JJ., concur.

ANNOTATION.

Income tax on nonresident.

- I. Federal statutes, 1326.
- II. State statutes, 1329.
- III. English and provincial acts:
 - a. In general, 1334.
 - b. New Zealand Income Tax Law, 1342.
 - c. Acts applicable to Queensland, 1343.

I. Federal statutes.

The first (Act Aug. 5, 1861; 12 Stat.

at L. 309, chap. 45), second (Act July 1, 1862, 12 Stat. at L. 473, chap. 119), and third (Act June 30, 1864; 13 Stat. at L. 281, chap. 173) Income Tax Acts enacted by Congress merely in terms imposed a tax upon the income of persons "residing" in the United States and upon "citizens" residing abroad, without mentioning nonresidents; and

it has been held that such acts did not impose an income tax on nonresident aliens. *Northern C. R. Co. v. Jackson* (1869) 7 Wall. (U. S.) 262, 19 L. ed. 88, affirming (1865) Chase, 268, Fed. Cas. No. 7,142 (two justices dissenting). This was upon the theory that Congress did not intend to include such aliens, and that it impliedly excluded them by confining the acts to residents of the United States and citizens residing abroad.

However, Congress did by express terms by the Acts of March 10 and July 13, 1866, impose a tax on alien nonresident bondholders. The Supreme Court of the United States in *Northern C. R. Co. v. Jackson* (U. S.) supra, expressly refused to pass upon the question whether or not it was competent for Congress to impose this tax. But in *United States v. Erie R. Co.* (1882) 106 U. S. 327, 27 L. ed. 151, 1 Sup. Ct. Rep. 223, it was held (Justice Field dissenting) that the tax imposed by the Act of June 30, 1864, as amended by the Act of July 13, 1866, upon dividends paid to nonresident alien holders of bonds of local corporations was valid and enforceable as against the corporation declaring the same, which, by the terms of the act, was required to deduct the same at their source.

And all subsequent Federal Income Tax Acts have imposed a tax upon non-residents of the United States and have been upheld and enforced.

Thus in *DeGanay v. Lederer* (1919) 250 U. S. 376, 63 L. ed. 1042, 39 Sup. Ct. Rep. 524, affirming (1917) 239 Fed. 568, it was held that the income from stocks and bonds of corporations organized under laws of the United States, and from bonds and mortgages secured upon property in the United States,—all owned by a nonresident alien,—which income is collected and remitted to her by an agent domiciled in the United States, who has physical possession of such securities under a power of attorney which gives him authority to sell, assign, or transfer any of them, and to invest and reinvest the proceeds of such sales as he may deem best in the management of the business and the affairs of the principal, is in-

come derived from property owned in the United States within the meaning of the Act of October 3, 1913 (38 Stat. at L. 166, chap. 16, 4 Fed. Stat. Anno. 2d ed. p. 236), § II.A., subd. 1, which imposed an income tax "upon the entire net income from all property owned, and of every business, trade, or profession carried on, in the United States, by persons residing elsewhere." The court said: "The question certified is: 'If an alien nonresident own stocks, bonds, and mortgages secured upon property in the United States, or payable by persons or corporations there domiciled; and if the income therefrom is collected for and remitted to such nonresident by an agent domiciled in the United States; and if the agent has physical possession of the certificates of stock, the bonds, and the mortgages,—is such income subject to an income tax under the Act of October 3d, 1913?' The question submitted comes to this: Is the income from the stock, bonds, and mortgages held by the Pennsylvania Company, derived from property owned in the United States? A learned argument is made to the effect that the stock certificates, bonds, and mortgages are not property; that they are but evidences of the ownership of interests which are property; that the property, in a legal sense, represented by the securities, would exist if the physical evidences thereof were destroyed. But we are of opinion that these refinements are not decisive of the congressional intent in using the term 'property' in this statute. Unless the contrary appears, statutory words are presumed to be used in their ordinary and usual sense, and with the meaning commonly attributable to them. To the general understanding and with the common meaning usually attached to such descriptive terms, bonds, mortgages, and certificates of stock are regarded as property. . . . We have no doubt that the securities herein involved are property. Are they property within the United States? It is insisted that the maxim, '*Mobilia sequuntur personam*,' applies in this instance, and that the situs of the property was at the domicile of the power

in France. But this court has frequently declared that the maxim, a fiction at most, must yield to the facts and circumstances of cases which require it; and that notes, bonds, and mortgages may acquire a situs at a place other than the domicile of the owner, and be there reached by the taxing authority. . . . In the case under consideration, the stocks and bonds were those of corporations organized under the laws of the United States, and the bonds and mortgages were secured upon property in Pennsylvania. The certificates of stock, the bonds and mortgages, were in the Pennsylvania Company's offices in Philadelphia. Not only is this so, but the stocks, bonds, and mortgages were held under a power of attorney which gave authority to the agent to sell, assign, or transfer any of them, and to invest and reinvest the proceeds of such sales as it might deem best in the management of the business and affairs of the principal. It is difficult to conceive how property could be more completely localized in the United States. There can be no question of the power of Congress to tax the income from such securities. Thus situated and held, and with the authority given to the local agent over them, we think the income derived is clearly from property within the United States, within the meaning of Congress as expressed in the statute under consideration."

And the validity of the provisions of the Federal Income Tax Acts of 1916, 1917, and 1918, which impose taxes upon the income of nonresidents, was recognized in *Lawrence v. Wardell* (1920) 270 Fed. 682, affirmed in (1921) — C. C. A. —, 273 Fed. 405, wherein it was held that a citizen of the United States who resided in the Philippine Islands during the year 1918 was subject to the tax imposed by the Revenue Act of that year instead of under the Acts of 1916 and 1917. The provisions of the acts were discussed as follows: "Section 1 of the Act of 1916 (Comp. Stat. § 6336a, Fed. Stat. Anno. Supp. 1918, p. 312) imposed a tax upon the entire net income received by every individual 'a

citizen or resident of the United States,' and upon the entire net income received by every individual 'a nonresident alien' from all sources within the United States. This act was amended in 1917 (40 Stat. at L. 300, chap. 63, Comp. Stat. § 6336aa, Fed. Stat. Anno. Supp. 1918, p. 336), but the amendment is not deemed material to our present inquiry. Section 210 of the Act of 1918 (Comp. Stat. § 6336 1-8e) imposed upon the net income of every individual a normal tax in lieu of the taxes imposed by the Acts of 1916 and 1917. From those provisions it will be seen that the tax is imposed on citizens of the United States regardless of their place of residence, or residents of the United States regardless of their citizenship, and upon the income of nonresident aliens from sources within the United States. Nothing is found in any other provision of the act in conflict with this view. Thus § 260 of the Act of 1918 refers to individuals who are citizens of any possession of the United States, but not otherwise citizens of the United States, and the following section provides that returns shall be made by individuals who are citizens or residents of Porto Rico and the Philippine Islands or derive income from sources therein, but makes no reference to citizens of the United States residing in the Islands. . . . The tax was properly imposed."

With respect to what constitutes business transacted or done in the United States within the meaning of the Revenue Act of 1909 and the Income Tax Act of 1913, it was held in *Laurentide Co. v. Durey* (1916) 231 Fed. 223, that a Canadian company was transacting business in the United States so as to render it liable to tax therein, it appearing that it sent its agents clothed with power, even though limited, to travel about and solicit customers or purchasers for its manufactured products, and paid their expenses and hired a place of business in the United States, even though but desk room, and empowered such salesmen to make written contracts in part in the United States, subject to its approval in Canada, and, when approved, to deliver them, and did so

ratify and have such contracts delivered, paid rent, storage charges, and other expenses, and also for the work so done, by checks drawn on a bank in the United States; that it kept temporarily its funds received for goods delivered in the United States to purchasers, and then, to carry out and perform its written contracts so made, and which in nearly all cases were to be performed in the United States as to delivery of goods, and in part as to making payments therefor, shipped such goods, consigned to itself, into the United States at different points; that it hired and paid for storage or warehouse room, and had them delivered to itself at such rooms; and that it stored them for itself in its own name and at its own risk, pending delivery to the customer, and did this for its own convenience and to insure delivery according to contract, and also shipped to the United States and stored in like manner goods to meet anticipated demands.

II. State statutes.

State statutes imposing a tax upon incomes of nonresidents earned or accruing within the taxing states have been upheld as against practically all constitutional objections which have been raised.

—due process of law.

It has been held that a state may, consistently with due process of law, impose an annual tax upon the net income derived by nonresidents from property owned by them within the state, and from any business, trade, or profession carried on by them within its borders. *Shaffer v. Carter* (1920) 252 U. S. 37, 64 L. ed. 445, 40 Sup. Ct. Rep. 221; *Travis v. Yale & T. Mfg. Co.* (1920) 252 U. S. 60, 64 L. ed. 460, 40 Sup. Ct. Rep. 228, affirming (1919) 262 Fed. 576; *Underwood Typewriter Co. v. Chamberlain* (U. S. Adv. Ops. 1920-21, p. 50) 254 U. S. 113, 65 L. ed. —, 41 Sup. Ct. Rep. 45, affirming (1919) 94 Conn. 47, 108 Atl. 154.

In *Underwood Typewriter Co. v. Chamberlain* (U. S.) supra, the United States Supreme Court held that measuring for tax purposes the net profits earned by a foreign manufacturing

and trading corporation within the state, by taking such proportion of the whole net income as the fair cash value of the corporation's real and tangible personal property within the state bears to the fair cash value of all the real and tangible personal property of such corporation, cannot be said to be so inherently arbitrary, nor, as applied to a corporation whose profits were largely earned in a series of transactions, beginning with manufacture in the state and ending with sale in other states, to produce so unreasonable a result, as to render invalid the state law prescribing such rule, upon the ground that it taxes business outside the state, and hence denying due process of law, where the only showing made in support of this constitutional objection is that but a very small part of the corporation's net receipts was received within the state, while, under the statutory method of apportionment, nearly one half of the corporation's net income is attributable to operations within the state, since the percentage of net profits earned within the state may, none the less, have been even larger than the percentage arrived at by the statutory method.

So it has been held that the facts that it required the personal skill and management of a nonresident to bring his income from producing property within the state to fruition, and that his management was exerted from his place of business in another state, did not, by reason of the due process of law clause of the Federal Constitution, deprive the former state of jurisdiction to tax the income which arose within its own borders. *Shaffer v. Carter* (U. S.) supra. And it was further held in this case that a nonresident whose entire property within the state consists of oil-producing land, oil and gas mining leaseholds, and other property used in the production of oil and gas, and whose entire net income in the state was derived from his oil operations, which he managed in that and other states as one business, having proceeded with notice of a law of the state taxing incomes derived by nonresidents from

business out of which arose the income taxed under such law, cannot claim that the state exceeded its power or authority so as to deny due process of law by treating his property interests and his business as a single entity, and enforcing payment of the tax by the imposition of a lien, to be followed by execution or other appropriate process upon all the property employed by him within the state in the business.

And in *Shaffer v. Howard* (1918) 250 Fed. 873 (decree reversed and dismissal of bill ordered for want of proper parties in (1919) 249 U. S. 200, 63 L. ed. 559, 39 Sup. Ct. Rep. 255) in holding that income of a nonresident received from Oklahoma oil wells was taxable under the Oklahoma Income Tax Act (Laws 1915, chap. 164, § 1), which imposed a tax upon "the entire net income from all property owned, and of every business, trade, or profession carried on, in this state by persons residing elsewhere," as against the contention that it was invalid in respect of nonresidents, the court said: "This [alleged invalidity of the law] is based on the claims that an income tax is a kind of taxation differing in its basic principles from all other taxation; and, as such, being a tax levied against the person who receives the income, is invalid because he is a nonresident; or, if levied against the income, is still void because the income is made up from two inseparable elements,—the property and the owner's management or intelligence,—and the latter of these is outside the state. It is claimed that income taxation is a generic kind of taxation, different from all other taxation, and resting upon an entirely different basis. That income taxation is a separate and distinct form of exercising the sovereign power of taxation is evident. That the right to its employment rests upon a basis different from that of other modes of raising revenue does not follow. Laying aside political considerations, such as gave rise to the War of the Revolution, there is but one theory of right to tax underlying all taxation—that of protection or benefit rendered by the state

to persons, property, or business. . . . Within constitutional limits, the choice of any particular form of taxation is a practical legislative problem. Certain classes of taxation have adherents who urge certain consideration, based upon their ideas of just and practical legislative results in taxation. One such class is income taxes, and its sponsors urge its employment on the theory that it places the burden of government upon those most able to bear it. This may be a reason why the legislature should choose income taxation as a revenue-raising method. It forms no new basis for a right of taxation itself. It refers solely to a choice of methods, all of which rest upon a common basis. The right to tax an income rests upon the protection or benefit given that income by the state. The next contentions of plaintiff are related in thought, and will be considered together. They are based upon the idea that the entire income, or at least a material, inseparable, component part thereof (the directing or managing intelligence), is without the jurisdiction of the state of Oklahoma. The income here involved arose solely from production of oil wells and appliances within the state of Oklahoma, managed by plaintiff from his city of residence, Chicago, Illinois. Unless the state has given protection or benefit to this income, it has no reason or right to ask contribution therefrom. . . . Plaintiff says no such protection has here been given because the levy is a 'tax on this plaintiff because of his income.' In one sense all taxes might be said to be a tax on the taxpayer because of his land or of his personality or of his business or of some privilege. But what the plaintiff means, as he says further in his brief, is that 'the tax is directed against the individual, and not against the property.' By way of further elucidation, he quotes with approval from *State ex rel. Sallie F. Moon Co. v. Wisconsin Tax Commission* (1917) 166 Wis. 287, 163 N. W. 639, 165 N. W. 470, a portion of which is that 'it is the recipient of the income [tax] that is taxed, not his property. . . . The

tax is upon the right or ability to produce, create, receive, and enjoy, and not upon specific property.' It does not necessarily follow from this definition that the plaintiff is subject to income tax only in the state of his residence. It means, rather, that he is subject to income taxation only in those jurisdictions which protect him in the production, creation, receipt, and enjoyment of his income. If he lives in Illinois, and has in Oklahoma the property, or the business, from which his income flows, does not the latter state truly protect him in the privilege of producing, creating, receiving, and enjoying that income when it permits and protects his business from which the income flows? How is that affected by his residence? Both the property in Oklahoma and the intelligence in Illinois contributed to this income. Each was necessary to the result. Each had protection from the state in which it was. It is impossible to separate the two elements for taxation purposes. It is impossible, if material, to determine which was most potent in the result. Can either state be told it cannot be compensated for its protection of a necessary component element of this income, or that it cannot measure such compensation by that income? If, through accident or design, an individual dwells in one state, while his business is in part or wholly located in other states, so that he needs, commands, and receives the protection of several states, can his income therefrom escape imposition? It may be true that the state which protects the person of the one who creates, receives, or enjoys an income, may require of him therefor a tax measured by his ability to pay from his entire income. That is no reason why the state which protects the business which contributes to his income may not also demand, as pay for that protection, a tax measured by that part of his income which came from that business. If in the one case the state of residence can tax the right to create, receive, and enjoy an income, why cannot another state tax his right to create and receive an income from

business within its borders? A tax upon an income of the instant character (from a business) is directed at neither the person who receives nor the property from which the income arises, but at the privilege of making, producing, creating, receiving; and enjoying the income itself. The right to lay such tax depends upon the protection of the person who receives or of the business which helps create that income."

—privileges and immunities; equal protection; discrimination.

It has been held that nonresidents are not denied their constitutional privileges or immunities, nor the equal protection of the laws, by a state tax imposed upon the net income derived by them from property owned within the state, and from any business, trade, or profession carried on within its borders, either on the theory that, since the tax is, as to citizens of the state, a purely personal tax, measured by their incomes, while, as applied to a nonresident, it is essentially a tax upon his property and business within the state, to which the property and business of citizens and residents of the state are not subjected, there was a discrimination against the nonresident, or because the taxing statute permits residents to deduct from their gross income not only losses incurred within the state, but also those sustained elsewhere, while nonresidents may deduct only those incurred within the state. *Shaffer v. Carter* (1920) 252 U. S. 37, 64 L. ed. 445, 40 Sup. Ct. Rep. 221. And see *Travis v. Yale & T. Mfg. Co.* (1920) 252 U. S. 60, 64 L. ed. 460, 40 Sup. Ct. Rep. 228, affirming (1919) 262 Fed. 576; *Underwood Type-writer Co. v. Chamberlain* (U. S. Adv. Ops. 1920-21, p. 50) 254 U. S. 113, 65 L. ed. —, 41 Sup. Ct. Rep. 45, affirming (1919) 94 Conn. 47, 108 Atl. 154; *PEOPLE EX REL. STAFFORD v. TRAVIS* (reported herewith) ante, 1819; and *State ex rel. Bolens v. Frear* (1912) 148 Wis. 456, L.R.A.1915B, 569, 134 N. W. 673, 135 N. W. 164, Ann. Cas. 1913A, 1147.

In the reported case (*PEOPLE EX REL. STAFFORD v. TRAVIS*, ante, 1819) it will be remembered that the New York court of appeals upheld the statute

under consideration upon the theory that the tax imposed by it upon foreign corporations was not for the privilege of carrying on a business within the boundaries of the state, but upon the business actually done in the state, measured by a percentage on the income therefrom.

In *Travis v. Yale & T. Mfg. Co.* (U. S.) *supra*, it was held that there is no unconstitutional discrimination against citizens of other states in a state income tax law merely because it confines the deduction of expenses, losses, etc., in the case of nonresident taxpayers, to such as are connected with income arising from sources within the taxing state. And it was also held in the *Yale & T. Mfg. Co.* Case that a state income tax law does not unconstitutionally discriminate against noncitizens merely because it confines the withholding at source to the income of nonresidents, since such provision does not in any way increase the burden of the tax upon nonresidents, but merely recognizes the fact that, as to them, the state imposes no personal liability, and hence adopts a convenient substitute for it.

In *Underwood Typewriter Co. v. Chamberlain* (U. S. Adv. Ops. 1920-21, p. 50) 254 U. S. 113, 65 L. ed. —, 41 Sup. Ct. Rep. 45, affirming (1919) 94 Conn. 47, 108 Atl. 154, *supra*, it was held that a foreign corporation may not successfully attack as invalid, under U. S. Const. 14th Amend., a state tax, applicable alike to all foreign and domestic corporations, measured by the net profits of the corporation earned within the state, on the ground that such corporation had made large permanent investments in the state before the state tax law was enacted. And the Wisconsin Income Tax Law of 1911 has been upheld as against the contention that its provisions for increasing the assessment against a nonresident taxpayer without notice, whereas it required that notice be given to a resident, deprived him of the privileges and immunities guaranteed by the Federal Constitution. *State ex rel. Bolens v. Frear* (Wis.) *supra*. The court said: "So far as the provision allowing the increasing of an assess-

ment against a nonresident without notice is concerned, this would seem to be almost a necessity if power to increase the assessment of a nonresident is to be given to the board at all, otherwise the nonresident would only need to stay out of the state to prevent the possibility of an increase of his assessment. We do not consider that this latter provision affects in any way the privileges or immunities which are covered by the constitutional provision."

But it has been held that the privileges and immunities of citizens of New York are unconstitutionally denied to citizens of Connecticut and New Jersey by the provision of the New York Income Tax Law, which denies to all nonresidents, without special reference to citizenship, the exemptions accorded to residents, viz., \$1,000 of the income of a single person, \$2,000 in the case of a married person, and \$200 additional for each dependent, although the nonresident, if liable to an income tax in his own state, including income derived from sources within New York, and subject to taxation under the New York act, is allowed a credit upon the income tax otherwise payable to New York by the same proportion of the tax payable to the state of his residence as his income subject to taxation by the New York act bears to his entire income taxed in his own state, provided that such credit shall be given only if the laws of said state grant a substantially similar credit to residents of New York subject to income tax under such laws, and although the New York act also excludes from the income of nonresident taxpayers annuities, interest on bank deposits, interest on bonds, notes, or other interest-bearing obligations, or dividends from corporations, except to the extent to which the same shall be a part of income from any business, trade, profession, or occupation carried on in the state, subject to taxation under that act. *Travis v. Yale & T. Mfg. Co.* (1920) 252 U. S. 60, 64 L. ed. 460, 40 Sup. Ct. Rep. 228, affirming (1919) 262 Fed. 576, *supra*.

So, in *Eliasberg Bros. Mercantile*

Co. v. Grimes (1920) 204 Ala. 492, 11 A.L.R. 300, 86 So. 56, it was held that denying income tax exemptions to non-residents which are allowed to residents denies them the equal protection of the laws as guaranteed by the Federal Constitution.

And the discrimination against citizens of Connecticut and New Jersey, produced by the provision of the New York Income Tax Law, which denies to all nonresidents, without special reference to citizenship, the exemptions accorded to residents, viz., \$1,000 of the income of a single person, \$2,000 in the case of a married person, and \$200 additional for each dependent, cannot be upheld on the theory that nonresidents have untaxed income derived from sources in their home states or elsewhere outside of the state of New York, corresponding to the amount upon which residents of the latter state are exempt from taxation under the act. *Travis v. Yale & T. Mfg. Co.* (U. S.) *supra*. This case also is authority for the proposition that a discrimination by the state of New York in its income tax legislation against citizens of adjoining states would not be cured were those states to establish like discriminations against citizens of the state of New York.

In *H. P. Hood & Sons v. Com.* (1920) 235 Mass. 572, 127 N. E. 497, it was held that a state statute imposing an additional tax upon the income of foreign corporations derived from business carried on within the taxing state cannot be declared discriminatory against such corporations where another statute taking effect on the same day places an equally onerous additional tax upon the income of domestic corporations.

And no discrimination in favor of or against foreign corporations is effected by the Wisconsin Income Tax Law provisions, which permit them a deduction of 6 per cent of capital stock and surplus before assessing the tax, where the basis of deduction is the property out of which the assessable income is earned, and not 6 per cent of the corporation's property, both local and foreign. *State ex rel.*

Atwood v. Johnson (1919) 170 Wis. 218, 7 A.L.R. 1617, 175 N. W. 589.

—Obligation of contract.

The question of impairment of obligation of contract has also been raised. Thus, in *Travis v. Yale & T. Mfg. Co.* (1920) 252 U. S. 60, 64 L. ed. 460, 40 Sup. Ct. Rep. 228, affirming (1919) 262 Fed. 576, it was held that a foreign corporation doing business within the state and elsewhere has no just ground of complaint against a state income tax, in the absence of any contract limiting the state's power of regulation, by reason of being required to adjust its system of accounting and paying salaries and wages to the extent required to fulfil the duty of deducting and withholding the tax from that part of the salaries and wages of its nonresident employees which was earned by them within the state, although the corporation asserts that the statute impairs the obligation of contracts between it and its employees; there being no averment, however, that any such contract, made before the passage of the statute, required the wages or salaries to be paid in the state of incorporation, where it has its principal place of business, or contained other provisions in anywise conflicting with the withholding requirement.

—Commerce clause.

A state income tax upon the net income of a nonresident from the business carried on by him in the state is not a burden on interstate commerce merely because the goods used in, or the products of, the business, are shipped in or out of the state; since the tax not being upon gross receipts, but only upon the net proceeds, is plainly sustainable even if it includes net gains from interstate commerce. *Shaffer v. Carter* (1920) 252 U. S. 37, 64 L. ed. 445, 40 Sup. Ct. Rep. 221.

And again, in *Underwood Type-writer Co. v. Chamberlain* (U. S. Adv. Ops. 1920–21 p. 50) 254 U. S. 113, 65 L. ed. —, 41 Sup. Ct. Rep. 45, affirming (1919) 94 Conn. 47, 108 Atl. 154, it was held that state taxation of a foreign manufacturing and trading cor-

poration, measured by the net profits earned within the state, does not offend against the commerce clause of the Federal Constitution, whether deemed a property tax or a franchise tax, even though these profits may have been derived in part, or indeed mainly, from interstate commerce, where payment of the tax is not made a condition precedent to the right of the corporation to carry on business, including interstate business, but its enforcement is left to the ordinary means of collecting taxes.

So, in the reported case (*STATE ex rel. STAFFORD v. TRAVIS*, ante, 1319), the court proceeded upon the theory that the provisions of the New York Income Tax Law of 1919, imposing a tax upon the income from every business, trade, profession, or occupation carried on in the state by natural persons not residents of the state, imposed a tax not upon the business or the goods handled therein, but upon the net income therefrom, and held that the tax could not be regarded as laid on interstate commerce in violation of the Federal Constitution, even though a large portion of the goods, etc., dealt with were imported into the state and ultimately exported again. However, it was also held that in such a case the tax should be levied only upon income from the proportionate part of the business actually carried on in New York state.

And in *H. B. Hood & Sons v. Com.* (1920) 235 Mass. 572, 127 N. E. 497, the Massachusetts supreme judicial court, adopting the reasoning of *Shaffer v. Carter* (U. S.) supra, and *United States Glue Co. v. Oak Creek* (1918) 247 U. S. 321, 62 L. ed. 1135, 38 Sup. Ct. Rep. 499, Ann. Cas. 1918E, 748, held that Massachusetts Statute 1918, chap. 253, which imposed an additional income tax upon foreign corporations carrying on business in the state, upon that portion of their income from the business so carried on, was not a tax on interstate commerce so as to render it violative of the Federal Constitution. In this case a foreign corporation transported milk into Massachusetts from neighboring states, and there prepared it for and

distributed it to local customers, and the court upheld the tax upon the ground that it was upon income derived from sales of milk within the state, and not upon the interstate transportation of the milk.

— **double taxation.**

It has been held that a state tax, upon the income therein of nonresidents cannot be successfully attacked on the ground that such a tax constitutes double taxation, there being nothing in the Federal Constitution or in the 14th Amendment which prevents the states from imposing double taxation or any other form of unequal taxation so long, at least, as the inequality is not based upon arbitrary distinctions. *Shaffer v. Carter* (1920) 252 U. S. 37, 64 L. ed. 445, 40 Sup. Ct. Rep. 221.

— **what constitutes income.**

The question what constitutes income of a nonresident derived from sources within a taxing state has been answered in a few cases.

Thus it was held in *State ex rel. Manitowoc Gas Co. v. Wisconsin Tax Commission* (1915) 161 Wis. 111, 152 N. W. 848, that interest due a nonresident on bonds of a domestic corporation was not such income within the meaning of the Wisconsin Income Tax Law of 1911. Nor does such statute authorize a tax on the income of a trust estate, the trustees and beneficiaries of which are all nonresidents, and the income from which is not derived from property located or business transacted within the state, merely because a county court within the state administered the trust. *Bayfield County v. Pishon* (1916) 162 Wis. 466, 156 N. W. 463.

III. English and provincial acts.

a. In general.

The Income Tax Acts of the United Kingdom in terms tax profits or gains earned or accruing therein and belonging to a person or corporation not resident but doing or carrying on a business therein. Under these acts it has been held that a nonresident of the United Kingdom must pay an income tax on any income earned there-

in. *Atty. Gen. v. Alexander* (1874) L. R. 10 Exch. (Eng.) 20, 44 L. J. Exch. N. S. 3, 31 L. T. N. S. 694, 23 Week Rep. 255; *Gilbertson v. Ferguson* (1879) L. R. 5 Exch. Div. (Eng.) 57, affirmed in (1881) L. R. 7 Q. B. Div. 562, 46 L. T. N. S. 10; *Erichsen v. Last* (1881) L. R. 8 Q. B. Div. (Eng.) 414, 51 L. J. Q. B. N. S. 86, 45 L. T. N. S. 703, 30 Week Rep. 301, 46 J. P. 357; *Tischler & Co. v. Apthorpe* (1885) 52 L. T. N. S. (Eng.) 814, 33 Week Rep. 548, 49 J. P. 372; *Pommery v. Apthorpe* (1886) 56 L. J. Q. B. N. S. (Eng.) 155, 56 L. T. N. S. 24, 35 Week Rep. 307; *Werle & Co. v. Colquhoun* (1888) L. R. 20 Q. B. Div. (Eng.) 753, 57 L. J. Q. B. N. S. 323, 58 L. T. N. S. 756, 52 J. P. 644, 36 Week Rep. 613; *Grainger v. Gough* [1896] A. C. (Eng.) 325, 65 L. J. Q. B. N. S. 410, 74 L. T. N. S. 435, 60 J. P. 692, 44 Week Rep. 561; *Watson v. Sandie* [1898] 1 Q. B. (Eng.) 326, 67 L. J. Q. B. N. S. 319, 77 L. T. N. S. 528, 14 Times L. R. 124, 46 Week Rep. 202; *Weiss, Biheller & Brooks v. Farmer* [1918] 2 K. B. (Eng.) 725, 34 Times L. R. 561, 145 L. J. Jo. 214; *Macpherson v. Inland Revenue* [1912] S. C. (Scot.) 1315, 6 Tax Cas. 107 (set out in *Mews*, Eng. Case Law Dig. (1911–1915) col. 1277).

Under these acts the principal point of difficulty is to determine when a trade is carried on in the United Kingdom by a nonresident, and with this question the English courts admittedly have had considerable difficulty.

For instance, in *Werle & Co. v. Colquhoun* (1888) L. R. 20 Q. B. Div. (Eng.) 753, where a firm of wine merchants in Rheims employed a London firm to take orders for their wine in England, where the wine was advertised, and the name of the Rheims firm was put up on the place of business of the London firm, and was published in the London Directory with that address, it was held that the Rheims firm exercised a trade within the United Kingdom so as to subject them to a tax on the profits arising therefrom; it appearing that the London firm was paid by a commission on the wine sold, and that the Rheims

firm alone was interested in the gain or loss on the sales. Other facts seemingly taken into consideration by the court were that the Rheims firm had no wine in England, but that all orders were forwarded to Rheims, and the wine invoiced in the name of the foreign firm, was shipped direct to the customers in England at the latter's expense and risk; and that payments were made either direct to the Rheims firm or to the London firm, which remitted directly to its principle, who forwarded all receipts to purchasers. In reaching the above stated conclusion, Lord Esher, M. R., said: "I agree with the opinion expressed by the late Lord Chief Justice Cockburn in *Sulley v. Atty. Gen.* (1860) 5 Hurlst. & N. 711, 157 Eng. Reprint, 1364, 29 L. J. Exch. N. S. 464, 6 Jur. N. S. 1018, 2 L. T. N. S. 439, 8 Week Rep. 472 [*infra*], that it is probably a question of fact where the trade is carried on. That question is divisible into two,—Is there a trade carried on? If so, is it carried on in England? If it is a question of fact in each case it will be impossible to give an exhaustive definition of what constitutes carrying on a trade. The question in each case must be whether the facts shown to exist in that particular case establish that a trade is carried on and that it is carried on in England. . . . One way of testing whether this trade was carried on in England is that which I enunciated in *Erichsen v. Last* (1881) L. R. 8 Q. B. Div. (Eng.) 414, 51 L. J. Q. B. N. S. 86, 45 L. T. N. S. 703, 30 Week Rep. 301, 46 J. P. 357 [*infra*]; that 'whether profitable contracts are habitually made in England by or for foreigners, with persons in England because they are in England, to do something for or supply something to those persons, such foreigners are exercising a profitable trade in England even though everything to be done by them in order to fulfil the contracts is done abroad.' . . . I think that both the learned judges who heard that case expressed the same thing. Cotton, L. J., said: 'When a person habitually does and contracts to do a thing capable of producing profit, and

for the purpose of producing profit, he carries on a trade or business;' and Jessel, M. R., said: "There are a multitude of things which together make up the carrying on of trade, but I know no one distinguishing incident, for it is a compound fact made up of a variety of things;" and, further: "The company habitually receive money in this country from English subjects for messages sent from England to places abroad, and may transmit those messages from stations in this country to places abroad. This, I think, makes it a carrying on of trade in this country." There is no reliance placed on the fact of there being an establishment in England, nor upon the fact of the money being received in England. If both these facts exist, they are strong circumstances to show that a trade is carried on in England, but their absence is not conclusive against this." In the same case, Fry, L. J., states: "Now I shall not attempt anything like a definition of exercising a trade within the United Kingdom. I think it is obvious that the late Master of the Rolls was correct when he said that whatever else those words may mean, they plainly included carrying on a trade; and I also entirely agree in his observation that the question whether a trade is carried on is not a matter of law, or one in respect of which you can lay down any one distinguishing incident, but it is a compound fact, made up of a variety of things."

So, in *Tischler & Co. v. Apthorpe* (1885) 52 L. T. N. S. (Eng.) 814, 49 J. P. 372, 33 Week. Rep. 548, a French wine merchant was held subject to taxes where one of the partners of the firm came to England every year and remained for about four months soliciting orders for wines of the firm, and at the office of an English agent had a room devoted to his business and occupied by a clerk, who represented him; and the fact that the English agent was a *del credere* agent was held not to change this rule.

And again, in *Pommery v. Apthorpe* (1886) 56 L. J. Q. B. N. S. (Eng.) 155, 56 L. T. N. S. 24, 35 Week. Rep. 307, a

French wine merchant was held subject to an income tax on profits derived from his business in England, where he established an agency in London, put his name over the office, had bankers in London and his name in the London Directory, describing his business, with the name of his agent added, as wine merchants; and where the agent in London received as many orders as he could get, filled part of them from a stock which he kept in London for that purpose, and the remainder from the stock which the French merchant kept in France and transmitted to him upon orders. In this case payments for wine sold to customers were made in various ways as cash, notes, bills, etc.; it being the duty of the London agent to receive all such forms of payment, and to accept the paper upon the authority of the principal as payment, except when dishonored at maturity.

Upon the other hand in *Grainger v. Gough* [1896] A. C. (Eng.) 325, 65 L. J. Q. B. N. S. 410, 74 L. T. N. S. 435, 66 J. P. 692, 44 Week. Rep. 561, it was held that a French wine merchant who supplied large quantities of wine in England through agents, resident there, who canvassed for orders for the wine and transmitted those received to the merchant, who exercised his discretion as to filling them, the customer purchasing the wine as it lay in the cellar of the merchant, and paying the cost of packing and carriage from the cellar, taking all risks, and receiving an invoice direct from the French merchant, was not exercising a trade in England within the meaning of the Income Tax Law, taxing nonresidents who exercised a trade within the United Kingdom. In reaching this conclusion Lord Watson stated that the decision of the Court of Appeal in *Werle Co. v. Colquhoun* (1888) L. R. 20 Q. B. Div. (Eng.) 753, 57 L. J. Q. B. N. S. 323, 58 L. T. N. S. 756, 52 J. P. 644, 36 Week. Rep. 613, *supra*, "was based upon the express ground that the foreign wine merchant exercised his trade in England by making contracts there for the sale of his champagne through his English agent;" and this interpreta-

tion seems correct, although it was urged in the Werle Case that the English agent had no authority to receive orders for the wine as contracts, but that all he could do was to forward them to the French merchant for acceptance. The court, however, stated that the inference was irresistibly to the contrary; that the French wine merchant, by virtue of the contract made with his agent in London, undertook to select and despatch the wine to the address given him in England.

And in *Smidth & Co. v. Greenwood* [1920] 3 K. B. (Eng.) 275, the court declared that the test of liability to taxation in case of trade was whether the contracts were closed in the country of the nonresident or in England, there being no business carried on in the United Kingdom unless actually transacted there by the closing of trades, etc. The facts, etc., sufficiently appear in the following extract from the opinion of the court: "The main question is whether the appellants, who are a Danish firm manufacturing and dealing in cement-making and other similar machinery, which they export all over the world, are assessable to income tax in respect of a trade exercised in the United Kingdom. The facts may be very shortly summarized. The appellants are resident in Copenhagen, but they have an office in London in charge of a representative with engineering qualifications, who is their whole-time servant. He receives inquiries for machinery such as the appellants can supply, sends to Denmark particulars of the work which the machinery is required to do, including samples of materials to be dealt with, and when the machinery is supplied he is available to give the English purchasers the benefit of his experience in erecting it. The contracts, however, between the appellants and their customers are made in Copenhagen and the goods are shipped f. o. b. Under these circumstances the commissioners have held that the appellants exercised a trade within the United Kingdom, and it is contended on behalf of the Crown that the acts done by or on behalf of the appellants in the United

Kingdom, together with their maintenance of an office and representative here, is evidence sufficient to justify that finding. It seems to me that in these cases the question is whether the trade which it is sought to tax is exercised in the United Kingdom or outside of it in the sense that it is supposed to have a single situation, and the question is what that situation is. I do not think the exercise of a trade as mentioned in schedule D can be said to be in the United Kingdom, with the reservation that it may also take place outside of it. The scheme of this part of the income tax is to tax a foreign resident in respect of a source of income in the United Kingdom. The exercise of a trade produces a profit once but not twice, and if that exercise takes place in the United Kingdom it cannot, as the source of the same profits and gains, also take place elsewhere. The question in this case is therefore between the United Kingdom to the exclusion of Denmark, and Denmark to the exclusion of the United Kingdom. . . .

The real place where the trade is exercised is the place where the transactions forming the alleged business are closed, in the case of a selling business, by the sale of the commodity and the profit thereby realized. It seems to me that is a clear and definite principle. Until the sale is effected the trade is incomplete. Trading is buying or making and selling, and if I am right in supposing that one single place has to be treated as the place where the trade is exercised, it seems to me that it must be where the profit-bearing transactions are closed. After all, this is a much more satisfactory principle than to leave it as a question of fact in each case whether there has been a sufficient volume of activity in connection with the business in any particular place to afford evidence to support a finding that the trade was exercised there."

In *Watson v. Sandie* [1898] 1 Q. B. (Eng.) 326, 67 L. J. Q. B. N. S. 319, 77 L. T. N. S. 528, 14 Times L. R. 124, 46 Week. Rep. 202, where American packers and provision merchants con-

signed goods to an agent in England for sale in that country, it was held that the foreign firm was subject to an income tax on the profits derived from the sales in England, although the English agent fixed the prices and sold the goods in his own name; it appearing that as a matter of fact he was merely an agent and that the American firm was the real principal.

In *Weiss, Biheller & Brooks v. Farmer* [1918] 2 K. B. (Eng.) 725, 34 Times L. R. 561, 145 L. J. Jo. 214, a Dutch company engaged in manufacturing gas mantels entered into an agreement with an English company for the exclusive sale of their product in England, whereby the Dutch company was to manufacture mantels and add 10 per cent to the cost, and the English company was to sell them at the best possible price, with the selling price and profits to be apportioned as follows: The Dutch company to receive the cost price plus 10 per cent, the English company to have 5 per cent on the turnover as commissions, and the additional difference, if any, between the selling price and the sums already apportioned to be divided according to an agreed scale. The English company also agreed to obtain the best possible price, and to have its daybook showing the prices obtained open to the officers of the Dutch company. The name of the latter company did not appear in the invoice of goods by the English company to its customers, but the name of the Dutch company appeared on the English place of business in that the local company stated that they were agents for the foreign company's mantels. Upon these facts it was held that there was sufficient to warrant the tax commissioners in imposing an income tax upon the profits of the Dutch company resulting from the trade carried on by them in England through their local agent.

And in *Macpherson v. Inland Revenue* [1912] S. C. (Scot.) 1315, 6 Tax Cas. 107, as set out in *Mews, Eng. Case Law Dig.* (1911-1915) col. 1277, where a local concern carried on business as merchants and commission agents in the United Kingdom and

sold goods on behalf of a Belgian manufacturer under the following circumstances: There was no written agency agreement; offers received by the local firm were submitted to the manufacturers for approval, and, if approved, were accepted on behalf of the foreign firm by the local firm; the goods sold were consigned to the local firm for delivery to customers in the United Kingdom; the local firm received payment for the goods and discharged the accounts on behalf of the manufacturers; the local firm sent sale accounts to the manufacturers monthly and rendered a quarterly statement for expenses and commissions, and they were paid by commission on business done and were liable for one half of the bad debts,—it was held that the Belgian firm was exercising a trade within the United Kingdom, and that the local firm as agents were assessable in respect of the profits derived by the nonresident manufacturers from the exercise of such trade.

In *Erichsen v. Last* (1881) L. R. 8 Q. B. Div. (Eng.) 414, *supra*, it was held that a foreign telegraph company with an agent and office in England was subject to an income tax on gains realized from receipts in England, *Jessel, M. R.*, saying: "The present appeal is from the decision of the divisional court, which decided in effect two things,—the first was, that the appellant company carry on trade within the United Kingdom. The words of the act are not quite those, but are 'any trade' 'exercised within the United Kingdom.' 16 & 17 Vict. chap. 34, § 2. Whatever the word 'exercised' may mean, it certainly includes carrying on, and therefore carrying on trade is within that word. The second point decided was that the profits of that trade are subject to income tax wherever the expenses may be incurred, and whether they are incurred by reason of the company carrying on trade along cables belonging to themselves, or along cables belonging to anybody else, or, to put the point rather more distinctly, that the company are not to be allowed to deduct from the profit any imaginary or esti-

mated profits which would be obtained by the company if they carried the message along their own cables abroad. The facts, as I understand them, are clear enough, and the question is whether what the company do amounts to carrying on trade in the United Kingdom. There is not, I think, any principle of law which lays down what carrying on trade is. There are a multitude of things which together make up the carrying on of trade, but I know no one distinguishing incident, for it is a compound fact made up of a variety of things. Now this company are a foreign corporation established at Copenhagen, but they have an agent and an office here, and, being a telegraph company, they have at Newbiggin near Newcastle, the ends of two cables, which are worked by a staff of servants at Newcastle, and they have a third cable at Peterhead, in Scotland, which is worked by a staff of servants at Aberdeen, and they have also workrooms in Winchester street, in London, and they employ in these places about forty clerks and electricians, whom they pay. Therefore there is a telegraph company with telegraph stations in this Kingdom, and with the ends of the cables in this Kingdom, which are worked by their own staff, and they transmit messages from England to distant foreign parts. The way they do so is this: They have a chief office in London, where they take, in messages direct. All over the Kingdom they take messages through the postoffice, having an arrangement with the Postmaster General by which he deducts what he is entitled to receive for the transmission of the message to the company's outlying stations, that is, the one at Peterhead and the one at Newbiggin, and he hands them, the rest. Now that, as it appears to me, is a perfectly plain case of carrying on trade in this country. The company habitually receive money in this country from English subjects for messages sent from England to places abroad, and they transmit those messages from stations in this country to places abroad. This, I think, makes it a carrying on of

trade in this country. . . . Therefore, in the present case, there is a trading within the meaning of the statute. The next point is the question of profits. Now what is profit? It is, as I understand, the difference between the price received on a sale and the cost price of what is sold. There may be the expense of management or of the establishment in which the profit is earned, but that is only an element in the cost price. The difference between money received for goods sold and money received for messages is, to my mind, appreciable. One must take the money received and deduct from that what it costs the company to transmit the messages, and the difference is the profit, and upon that difference the company ought to be taxed. But then it is said that the profit is earned in this way: The company have abroad cables belonging to them which are not connected with this country directly (there being foreign cables intervening between the company's cables abroad and the cables connected with this country), and that those cables are used by them to convey the messages and so earn the profit, and that that profit ought to be deducted. The answer is, that those cables do not earn a profit. The use of them by the company may diminish the expense of earning a profit, and therefore diminish the cost price, that is to say, the cost of transmitting the message abroad, but it is a fallacy to say that those cables earn a profit. Consequently the company can only deduct from the price received the cost of transmitting the message. It seems to me, therefore, that the decision of the court below is correct and ought to be affirmed."

In *Gilbertson v. Ferguson* (1881) L. R. 7 Q. B. Div. (Eng.) 562, *supra*, wherein it appeared that a foreign bank had an agency in London which made profits and distributed dividends, the question for the court was said to be: "Whether any portion of the profits made out of the United Kingdom by a Turkish corporation, carrying on business in Constantinople, London, and elsewhere, under the name of the Imperial Ottoman

Bank, and not actually remitted to the United Kingdom, was as profits, or as forming part of dividends paid in the United Kingdom, the subject of assessment to income tax under schedule D of the Act 16 & 17 Vict. chap. 34, in the circumstances appearing in the case." Bramwell, L. J. said: "I think this judgment should be affirmed, and although the order may require a verbal alteration, I think the substance of it should be retained. I agree with the judgment of by brothers Pollock and Huddleston, and with the reasons they give. With great submission to the late Lord Chief Baron, and with great respect for his opinion, I think he has misunderstood the effect of the contention of the Crown in the first part of his judgment. It seems to me that the substance of the claim which the Crown is making is this, to assess the dividends received in England. Take the case of the shares being equally held in England and Constantinople, and take it that the profits are equal in England and Constantinople, say 1,000 pounds in each place. Now the Crown says: 'Assess the dividends received in England, because the persons who receive the dividends are English or persons residing in England;' and so this case is under one of the classes in schedule D. Then the Crown says: 'Assess so much of the Turk's dividends as he receives out of the profits made in England.' Then if the proportions and profits are what I have said, equal in England and Turkey, the Turk will receive £500 out of the English profits. Therefore upon the whole the Crown says 'that the profits made by this bank, supposing they were made in the proportions I have mentioned, three fourths ought to be assessed to income tax.' That is the contention of the Crown, and I have no misgiving on the subject that that is right in substance, and I have heard no argument that it is not. On the contrary, it has been conceded that in the case put of two partners, one living abroad and the other in England, and making equal profits and having equal shares, three fourths of the profits would be

taxed in England. It seems to me that that is not susceptible of doubt. Supposing there was only one partner who lived abroad, the whole of his profit made in England would be assessable in England, and because he has got a partner residing here, and consequently only gets half of that profit, there is no reason why the duty should not still be paid. Then, there is another illustration,—suppose there was one dividend in the course of the year upon the English profits, and another dividend in the course of the year upon the Turkish profits, I do not see how it could be contested that the whole of the English profits must be subject to income tax, and that the English shareholder's share of the profits that were made in Turkey must be subject to income tax. It seems to me, therefore, that the substance of the Crown's contention is correct, and cannot be controverted. Then the question is whether the machinery is enough. I think it is. I think it comes within the meaning of § 10 of 16 & 17 Vict. chap. 34, the expression there, 'acting therein as agents or in any other character,' is most general and comprehensive. There is another case that might be put. Supposing there was a branch at Liverpool, and supposing the agent for the payment of the dividends was in London, it is quite certain that a return must be made showing the whole of the dividends paid in England, and showing also the profits made in Liverpool, and I think that this would be done under the words of § 10, and so that no dividend receiver in England would be made to pay the tax twice over. In the present case, this London agency are persons who have the duty to pay or who are intrusted to pay dividends on the shares of the Turkish company, to the extent only to which those shares are held in England, and to the extent only of the worth of the profits made out of those shares abroad, so that they are not intrusted to pay the English shareholders the English profits within the meaning of the Act of Parliament, but to pay the English shareholders the Turkish profits. I think that in that way the very lan-

guage of the Act of Parliament may be made to work out justly and properly. I think, therefore, the judgment below is right and should be affirmed."

In *Atty. Gen. v. Alexander* (1874) L. R. 10 Exch. (Eng.) 20, *supra*, it was held that a foreign bank was not taxable on its whole income, but only on the part derived from its branch in England, *Kelly, C. B.*, saying: "The question in this case is whether the defendants, who represent a banking corporation called the Imperial Ottoman Bank, are liable to be assessed to the income tax in respect not only of the profits realized by the branch or agency of the bank established in London, amounting to £40,000, as to which they admit their liability, but upon the whole profits of the corporation realized in England, France, Turkey, or elsewhere, which amount to no less than £278,395; and this question is, no doubt, one of great importance to the Imperial Ottoman Bank and other corporations similarly situated. It is contended on behalf of the Crown that they are liable to be assessed in respect of the whole of their profits, on the ground that the corporation comes within the first clause of schedule D to 16 and 17 Vict. chap. 34, § 2, which provides that income tax shall be payable 'for and in respect of the annual profits or gains arising or accruing to any person residing within the United Kingdom, from any profession, trade, employment, or vocation, whether the same shall respectively be carried on in the United Kingdom or elsewhere;' and the question, therefore, is whether this corporation, the Imperial Ottoman Bank, can be said, on the facts stated, to reside within the United Kingdom. Now, I am clearly of opinion that upon the case now before the court, the Imperial Ottoman Bank cannot be said to be resident in this country; that the business carried on in London is a mere branch or agency, and not the bank itself; and that London is not the chief seat of carrying on the business of the bank. This is, I think, conclusively settled by the language of what we may term the

charter of incorporation, that is, the convention relating to the concession, the 6th article of which is as follows: 'The seat of the bank shall be at Constantinople; with the authority of the government it shall establish as many branch establishments and agencies as it may judge convenient;' in conformity with which the statutes of the bank provide, art. 4: 'The society has its seat at Constantinople, it can establish as many branches and agencies as it may think fit.' If, therefore, this corporation can be said to be resident anywhere, I am of opinion that it must be resident in Constantinople, where alone it has its 'seat,' under the express terms of its charter; and the branches or agencies, which it establishes in London, Paris, or elsewhere, are not the establishment, the bank itself, but only branches of that bank which has its seat at Constantinople. Beyond language of the concession, which is plain and clear enough, and cannot well admit of any other construction, it may be observed that the establishment in London is throughout alluded to in the case not as the chief seat of the society, or as the corporation itself, but as an agency. . . . I think, therefore, that we cannot hold that this is a corporation residing in the United Kingdom within the 1st clause in schedule D. It is important to observe the distinction between the liability of a person and that of a corporation. If a person residing in London derived profits from some business carried on either in the United Kingdom or elsewhere, he would be liable only for the profits which he himself personally acquired. If he had a banking house at London, and another at Paris, and another at Constantinople, he would of course be entitled to the aggregate profits of the whole three, and would be liable to assessment in respect of the aggregate amount. But if he carried on business in this way in partnership he would be liable not for the whole profits of the undertaking, but only for his share of the profits, whatever it might be. If, however, we were to hold this corporation to be a person residing in the United Kingdom, then the corporation,

acquiring the whole aggregate profits, would be liable to assessment upon the aggregate amount. If, then, this corporation is not within the 1st clause of schedule D, I do not think it is necessary to say more than that the 2d clause is one which may well be held to provide for the case. Here, therefore, a branch establishment existing within the United Kingdom, and a profit to the extent of £40,000 a year being realized at this branch, the corporation, as represented by the defendants, are liable to assessment on that amount, and no more."

But in *Yokohama Specie Bank v. Williams* (1915) 85 L. J. K. B. N. S. (Eng.) 950, 113 L. T. N. S. 860, 6 Tax Cas. 634, it was held that a foreign bank which merely employed a local bank to sell bonds for it on a commission basis was not subject to an income tax in England. In this case the local bank was not a general agent, but was employed to carry out special assignments; it advertised the bonds for sale as "agents for" the foreign bank, and accepted subscriptions "on behalf of" that bank, and the foreign bank had no office in England.

And in *Sulley v. Atty. Gen.* (1860) 5 Hurlst. & N. 711, 157 Eng. Reprint, 1364, it was held that profits made by a New York firm in selling goods in America which it had purchased in England through a member of the firm who resided there were not taxable in England, since in such a case there was no carrying on or exercise of trade in England. Cockburn, Ch. J., said: "The question is whether there is a carrying on or exercise of the trade in this country. I think there is not, looking at the sense in which the term is used and having regard to the subject-matter of the statute. Wherever a merchant is established, in the course of his operations his dealings must extend over various places; he buys in one place and sells in another. But he has one principal place in which he may be said to trade, viz., where his profits come home to him. That is where he exercises his trade. It would be very inconvenient if this were otherwise. If a man were liable

to income tax in every country in which his agents are established, it would lead to great injustice. The argument for the Crown must be carried to this extent, that merely buying goods in this country is a trade exercised here so as to subject the purchaser of the goods to income tax. In the present case the defendant is a partner; but if the argument is well founded, this American firm might be taxed in the same way if he had been merely an agent. It would be most impolitic thus to tax those who come here as customers. The subjects of a foreign state, not resident here, cannot be made amenable to our laws. How then are their profits to be made amenable to the fiscal law? Simply by the provision that whosoever carries on the business and receives the profits here shall be assessed. But in the present case no profits are received by the firm, or exist in this country. . . . The profits of the firm in America do not accrue in respect of any trade carried on in this country, but in respect of the trade carried on in New York, where the main business is conducted. The profits which come home to this country as the share of the individual partner resident here are taxable; but as to the main profits which go into the pockets of the partners in America, we think they are not."

It has been held that the supertax imposed by the provisions of the English Finance Act of 1910, which imposes a super tax in respect of the "income of any individual" derived from property in the United Kingdom, is broad enough to cover nonresidents deriving an income from property located in the Kingdom. *Brooke v. Inland Revenue Comrs.* [1917] W. N. (Eng.) 382, 34 Times L. R. 142, 144 L. T. Jo. 125, affirming [1917] 1 K. B. 61, 86 L. J. K. B. N. S. 503, 115 L. T. N. S. 715, 33 Times L. R. 54.

b. New Zealand Income Tax Law.

Profits derived by what was apparently an English company from sales in England on commission of produce shipped by growers in and under arrangements and contracts

made in New Zealand for sale by the company were held not to be income derived from business in New Zealand within the meaning of a New Zealand Income Taxing Law in *Lovell & Christmas v. Tax Comrs.* [1908] A. C. (Eng.) 46. The House of Lords admits the difficulty of determining what is income, but states that "in the present case their Lordships are of opinion that the business which yields the profit is the business of selling goods on commission in London. The commission is the consideration for effecting such sales. The moneys received by the appellants out of which they deduct their commissions and from which, therefore, their profits come, are paid to them under the contract of sale effected in London. The earlier arrangements entered into in New Zealand appear to their Lordships to be transactions the object and effect of which is to bring goods from New Zealand within the net of the business which is to yield a profit. To make those transactions a ground for taxing, in New Zealand, the profits actually realized in London, would, in their Lordships' opinion, be to extend the area of taxation further than the authorities would warrant."

c. Acts applicable to Queensland.

The case of *Re Munro* [1909] St. Rep. Qd. (Austr.) 167 Qd. W. N. 22, as varied in *Hughes v. Munro*, 9 C. L. R. (Austr.) 289, is set out in Queensland Dig. (1906-1917) col. 436, as follows: "The Income Tax Act 1902, 2 Edw. VII. No. 10, as amended by 4 Edw. VII. No. 9, and 6 Edw. VII. No. 11, prescribes by § 32 (1): 'When a foreign company or an absentee, or person absent from Queensland, herein termed 'the principal,' by means of a company registered in Queensland or carrying on business therein or by means of any person in Queensland, herein termed 'the agent,' sells or disposes of any property for the principal, whether such property is in Queensland or if by the contract to be brought into Queensland, and whether the contract is made by the agent in Queensland, or by or on behalf of the principal out of Queensland, and whether

the moneys arising therefrom shall be deemed to be income accruing to the principal from a business carried on by him in Queensland, the taxable amount of the income derived therefrom by the principal shall, if such income cannot, in the opinion of the commissioner, be otherwise satisfactorily determined, be assessed at an amount equal to £5 per centum upon the net amount for which such property has been sold or disposed of after taking into consideration any mortgage thereon. 'In every case the amount assessed shall, for the purpose of obtaining income tax, be deemed to be income derived by the agent. (2) The agent shall, as regards such income, make the returns, be assessed, be liable to income tax, and otherwise be subject to the provisions of this act and to all acts and things thereunder as if such income were actually the income of the agent. But nothing herein contained shall exempt or discharge the principal from liability to pay income tax upon such income.' Held (1) that the words 'by means of' must be taken to mean 'by the instrumentality of' or 'through the intervention of.' (2) That the words 'is by the contract to be brought into Queensland' apply to cases in which the contract of sale stipulates, either expressly or by implication, that the property shall be shipped to Queensland, so that the contract is not completely performed until that is done,—and this whether the obligation to ship to Queensland is on the vendor or purchaser. Per Griffith, C. J.: As a rule of construction it should be assumed *prima facie* that the legislature did not intend to interfere with matters wholly outside its territorial limits, or to impose a tax upon transactions in respect of property not either actually or potentially within those limits."

And this proposition is followed by the following statement of the facts and holdings in *Re Income Tax Acts & Trust & Agency Co.* [1910] St. Rep. Qd. (Austr.) 203, Qd. W. N. 34: "A limited English company had power to make advances on real estate in Australia, and on the security of station

runs, wool, cattle, sheep, by taking a preferable lien thereon. They conducted their business in Australia, in Melbourne, and although they were registered in Queensland, had no representative here. The securities for all advances were prepared and kept in Melbourne, and those relating to property in Queensland were sent to that state only for the purpose of being registered. All advances were made in Melbourne, and interest was paid there, and the company did not care from what source the principal or interest was derived. The company made advances on station runs, stock, and wool in Queensland, and

the securities for these advances were registered in Queensland. Held, the company was liable to pay income tax on the amount of interest they received on these securities. Certain shareholders in the company paid up capital subscribed by them beyond the amount actually called on their shares. Under the articles of association, the company paid interest to them on the prepayments. Held, that these payments to shareholders were payments of interest on borrowed money within § 13 (iii) of the Income Tax Acts, and the company was therefore entitled to deduct them from its otherwise taxable income." G. J. C.

PEOPLE OF THE STATE OF NEW YORK, Respt.,

v.

WESTCHESTER NATIONAL BANK OF PEEKSKILL, NEW YORK,
Appt.

New York Court of Appeals — August 31, 1921.

(231 N. Y. 465, 132 N. E. 241.)

Constitutional law — gift of credit by state — bonus to soldiers.

1. The issuance by a state of its bonds to raise a fund with which to pay a bonus to persons who have served as soldiers under the Federal government is prohibited by a constitutional provision that the credit of the state shall not in any manner be given to or in aid of any individual.

[See note on this question beginning on page 1359.]

Appropriation — for private individuals.

2. Except as restricted by the Constitution, the legislature may appropriate public money for private individuals if thereby the public welfare is promoted.

[See 26 R. C. L. 63.]

— bonus to soldiers as public purpose.

3. The granting of a bonus to persons who have served in the military or naval forces of the United States in time of war serves a public purpose.

[See 4 R. C. L. 134-136; 21 R. C. L. 239, 240; see note in 7 A.L.R. 1644.]

Courts — interference with legislative adoption of bonus to soldiers.

4. When the legislature has declared that the granting of a bonus to soldiers is a public purpose, the courts will not interfere.

[See note in 7 A.L.R. 1644.]

Appropriation — distinction between bonus and pension.

5. No distinction can be made between a bonus and a pension in determining the validity of an appropriation in favor of former soldiers.

Gift — by state — recognition of obligation.

6. The payment by a state to an individual is not a gift, within the meaning of a constitutional inhibition, if it is made in recognition of a claim, moral or equitable, which he may have against the state.

[See 4 R. C. L. 136.]

Courts — assertion by legislature of moral obligation to pay — binding effect.

7. The prohibition of the Constitution against gifts to individuals cannot be evaded by the assertion by the legislature that a moral obligation to pay exists when in fact it does not.

Contract — moral obligation — payment by state to Federal soldiers.

8. No moral obligation rests upon a state to give a bonus to its citizens who

enlist or are drafted into the Army of the United States to fight against a public enemy.

[See note in 7 A.L.R. 1644.]

(Cardozo and Pound, JJ., dissent.)

APPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, Third Department, in favor of plaintiff upon the submission of a controversy as to the constitutionality of the Soldiers' Bonus Law. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Louis Marshall and Chester D. Pugsley for appellant.

Messrs. Edward G. Griffin, J. S. Y. Ivins, and P. H. Clune, with Mr. Charles D. Newton, Attorney General, for respondent:

The state has always had inherent power to grant a pension or gratuity to veterans of the wars.

21 R. C. L. 238; United States v. Hall, 98 U. S. 343, 25 L. ed. 189; Frisbie v. United States, 157 U. S. 160, 39 L. ed. 657, 15 Sup. Ct. Rep. 586; Taber v. Erie County, 131 N. Y. 432, 30 N. E. 177; Gilbert v. Minnesota, 254 U. S. 325, 65 L. ed. —, 41 Sup. Ct. Rep. 125; Gustafson v. Rhinow, 144 Minn. 415, 175 N. W. 903; Opinion of Justices, 190 Mass. 611, 77 N. E. 820; People ex rel. Doscher v. Sisson, 180 App. Div. 464, 167 N. Y. Supp. 801; Hamilton v. Kentucky Distilleries & Warehouse Co. 251 U. S. 146, 64 L. ed. 194, 40 Sup. Ct. Rep. 106.

The amendments to the State Constitution do not limit this inherent power of the state as a sovereign to grant a bonus; such amendments apply, at most, only to the municipalities of the state.

Rumsey v. New York & N. E. R. Co. 130 N. Y. 88, 28 N. E. 763; Guilford v. Chenango County, 13 N. Y. 143; Taber v. Erie County, 131 N. Y. 433, 30 N. E. 177; People ex rel. Peake v. Columbia County, 43 N. Y. 130; Powers v. Shepard, 48 N. Y. 541; Oswego & S. R. Co. v. State, 226 N. Y. 351, 124 N. E. 8.

The bonus will be expended for a public purpose founded upon good morals, equity, and justice, and, as such, is valid under first principles and the existing Constitution.

Mahon v. Board of Education, 171 N. Y. 263, 89 Am. St. Rep. 810, 63 N. E. 1107; People ex rel. Waddy v. Partidge, 172 N. Y. 305, 65 N. E. 164; Re Jensen, 44 App. Div. 509, 60 N. Y. Supp. 933; Hammitt v. Gaynor, 82 Misc. 196, 144 N. Y. Supp. 127; Porter 15 A.L.R.—85.

v. Fletcher, 153 App. Div. 470, 138 N. Y. Supp. 557; Re Borup, 182 N. Y. 222, 108 Am. St. Rep. 798, 74 N. E. 838; Lehigh Valley R. Co. v. Canal Bd. 204 N. Y. 471, 97 N. E. 964, Ann. Cas. 1913C, 1228; People ex rel. Cayuga Nation v. Land Office Commrs. 207 N. Y. 42, 100 N. E. 735; Exempt Firemen's Benev. Fund v. Roome, 93 N. Y. 313, 45 Am. Rep. 217; Oswego & S. R. Co. v. State, 226 N. Y. 351, 124 N. E. 8; State ex rel. Hart v. Clausen, — Wash. —, 13 A.L.R. 580, 194 Pac. 793; State ex rel. Atwood v. Johnson, 170 Wis. 218, 7 A.L.R. 1617, 175 N. W. 589; Gustafson v. Rhinow, 144 Minn. 415, 175 N. W. 903; State ex rel. Morris v. Handlin, 38 S. D. 550, 162 N. W. 379.

Messrs. Samuel E. Aronowitz and Edward N. Scheiberling, with Messrs. Charles G. Blakeslee and Charles P. Coffey, for the American Legion.

Andrews, J., delivered the opinion of the court:

The only question before us is the validity of chapter 872 of the Laws of 1920. The defendant was the successful bidder for \$25,000 of bonds issued under the authority of that act. It later refused to accept them. If the act is constitutional, under the submission the plaintiff is entitled to an affirmance of the judgment of the appellate division in its favor. If not, the defendant should succeed.

The act provides for the issue of \$45,000,000 of bonds by the state. Their proceeds are to be paid into the state treasury and expended for a bonus to persons who served in the military or naval service of the United States at any time between April 6, 1917, and November 11, 1918. These moneys, therefore, must be applied for this object, and for no other purpose whatever. Const. art. 7, § 4. "Every person,

male or female, who was enlisted, inducted, warranted or commissioned, and who served honorably in active duty in the military or naval service of the United States at any time" during the war "for a period longer than two months, and who at the time of entering into such service was a resident of the state of New York, and is a resident at the time this act takes effect, and who was honorably separated or discharged from such service, or who is still in active service, or has been retired, or has been furloughed to a reserve" (§ 5), is to receive \$10 for each month of active service, not exceeding, however, \$250 in the aggregate. If dead, the same amount shall be paid to the relatives of the deceased. As required by its terms, this act was submitted to the people and was approved by a vote of 1,454,940 in its favor as against 673,292 in opposition.

The logic of this opinion is not that the legislature is unauthorized to aid the wounded. We cannot too clearly emphasize at the outset of our discussion that this is not an act to care for and restore to health and usefulness those who became disabled in the performance of their duty. To do this is a sacred trust. Every human impulse prompts us to its full accomplishment. Neglect here spells disgrace. Yet by this act help for the wounded is at least postponed. For them as a class nothing is done. Whatever right the state may have to use its moneys in making these the subject of its first and devoted consideration, this right finds no expression in the present statute. The wounded are not a reason or a ground for its enactment. He who occupied a perfectly safe, although highly useful, desk in a department, stands on a level under this act's provisions, with that other who comes back to us shattered in mind or body because of a more perilous service. This court, of course, considers the purpose of the act as it is written. What we may say has no bearing

upon and is no definition of the power of the state to provide for the disabled, for whose prompt and adequate care there is an insistent and righteous demand. The statute includes everyone, indiscriminately, who served the United States for two months, whatever the circumstances of his or her induction into the service. It is not in fulfillment of any promise made to encourage enlistment. The Selective Service Act (Comp. Stat. §§ 2044a-2044k, 9 Fed. Stat. Anno. 2d ed. p. 1136) expressly provided that no bonus should be given for that purpose, and that no substitute should be accepted. It called upon every citizen of the United States between certain ages to render his full obligation to the nation. The only exceptions allowed were those made in the act itself. It is also true that the number of the beneficiaries and the amount they will receive is indefinite.

It is now assumed that \$45,000,000 will suffice. It may be so. It may be equally true that a far larger sum will be required to make the payments designed. We all know how often, when an issue of bonds is proposed, the amount that will be required in the end is underestimated. More than once we have had that experience. Nor is there any assurance that other and greater debts may not be incurred if a second bonus is proposed. It may be said, and said truly, that \$10 a month will not compensate our soldiers for their sacrifices. Elsewhere the sum of \$15 or more has been allowed under somewhat similar acts. Should New York, it has already been asked, do less than others? We see no limit to the indebtedness with which the state may be burdened.

If, however, the legislature has the power to create a debt for the purpose declared in this act, these considerations are not for us. They serve but to admonish us to scrutinize our Constitution with the greater care, to use the greater caution in deciding how and when and

why New York may incur indebtedness under its limitations. To that question we confine ourselves.

At the basis of our ideas as to the relation of the citizen to the state is one outstanding principle of taxation. Whether or not the legislature is curbed by any constitutional formula, no tax may be imposed except it be for a public purpose; otherwise, however, unless for some constitutional restriction the taxing power is plenary. Except

for such restriction the legislature may appropriate public moneys for private corporations or for individuals if thereby the public welfare is promoted. *Guilford v. Chenango County*, 13 N. Y. 143.

It is said that this act serves no such purpose. We think, however, that it does. In deciding whether the object for which taxation is imposed is a public object, the courts

—bonus to soldiers as public purpose.

“must be governed

mainly by the course and usage of the government, the objects for which taxes have been customarily and by long course of legislation levied, what objects or purposes have been considered necessary to the support and for the proper use of the government, whether state or municipal. Whatever lawfully pertains to this and is sanctioned by time and the acquiescence of the people may well be held to belong to the public use, and proper for the maintenance of good government, though this may not be the only criterion of rightful taxation.” *Citizens’ Sav. & L. Asso. v. Topeka*, 20 Wall. 655, 665, 22 L. ed. 455, 461. In this state the granting of pensions and gratuities for military service is not a new experiment. By the Act of May 11, 1784 (Laws 1784, chap. 63), public land was granted to Revolutionary veterans. By chapter 8 of the Laws of 1814, pay in addition to that granted by the United States was given to soldiers of the War of 1812. By chapter 178 of the Laws of 1904 a pension was granted to the last surviv-

or of that war. By § 220 of the Military Law (Consol. Laws, chap. 36) a pension was given to any member of the militia who had been disabled within ten years in the performance of duty. A pension policy has long been adopted by the United States, and acts similar to ours have been passed in at least nineteen other states.

The payment of a pension or a bonus for past services, showing the gratitude of the people, showing that the state is mindful of those who have made sacrifices for it, is an incitement to patriotism, and an encouragement to defend the country in future conflicts. Even if such a payment is not clearly one made in the general interest, at least there is such ground for the claim that, where the legislature has accepted that view, the courts may not interfere. That they believe the action unwise

Courts—interference with legislative adoption of bonus to soldiers.

or unnecessary is immaterial. As to that question the legislature is the final arbiter. *Jones v. Portland*, 245 U. S. 217, 62 L. ed. 252, L.R.A. 1918C, 765, 38 Sup. Ct. Rep. 112, Ann. Cas. 1918E, 660; *State ex rel. Atwood v. Johnson*, 170 Wis. 218, 7 A.L.R. 1617, 175 N. W. 589; *State ex rel. Atwood v. Johnson*, 170 Wis. 251, 176 N. W. 224; *Gustafson v. Rhinow*, 144 Minn. 415, 175 N. W. 903; *State ex rel. Hart v. Clausen*, — Wash. —, 13 A.L.R. 580, 194 Pac. 793; *Opinion of Justices*, 211 Mass. 608, 98 N. E. 338. What long custom and usage have sanctioned, what the weight of judicial authority has approved, that we should be slow to declare wrongful. Nor may a distinction be made between such a bonus as our act provides and a pension. The one is a reward for past military services, payable at once; the other, such a reward, payable in instalments.

Appropriation—distinction between bonus and pension.

We are to determine, therefore, whether there are any limitations in our Constitution upon the pow-

ers of the legislature which affect the matter before us. Originally there were none. In the Constitutional Convention of 1846, however, it was found that the state had contracted debts which, with interest, amounted to some \$38,000,000. Six million dollars represented instances where the public credit had been used to finance railroads then insolvent; \$2,700,000, for railroads still rated as solvent, but whose condition was precarious. There was much discussion as to how this debt should be paid, and as to how in the future "abuses of delegated power" should be prevented. Gross extravagance was charged. There was fear of repudiation. Moneys raised by loans could be wasted with little comment, when the same waste would cause a storm of protest if the moneys had to be raised by taxation. The existing evil required drastic remedies. The power to create debts must be curbed before ruin came. Reliance might not be solely placed upon the public spirit and the economic knowledge of the legislature. Something more was needed. So the committee on the state finances finally reported an article entitled, "On the Power to Create Future State Debts and Liabilities and in Restraint Thereof." This report, which was adopted with immaterial verbal alterations, became a part of article 7 of the Constitution. No longer, under any circumstances, might the credit of the state in any manner be given or loaned to or in aid of any individual, association, or corporation. To meet casual deficits the state might contract debts not exceeding at any time \$1,000,000 in the aggregate. It might also contract debts to repel invasion, suppress insurrection, or for defense in war. Except for these purposes, a debt might be incurred at all only for some specific object, distinctly named in an act passed in a certain way, approved by the people, containing provisions for a direct tax sufficient to provide for its repayment within eighteen years.

This article as reported was confined solely to limiting the power of the legislature as to debts. It did not touch the power to appropriate the property of the state or the money it might raise by taxation for payments or gifts to individuals or corporations, so long as such payments or gifts subserved the public good. It was proposed to limit this power also. Mr. Charles O'Connor suggested the addition to the section of the provision: "Nor shall any gift of public moneys or property be made, except as a reward for military services, or by the release of escheats and forfeitures."

This was objected to, however, and, as the evil apparently was not serious, the effort was abandoned, and the section was allowed to stand as reported. Debates of the Convention, p. 722. In the address by the members of the convention to the people it was said: "They have incorporated many useful provisions more effectually to secure the people in their rights of person and property against the abuses of delegated power." Convention Journal, p. 1547.

Cut off from the right to loan or give the credit of the state, however, by 1867 the legislature had begun to resort freely to grants of public funds to railroads and to charitable associations. Therefore, in the Constitutional Convention of that year the attempt was renewed to deprive it of that power. Sanford E. Church, later the distinguished chief judge of this court, reported from the committee of finance a proposed article of the Constitution. It contained a section numbered 11: "Neither the credit, money or property of the state shall in any manner be given or loaned to or in aid of any individual, association or corporation." Proceedings of Debates, p. 791.

This proposal was debated at length, but it was not adopted.

This Constitution having been rejected by the people, a commission was appointed in 1872 to consider

amendments. It was again proposed to limit the right of the state with regard to gifts and loans of its property. The committee on sectarian appropriations reported a clause: "Neither the credit nor the money or property of the state or of any county, city, village, or town shall in any manner be given or loaned to or in aid of any association, corporation, or other private institution whatever."

Later a substitute for this proposal was accepted: "Neither the credit nor the money of the state shall be given or loaned to or in aid of any association, corporation or other private undertaking."

Still later the word "other" was deleted. In the report it was said that this proposed amendment "cuts off all gifts of money and all loaning of the credit of the state to all other associations, corporations, etc., but they are all subject to the same objection and appropriations to them of the money of the state are liable to the same abuses. They must all stand or fall together." *Journal*, p. 452.

In this form the section now stands in our Constitution. Art. 8, § 9.

We find, therefore, among others, two limitations imposed on the legislature in addition to the one that was always implied. They both relate to gifts or loans either of the credit or the moneys of the state. "The credit of the state shall not in any manner be given or loaned to or in aid of any individual." Art. 7, § 1. "Neither the credit nor the money of the state shall be given or loaned to or in aid of . . . any . . . private undertaking." Art. 8, § 9. They both also represent the triumph of efforts to prevent improvidence, to make useless any pressure from special interests, to safeguard the credit of the state, and the interests of the people as a whole. They are not to be brushed aside. They are to be fairly construed to obtain the object for which they were intended. As in 1846, so to-day, economy,

public and private, is one of our pressing needs. Upon it depends the prosperity of the state and its inhabitants. The crushing load of taxation—national, state, and municipal—now, as then, threatens our future,—the future of him who pays no direct taxes as well as the future of him who does. Now, as then, great expenditures may be lightly authorized if payment is postponed. To place the burden upon our children is easy. Nor do we scrutinize so closely the expenditures to be made if that be done. We all recognize this tendency in private life. We incur a future obligation cheerfully, where we would hesitate had we to pay the cash. It is true in public matters. The pressure which will come when the obligation matures is ignored. Conscious of this human weakness, to guard against public bankruptcy the people thought it wise to limit the legislative power. The courts must see to it that their intentions are not frustrated or evaded. And this is true even if the action questioned seems to be approved by the voters. One of the chief objects of the Constitution is the protection of minorities against the hasty acts of the majority. It expresses the well-considered, unimpassioned, and deliberate judgment of the people. It is not to be amended informally. Twice, two legislatures, with newly elected members in each house, must pass upon such a proposal before it is submitted to the voters.

Whether the purpose is a public one, therefore, is no longer the sole test as to the proper use of the state's credit. Such a purpose may not be served in one particular way. However important, however useful, the objects designed by the legislature, they may not be accomplished by a gift or a loan of credit to an individual or to a corporation. It will not do to say that the character of the act is to be judged by its main object; that, because the purpose is public, the means adopted cannot be called a gift or a loan. To do so would be to make meaningless

the provision adopted by the Convention of 1846. Gifts of credit to railroads served an important public purpose. That purpose was distinctly before the legislatures that made them. Yet they were still gifts, and so were prohibited.

As we have seen, this act provides that \$45,000,000 shall be raised by the state upon its bonds, and the proceeds applied as a bonus to those who have been in the military service of the United States. We have seen also that the proceeds can be used only for this one object. Is this a gift or a loan of the credit of the state? Clearly it is not a loan. A loan implies repayment. Here there is no such situation. The bonds are issued for full value. Their proceeds are transferred absolutely, with no promise, express or implied, of return.

If not a loan, then does this act contemplate a gift of the state's credit? In answering this question the mere form of the transaction is immaterial. If the gift of the bonds of the state to a railroad corporation would be such a gift, and it undoubtedly would be, then so would be an issue of bonds by the state with the express condition that their proceeds should be given to the same corporation. The evasion of the constitutional prohibition would be palpable, and it could not and should not be permitted.

The important question is, therefore, whether, under this act, the provisions made for the soldiers and sailors is a gift to them or a gift in their aid. We have held that a payment to an individual is not a gift if it be made in recognition of a claim, moral or equitable, which he may have against the state. "The legislature, however, is not prevented from recognizing claims founded on equity and justice, though they are not such as could have been enforced in a court of law if the state had not been immune from suit." *Munro v. State*, 223 N. Y. 208, 215, 119 N. E. 445.

What meaning, then, have the

courts given to these terms? What is an equitable or moral obligation against the state? Instances where such payments have been authorized are many. In some claims have been allowed where beneficial services have been performed for the state (*Cole v. State*, 102 N. Y. 48, 6 N. E. 277); in others where property was furnished it (*O'Hara v. State*, 112 N. Y. 146, 2 L.R.A. 603, 8 Am. St. Rep. 726, 19 N. E. 659); or the state received money for land the title to which proved defective (*Wheeler v. State*, 190 N. Y. 406, 123 Am. St. Rep. 555, 83 N. E. 54); or work was done, the expense of which, in equity, the state should bear (*Lehigh Valley R. Co. v. Canal Bd.* 204 N. Y. 471, 97 N. E. 964, Ann. Cas. 1913C, 1228). In another class of cases the legislature has authorized payment where the claimant had been injured by the negligence of the servants of the state. *Spittorf v. State*, 108 N. Y. 205, 15 N. E. 322.

These cases give some indication of what we mean when we speak of a moral obligation. In all some direct benefit was received by the state as a state, or some direct injury suffered by the claimant under circumstances where, in fairness, the state might be asked to respond,—where something more than a mere gratuity was involved.

We are referred, however, to three cases where it is said a far wider interpretation was given to this doctrine. This we believe to be a mistake. In *Munro v. State*, 223 N. Y. 208, 119 N. E. 444, *Munro* was employed by the state in what has been defined as a hazardous employment in connection with a state hospital for the insane. Workmen's Compensation Law (Consol. Laws, chap. 67), § 2, group 7. While engaged in his work, he was struck by one of a gang of eighteen insane patients, who, under the care of two keepers, were repairing a road. The state conceded on the trial that *Sabilski*, who assaulted him, was known to be dangerous, and also conceded that there was negligence

Gift—by state—
recognition of
obligation.

in permitting him to be working in a gang with but two attendants. Under these circumstances there was a clear moral obligation. Munro was injured by the negligence of the state's employees. He was engaged in the kind of work which, had the employer been an individual, would have, our legislature has said, required compensation for an accident, irrespective of fault. In *Re Borup*, 182 N. Y. 222, 108 Am. St. Rep. 796, 74 N. E. 838, we held that, by retroactive statute, the legislature might assume liability or require a town to assume it where the owner's property was injured by a change of the grade of a street, although, at the time of the change, no recovery was possible. The law in this respect was, to the common idea, unjust. For the benefit of the public a private injury must be borne without compensation. We carefully pointed out that the individual was harmed by a public work authorized by the state. Under such circumstances it might fairly be said that a moral claim existed to compensation for affirmative acts done under its authority. In *Exempt Firemen's Benev. Fund v. Roome*, 93 N. Y. 313, 45 Am. Rep. 217, volunteer firemen in New York city served without pay, and to partly compensate them for years they were exempted from certain public duties, and also a tax upon foreign insurance companies was paid to a corporation representing them, for their use and benefit. The corporation in turn used these funds to aid them when they became disabled and indigent. When the paid fire department came into being and the volunteer firemen were disbanded, the exemptions were continued, and so, for a limited time, were the provisions as to this tax. Under the circumstances we said that this was not a gift. It was the performance of its equitable obligation by the state. The firemen had enlisted with this provision in view; they were disbanded without fault of their own; in justice the state should maintain this fund in the

future as it had in the past until its objects were accomplished. Again, however, this obligation arose because of the acts of the state. The state but fulfilled, and in honor it should, its implied promise under which it had obtained the unpaid service of the firemen.

In every case that we have found, therefore, there was the foundation of a claim against the state itself, however imperfect. In all there was some obligation, not enforceable against it, perhaps because it might not be sued, perhaps because the maxim of *respondeat superior* may not be invoked against it, perhaps because of the absence of some small element, the presence of which would give a legal cause of action, and where without that element payment might still be morally required. They are cases where the state is allowed to make compensation for benefits which it has received, or for injuries which have been suffered in its service, or because of its acts or acts done under its authority, or because of the acts of its servants. So far, at least, when we have used the term, we have implied an obligation,—something that binds,—if not in law, at least in morals. There must be a duty, even if it is a duty not enforceable. The desire to compensate those to whom we owe gratitude is a natural one. It finds expression every day in common life. It is entirely to be praised. But a "moral obligation," when we use that term in relation to the spending of public funds, means more than this. Gratitude is not enough.

Under these decisions, is the bonus to our soldiers and sailors the payment of an obligation due them from the state? This is the ultimate question. Upon its answer depends the validity of the Act of 1920. It is so conceded in one of the dissenting opinions, and in discussing it we do not ignore the splendid services and the great patriotism not only of the American Expeditionary Forces, but of those who remained on this side of the sea. We do not

forget the love and admiration that they have won and the gratitude that is theirs. We know that when the United States declared war it declared it for the whole country; that the government of the state and the government of the United States were equally interested in victory; that, while serving the United States, our soldiers and sailors were also protecting New York. We were all vitally interested in the war. Defeat spelled unspeakable calamity. Yet the men who gained the victory were not in any respect servants of the state. It did not call them from their homes or lead them to battle. It did nothing. It exercised no authority. It is said that our soldiers were taken from homes and occupations and compelled to risk their lives for inadequate pay while others earned large wages in safety; that the statute attempts, in a small way, to distribute more fairly the public burden. It is all true, but again the state was not the actor. Neither it nor its servants injured anyone. It received no property for which it has not paid. Nor were services rendered to it in any sense that services were not rendered to every city in the land. That services rendered the United States incidentally benefited every state is no foundation for a claim of obligation, however great the gratitude due. Gratitude may impel an individual to reward his benefactor. One may do as he will with his own. The state of New York may not. Its Constitution forbids. It may not attempt to equalize among its citizens inequalities caused by Federal legislation. For that equalization resort must be had to the Federal government. And the Federal government recognizes the claim. It intends to discharge the obligation as its own. As soon as its finances permit, payments are to be made that it is estimated will amount to between \$3,000,000,000 and \$5,000,000,000. This proposition receives popular approval. It is not forbidden by our national Constitution. Thus,

and thus only, can everyone, in whatever state he may reside, receive an equal reward for equal services. And when the time comes for this distribution, New York, as a part of the United States, will bear a very large proportion of the total expense involved. So it will aid in repaying the moral obligation which is due from the country to its defenders. But under this act it will bear a double burden. Its citizens will pay twice,—once for the state, once for the nation. Is New York under a moral obligation to make this second satisfaction?

Should we give the words "moral obligation" the broad meaning urged upon us, we may go far. More than once men of whom we are proud, through sheer patriotism, have gone to Washington and served us in serving the United States, at great cost to themselves in money and health and comfort. Have they a moral claim against the state? It is said they were voluntary agents; that they were not compelled to do what they did. Is the obligation less towards one who aids us of his free will than towards one whom the law constrains?

On its face the act itself shows an attempt, not to pay a claim, but to give a reward. No distinction is made between one and another. All, whatever their merits, whether their duties led them to danger or to safety, are treated alike. No attempt is made to adjust economic conditions. And as a reward, not a payment, the public rightly regards it. Did the majority favor the act because they believed they were discharging an obligation? Or was their vote a testimony of their gratitude? We are told that similar statutes have been passed elsewhere. So we have already said. It is one thing, however, to quote such practices as illustrating those fundamental principles common to free governments as we have quoted them. It is another to use them as defining the distinction between a gift and the payment of an obligation necessitated by the language of

our Constitution. Such decisions as have been made show the danger of such a course. In Massachusetts the justices were of the opinion that money might lawfully be raised by taxation to pay veterans of the Civil War, but they speak of such a payment as a gratuity. Opinion of Justices, 211 Mass. 608, 98 N. E. 338. In Wisconsin money was to be raised by taxation to pay a bonus to veterans. In considering the constitutionality of this act, the court held that, notwithstanding the soldiers served the United States, they also served Wisconsin, and that, as the object was to promote loyalty, the act served a public purpose. But the question we must decide, whether any moral obligation rested on the state to make compensation, did not arise. The inference is that the court did not so believe, for it treats the bonus as a mere gratuity. Further, an article in its Constitution similar to ours (Wis. Const. § 3, art. 8) was not violated, not because the bonus was in payment of an obligation, but because the money was to be raised by taxation. State ex rel. Atwood v. Johnson, 170 Wis. 218, 7 A.L.R. 1617, 175 N. W. 589; State ex rel. Atwood v. Johnson, 170 Wis. 251, 176 N. W. 224. In Minnesota the money necessary to pay a bonus was to be borrowed. It was held that the purpose of the loan was public and the act constitutional. A clause like ours was in the Constitution (§ 10, art. 9), but this phase of the matter seems not to have been argued. Certainly it was not referred to in the opinion. Gustafson v. Rhinow, 144 Minn. 415, 175 N. W. 903. Again, in Washington a bonus was to be financed by an issue of bonds. Again, too, a similar clause in the Constitution (§ 5, art. 8) was not referred to. But, in discussing whether the purpose of the act was public, the court did say that moral obligation to make a compensation rested on the state. State ex rel. Hart v. Clausen, — Wash. —, 13 A.L.R. 580, 194 Pac. 793.

As striking an illustration as can be found of the general understanding of this subject may be found in a recent message of the President of the United States to Congress. He says: "I have commended the policy of generous treatment of the nation's defenders, not as a part of any contract, not as a payment of a debt that is owing, but as a mark of the nation's gratitude."

We need, however, go no further than our own decisions. We have used the same language under like circumstances. In 1892 an act was passed, directing supervisors to raise by tax and pay each man drafted in the Civil War the sum of \$300. Such men never received a bounty. They were compelled to serve, as the majority of the soldiers and sailors of this war served, under an act of the national government granting them no compensation except their military pay. We said our national government had the right to call upon these men, and that they had no claim, legal or equitable, against the town or county where the money was to be raised. Those who served under conscription only discharged their obligation to the general government. They did nothing more than fulfil their duties as citizens, and we called the proposed grant a gratuity. It is true the case might have been decided upon another ground alone. As a fact it was not. Therefore what this court said cannot be treated as dictum. And if, because of the circumstances, there was no equitable claim against a county, it would seem there was none against the state. The same reason would be applicable. Bush v. Orange County, 159 N. Y. 213, 45 L.R.A. 556, 70 Am. St. Rep. 538, 53 N. E. 1121.

We are not forgetful of the fact that, if there is any reasonable ground for the legislative decision that a moral obligation exists, the courts may not intervene. If there is such a ground, the legislature

must determine whether the claim shall be recognized. But the prohibitions of the Constitution may not be evaded by the assertion that such an obligation exists, when in fact it does not. Arbitrary action may not convert a wrong into a right.

Such, we believe, is the situation here. The state proposes to give its credit to the soldiers and sailors, not to satisfy any obligation that it owes them, but as a gratuity. The act is, therefore, prohibited by § 1 of article 7 of the Constitution.

"The credit of the state shall not should be reversed, and judgment should be rendered in favor of the defendant against the plaintiff, with costs in this court.

Hiscock, Ch. J., and Hogan, McLaughlin, and Crane, JJ., concur.

Cardozo, J., dissenting:

"The credit of the state shall not in any manner be given or loaned to or in aid of any individual, association or corporation." N. Y. Const. art. 7, § 1. The purpose of the prohibition is revealed in its history. 2 Lincoln, Const. History of N. Y. p. 87. The purpose was to put an end to the use of the credit of the state in fostering the growth of private enterprise and business. That is the mischief which gives understanding of the remedy. I do not mean that the prohibition is to be limited to the particular evil that inspired it. It is limited, however, to evils of a kindred nature. The credit of the state may not be pledged in aid of an individual who has no claim in justice or morals to relief or compensation. It may be pledged in recognition of an honorable obligation, to effect a proportionate and equitable distribution of the burdens of public service. Mun-

ro v. State, 223 N. Y. 208, 216, 119 N. E. 444; Re Borup, 182 N. Y. 222, 108 Am. St. Rep. 796, 74 N. E. 838; Exempt Firemen's Benev. Fund v. Roome, 93 N. Y. 313, 326, 45 Am. Rep. 217. Payments so made or promised are, in one sense, gifts, for they are the voluntary assumption of liabilities not theretofore imposed by law. They are not gifts, however, in the sense of the prohibition under discussion, for their animating purpose is not benefaction, but requital.

We are told that requital, if due at all, is due, not from the state, but from the nation, which summoned the host to service. I find myself unable to define by bounds so artificial the claims of equity and honor. The service that preserved the life and safety of the nation preserved at the same time the life and safety of the states. Opinion of Justices, 190 Mass. 611, 615, 77 N. E. 820; Gilbert v. Minnesota, 251 U. S. 325, 328, 65 L. ed. —, 41 Sup. Ct. Rep. 125; Gustafson v. Rhinow, 144 Minn. 415, 175 N. W. 903; State ex rel. Atwood v. Johnson, 170 Wis. 251, 176 N. W. 224. If something is still due beyond the letter of the bond (Opinion of Justices, 175 Mass. 599, 49 L.R.A. 564, 57 N. E. 675), state, as well as nation, will not rest till justice has been done. Neither can silence conscience by referring the claimant to the other. I am not convinced by the argument that reparation, if due from our legislature to residents of New York, is due in equal measure to residents of Maine and California. Each state may fairly be left to take care of its own. Most have already done so. One finds it hard to believe that they have, all of them, been meddling in matters not of their concern. It is the state rather than the nation,—possessing, as the state does, the residuary powers of government,—which, in our Federal system, is to be viewed as *parens patriæ*. The parent does not listen unmoved to the necessities of her sons who have fought in her defense.

I pass, then, to the question whether the legislature might reasonably hold that men who, in greatly serving, had also greatly suffered, gained thereby a claim to reparation for their suffering. I mean, of course, a claim in justice or equity or morals or honor. Great achievement and great sacrifice have been meagerly rewarded. The perils of battle, the hardships of camp and trench, may be poorly paid at any price; few will assert that they are recompensed at the rate of \$1 a day. Even for those who did not reach the firing line, there were the pangs of separation from home and kindred, the anxieties and the strain of a new and hazardous adventure. Legislature and people, beneficiaries of this devotion, have heard the call of a moral duty to mitigate the disparity between suffering and requital. But the catalogue of suffering does not end with pain of mind and body. There was money loss as well, or so, at least, a legislature, looking at average conditions, might not unreasonably believe. Its judgment in such matters must prevail unless wholly arbitrary and baseless. *Stubbe v. Adamson*, 220 N. Y. 459, 469, 116 N. E. 372. Labor in the market was paid with no such modest stipend as these men received for labor in submarine and trench. Even with food and housing added to the stipend, we cannot say that there is mere caprice in a finding of the lawmakers that compensation was inadequate. Often the stipend was sent home for the benefit of relatives who, if not wholly dependent on the absent one, had need of something more if they were to be maintained in his absence according to the standards of the past. Lost also were indefinite opportunities for profit and advancement. While soldiers and sailors risked their lives abroad, wages abnormally high were the reward of those who stayed behind. The losses did not end with peace. Men who had left their callings overnight, breaking up the old relations of business and employment, found

on their return that business must be rebuilt, and employment sought anew. Then, too, the shock and strain provoked a period of reaction, in which idleness was inevitable. New losses must be suffered till work could be resumed, and life adjusted to the ways of peace. It is significant, I think, that the statute limits the bonus to soldiers and sailors of the lower grades; i. e., to those whose pay was smallest, and who are most in need of aid. Of these, some may bear a loss more easily than others, but for many, if not for all, there will be loss in some degree. Legislation in such matters must take note of average conditions. *Tenement House Dept. v. McDevitt*, 215 N. Y. 160, 167, 109 N. E. 88, Ann. Cas. 1917A, 455. The problem is too complex, the difficulty of proof too great, for investigation of the individual case, and adjustment of reward accordingly. We take judicial notice of these things. *People ex rel. Durham Realty Corp. v. La Fetra*, 230 N. Y. 429, 130 N. E. 601; *People v. Charles Schweinler Press*, 214 N. Y. 395, L.R.A.1918A, 1124, 108 N. E. 639, Ann. Cas. 1916D, 1059; *Re Stubbe v. Adamson*, 220 N. Y. 459, 116 N. E. 372. We take judicial notice, too, that since the beginnings of our history a sense of the moral obligation to give aid to the returning soldier has been felt and acted on by government. *United States v. Hall*, 98 U. S. 343, 346, 25 L. ed. 180, 181. The call of these and kindred equities has been heard and answered in the past. Are the equities so feeble, is their summons so plainly an illusion, that we may answer them no more?

We have held that the legislature is still free, with all the restrictions imposed by the Constitution upon gifts of money or of credit, to assume liability in law when liability may be found in equity or honor. *Lehigh Valley R. Co. v. Canal Bd.* 204 N. Y. 471, 97 N. E. 964, Ann. Cas. 1913C, 1228. Equity and honor are the same as in olden days. The Constitution does not define

them, nor seek to circumscribe their content. An employee in a state hospital was injured by the assault of a patient confided to his care. *Munro v. State*, 223 N. Y. 208, 119 N. E. 444. A statute, after the event, declared that, upon a finding by the court of claims that the injuries "were so sustained," damages therefor should "constitute a legal and valid claim against the state." We held that the right to reparation was so rooted in equity and fairness that the legislature was free to recognize it by assuming liability. We did not put our decision, as the legislature did not base the statute, upon any theory of negligence in the conduct of the enterprise. The claimant had been injured by an "unforeseen accident" (223 N. Y. 216), as the result of service to the state, and that was thought enough, though the state was not at fault. If a hospital attendant, serving in times of peace, has a moral claim to be indemnified against the risks of an employment which he was free to accept or to reject, the soldier, injured in a war, has at least an equal equity. I cannot doubt that, under *Munroe v. State*, supra, a bonus or pension to the maimed or incapacitated would be the recognition and fulfilment of a moral obligation, and not a largess or donation, the dole of charity or benevolence. The conscience of the state would listen with little patience to the argument that wounded and disabled had no claim upon its bounty because wounds and disabilities were suffered in the service of the nation. This the prevailing opinion apparently concedes, though I cannot reconcile the concession with the logic of its theorem. Relief in such circumstances would not rest upon the narrow ground that the injured or disabled might be in danger of becoming paupers. It would be due. If so, the legislature should read the promptings of morality, though all were self-supporting. Aid to men thus stricken is not benevolence to the poor. It is an attempt, however feeble, with

sacrifice outweighing payment, to set the balance true.

If the account may be recast by adjusting recompense to suffering when the disparity disturbs the conscience, it is for the legislature to declare when conscience is disturbed. Not this form of sacrifice or that, to the exclusion of another, but merely sacrifice unrequited, is the basis of its power. I cannot say that there is an equity in unrequited wounds, and none in other suffering of body or of mind. The grip is, indeed, weaker, and yet it can be felt. I cannot say, if there is an equity in suffering of body or of mind, that there is none in economic suffering, the loss of money or money's worth. Few would doubt this if the soldiers had received no pay at all. Pay so inadequate as to be almost nominal does not greatly change the balance. A has saved the life of B, or of B's child, and in so doing has suffered loss. Many a man in B's case would feel that the loss should be repaired. We deal here with a like service, not of one man, but of an army. "That which would have been merely a charity or a gift is not such by reason of the service given, the consideration rendered, the honorable obligation incurred." *Exempt Firemen's Benev. Fund v. Roome*, 93 N. Y. 326, 45 Am. Rep. 217. We err when we envisage the soldier's relation to the government in the category of contract. Contract in the true sense there is none, but service conscripted by the sovereign; and, even though not conscripted, rewarded at its will. That is why payment of the wage does not always satisfy the conscience that there has been payment of the debt. The Constitution does not silence these mutterings of spiritual disquiet when sacrifice unevenly distributed oppresses those who profit by it with the sense of a burden undischarged. Our ruling in *Re Borup*, 182 N. Y. 222, 108 Am. St. Rep. 796, 74 N. E. 838, was founded in that truth. We held that it was in the power of the legislature, by a retroactive

statute, to assume liability to a landowner injured by a change of grade, though, at the time of the change, the impairment of value was damage without wrong. Under the law before the statute, the loss was one of the incidents of life in organized society. It was part of the price which the citizen must pay for the benefits of government. We held that the legislature might readjust the incidence of the burden, might establish a more equitable distribution between the individual and the public, through the voluntary acceptance of liability for a loss which was without a remedy when suffered. I cannot yield to an appraisal of values that would find the basis of an equity there, and a mere cobweb, and illusion, here. In neither case is there legal liability unless the legislature assumes one. In each there is an unequal pressure of the burdens and the power of government upon one man and upon others. The readjustment of these burdens along the lines of equality and equity is a legitimate function of the state as long as justice to its citizens remains its chief concern. *Oswego & S. R. Co. v. State*, 226 N. Y. 351, 124 N. E. 8.

I am led, therefore, to the conclusion that the payment of this bonus, as money earned, but not received, is not wholly without support in something which the legislature might estimate as a moral or honorary obligation. If there is any reasonable basis for such an estimate, for such a conception of equity and justice, the courts must yield to the judgment of the legislature that it is worthy of recognition. The question is, then, one that the legislature must determine for itself. *United States v. Realty Co.* 163 U. S. 427, 444, 41 L. ed. 215, 221, 16 Sup. Ct. Rep. 1120; *Oswego & S. R. Co. v. State*, supra, at page 357 of 226 N. Y., 124 N. E. 10. "Its decision . . . can rarely, if ever, be the subject of review by the judicial branch of the government." *United States v. Realty Co.* supra; cf. *Opinion of Justices*, 175 Mass.

599, at page 602, 49 L.R.A. 564, 57 N. E. 677. Some may think the service so far beyond requital that the attempt should be surrendered for mere futility. Others may think that high and unselfish sacrifice is cheapened when repaid in money. Others, again, may think that, for the sake of the economic or financial stability of the commonwealth, losses already suffered should be left to lie where they have fallen. These are questions of political or legislative expediency. I make no attempt to answer them. I am not to substitute my judgment for the judgment of the lawmakers. The act, moreover, was either valid or invalid at the date of its enactment. Its validity cannot turn upon the hope or expectation that aid, at some indefinite period hereafter, may be granted by the nation. Impressive is the list of like statutes to be found in other states (California, Connecticut, Maine, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Jersey, New Hampshire, North Dakota, Oregon, Rhode Island, South Dakota, Vermont, Washington, Wisconsin, and Wyoming), as well as in foreign countries (Italy, France, Great Britain, Canada, and Australia). Impressive, too, is the vote in favor of our own statute, when submitted to the electors. I cannot bring myself to believe that all these concurring acts were unmoved by any conception of honor or of duty, or that the conception, if held, had no basis in reality. If there be the possibility of conflicting motives, those that vitiate are to be rejected, and those that validate presumed.

We are warned that the recognition of this equity may be followed by the recognition of others still weaker and more rarefied. All sorts of hypothetical situations are suggested in the briefs of counsel, and held before us in terror. I am not swerved by these forebodings. I do not know the equity that is incapable of being reduced to an absurdity when extended by some process of analogy to varying con-

ditions. Here, as often in the law, the difference between right and wrong is a difference of degree. Most of these imaginary problems will never in fact arise. They assume a legislature and an electorate without responsibility or conscience. The public credit is not pledged in these cases by the legislature alone. The pledge is invalid unless ratified by the vote of the electors. Const. art. 7, § 4. I find little opportunity here for the charlatan or the cheat. Something more than a bizarre and shadowy pretense, some service stirring the deep currents of public gratitude and loyalty, will be needed before these protecting dykes and dams are overcome and flooded. But the existence of a power is not refuted by demonstrating the opportunity for its abuse. The abuse must be dealt with when it arises. Opinion of Justices, *supra*. We may not nullify a statute from mere mistrust of the capacity of legislature and people to use their power wisely. I am persuaded that hundreds of thousands of earnest men and women believe that justice and equity demand the payment of this bonus. They may be wrong. I do not know. It is enough that I cannot characterize their belief as a vagary of the mind,—an idle dream or phantasy,—an irrational pretense.

None of the previous cases in this state controls the case before us. *Bush v. Orange County*, 159 N. Y. 212, 45 L.R.A. 556, 70 Am. St. Rep. 538, 53 N. E. 1121, is not decisive. The claim of drafted men, or of those who had hired a substitute, that they should receive, many years after the Civil War, a bounty equal to that paid as a reward for volunteering, had small support in morals (cf. Opinion of Justices, 190 Mass. 611, 77 N. E. 820; Opinion of Justices, 211 Mass. 608, 98 N. E. 338). That decision, moreover, could stand on the single ground that the debt, contracted by a county, was not one for county purposes, and that there was surely no moral obligation resting on the county,

even though, upon some strained theory, we might ascribe one to the state. The *Mahon Case* (*Mahon v. Board of Education*, 171 N. Y. 263, 89 Am. St. Rep. 810, 63 N. E. 1107), does not control, for the teachers were servants of the municipality, who had made a voluntary contract, and the Constitution prohibits the grant of extra compensation to public officers, servants, agents, or contractors of the state, or of its civil subdivisions. Art. 3, § 28. That provision is inapplicable here, for it postulates a contract to which the state or the municipality was a party, and not submission to a mandate, issued by another agency of government, where volition is excluded. What was said in the other cases, so far as it is applicable here, was obiter. We may even assume, in accordance with the rather sweeping dictum of Cullen, Ch. J., that there is no longer room for the play of mere gratitude and charity. *Lehigh Valley R. Co. v. Canal Bd.* 204 N. Y. 471, 97 N. E. 964, Ann. Cas. 1913C, 1228. The dictum is coupled with the concession that room there still is for the recognition of the claims of equity and justice. 204 N. Y. 475, 476. *Exempt Firemen's Benev. Fund v. Roome*, 93 N. Y. 313, 45 Am. Rep. 217, and *Munro v. State*, 223 N. Y. 208, 119 N. E. 444, show how plastic and comprehensive is the content of those terms. There is a difference, not to be ignored, between profit and indemnity. If the soldiers had not suffered, and the sole purpose of the bonus were to reward them above others, the reward might be said to have no basis except gratitude, a free offering of thanksgiving, untouched by the admixture of any sentiment of justice. Their service has been coupled with sacrifice, and from the union of the two there is born the equity that prompts to reparation.

The judgment should be affirmed, with costs.

Pound, J., dissenting:

The New York Constitution (art.

7, § 1) provides: "The credit of the state shall not in any manner be given or loaned to or in aid of any individual, association or corporation."

I am unable to agree with my associates that this limitation prohibits the creation of a debt upon submission to the people, pursuant to article 7, § 4, for the purpose of raising money to pay soldiers' bonuses or for any other public purpose which is to be carried out by the state itself without the intervening agency of an individual, association, or corporation.

The credit of the state is not given to or in aid of the recipients of the state's bounty under chapter 872, Laws of 1920. It is not given or loaned "in any manner." It is sold in the market to the purchasers of the bonds. The borrowed money becomes the money of the state, and is held subject to the provisions of article 8, § 9. It may not be given "to or in aid of any . . . private undertaking." Except for such limitation, it may be given to in-

dividuals for any public purpose, "in pursuance of an appropriation by law," but not otherwise. Const. art. 3, § 21.

The payment of soldiers' bonuses is, or may be recognized as being, for a public purpose and a public undertaking. The purpose and the undertaking are to supplement the pay of the soldiers, and thereby to promote military zeal in the future. Whether the sense of gratitude or the sense of obligation prevailed with the legislature and the people as the impulse of the legislation, whether the bonus is to be regarded as alms or honorarium, thus becomes a matter of indifference to the court. What to one seems an act of gratitude becomes to another the recognition of an equity. But the state may borrow money for its public purposes, whether moved thereto by benevolence or by moral constraint, so long as no association, corporation, or private undertaking, acting as a quasi state agency, receives the money or is thereby aided.

I vote to affirm.

ANNOTATION.

Constitutionality of statutes providing for bounty or pension for soldiers.

The cases on the above question are collected and discussed in annotation in 7 A.L.R. 1636, and 13 A.L.R. 587. Since the preparation of those notes, the only state which has passed upon the constitutionality of soldier bonus laws apparently is New York, in which the statute providing for the issuance of bonds the proceeds of which were to be paid as a bonus to soldiers and sailors in the late World War at the rate of \$10 for each month of active service, with a maximum of \$250, was held unconstitutional. The particular constitutional provisions on which the decision rests are that "the credit of the state shall not in any manner be given or loaned to or in aid of any individual;" and that "neither the credit nor the money of the state shall be given or loaned to or in aid of . . . any private undertaking." The majority view was that the bonus

was a "gift" to, or in aid of, those who had served in the war, within the meaning of these constitutional provisions. In taking this view the court held that the bounty was not in discharge of a moral or equitable obligation against the state, so as to bring the case within the principle of its former decisions in which it held that a payment to an individual is not a gift if it is made in recognition of a claim, moral or equitable, which he may have against the state. Gratitude, the court said, was insufficient. And the further position is taken that the obligation, if any, rests on the Federal government, and not on the state.

The decision of the New York court in the reported case. (PEOPLE v. WESTCHESTER NAT. BANK, ante, 1344) will doubtless be given great weight in other states which have not yet passed

on the question. It appears to be especially important in view of the fact that it seems to be opposed to the trend of the recent decisions on the question of the validity of bonus laws. The question is one upon which the courts are likely to differ in opinion, even though the constitutional provisions involved are somewhat similar. And the dissenting opinion of Cardozo, J., will doubtless commend itself to many courts.

It may be noted that the New York court takes the view that money raised for payment of bounties is for a public purpose, and that the decision does

not apparently preclude the raising of funds by taxation for military bounties, but rather turns on the proposition that the "credit" of the state cannot be used for this purpose. And in view of the public purpose involved, it would seem that the constitutional provision prohibiting the giving of money of the state to or in aid of "any private undertaking" would not, under this decision, necessarily preclude an appropriation for military bounties of money already in the hands of the state, and not, for some other reason, unavailable for this purpose.

R. E. H.

TIMOTHY J. SULLIVAN, Admr. etc., of Catherine Sullivan, Deceased,
v.

J. H. HUSTIS, Temporary Receiver of the Boston & Maine Railroad.

Massachusetts Supreme Judicial Court — March 4, 1921.

(237 Mass. 441, 130 N. E. 247.)

Receiver — liability for disobedience of state statutes.

A receiver appointed by a Federal court to operate a railroad is, under the provisions of the Federal Judicial Code that he shall manage according to the requirements of the valid laws of the state in which the property shall be situated, liable for injuries resulting from failure to give signals at railroad crossings; and it is immaterial that the state statute is in form a penal or punitive one, if it merely results in the fixing of compensation for the person injured by failure to obey the statute.

[See note on this question beginning on page 1372.]

REPORT by the Superior Court for Suffolk County (Brown, J.) for determination by the full court after sustaining a demurrer to the declaration, of an action brought to recover damages for the death of plaintiff's intestate alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. James J. McCarthy and Thomas C. O'Brien, for plaintiff:

The defendant receiver is a "railroad corporation" within the meaning of the act.

Johnson v. Southern P. Co. 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158, 17 Am. Neg. Rep. 412; Wall v. Platt, 169 Mass. 398, 48 N. E. 270; Com. v. Boston & W. R. Corp. 11 Cush. 512; United States v. Harris, 177 U. S. 305, 44 L. ed. 780, 20 Sup. Ct. Rep. 609; United States v. Nixon, 235 U. S. 231, 59 L. ed. 207, 35 Sup. Ct. Rep. 49; Eddy

v. Lafayette, 163 U. S. 456, 41 L. ed. 225, 16 Sup. Ct. Rep. 1083; Gowen v. Harlev, 6 C. C. A. 190, 12 U. S. App. 574, 56 Fed. 973; Hornsby v. Eddy, 5 C. C. A. 560, 12 U. S. App. 404, 56 Fed. 461; McNulta v. Lochridge, 141 U. S. 327, 35 L. ed. 796, 12 Sup. Ct. Rep. 11.

Messrs. Henry F. Hurlburt and Albert W. Rockwood, for defendant:

Defendant, being a receiver, and not a railroad corporation, cannot be held liable on death statutes imposing liability upon a railroad corporation only, under a declaration which must be con-

strued with the strictness of an indictment.

Black v. New York, N. H. & H. R. Co. 193 Mass. 448, 7 L.R.A.(N.S.) 148, 79 N. E. 797, 9 Ann. Cas. 485; Hudson v. Lynn & B. R. Co. 185 Mass. 510, 71 N. E. 66, 16 Am. Neg. Rep. 366; Bothwell v. Boston Elev. R. Co. 215 Mass. 467, L.R.A.1917F, 167, 102 N. E. 665, Ann. Cas. 1914D, 275; Wiemert v. Boston Elev. R. Co. 216 Mass. 598, 104 N. E. 360; Rowley v. Ellis, 197 Mass. 391, 83 N. E. 1103; Merrill v. Eastern R. Co. 139 Mass. 252, 29 N. E. 666, 3 Am. Neg. Cas. 818.

The receiver cannot be sued under a penal statute imposing liability upon the corporation only.

Wall v. Platt, 169 Mass. 398, 48 N. E. 270; United States v. Harris, 78 Fed. 290, 29 C. C. A. 327, 57 U. S. App. 259, 85 Fed. 533, 177 U. S. 305, 44 L. ed. 780, 20 Sup. Ct. Rep. 609; United States v. Wiltberger, 5 Wheat. 76, 5 L. ed. 37; Sarlls v. United States, 152 U. S. 570, 38 L. ed. 556, 14 Sup. Ct. Rep. 720; San Marcos v. International & G. N. R. Co. — Tex. Civ. App. —, 203 S. W. 458; McNulta v. Lochridge, 141 U. S. 327, 35 L. ed. 796, 12 Sup. Ct. Rep. 11; Hudson v. Lynn & B. R. Co. 185 Mass. 510, 71 N. E. 66, 16 Am. Neg. Rep. 366; Brooks v. Fitchburg & L. Street R. Co. 200 Mass. 8, 86 N. E. 289; Boott Mills v. Boston & M. R. Co. 218 Mass. 582, 106 N. E. 680; Gove's Case, 223 Mass. 187, 111 N. E. 702; Littlejohn v. Fitchburg R. Co. 148 Mass. 478, 2 L.R.A. 502, 20 N. E. 103; Doyle v. Fitchburg R. Co. 162 Mass. 66, 25 L.R.A. 157, 44 Am. St. Rep. 335, 37 N. E. 770; Renaud v. New York, N. H. & H. R. Co. 210 Mass. 553, 38 L.R.A.(N.S.) 689, 97 N. E. 98; Hudson v. Lynn & B. R. Co. 185 Mass. 510, 71 N. E. 66, 16 Am. Neg. Rep. 366; Johnston v. Bay State Street R. Co. 222 Mass. 583, L.R.A.1918A, 650, 111 N. E. 391; Jones v. Boston & N. Street R. Co. 205 Mass. 108, 90 N. E. 1152; Oulighan v. Butler, 189 Mass. 287, 75 N. E. 726; Mulhall v. Fallon, 176 Mass. 266, 54 L.R.A. 934, 79 Am. St. Rep. 309, 57 N. E. 386; Melody v. Reab, 4 Mass. 471; Com. v. Worcester & N. R. Co. 124 Mass. 561; Com. v. Alexander, 185 Mass. 551, 70 N. E. 1017; Harvey v. Easton, 189 Mass. 505, 75 N. E. 948; Todd v. United States, 158 U. S. 278, 39 L. ed. 982, 15 Sup. Ct. Rep. 889; United States v. Weitzel, 246 U. S. 533, 62 L. ed. 872, 38 Sup. Ct. Rep. 381.

Penal statutes rendering a "railroad corporation" liable for their violation, 15 A.L.R.—86.

but not mentioning receivers, cannot be extended beyond the scope of the terms employed therein so as to include receivers.

Turner v. Cross, 83 Tex. 218, 15 L.R.A. 262, 18 S. W. 578; Yoakum v. Selph, 83 Tex. 607, 19 S. W. 145; Lipscomb v. Houston & T. C. R. Co. 95 Tex. 5, 55 L.R.A. 869, 93 Am. St. Rep. 804, 64 S. W. 923; Bonner v. Franklin Co-op. Asso. 4 Tex. Civ. App. 166, 23 S. W. 317; Campbell v. Wiess, — Tex. Civ. App. —, 25 S. W. 1076; Ft. Worth & D. C. R. Co. v. Shetter, — Tex. Civ. App. —, 58 S. W. 179; San Marcos v. International & G. N. R. Co. — Tex. Civ. App. —, 203 S. W. 458; Allen v. Dillingham, 8 C. C. A. 544, 23 U. S. App. 167, 60 Fed. 176; Burke v. Dillingham, 9 C. C. A. 255, 23 U. S. App. 153, 60 Fed. 729; Com. v. Felton, 107 Ky. 330, 53 S. W. 1046; Henderson v. Walker, 55 Ga. 481; Thurman v. Cherokee R. Co. 56 Ga. 376.

Rugg, Ch. J., delivered the opinion of the court:

This is an action of tort. The declaration sets forth in one count that the defendant is temporary receiver of the Boston & Maine Railroad, duly appointed by the United States district court for the district of Massachusetts, and that personal injury and suffering came to the plaintiff's intestate while a traveler on a highway in Wilmington, at a place where the tracks of the Boston & Maine Railroad cross the highway at grade, through collision with an engine or cars arising from the neglect to give the grade-crossing signals required by Stat. 1906, chap. 463, pt. 2, § 147. The other count is like, except that it sets forth the death of the plaintiff's intestate. Both counts are founded on § 245 of said part 2, which is in these words: "If a person is injured in his person or property by collision with the engines or cars of a railroad corporation at a crossing such as is described in § 147, and it appears that the corporation neglected to give the signals required by said section, and that such neglect contributed to the injury, the corporation shall be liable for all damages caused by the collision, or to a fine recoverable by indictment as pro-

vided in § 68 of part I., or, if the life of a person so injured is lost, to damages recoverable in an action of tort, as provided in said section, unless it is shown that, in addition to a mere want of ordinary care, the person injured or the person who had charge of his person or property was, at the time of the collision, guilty of gross or wilful negligence, or was acting in violation of the law, and that such gross or wilful negligence or unlawful act contributed to the injury."

The defendant demurred. The question to be decided is whether the defendant as receiver can be held liable under said § 245.

There is no provision of our railroad act in express terms imposing upon receivers the obligations of this kind resting upon railroad corporations.

Pertinent provisions of Federal statutes are found in the Judicial Code of the United States (Act of Congress of March 3, 1911, 36 Stat. at L. 1087, chap. 231), as follows:

"Sec. 65. Whenever in any cause pending in any court of the United States there shall be a receiver or manager in possession of any property, such receiver or manager shall manage and operate such property according to the requirements of the valid laws of the state in which such property shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof. Any receiver or manager who shall wilfully violate any provision of this section shall be fined not more than \$3,000, or imprisoned not more than one year, or both.

"Sec. 66. Every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such manager or receiver was

appointed so far as the same may be necessary to the ends of justice."

Comp. Stat. §§ 1047, 1048, 5 Fed. Stat. Anno. 2d ed. pp. 540, 541.

These sections in substance and effect are re-enactments of the Act of Congress of March 3, 1887, chap. 373, §§ 2, 3, 24 Stat. at L. 552, 554, and Act of Congress of August 13, 1888, chap. 866, §§ 2, 3, 25 Stat. at L. 433, 436.

These sections of the Federal statutes have been considered by the Supreme Court of the United States in several cases. In holding that a receiver of a railroad was, under Act of Congress of March 3, 1887, chap. 373, § 3, 24 Stat. at L. 554, Comp. Stat. § 1048, liable for the acts of his predecessor in the same office, it was said in *McNulta v. Lochridge*, 141 U. S. 327, at page 331, 35 L. ed. 796, 799, 12 Sup. Ct. Rep. 11, 13: "We agree . . . that, with respect to the question of liability, he stands in place of the corporation."

And at page 332 of 141 U. S.: "Actions against the receiver are in law actions against the receivership or the funds in the hands of the receiver, and his contracts, misfeasances, negligences, and liabilities are official, and not personal, and judgments against his as receiver are payable only from the funds in his hands. As the right given by the statute to sue for the acts and transactions of the receivership is unlimited, we cannot say that it should be restricted to causes of action arising from the conduct of the receiver against whom the suit is brought."

An action of tort for negligent setting of fire by sparks from a locomotive was before the court in *Eddy v. Lafayette*, 163 U. S. 456, where at page 464, 41 L. ed. 225, 228, 16 Sup. Ct. Rep. 1082, 1085, it is said: "The trial court and also the circuit court of appeals were of opinion that the third section of the Judiciary Act of March 3, 1887, chap. 373, § 2, 24 Stat. at L. 552, 554, Comp. Stat. § 1047, authorizing suits to be brought against receivers

of railroads, without special leave of the court by which they were appointed, was intended to place receivers upon the same plane with railroad companies, both as respects their liability to be sued for acts done while operating a railroad and as respects the mode of service. We concur in that view."

An action was brought against receivers of a railroad in *United States v. Harris*, 177 U. S. 305, 44 L. ed. 780, 20 Sup. Ct. Rep. 609, to recover penalties in the name and for the benefit of the United States for the alleged, knowing and wilful violation of the laws of the United States respecting the watering of live stock while in transportation. In the course of an opinion holding that such recovery could not be had because, as matter of statutory construction, the word "company" could not rightly be said to include "receivers of such company," it was said (177 U. S. at page 308): "It may be conceded that it was the intention of Congress [by enacting the Act of August 13, 1888, chap. 866, §§ 2 and 3, 25 Stat. at L. 433, 436, Comp. Stat. §§ 1047, 1048] to subject receivers of railroad companies, appointed . . . by courts of the United States, to the valid laws and regulations of the states and of the United States, whose object is to promote the safety, comfort, and convenience of the traveling public."

The statute there before the court was strictly penal without compensatory features. The penalty was payable to the United States, and not by way of damages to the owner of the cattle or other person suffering injury. It was in its essence criminal in nature. In an opinion in the same case in the district court it was said (78 Fed. 291): "The construction of the statute, and the proceeding under it, are governed by the rules of the criminal law, as fully as if the proceeding was by indictment. The exclusive purpose of the section is to inflict punishment."

The decision in *United States v.*

Harris, to the effect that a penalty for the transportation of cattle by a railroad company could not be imposed upon the receiver of the railroad, was reaffirmed in *United States v. Nixon*, 235 U. S. 231, 59 L. ed. 207, 35 Sup. Ct. Rep. 49, but a different conclusion was reached because of an amendment to the act of Congress not here relevant.

These excerpts from decisions of the United States Supreme Court show that §§ 65 and 66 of the Judicial Code have no constricted meaning, but are to be interpreted broadly to effectuate the operation of business carried on by receivers appointed by the Federal courts, with as much regard for the safety and protection and general observance of the rights of others, both in contract and in tort, as would be required of the owners of the property of which as receivers they have possession.

The words of the pertinent sections of the Judicial Code require the receiver of a railroad corporation to conduct its business and operate its system of transportation in conformity to valid state laws, upon the same footing, with like responsibility, subject to the same liability to respond to suits which would rest upon the owner if in possession and operating.

The doubt to be resolved is whether our statutes, upon which this action rests, fairly can be construed to be sufficiently inclusive to render a receiver liable.

The provisions of Stat. 1906, chap. 463, pt. 2, § 147, requiring the ringing of the bell and sounding of the whistle at highway grade crossings manifestly was designed to protect travelers on the highway from danger of injury. That section relates specifically to the management and operation of the trains of the railroad and therefore falls within the precise terms of § 65 of the Judicial Code, requiring the receiver to "manage and operate such property according to the valid laws of the state." One purpose of the legislature in enacting said § 147

was thus to afford warning to travelers upon the highway of the peril inevitably attendant upon crossing a railroad, in order that personal harm and loss of life may be avoided. Another purpose was, in case of accident, to give some compensation to those suffering directly from the injury or loss of life. Observance of the requirements of the statute calls the attention of those in charge of locomotives to the crossing, to the end that they also may take whatever measures may be within their power to prevent a grade-crossing accident, with its possibility of harm both to those traveling upon the highway and to those connected with the locomotive and train as employees and passengers. From every point of view the immediate tendency of the statute is "to promote the safety, comfort, and convenience of the traveling public." *United States v. Harris*, *supra*. These ends are of equal importance, whether the railroad corporation or a receiver is operating the trains.

It is settled beyond doubt by a long line of decisions that said § 245, so far as concerns recovery of damages for death, is in some aspects punitive in its nature. Only a few recent cases need be cited. *Hudson v. Lynn & B. R. Co.* 185 Mass. 510, 71 N. E. 66, 16 Am. Neg. Rep. 366; *Boott Mills v. Boston & M. R. Co.* 218 Mass. 582, 106 N. E. 680; *Johnston v. Bay State Street R. Co.* 222 Mass. 583, L.R.A. 1918A, 650, 111 N. E. 391; *Duggan v. Bay State Street R. Co.* 230 Mass. 370, 376, L.R.A.1918E, 680, 119 N. E. 757. Nothing here decided narrows or limits the scope of those decisions. The words "penal" and "punitive," which have been used from the beginning to describe the nature of our death statutes, were necessary and accurate because at the first all such statutes were criminal in form and were prosecuted by indictment. Later, when the remedy by action of tort was added in some cases and substituted in others for indictment, and

in still other instances new causes of action by tort created for the death resulting from negligence, the amount to be recovered never has been based on damages sustained by the family of the deceased. See *Brooks v. Fitchburg & L. Street R. Co.* 200 Mass. 8, 86 N. E. 289, where the statutes are reviewed. The amount recoverable always has been ascertained and assessed with reference to the culpability of the defendant himself or his agents, and never with any reference to the actual loss sustained by the plaintiff, or by the widow, the family, or next of kin of the deceased. The words "penal" and "punitive" have continued to be used rightly as descriptive of the method of determining the damages recoverable. They also have been used correctly when the rights between themselves or those who have contributed to causing the death of a human being were involved. *Boott Mills v. Boston & M. R. Co.* 218 Mass. 582, 106 N. E. 680. It is not necessary to speculate as to the reason for this aspect of our death statutes. See *Sullivan v. Old Colony Street R. Co.* 197 Mass. 512, 516, 517, 125 Am. St. Rep. 378, 83 N. E. 1091. The fact is indubitable.

But said § 245 has also compensatory features and a remedial function. The money exacted from a defendant is paid to the use of the widow, children, or next kin of the deceased (Stat. 1906, chap. 463, pt. 1, § 63), and not to or for the benefit of the state. While damages are not assessed on the basis of compensation, but with reference to the extent of the element of wrongdoing in the tortious act, nevertheless they are paid for the benefit of the person injured or the family of the person whose life is lost. Doubtless this feature of the law was enacted to supplement the rule of the common law, that the family of one who lost his life through negligence could recover no damages from the wrongdoer. In *Com. v. Eastern R. Co.* 5 Gray, 473, at page 474, respecting one of our early

death statutes, it was said: "Although the proceedings . . . assume the form adapted to a criminal offense, . . . yet it is apparent that a leading object of the statute was to secure some pecuniary provision for the widow and children, or heirs at law, . . . the fine is to be recovered to the use of the executor or administrator of the deceased person . . . for the benefit of the widow and heirs at law."

It was said in *Com. v. Boston & A. R. Co.* 121 Mass. 36, 37, in referring to Gen. Stat. chap. 63, §§ 97, 98, conferring remedy by indictment alone for loss of life: "Both sections contemplate proceedings, as for a criminal offense, by indictment; but a leading object of them is to secure some pecuniary provision for those who may be dependent upon the deceased, and, while penal in form, they are therefore largely remedial in character."

The right to an action of tort in addition to the remedy by indictment was created first by Stat. 1881, chap. 199, with respect to railroads and has been continued to the present. This civil "action differs in important particulars from the remedy by indictment. The latter is not available as a matter of right, but is a remedy in the name of the commonwealth, dependent upon the action of the grand jury, and to be enforced by or under the direction of a public officer, and according to the forms of criminal proceedings. The civil action may be instituted by the executor or administrator of the deceased person of his own motion; the trial will be before the court, without a jury, unless a jury trial is demanded by one of the parties; in case of trial by jury, the damages are to be assessed by the jury; the burden of proof will be sustained by proving the issue by a preponderance of evidence; and the plaintiff will recover or be liable to costs, as the result of the case may be." *Kelley v. Boston & M. R. Co.* 135 Mass. 448, 449; *Grella v. Lewis Wharf Co.* 211 Mass. 54, 59, 97 N. E. 745, Ann. Cas. 1913A, 1136.

An action like the present, therefore, is assimilated in most of its aspects so far as concerns the plaintiff to a civil action.

It may be conceded that state statutes imposing criminal liability upon a railroad corporation in respect of the operation of its road would not render the receiver subject to complaint or indictment, unless he is expressly named. See Stat. 1906, chap. 463, pt. 2, § 155.

The words "penal" and "punitive" are used often in a criminal sense as applied to actions. But there is a well-established distinction "between a suit for penalty by a private individual in his own interest and a suit brought by the government or people of a state for the vindication of public law." *Huntington v. Attrill* [1893] A. C. 150, 161.

A statute manifestly intended to protect human life and to impose an extraordinary civil liability, not existing at common law, upon those causing death, by subjecting them to a private action for recovery of damages for the pecuniary benefit of the family of the deceased, not inuring in any particular to the benefit of the state, is not criminal, but has important remedial features. It has been held in numerous decisions that such a statute is not criminal or penal in an international sense, but that civil rights founded on it may be enforced in the courts of another jurisdiction. *Huntington v. Attrill*, 146 U. S. 657, 675, 36 L. ed. 1123, 1130, 13 Sup. Ct. Rep. 224; *Huntington v. Attrill* [1893] A. C. 150, 62 L. J. P. C. N. S. 44, 68 L. T. N. S. 326, 41 Week. Rep. 575, 57 J. P. 404; *Loucks v. Standard Oil Co.* 224 N. Y. 99, 120 N. E. 198; *Hill v. Boston & M. R. Co.* 77 N. H. 151, 89 Atl. 482, Ann. Cas. 1914C, 714; *Boston & M. R. Co. v. Hurd*, 56 L.R.A. 193, 47 C. C. A. 615, 108 Fed. 116; *Whitlow v. Nashville, C. & St. L. R. Co.* 114 Tenn. 344, 68 L.R.A. 503, 84 S. W. 618; *Gardner v. New York & N. E. R. Co.* 17 R. I. 790, 24 Atl. 831; *Raulin v. Fischer* [1911] 2 K. B. 93, 80 L. J. K. B. N. S. 811, 104 L. T.

N. S. 849, 27 Times L. R. 220; Malloy v. American Hide & Leather Co. (C. C.) 148 Fed. 482. There is general recognition of this principle, although there has been some divergence of view in its application. Cristilly v. Warner, 87 Conn. 461, 467, 51 L.R.A. (N.S.) 415, 88 Atl. 711; Adams v. Fitchburg R. Co. 67 Vt. 76, 48 Am. St. Rep. 800, 30 Atl. 687; Raiser v. Chicago & A. R. Co. 215 Ill. 47, 106 Am. St. Rep. 153, 74 N. E. 69, 2 Ann. Cas. 802; O'Reilly v. New York & N. E. R. Co. 16 R. I. 388, 5 L.R.A. 364, 6 L.R.A. 719, 17 Atl. 171, 906, 19 Atl. 244.

In Wall v. Platt, 169 Mass. 398, 48 N. E. 270, it was decided that receivers of a railroad were liable under a statute which provided that "Every railroad corporation . . . shall be responsible in damages to a person . . . whose buildings or other property may be injured by fire communicated by its locomotive engines."

The reasoning upon which that decision rests is in large measure equally applicable to the present facts. In that opinion, after referring to the facts that the receivers in the operation of the railroad stand in many important respects in the place of the corporation, having sole possession of its property, exercising all its franchises, conducting its business as common carrier, and succeeding for the time being to many of its most important powers, privileges, and obligations, it was said (169 Mass. 401): "The mischief for which the statute is designed to provide a remedy is an incident to the operation of the road in their hands as in those of the corporation. And we cannot think that, by the use of the words 'railroad corporation,' the legislature intended to exclude them from liability under the statute in question, but that the words were used in a comprehensive sense sufficiently broad to include parties holding the relation to the corporation which receivers of a railroad . . . usually do."

The liability established by the

statute there in question did not rest upon any principle of the common law nor upon negligence. It might arise even though the highest care was exercised. In *Com. v. Boston & W. R. Corp.* 11 Cush. 512, in construing a death statute, it was held that, although the word "proprietors" in the section there under consideration might not technically describe a body corporate created in the manner and form our railroad corporations are, yet undoubtedly it ought to be given the effect of embracing all common carriers incorporated or not. In *Collector of Taxes v. Bay State Street R. Co.* 234 Mass. 336, 125 N. E. 614, it was held that the appointment of a receiver did not affect the excise tax to be assessed upon a "street railway . . . company" in respect of the length of its operated lines, following the principle of *Wall v. Platt*, supra. That principle is applicable to the case at bar. It follows that a receiver of a railroad is made liable under the statutes of this commonwealth to action in tort under Stat. 1906, chap. 463, pt. 2, § 245, for personal injury or loss of life arising from failure to give the signals required by § 147, to the same extent as the corporation owner would be liable if operating the railroad itself.

Receiver—
liability for
disobedience
of state
statutes.

Several decisions are in accord with the result here reached. *Murphy v. Holbrook*, 20 Ohio St. 137, 5 Am. Rep. 633; *Lamphear v. Buckingham*, 33 Conn. 238; *Little v. Dusenberry*, 46 N. J. L. 614, 50 Am. Rep. 445; *Lyman v. Central Vermont R. Co.* 59 Vt. 167, 10 Atl. 346. While other courts have reached a contrary result. *Turner v. Cross*, 83 Tex. 218, 15 L.R.A. 262, 18 S. W. 578; *Henderson v. Walker*, 55 Ga. 481. It is not necessary to review these decisions, because they all rest upon statutes differing more or less from the one here considered. See also *Peirce v. Van Dusen*, 69 L.R.A. 705, 24 C. C. A. 280, 47 U. S. App. 339, 78 Fed. 693; *Hornsby v. Eddy*,

56 Fed. 461; Sloan v. Central Iowa R. Co. 62 Iowa, 728, 16 N. W. 331; Mikkelson v. Truesdale, 63 Minn. 137, 65 N. W. 260, 16 Am. Neg. Cas. 336; Rouse v. Harry, 55 Kan. 589, 40 Pac. 1007.

The decision in Griffin v. Hustis, 234 Mass. 95, 98, 125 N. E. 387, was predicated upon the assumption that Stat. 1906, chap. 463, pt. 2, § 147, relative to the giving of signals by trains approaching grade crossings, applied to the defendant as receiver. But the point here raised was not there urged or adjudged, and the case at bar has been considered

without reference to that decision. It supports the conclusion here reached.

The order sustaining the demurrer is reversed and the demurrer is to be overruled.

So ordered.

NOTE.

The applicability of penal statutes to railroad receivers is the subject of the annotation following *INTERNATIONAL & G. N. R. Co. v. DAWSON*, post, 1372.

**INTERNATIONAL & GREAT NORTHERN RAILWAY COMPANY
et al.**

v.

MRS. J. E. DAWSON et al.

Texas Supreme Court—June 1, 1921.

(— Tex. —, 232 S. W. 279.)

Statute — construction — penalty on railroad — application to receiver.

1. A statute imposing a penalty on a railroad or railway company which permits weeds to go to seed upon its right of way applies to receivers in control of the railroad.

[See note on this question beginning on page 1372.]

Conflict of laws — imposition of penalty on Federal receiver.

2. A state may impose a penalty on

a railroad receiver appointed by a Federal court, for permitting weeds to go to seed on the railroad right of way.

CERTIFICATION by the Court of Civil Appeals for the Fifth Supreme Judicial District for determination by the Supreme Court of a question arising upon appeal by defendants from a judgment of the Ellis County Court in plaintiffs' favor in an action brought to recover statutory penalties for permitting weeds to go to seed on defendants' right of way. *Question answered in the affirmative.*

The facts are stated in the opinion of the court.

Messrs. Dabney & King, John B. King, and Will Hancock, for defendants:

The court erred in holding that receivers of the properties and franchises of railway companies appointed by the United States court are liable for allowing Johnson grass to go to seed on the right of way of the railroad of which they have control.

Campbell v. Cook, 86 Tex. 630, 40 Am. St. Rep. 878, 26 S. W. 486; Turner v. Cross, 83 Tex. 218, 15 L.R.A. 262, 18 S. W. 578; State v. Texas & P. R. Co. 106 Tex. 18, 154 S. W. 1159; United States v. Harris, 177 U. S. 305, 44 L. ed. 780, 20 Sup. Ct. Rep. 609; United States v. Nixon, 235 U. S. 231, 59 L. ed. 207, 35 Sup. Ct. Rep. 49; Campbell v. Wiess, — Tex. Civ. App. —, 25 S.

W. 1076; *Bonner v. Franklin Co-op. Asso.* 4 Tex. Civ. App. 166, 23 S. W. 317; *Missouri, K. & T. R. Co. v. Stoner*, 5 Tex. Civ. App. 50, 23 S. W. 1021; *United States v. Weitzel*, 246 U. S. 533, 62 L. ed. 872, 38 Sup. Ct. Rep. 381; *Keller v. Corpus Christi*, 50 Tex. 614, 32 Am. Rep. 613; *Hendrick v. Walton*, 69 Tex. 192, 6 S. W. 749; *Schloss v. Atchison, T. & S. F. R. Co.* 85 Tex. 601, 22 S. W. 1014.

Messrs. *Supple & Harding* also for defendants.

Messrs. *Clyde F. Winn* and *S. E. Dawson* for plaintiffs.

Pierson, J., delivered the opinion of the court:

The facts of the case are clearly and concisely stated by the court of civil appeals for the fifth supreme judicial district of Texas in its certificate as follows:

"Appellee sued the International & Great Northern Railway Company and receivers, appellants, to recover statutory penalties for permitting Johnson grass to go to seed on the right of way of appellant railway company, while in the hands of receivers appointed by the United States court, and judgment entered by the justice court and by the county court, and on appeal from the last judgment to this court the judgment was reversed and rendered for appellant on the ground that the statute, articles 6601, 6602, providing for penalties and damages, did not authorize a recovery against receivers, when, as in this case, the Johnson grass went to seed after the receivers had taken charge, following the case of *United States v. Harris*, 177 U. S. 305, 44 L. ed. 780, 20 Sup. Ct. Rep. 609, which holds that receivers appointed by the United States courts are not liable for penalties, and it is contended that said case is not in point, and that our opinion rendered in this case is in conflict with the cases of *Clark v. Dyer*, 81 Tex. 339, 16 S. W. 1061, and other cases of our courts where recoveries have been had against receivers.

"As the exact point here involved has never been decided by the courts in this state, and desiring it passed

upon by your Honors, we certify the following question for your decision:

"Question: Are receivers of railway companies appointed by the United States court liable, under articles 6601, 6602, Rev. Stat. of this state, for allowing Johnson grass to go to seed on the right of way of the railway company of which they have control? In other words, are we justified in following the case of *United States v. Harris*, supra?"

To the question propounded by the court of civil appeals we answer that receivers of the properties and franchises of railway companies appointed by the United States court are liable, under articles 6601 and 6602 of the Revised Statutes of this state, for allowing Johnson grass to go to seed on the right of way of the railroad of which they have control.

Conflict of laws—imposition of penalty on Federal receiver.

In regard to the penalties provided in articles 6601 and 6602, the contention of the receivers, appellants, is that while a railway is under the management of receivers under appointment by the Federal court, there can be no liability for the penalties in said articles, because the statute does not mention a receiver as one amenable to its terms; that under the law such receivers are not liable for the penalties sued for; and that it was fundamental error upon the part of the court below to render judgment against the receivers therefor. Their insistence is that on account of the recovery being for penalties, receivers are not liable therefor, and do not come under the terms of the statute.

Under a proper construction, receivers of railroads are included in articles 6601 and 6602, *Vernon's Sayles' Texas Civil Statutes*.

Article 6601 is as follows: "It shall be unlawful for any railroad or railway company or corporation doing business in this state to permit any Johnson grass or Russian thistle to mature or go to seed upon

any right of way owned, leased or controlled by such railroad or railway company or corporation in this state."

Article 6602 is in part as follows: "If it shall appear upon the suit of any person owning, leasing or controlling land contiguous to the right of way of any such railroad or railway company or corporation that said railroad or railway company or corporation has permitted any Johnson grass or Russian thistle to mature or go to seed upon their right of way, such person so suing shall recover from such railroad or railway company or corporation the sum of \$25, and any such additional sum as he may have been damaged by reason of such railroad or railway company or corporation permitting Johnson grass or Russian Thistle to mature or go to seed upon their right of way."

The words "railroad" and "railway company" include natural persons as well as corporations, and requirements and regulations necessary to the proper management of the property and the safeguarding of private property and the public protection are just as obligatory upon receivers as upon railroads under the management of their own chosen officers.

A receiver cannot exercise the franchises and powers of a railroad company and at the same time claim immunity from the police regulations and liabilities which have been imposed upon a railroad company by statute. While engaged in operating railroads, we can see no reason why receivers should not be held officially to the same rules of liability that control common carriers. *Sloan v. Central Iowa R. Co.* 62 Iowa, 728, 16 N. W. 331; *Mikkelsen v. Truesdale*, 63 Minn. 137, 65 N. W. 260, 16 Am. Neg. Cas. 336; *Hunt v. Conner*, 26 Ind. App. 46, 59 N. E. 52; *Lamphear v. Buckingham*, 33 Conn. 237; *Com. v. Felton*, 107 Ky. 330, 53 S. W. 1046; *Atlantic Coast Line R. Co. v. Georgia*, 234 U. S. 289, 58 L. ed. 1317, 34 Sup. Ct. Rep. 829.

This court, in an able opinion by Chief Justice Stayton, in the case of *International & G. N. R. Co. v. Bender*, 87 Tex. 100, 26 S. W. 1047, announces this rule as follows:

"The liability of a receiver, unless based on some personal wrong, is solely official, and compensation for injury inflicted while a railway company is controlled by a receiver must be made, if at all, from funds belonging to the corporation; and no reason is perceived why the rule of evidence applicable in terms to a railway company should not apply to a receiver when engaged in operating a railway.

"The reasons for enforcing such a rule are as forcible when a railway is under the exclusive control of a court and its receiver as when it is operated by the company to which it belongs; and we see no reason to doubt the propriety of applying the same rules of evidence and the same general rules of law in determining the liability of a receiver which would be applied in determining the liability of a railway company in all cases in which the action is not based on a statute which by its terms excludes such application."

In construing a similar statute and in considering and discussing the construction and application to be given penal statutes, Chief Justice Brown, in the case of *Thompson v. Missouri, K. & T. R. Co.* 103 Tex. 372, 126 S. W. 257, 128 S. W. 109, said:

"The defendant in error invokes the rule that penal statutes must be strictly construed and the honorable court of civil appeals adopted the suggestion, applying the rule in its extreme rigor to the facts of this case. The rule upon this subject which now prevails, being sustained by the best authority, is forcibly expressed by Chief Justice Fuller of the United States Supreme Court in the case of *United States v. Lacher*, 134 U. S. on page 629, 33 L. ed. 1083, 10 Sup. Ct. Rep. 625, by the following quotation from Mr. Sedgwick on Statutory and Constitu-

tional Law: 'The rule that statutes of this class are to be construed strictly is far from being a rigid or unbending one; or rather, it has in modern times been so modified and explained away as to mean little more than that penal provisions, like all others, are to be fairly construed according to the legislative intent as expressed in the enactment; the courts refusing, on the one hand, to extend the punishment to cases which are not clearly embraced in them, and, on the other, equally refusing by any mere verbal nicety, forced construction, or equitable interpretation, to exonerate parties plainly within their scope.' This passage is quoted by Baron Bramwell in *Atty. Gen. v. Sillem*, 2 Hurlst. & C. 532, 159 Eng. Reprint, 223, as one 'in which good sense, force, and propriety of language are equally conspicuous; and which is amply borne out by the authorities, English and American, which he cites.'

"That quotation expresses the rule of construction that is applicable to the facts of the case now before us. *Missouri ex rel. Barton County v. Kansas City, Ft. S. & G. R. Co.* 32 Fed. 726; *Pike v. Jenkins*, 12 N. H. 261. In the case last cited the court said; 'In construing penal statutes the proper course is to search out and to follow the true intent of the legislature, and to adopt that sense which harmonizes best with the context, and promotes, in the fullest manner, the apparent policy and objects of the legislature.'

"In order to determine the proper construction of the language of the articles above quoted from the Revised Statutes, it is necessary that we should ascertain the purpose and intent of the legislature in enacting them. Thompson had the undoubted right, in shipping his cars of lumber, to designate the route by which they should be carried by the different railroads over which they were destined to pass. *Inman v. St. Louis & S. W. R. Co.* 14 Tex.

Civ. App. 39, 37 S. W. 37. This right is not controverted by the defendant. That undoubted right would be of little avail to shippers over railroads in this state if there were not some provision for enforcing its observance. We must look to the language, the subject of legislation, the right to be secured, and the evil to be remedied, to determine the purpose and intent of the legislature as embodied in article 4574, and, judging from the facts of this case, the remedy is not more than adequate. If a fair construction of the language used in the law, in view of the purpose of its enactment, will embrace the acts of the defendant shown by the evidence, then the evidence establishes a cause of action against the defendant. If, however, the acts, which are claimed to be a violation of the statute, do not come within the terms of the statute when construed as we have stated, then the court cannot inflict the penalty, no matter how unjustly the railroad has treated Thompson. The paramount rule for construing statutes of any class is to ascertain what the legislature intended to prescribe by the language used, 'all others are helps,' to the accomplishment of that purpose."

In order that there be no confusion and no doubt as to the applicability of valid statutes of the states to the management of property in the hands of a receiver appointed by the United States court, the Congress of the United States passed the following statute: "Whenever in any cause pending in any court of the United States there shall be a receiver or manager in possession of any property, such receiver or manager shall manage and operate such property according to the requirements of the valid laws of the state in which such property shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof. Any receiver or

manager who shall wilfully violate any provision of this section shall be fined not more than \$3,000, or imprisoned not more than one year, or both. Judicial Code, § 65; Acts March 3, 1887, chap. 373, § 2, 24 Stat. at L. 554; Aug. 13, 1888, chap. 866, § 3, 25 Stat. at L. 436; March 3, 1911, chap. 231, § 65, 36 Stat. at L. 1104." Barnes's Fed. Code, § 827, Comp. Stat. § 1047, 5 Fed. Stat. Anno. 2d ed. p. 540.

In the case of *United States v. Ramsey*, 42 L.R.A.(N.S.) 1031, 116 C. C. A. 568, 197 Fed. 144, the United States circuit court of appeals held that penalties provided by Federal statute limiting the hours during which a "common carrier" may keep an employee on duty apply to a receiver appointed by a Federal court.

After discussing authorities, it said: "From a consideration of the foregoing authorities, it seems to us clear that the term 'common carrier' had a well-defined meaning, and that the receiver of a railroad came within the designation 'common carrier;' that Congress, in using the term 'common carrier,' used it in the sense in which such words are generally meant and understood; that the object and purpose of the statute would be entirely defeated in all cases in which a railroad or other common carrier is operated by a receiver, if the words 'common carrier' should be given a more restricted meaning than generally understood. It seems clear that a receiver, in the operation of a railroad, is a common carrier within the meaning of the statute; and though he is not personally liable, he is liable in his official capacity, and the payment of any judgment obtained would be subject to the order of the court appointing the receiver in the exercise of its equitable powers."

In regard to the case of *United States v. Harris*, the court said: "Defendants rely chiefly upon the

case of *United States v. Harris*, 177 U. S. 305, 44 L. ed. 780, 20 Sup. Ct. Rep. 609. That case simply held that a receiver of a railroad was not within the letter or spirit of the provisions of the Act of March 3, 1873 (Rev. Stat. §§ 4386-4388)."

The United States Supreme Court and many of the state courts have held receivers liable under statutes similar to the one before us, and that the case of *United States v. Harris*, *supra*, was not in conflict therewith. *Huntington v. Attrill*, 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224, and cases cited; *Central Trust Co. v. Wabash, St. L. & P. R. Co.* (C. C.) 26 Fed. 12; *Robinson v. Harmon*, 157 Mich. 272, 117 N. W. 664, 122 N. W. 106; *Hill v. Boston & M. R. Co.* 77 N. H. 151, 89 Atl. 482, Ann. Cas. 1914C, 714.

These opinions contain extensive discussion of the principles upon which statutes similar to our statute under consideration have been sustained, and cite numerous authorities from English and American courts and text-writers. We deem further elaboration unnecessary.

Receivers controlling and managing the properties of a railroad should be held to the same accountability in regard to these statutory penalties as the railway corporation itself in the management and control thereof.

We think the legislative intent clear that all railroads doing business in this state, whether managed by a receiver or otherwise, should comply with this Johnson Grass Statute or pay the penalty for its violation; and that it did not intend to license them under a receivership to neglect or override wholesome regulations for the protection of individual rights and the public good.

Statute—
construction—
penalty on
railroad—
application to
receiver.

Petition for rehearing denied.

ANNOTATION.

Applicability of penal statutes to railroad receivers.

- I. Introduction, 1372.
- II. Penal statutes held applicable to receivers, 1372.
- III. Penal statutes held inapplicable to receivers, 1375.

I. Introduction.

The question of the liability of a receiver in his official capacity for torts or negligence of receivership employees is treated in annotation appended to *Gardner v. Martin*, 10 A.L.R. 1055. As to exemplary or punitive damages, see page 1078 of that annotation.

As to individual liability of receivers for injury to person or property of third persons due to negligence, or violation of statute or ordinance, in management of the trust estate, see annotations in 7 A.L.R. on page 414, and 14 A.L.R. 371.

And the question whether a statute creating a presumption of negligence against a railroad company is applicable to a receiver operating the road is discussed in annotation to *Lamb v. Floyd*, 1 A.L.R. 1180.

The present annotation deals only with the question whether railroad receivers are within statutes which impose not merely a liability for damages, but also a penalty for failing to perform, or for performing, certain acts. Cases on the question whether statutes generally which in terms apply to railroad companies or common carriers are applicable to receivers of a railroad are collected in 10 A.L.R. beginning on p. 1069. It seems, however, that even though such a statute imposing a liability for damages were held applicable to receivers, the same might not be true where the statute imposes a penalty, in view of the rule of strict construction of the latter class of statutes.

It should be observed that the annotation does not consider the question of the liability of a railroad company for the torts of the servants or agents of a receiver of the road while operating it; and, therefore, does not

include such cases as *Arkansas C. R. Co. v. State* (1904) 72 Ark. 250, 79 S. W. 773, holding that a railroad company is not liable for the statutory penalty for failure to give proper crossing signals, where at the time of the failure the road was being operated by a receiver.

II. Penal statutes held applicable to receivers.

Statutes imposing a penalty upon a "railroad company" or "common carrier," or using similar terms, for the doing or failure to do certain acts, have usually been construed as applicable to receivers of a railroad, although the statute did not expressly mention receivers.

United States.—*United States v. Nixon* (1914) 235 U. S. 231, 59 L. ed. 207, 35 Sup. Ct. Rep. 49; *Central Trust Co. v. Wabash, St. L. & P. R. Co.* (1886) 26 Fed. 12; *United States v. Ramsay* (1912) 42 L.R.A.(N.S.) 1031, 116 C. C. A. 568, 197 Fed. 144.

Arkansas.—*Bush v. State* (1917) 128 Ark. 448, 194 S. W. 857.

Illinois.—See *Malott v. Howell* (1903) 111 Ill. App. 233, and *Malott v. Mapes* (1903) 111 Ill. App. 340, *infra*.

Iowa.—*Brockert v. Central Iowa R. Co.* (1891) 82 Iowa, 369, 47 N. W. 1026.

Massachusetts.—*SULLIVAN v. HUSTIS* (reported herewith) ante, 1360.

Minnesota.—See *State v. Corbett* (1894) 57 Minn. 345, 24 L.R.A. 498, 4 Inters. Com. Rep. 694, 59 N. W. 317, *infra*.

Mississippi.—*Memphis & C. R. Co. v. Glover* (1900) 78 Miss. 467, 29 So. 89.

Missouri.—*Farrell v. Union Trust Co.* (1882) 77 Mo. 475.

Texas.—*INTERNATIONAL & G. N. R. Co. v. DAWSON* (reported herewith) ante, 1367.

In *INTERNATIONAL & G. N. R. Co. v. DAWSON* (reported herewith), it was held that receivers of a railroad appointed by the Federal court were liable for the penalty imposed by a stat-

ute making it unlawful of any "railroad or railway company or corporation" doing business in the state to permit any Johnson grass to go to seed upon any right of way owned, leased, or controlled by such "railroad or railway company or corporation" in the state. The court said that the words "railroad" and "railway company" include natural persons as well as corporations; and that requirements and regulations necessary to the proper management of the property, and the safeguarding of private property, and the public protection, were just as obligatory upon receivers as upon railroads under the management of their own chosen officers; that the legislature did not intend to license railroads under a receivership to neglect or override wholesome regulations for the protection of individual rights and the public good.

In *Bush v. State* (Ark.) *supra*, the Arkansas statute requiring the ringing of the bell or blowing of the whistle, at railroad crossings, under a penalty of \$200 for any neglect, to be paid by the "corporation owning the railroad," was held applicable to a receiver operating a railroad apparently under the orders of the Federal court. The court said that the statute was directed at whoever was operating the railroad, rather than the corporation having the technical ownership thereof; that in statutes prescribing, under penalty, duties to be performed by "owners" of railroad companies, the word "owners" is used in the popular, rather than in the technical, sense, and is construed so as to include all who are operating the railroad, whether as owners of the property, or as lessees, receivers, or the like.

And the word "owner" in the Minnesota statute regulating the sale and redemption of tickets of common carriers, and providing a punishment for the violation of the same, was said in *State v. Corbett* (1894) 57 Minn. 345, 24 L.R.A. 498, 4 Inters. Com. Rep. 694, 59 N. W. 317, *supra*, to include all who operated a railroad or steamboat in the transportation of passengers, as, for example, lessees, receivers, and the

like. The court does not set out the provisions of the act, however; nor does it appear that the question was directly involved as to whether a receiver was within the statute.

The Federal statute limiting, under penalty, the hours during which a "common carrier" may keep an employee on duty, was held in *United States v. Ramsay* (1912) 42 L.R.A. (N.S.) 1031, 116 C. C. A. 568, 197 Fed. 144, *supra*, to apply to a receiver appointed by a Federal court for an interstate railroad. It was said: "Congress, in passing the act in question, must have intended to use the term 'common carrier' in the usual and ordinary acceptance of the term; to wit, as one engaged in the business of carrying persons and property from one place to another for compensation, for all who should apply to have their goods transported or to be transported in person. The mere fact that the statute in question is a penal one does not require that the words 'common carrier' should receive a restricted interpretation. . . . From a consideration of the foregoing authorities, it seems to us clear that the term 'common carrier' had a well-defined meaning, and that the receiver of a railroad came within the designation 'common carrier;' that Congress, in using the term 'common carrier,' used it in the sense in which such words are generally meant and understood; that the object and purpose of the statute would be entirely defeated in all cases in which a railroad or other common carrier is operated by a receiver, if the words 'common carrier' should be given a more restricted meaning than generally understood. It seems clear that a receiver, in the operation of a railroad, is a common carrier within the meaning of the statute."

And the court in *United States v. Ramsey* (Fed.) *supra*, quoted from authorities to the effect that, though penal laws are to be construed strictly, yet the intention of the legislature must govern in their construction as well as in the construction of other statutes, and that they are not to be construed so strictly as to defeat the

obvious intention of the legislature; that where the words used in a penal statute are general, and include various classes of persons, the court is not justified in restricting them to one class, or in giving them the narrowest interpretation, where the mischief to be remedied is equally applicable to all classes; but that the proper course is to adopt that meaning which promotes in the fullest manner the apparent policy and objects of the legislature.

The Federal Quarantine Act of 1905 imposing a penalty upon railroad companies transporting cattle from a quarantine state to any other state except in compliance with certain regulations, was made applicable by the Statute of 1913 to "any railroad company or other common carrier" whose road or line formed any part of the route over which cattle were transported in the course of a shipment from a quarantine state to another state. And in *United States v. Nixon* (1914) 235 U. S. 231, 59 L. ed. 207, 85 Sup. Ct. Rep. 49, *supra*, the court held that the 1913 Act applied to receivers of a railway company who transported cattle from a quarantine district in one state to another state. The court said that in view of the decision in *United States v. Harris* (U. S.) *infra*, III., the decision that the statute did not create an offense for which receivers could be punished would necessarily have to be affirmed if the case were to be determined solely by the provisions of the Quarantine Act of 1905, imposing a penalty for the transportation of cattle by a railroad company, it being said that a receiver is not a corporation, and, therefore, not within the terms of a statute applicable to railroad companies, even though cattle from an infected district transported by him would be as likely to transmit disease as if they had been shipped over the same line while it was being operated by the railroad itself. But the court stated that it was no doubt in view of recognition of this fact, and in order to make the remedy as broad as the evil sought to be cured, that Congress, by the Statute of

1913, had made all the provisions of the original act apply to "any railroad company or other common carrier," etc.; that in so far as he transported passengers and property the receiver was a common carrier, with rights and civil responsibilities as such; and that there was no reason suggested, why a receiver, operating a railroad, should not also be subject to the penal provisions of a statute prohibiting any common carrier from transporting live stock by rail from a quarantine district into another state.

A receiver of a railroad company appointed by a Federal court was held by the Massachusetts court in *SULLIVAN v. HUSTIS* (reported herewith) ante, 1360, to be liable under the Massachusetts statute to an action in tort for death arising from failure to give crossing signals as required by the statute, which provided that if a person was injured by collision with the engines or cars of a "railroad corporation" at a crossing, and it appeared that the "corporation" neglected to give the signals required by the statute, the "corporation" should be liable for damages caused by the collision, or to a fine recoverable by indictment, or, if the life of a person so injured was lost, for damages recoverable in an action of tort. The court said that it was settled beyond doubt that the statute, so far as it concerned recovery of damages for death, was in some aspects punitive in its nature; but that it had compensatory features, the damages, while not being assessed on the basis of compensation but with reference to the extent of the element of wrongdoing in the tortious act, nevertheless being paid for the benefit of the person injured or the family of the person whose life was lost. And the court on this ground distinguished *United States v. Harris* (1900) 177 U. S. 305, 44 L. ed. 780, 20 Sup. Ct. Rep. 609, *infra*, stating that the statute there before the court was strictly penal, without compensatory features, the penalty being payable to the United States, and not by way of damages to the person suffering the injury; in other words, the statute there was in its essence crim-

inal in nature. And the court said it might be conceded that state statutes imposing criminal liability upon a railroad corporation in respect to the operation of its road would not render a receiver subject to complaint or indictment, unless he was expressly named.

It was held in *Memphis & C. R. Co. v. Glover* (1900) 78 Miss. 467, 29 So. 89, *supra*, that receivers of a railroad were liable as such for the statutory penalty imposed on railroads for failure to construct or maintain proper cattle guards and stock gaps where the tracks passed through inclosed land.

Statutes imposing double damages on railway companies for failure to fence their tracks have been held applicable to railroad receivers. *Central Trust Co. v. Wabash, St. L. & C. R. Co.* (1886) 26 Fed. 12; *Brockert v. Central Iowa R. Co.* (1891) 82 Iowa, 369, 47 N. W. 1026; *Farrell v. Union Trust Co.* (1882) 77 Mo. 475 (statute held to apply to a trust company operating a railroad).

In *Farrell v. Union Trust Co.* (Mo.) *supra*, a statute subjecting "railroad corporations" to double damages for the killing of live stock on failure to fence the track was held to apply to a trust company operating a railroad; and the court in the opinion takes the view that a receiver is liable, as such, under the statute.

The Missouri statute was similarly construed in *Central Trust Co. v. Wabash, St. L. & P. R. Co.* (Fed.) *supra*. *Brewer, J.*, in delivering the opinion, while recognizing that there might be no equity, where the court takes possession of the assets of a railroad by a receiver, in thus distributing the assets so as to allow double the amount of a claim against the company, said that no reason was apparent why the statute was not applicable to every railroad, whether in the hands of a receiver or otherwise.

The statute construed in *Brockert v. Central Iowa R. Co.* (1891) 82 Iowa, 369, 47 N. W. 1026, *supra*, made "any corporation operating a railway" liable for double damages due to a failure to fence the tracks, and provided

that "all lessees or other persons owning or operating such railway" should be subjected to the duties and liabilities imposed by the statute on corporations owning or operating railways.

The same doctrine seems indirectly supported by *Malott v. Howell* (1903) 111 Ill. App. 233, and *Malott v. Mapes* (1903) 111 Ill. App. 340, where, in actions against receivers of railroads to recover double the value of fences constructed by adjoining landowners, under a statute requiring railroad companies to fence their rights of way, and permitting adjoining landowners, on failure of the company to do so, to construct the fence and recover double its value, the court stated that the judgment should have been against the receiver in his official capacity, to be paid in due course of the administration of his trust, and that it is error to award execution against a receiver.

III. Penal statutes held inapplicable to receivers.

Statutes imposing a penalty upon "railroad companies," or using similar terms, but not in terms mentioning receivers of a railroad, have in several cases been held not to include such receivers. *United States v. Harris* (1900) 177 U. S. 305, 44 L. ed. 780, 20 Sup. Ct. Rep. 609; *Robinson v. Harmon* (1908) 157 Mich. 272, 117 N. W. 664, 122 N. W. 106; *Bonner v. Franklin Co-op. Asso.* (1893) 4 Tex. Civ. App. 166, 23 S. W. 317; *Campbell v. Wiess* (1894) — Tex. Civ. App. —, 25 S. W. 1076; *San Marcos v. International & G. N. R. Co.* (1918) — Tex. Civ. App. —, 203 S. W. 458. See also *Missouri, K. & T. R. Co. v. Stoner* (1893) 5 Tex. Civ. App. 50, 23 S. W. 1020.

Although different statutes were involved, the above Texas cases seem to be of somewhat doubtful authority, in view of the decision in *INTERNATIONAL & G. N. R. Co. v. DAWSON* (reported herewith) ante, 1367, holding that receivers of a railroad appointed by the Federal court were within the Texas statute, making it unlawful for any "railroad or railway company or corporation" doing business in the

state to permit any Johnson grass to go to seed upon its right of way.

The leading authority relied on by those courts which have held penal statutes inapplicable to receivers, where not expressly mentioned, is *United States v. Harris* (U. S.) *supra*, in which the Federal Supreme Court held that receivers of a railroad appointed by a Federal court were not liable to an action for penalties under the Federal Statute of 1873, entitled "An Act to Prevent Cruelty to Animals While in Transit by Railroads or Other Means of Transportation within the United States," providing that "no railroad company" shall confine live stock in cars longer than a certain period, without unloading for food and water, and making "any company, owner, or custodian of such animals," who knowingly and wilfully fails to comply with the provisions of the act, liable for a penalty of not less than \$100, nor more than \$500, to be recovered in a civil action in the name of the United States.

The reasoning of the court in *United States v. Harris* (U. S.) *supra*, was as follows: "It may be conceded that it was the intention of Congress to subject receivers of railroad companies, appointed such by courts of the United States, to the valid laws and regulation of the states and of the United States, whose object is to promote the safety, comfort, and convenience of the traveling public. But we are not now concerned with the general intention of Congress, but with its special intention, manifested in the enactments under which this suit was brought. Was it the purpose of Congress when prescribing a penalty for any company, owner, or custodian of animals who knowingly and willingly fails to comply with the directions of the statute, to include receivers? Can we fairly bring receivers within the penal clause by reasoning from a supposed or an apparent motive in Congress in passing the act? It was the view of the courts below that receivers were plainly not within the letter of the statute, and not necessarily within its purpose or spirit; and an attentive examination has brought us to

the same conclusion. It must be admitted that, in order to hold the receivers, they must be regarded as included in the word 'company.' Only by a strained and artificial construction, based chiefly upon a consideration of the mischief which the legislature sought to remedy, can receivers be brought within the terms of the law. But can such a kind of construction be resorted to in enforcing a penal statute? Giving all proper force to the contention of the counsel of the government, that there has been some relaxation on the part of the courts in applying the rule of strict construction to such statutes, it still remains that the intention of a penal statute must be found in the language actually used, interpreted according to its fair and obvious meaning. It is not permitted to courts, in this class of cases, to attribute inadvertence or oversight to the legislature when enumerating the classes of persons who are subjected to a penal enactment, nor to depart from the settled meaning of words or phrases in order to bring persons not named or distinctly described within the supposed purpose of the statute. It may well be that Congress, in omitting to expressly include receivers in these sections, intended to leave them subject to the control and direction of the courts, whose officers they are. It does not, therefore, follow that the statute in question would be without operation where railroads are in the hands of receivers. The owners and custodians of the stock would still remain subject to the punishment prescribed."

In *Robinson v. Harmon* (1908) 157 Mich. 272, 117 N. W. 664, 122 N. W. 106, *supra*, the court construed the Michigan statute, providing that every railroad corporation should, on due payment of freight legally authorized, transport property without partiality or favor, "under a penalty for each violation of this provision, of \$100, to be recovered, by the party aggrieved," as not applicable to a Federal receiver of a railroad, so as to render him liable for the penalty. On the first hearing the receiver was held liable, but a

different conclusion was reached on rehearing, the court saying that it was unable to distinguish the case from *United States v. Harris* (1900) 177 U. S. 305, 44 L. ed. 780, 20 Sup. Ct. Rep. 609, *supra*. On the first hearing the case was held distinguishable on the ground that the statute was not a penal one, strictly speaking, but was remedial in its effect.

It was held in *Bonner v. Franklin Co-op. Asso.* (1893) 4 Tex. Civ. App. 166, 23 S. W. 317, *supra*, and *Campbell v. Wiess* (1894) — Tex. Civ. App. —, 25 S. W. 1076, *supra*, that receivers of a railroad were not within the Texas statute subjecting "railroad companies" to a penalty for unjust discrimination in freight rates. In the *Bonner Case*, the court cited, as decisive of the question, *Turner v. Cross* (1892) 83 Tex. 218, 15 L.R.A. 262, 18 S. W. 578, which is a leading authority in that state, to the effect that a receiver of a railroad is not a "proprietor, owner, charterer, or hirer" of the road, within the meaning of a statute making persons of the class described liable for the death of any person by their own negligence, or that of their servants or agents. This case and others which have followed it in the same state, not involving penal statutes, are cited in the annotation in 10 A.L.R. on pages 1074, 1075.

In *Bonner v. Franklin Co-op. Asso.* (Tex.) *supra*, the court also called attention to the fact that the action before it was to recover a statutory penalty, and that a stricter rule, therefore, applied, and said that unless the language of the statute was broad enough to include railroad receivers they were not liable to its penalty, the statute not being susceptible of enlargement by implication.

And in *Missouri, K. & T. R. Co. v. Stoner* (1893) 5 Tex. Civ. App. 50, 23 S. W. 1020, *supra*, the court construed the same statute so as not to render a railroad company liable for the pen-

alty for detention of freight after tender of the charges due, where the penalty was incurred while the road was in the hands of receivers, although it had assumed all obligations incurred by them. The court said that the statute only imposed the penalty upon railroads for the acts, of their officers, agents, or employees; that it was well settled that one suing for a penalty must recover, if at all, according to the terms of the statute; and that a receiver of a railroad is neither its officer, agent, nor employee, but an officer of the court making the appointment.

A Federal receiver of a railroad was held in *San Marcos v. International & G. N. R. Co.* (1918) — Tex. Civ. App. —, 203 S. W. 458, *supra*, not to be within the Texas statute making it the duty of every "railroad company" in the state to keep street crossings in proper condition, and providing for a penalty of \$25 for each week "such railroad" failed or neglected to comply with the statute, after notice. The court said that the statute did not mention receivers, and, since it was penal in its nature, could not be extended beyond the scope of the terms employed therein so as to include them.

The court also in *San Marcos v. International & G. N. R. Co.* (Tex.) *supra*, held that a receiver appointed by a Federal court was in the same position with respect to the applicability of the statute as one appointed by a state court, overruling the contention that the Federal statutes requiring receivers appointed by the Federal courts in possession of property, to manage and operate the same according to the laws of the state in which the property was situated, made such receivers liable for any penalty prescribed for failure to comply with the state statutes.

R. E. H.

ELK HORN MINING CORPORATION, Appt.,
v.
P. A. VANHOOSE.

Kentucky Court of Appeals—February 26, 1918.

(179 Ky. 529, 200 S. W. 921.)

Master and servant — duty to provide against unsafe mine roof.

1. A master is not bound to provide against the unsafe condition of the roof of a mine which developed in the progress and as a result of the work of an employee injured by such condition, and who alone knew or had an opportunity to know of it.

[See note on this question beginning on page 1380.]

— statutory duty of mine foreman —
watching for danger.

2. The statutory duty of a mine foreman to visit all places in the mine at least twice a week does not impose upon him the duty of watching the progress of each employee's work for dangers that may develop in the progress of the work.

— assumption of risk.

3. An employee of a mine who fails to cease working and report to the foreman when the roof at the place where he is working becomes unsafe, as required by the rules of the employer, assumes the risk of injury from an unsafe roof.

[See 18 R. C. L. 1237.]

APPEAL by defendant from a judgment of the Circuit Court for Floyd County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Allie W. Young, E. C. O'Rear, and Smith & Combs for appellant.

Messrs. May & May for appellee.

Clarke, J., delivered the opinion of the court:

P. A. Vanhooose recovered a judgment for \$750 against the Elk Horn Mining Corporation for injuries received while employed as a loader in one of the mines of the company in Floyd county, and the company appeals.

The negligence alleged in the petition is that defendant permitted its mine roof, in the entry where plaintiff was at work, to become unsafe and dangerous; and that it was the duty of defendant to have properly propped, capped, and braced the roof at that place, but, although requested so to do, defendant did not prop, or use ordinary care to prop, the roof to prevent the injury to plaintiff. Defendant denied the allegations of the petition, and

pleaded assumed risk and contributory negligence; the plaintiff, by reply, traversed these affirmative defenses.

At the time of his injury, on September 29, 1914, plaintiff had had eight years' experience as a mine loader, and had been working at the place of the accident six days. Other employees had made, with an electric machine, a cut across the face of the coal up next to the roof 5½ inches wide and about 5 feet deep; and plaintiff, working alone, had bored holes downward into the face and shot the coal up to loosen it, and had loaded out about nine cars of coal when, about 3 o'clock in the afternoon, while he was loading another car, a piece of slate some 8 feet long, 6 feet wide, and 2½ inches thick, fell upon him, partially from the roof he had exposed, and injured him. At about 8 o'clock that morning, and before plaintiff shot the coal, the mine foreman, W. W. Per-

kins, on his round of inspection, came to where plaintiff was at work, and plaintiff requested him to examine the roof to see if it was safe, and, if not safe, to have it timbered. Perkins then, in the presence of plaintiff, tested with a pick, in the customary manner, the roof that was then exposed, and left without saying anything to plaintiff. Shortly thereafter he sent Borders, the timber foreman, to the place, with instructions to erect additional timbers, such as the company was erecting permanently, every 4 feet as the work progressed, if this could be done so as to leave space for setting the cutting machines for the next cut. Borders measured the space between the face of the coal and the timbers already erected, but did not set any additional timbers because there was not room for them, allowing the required space for the cutting machines.

Perkins testified that when he examined the roof there was no evidence that it was unsafe at that time, and plaintiff, in a way, corroborated him, although he would not say whether or not the roof was then safe, but said only that he did not consider it unsafe, and that he would not have gone to work there if he had thought it to be unsafe; that he did not pay any particular attention to the test made by the foreman, but relied entirely upon the foreman to warn him if it was unsafe; and that it was not his duty to examine or to judge of the safety of the place. He did not, however, say that it was not then safe, and he admitted that thereafter he fired the shots in the face of the coal under the roof to loosen the coal; and, without any examination whatever, by himself or anyone, to ascertain the condition of the roof resulting from the shots he fired, or as the work progressed, he worked under the roof until he was hurt, some six or seven hours later. Nor does he claim it was the duty of anyone to have examined the roof after he fired the shots under it, but rests

his case entirely upon the alleged negligence of the company in failing, after the inspection by the foreman, to have placed additional props under the roof, regardless of whether such props would have left room for the machines of the cutters who were to follow him. His position seems to us untenable for several reasons:

First, because there is no proof whatever that, when the foreman inspected the roof, and before plaintiff fired the shots, the roof was unsafe and needed additional support for plaintiff's protection; nor can such unsafe condition be inferred, as argued by counsel for plaintiff, from the action of the foreman in sending Borders in to place such permanent timbers as the company was erecting in the entry as could be placed, since it is perfectly apparent it was only such permanent timbers as could be erected that the foreman instructed Borders to erect, and not temporary timbers for the protection of plaintiff. So there is no inference, as there is no evidence, that temporary timbers, such as counsel for plaintiff argue could and should have been erected, were needed to make the place safe for plaintiff; and even if such an inference was warranted from the circumstances, plaintiff himself would have been bound thereby because he knew of every circumstance connected therewith, yet he would have us, from these circumstances, infer that the roof was unsafe and the company negligent in failing to prop it, and allow him to construe the same circumstance as a tacit assurance that the roof was safe and did not need propping.

Second. The law places upon the master no duty to provide against dangers, arising in the progress of an employee's work and resulting therefrom; and the only reasonable inference from the proof

Master and servant—duty to provide against unsafe mine roof.

here is that the unsafe condition which resulted in plaintiff's injury developed in the progress and as a

result of plaintiff's work, of which he alone knew or had the opportunity to know.

Third. It is made the duty of the mine foreman, by statute, to visit all working places in the mine at least twice a week, and manifestly it would be impossible for him to

—statutory duty of mine foreman watching for danger. watch the progress of each employee's work for dangers that might develop

in the progress of the work, and consequently no such duty was upon him; and the evidence shows there was no one else chargeable with such an inspection but the employee, plaintiff himself, which is shown by the rules adopted, approved, and posted by the company pursuant to § 2738b, Kentucky Statutes, by rule 7 of which it was made plaintiff's duty to inspect the roof after each blast and as the work progressed, and to cease working, leave the place, and report to the foreman or his assistant, whenever the roof became unsafe; and this plaintiff confessed he did not

—assumption of risk. do, and he therefore assumed the risk, and cannot recover.

Plaintiff seeks to avoid the duty of inspection imposed upon him by the rules by the fact that he had not been furnished a copy of same. The statute provides that when the rules are adopted, approved, and posted, as therein required, which the evidence shows was done here, the employee is deemed to have notice of and to have agreed to same; and it is further provided that he shall be furnished a copy by the company when requested by him, but plaintiff does not even claim to have made such a request. Plaintiff also claims exemption from the rules because the defendant was doing all the propping required in this mine; but the rules show this was to be done by the company, except permanent timbering, only when, in the progress of such work as plaintiff was doing, he discovered and notified the company of the necessity therefor.

It is therefore apparent that the trial court erred in overruling the defendant's motion for a directed verdict.

Wherefore the judgment is reversed, and cause remanded for proceedings consistent herewith.

ANNOTATION.

Duty of an employer with respect to the timbering of a mine, under the common law and general statutes.

- I. Introductory, 1381.
- II. Various grounds upon which fault may be imputed to the employer, 1382.
- III. Employer's knowledge, actual or constructive, of the need for timbering the place of work, 1383.
- IV. Employer's duty with regard to inspection, 1386.
- V. Employer's duty with regard to the timbering of completed entries and other passageways, 1392.
- VI. Same subject further discussed, 1395.
- VII. Employer's duty with regard to the timbering of entries and passageways in course of construction or alteration, 1396.
- VIII. — of shafts, 1399.
- IX. — of chambers intended for the installation of machinery, 1400.
- X. — of rooms and similar places in coal mines:
 - a. Where the injured person was engaged in the actual work of excavation, 1400.
 - b. Where the injured person was not engaged in the actual work of excavation, 1408.
- XI. — of stopes, drifts, and chambers in mines other than those producing coal, 1408.
- XII. Employer's duty in respect of supplying timbers demanded by the miner, 1410.
- XIII. Employer's liability for injuries caused by the improper placement of timbers, 1415.
- XIV. — by the adoption of certain methods of work, 1416.
- XV. Employer's liability considered with reference to the quality of his duty in respect of the timbering of the mine, 1418.

I. Introductory.

The liability of the operator of a mine for injuries sustained by persons in his employ by reason of the insufficient timbering of the underground workings is determinable primarily with reference to the doctrine that a master owes to his servants the duty of exercising reasonable care to provide them with a safe place of work. It will be found that the qualifications to which that doctrine is subject as regards cases of the type discussed in the present monograph reflect partly the application of the general rules of the law of master and servant, and partly conclusions indicated by the peculiar incidents of mining work.

It is recognized that, in view of the

extremely dangerous conditions under which such work is carried on, the employer may properly be required to exercise an unusually high degree of care in providing for the safety of the workmen.¹ But he is not an insurer as respect that safety.²

The theory that the employer's duty with respect to timbering a dangerous portion of a mine does not arise until he has been requested or notified by the workmen to protect them was rejected in the case cited below.³

The doctrine that conformity to usage or custom is a circumstance admissible as evidence bearing upon the issue of negligence *vel non* has been applied in various cases.⁴ The weight to be ascribed to this element will depend upon the theory adopted with re-

¹ "The care and diligence required of the master is such as a reasonably prudent man would exercise under like circumstances in order to protect his servants from injury. It must be commensurate with the character of the service required, and with the dangers that a reasonably prudent man would apprehend under the circumstances of each particular case. Obviously, a far higher degree of care and diligence is demanded of the master who places his servant at work digging coal beneath overhanging masses of rock and earth in a mine than of him who places his employee on the surface of the earth, where danger from superincumbent masses is not to be apprehended. A reasonably prudent man would exercise greater care and watchfulness in the former than in the latter case." *Union P. R. Co. v. Jarvi* (1892) 3 C. C. A. 433, 10 U. S. App. 439, 58 Fed. 65.

For a statement of a similar tenor, see *Rock Island Coal Min. Co. v. Davis* (1914) 44 Okla. 412, 144 Pac. 600.

² For a specific statement to this effect, see *Grant v. Varney* (1895) 21 Colo. 329, 40 Pac. 771.

For a general review of the authorities relating to this limitation of an employer's obligations, see *Labatt, Mast. & S. § 919*.

In *Consolidated Coal Co. v. Yung* (1887) 24 Ill. App. 255, it was held that a good cause of action was not shown by averments in which the

only omission of duty charged was "the failure to furnish props and prop the clod, dirt, slate, and other material so that the same would not fall." But, as it was also averred that the defendant "carelessly and negligently, with full knowledge of the dangerous condition of said clod, etc., neglected and failed to put under said clod proper supports or props," it would seem that, when examined with reference to the liberal rules of modern systems of pleading, the declaration was good against a demurrer.

³ *Erickson v. Maple Block Coal Co.* (1918) 183 Iowa, 1292, 167 N. W. 105.

⁴ It is proper to allow an experienced timberman to give evidence as to what is customarily done in mines for the purpose of protecting by timbers the workmen engaged in running a drift through a formation similar to that in question. *Ohio Copper Min. Co. v. Hutchings* (1909) 96 C. C. A. 653, 172 Fed. 201; *Grant v. Varney* (1895) 21 Colo. 329, 40 Pac. 771.

"Evidence of the general custom in mines of this kind of timbering the drifts at certain intervals is admissible." *Anderson v. Pitt Iron Min. Co.* (1909) 108 Minn. 261, 121 N. W. 915.

In *Ricardo v. Central Coal & Coke Co.* (1917) 100 Kan. 95, 163 Pac. 641, evidence that it was customary for the operators of coal mines to put a room in safe condition when a miner was set to work in it was held competent.

gard to its probative significance in the jurisdiction in which the action is brought.⁵

As a servant is regarded as assuming only the ordinary risks of his employment (see *Labatt, Mast. & S. §§ 1167 et seq.*), it cannot, in any particular case, "be said, as a matter of law, that the plaintiff assumed the risk of the insecurity of the material" which fell upon him from the roof of the mine, if the defendant "was negligent in his duty in failing to properly secure the same, and permitted the place where the plaintiff was required to work to become unsafe."⁶

What risk was assumed under the circumstances is a question to be determined from the evidence introduced. But this is a subject which falls outside the scope of the present monograph. For a full discussion of the authorities, see *Labatt, Mast. & S. §§ 1178 et seq.* In cases where recovery has been denied in actions for injuries occasioned by the fall of materials in a place where the claimant was engaged in the work of excavation, the theory of an assumption of ordinary risks has sometimes been relied upon as the *ratio decidendi*.⁷ But it would seem that the liability of the employer is preferably considered with direct reference to the question which, in the final analysis, is involved; viz., whether it was the duty

of the employer or the miner to see that the place was safeguarded by timbers or otherwise.⁸

II. Various grounds upon which fault may be imputed to the employer.

In actions to recover on the ground of an employer's negligence in failing to see that the roof and walls of the underground workings of a mine operated by him are properly supported, the gravamen of the charge may, according to circumstances, be an alleged breach of duty in one or other of the following particulars:

(1) That he failed to inspect the place in question, with a view to ascertaining whether timbering was required for the security of the injured person. See IV. *infra*.

(2) That he failed entirely to timber that place. This is the situation involved in the great majority of the cases.

(3) That the timbering erected by him was defective with relation to the purpose which it was to subserve. The liability imputed by this situation is predicable, irrespective of whether the duty of timbering the place in question actually rested upon him or the miners. If he undertakes to perform the timbering work himself, he is bound to perform it with reasonable care.¹

⁵See generally *Labatt, Mast. & S. chap. 35*.

For cases in which this element was treated as being nonconclusive, see *Northam v. Boston & M. Consol. Copper & S. Mni. Co.* (1911) 111 C. C. A. 453, 190 Fed. 722 (sufficiency of lagging to support rocks falling upon it); *Vandalia Coal Co. v. Price* (1912) 178 Ind. 546, 97 N. E. 429 (method of constructing entry).

In *Stratton Cripple Creek Min. & Development Co. v. Ellison* (1908) 42 Colo. 498, 94 Pac. 303, an instruction was condemned by which the jury were told that, if they believed from the evidence that the method in which the mining was conducted rendered it impossible to timber the sides of the stope, and that such "manner of mining at that place was customary," then the failure to do such timbering was not negligence.

In *Hamilton v. Alleghany Ore & Iron Co.* (1908) 108 Va. 700, 62 S. E. 957, the fact that the usual methods of work had been adopted, and the usual precautions taken, in the stope in which the hanging wall fell on the miner, was treated as being conclusive in the employer's favor.

⁶*Arras v. Standard Plaster Co.* (1907) 121 App. Div. 61, 105 N. Y. Supp. 440.

⁷See, for example, *Gluebas v. Spring Valley Coal Co.* (1910) 159 Ill. App. 88 (coal fell from working face).

⁸See cases reviewed in subd. VII. *et seq.*, *infra*.

¹In *Consolidated Coal Co. v. Scheiber* (1897) 167 Ill. 539, 47 N. E. 1052, affirming (1896) 65 Ill. App. 304, an averment that the defendant undertook to properly secure the roof, but did it so carelessly that the roof was loosened and rendered more danger-

The fact that, on several occasions previous to the occurrence of the accident in question, the timbering had proved insufficient for that purpose, is evidence tending to show its defective quality.² But culpability on his part is not proved by evidence which goes no further than to indicate that, if another method of timbering had been used, the accident in question would not have occurred.³ Evidence as to the manner in which a section of timbering adjacent to that which gave way was constructed is admissible, if the construction of both sections is shown to have been similar.⁴ The testimony of an experienced timberman is competent for the purpose of showing that it was practicable to support, by means of certain timbers, the materials which fell upon the injured person,⁵ or of assisting the jury to determine whether the timbering provided at the place in question was constructed with reasonable care and skill.⁶

ous and liable to fall, was held sufficient, after verdict, to support the judgment. The court observed that whether or not it was the duty of the defendant to prop the roof, still, if it assumed that duty and undertook to discharge it, and did so in such a careless manner that the roof was thereby loosened and rendered more liable to fall, it would be responsible for the resulting injury.

²In *Northam v. Boston & M. Consol. Copper & S. Min. Co.* (1911) 111 C. C. A. 450, 190 Fed. 722, where a rock fell through the lagging of a floor in a stope and killed the plaintiff's decedent, the court remarked: "When it is shown . . . that the strength of the lagging was insufficient to sustain the rocks which fell and which had fallen at different times in the progress of the work, a prima facie presumption of negligence arises, and it is not overcome by the oral testimony of witnesses who testified that it was reasonably safe. No amount of testimony of that nature can avail to prove a working place to be safe which is obviously unsafe. In the testimony, therefore, that rocks had fallen upon and gone through the lagging at different times, and that the deceased was killed in the manner proven on the trial, there was evidence

(4) That he failed to remedy the dangerous conditions by removing the materials which, by falling, caused the injury complained of. This form of negligence has relation to the method of protecting the mines which is ordinarily available as an alternative to that of supporting the materials. Statements affirming the obligation of the employer to adopt either one method or the other are frequently found in the opinions of the courts.

III. Employer's knowledge, actual or constructive, of the need for timbering the place of work.

In many of the cases reviewed in this monograph the courts have had occasion to apply the elementary doctrine of the law of master and servant that the former is liable to the latter for injuries resulting from abnormally dangerous conditions in the place of work which were actually known to the former, or which were discoverable by the exercise of reasonable care.¹ The rationale of these cases is

tending to show negligence on the part of the defendant in error,—negligence in failing to furnish and use flooring of sufficient strength."

³*Lindquist v. Pacific Coast Coal Co.* (1914) 81 Wash. 73, 142 Pac. 445, where the contention that the defendant had pursued an improper method of mining, in that it had not directed the miners to safeguard their working places by cribbing instead of posts and caps, was rejected, on the ground that the mine had been timbered in the same manner for more than twenty years, and that the condition during that period had never been such as to suggest danger to a man of ordinary prudence and judgment.

⁴*Sampson Min. & Mill. Co. v. Schaad* (1890) 15 Colo. 197, 25 Pac. 89, 17 Mor. Min. Rep. 362.

⁵*Ohio Copper Min. Co. v. Hutchings* (1909) 96 C. C. A. 653, 172 Fed. 201.

⁶*Sampson Min. & Mill. Co. v. Schaad* (1890) 15 Colo. 197, 25 Pac. 89, 17 Mor. Min. Rep. 362; *Grant v. Varney* (1895) 21 Colo. 329, 40 Pac. 771; *Faulkner v. Mammoth Min. Co.* (1901) 23 Utah, 437, 66 Pac. 799.

Actual knowledge as an element of liability.

¹*United States.—Union P. R. Co. v.*

that the possession of such knowledge, actual or constructive, imposes upon

him the duty of safeguarding the miner by means of timbering, or by

Jarvi (1892) 3 C. C. A. 433, 10 U. S. App. 439, 53 Fed. 65; Big Brushy Coal & Coke Co. v. Williams (1910) 99 C. C. A. 102, 176 Fed. 529; Western Invest. Co. v. McFarland (1908) 91 C. C. A. 504, 166 Fed. 76.

Illinois.—Consolidated Coal Co. v. Scheiber (1897) 167 Ill. 539, 47 N. E. 1052; Coal Valley Min. Co. v. Haywood (1901) 98 Ill. App. 258; Fromm v. New Staunton Coal Co. (1918) 211 Ill. App. 3, affirmed in (1918) 286 Ill. 254, 121 N. E. 594.

Indiana.—Rogers v. Leyden (1891) 127 Ind. 50, 26 N. E. 210 (evidence showed concurrent negligence on the employer's part).

Iowa.—Cotton v. Center Coal Min. Co. (1909) 147 Iowa, 427, 123 N. W. 381.

Kentucky.—Campbell Coal Min. Co. v. Smith (1909) — Ky. —, 115 S. W. 256; Jellico Coal Min. Co. v. Helton (1914) 157 Ky. 610, 163 S. W. 744; Stearns Coal & Lumber Co. v. Spradlin (1917) 176 Ky. 405, 195 S. W. 781; Carter Coal Co. v. Lay (1918) 182 Ky. 540, 206 S. W. 769.

Missouri.—Garard v. Manufacturers' Coal & Coke Co. (1907) 207 Mo. 242, 105 S. W. 767; Gambino v. Manufacturers' Coal & Coke Co. (1914) 180 Mo. App. 643, 164 S. W. 264.

Texas.—Consumers' Lignite Co. v. Grant (1915) — Tex. Civ. App. —, 181 S. W. 202.

Utah.—Cunningham v. Union P. R. Co. (1885) 4 Utah, 206, 7 Pac. 795.

Washington.—McKenzie v. North Coast Colliery (1909) 55 Wash. 495, 28 L.R.A. (N.S.) 1244, 104 Pac. 801.

Wisconsin.—Strahlendorf v. Rosenthal (1872) 30 Wis. 678, 10 Mor. Min. Rep. 676.

In Peacock Coal & Min. Co. v. Crawford (1917) 65 Ind. App. 401, 117 N. E. 505, a breach of the employer's common-law duty to furnish a reasonably safe place of work was held to have been sufficiently stated by an averment to the effect that the defendant, with knowledge of the unsafe condition of the roof of the working place, negligently failed to make it reasonably secure.

In Smith v. Garrison (1908) 32 Ky. L. Rep. 1278, 108 S. W. 293, a peremptory instruction for defendant was held to have been properly refused, as there was evidence going to show that the dangerous condition of the side of

the entry which fell on plaintiff was known to the "mine boss" or "bank boss," and that this "bank boss" could, by furnishing the necessary props and timbers, have rendered the mine safe and prevented the accident.

In Trosper Coal Co. v. Crawford (1913) 152 Ky. 214, 153 S. W. 211, the claimant rested his right to recover upon the theory that the company, some time prior to the accident, was advised that the roof of the entry in question, for a considerable distance, was in a dangerous condition, and should be propped up; and that those in charge of the mine, although they knew this fact, made no effort to prop the roof, but suffered employees to continue to use it. Held, that, as the evidence concerning the state of the roof and defendant's knowledge was conflicting, the case had been properly submitted to the jury.

Constructive knowledge as an element of liability.

Western Coal & Min. Co. v. Ingraham (1895) 17 C. C. A. 71, 36 U. S. App. 1, 70 Fed. 219; Western Invest. Co. v. McFarland (1908) 91 C. C. A. 504, 166 Fed. 76; Fromm v. New Staunton Coal Co. (1918) 211 Ill. App. 3, affirmed in (1918) 286 Ill. 254, 121 N. E. 594; Noonan v. Saline County Coal Co. (1912) 173 Ill. App. 541 (evidence as to the existence of dangerous conditions two days before the accident was held competent); Carter Coal Co. v. Lay (1918) 182 Ky. 540, 206 S. W. 769; Neeley v. Snyder (1917) — Mo. App. —, 193 S. W. 610; Vanesse v. Catsburg Coal Co. (1893) 159 Pa. 403, 28 Atl. 200 ("defect easy of ascertainment").

In Sloss-Sheffield Steel & I. Co. v. Green (1909) 159 Ala. 178, 49 So. 301, the direction of a verdict for the defendant company was held to have been properly refused for the reason that the evidence was sufficient to warrant the conclusion that its superintendent was chargeable with constructive knowledge of the unsafe condition of the entry in question.

In Bauschka v. Western Coal & Min. Co. (1910) 95 Ark. 477, 129 S. W. 1095, testimony to the effect that a miner other than the one injured had called for timbers with which to support the roof of the air course in question, and that they were not

the removal of the materials which are liable to fall.²

Other cases illustrate the proposition which is the correlative of the doctrine stated above; viz., that liability cannot be imputed to the employer unless the evidence establishes that he was chargeable with one or other of the alternative forms of notice specified above.³ For a general discussion of knowledge as an element of negligence, see Labatt, Mast. & S. chap. 42.

furnished, was held to be competent, as having a tendency to show that the employer had notice of the dangerous condition of the roof. It was, however, declared to be inadmissible, unless it related to the particular part of the roof which fell, the air course being more than 1,000 feet long. "Notice of the necessity of props at another place in the air course would not necessarily constitute notice that the roof was in a dangerous condition at the place where plaintiff was injured." The court also disapproved an instruction the purport of which was that the fact that, prior to the accident, the rock which fell was loose and needed propping, was not of itself sufficient to warrant a finding of negligence on the part of defendant in failing to discover a defect in the roof.

See also following notes.

The fact that the complaint merely avers that defendant knew of the condition of the roof which fell upon him does not preclude the plaintiff from proving negligence in respect of a failure to use ordinary care for the purpose of ascertaining that condition. *Blazenic v. Iowa & W. Coal Co.* (1897) 102 Iowa, 706, 72 N. W. 292.

²For cases in which this connection between the knowledge acquired and the consequential duty which it raises was explicitly referred to, see *Jellico Coal Min. Co. v. Helton* (1914) 157 Ky. 610, 163 S. W. 744; *Gambino v. Manufacturers' Coal & Coke Co.* (1914) 180 Mo. App. 643, 164 S. W. 264. It is, of course, taken for granted in all the other cases cited in note 1, *supra*.

³In *Kennedy v. Chicago & C. Coal Co.* (1913) 180 Ill. App. 42, a verdict for plaintiff was set aside on the ground that the roof of the entry in question at the place where he was ordered to take down coal and slate

Constructive notice may be inferred from any circumstantial evidence which tends to show that unsafe conditions existed before the injury complained of was received; as, for example, that rock or other materials had fallen from the roof or walls of the portion of the mine in which the claimant was working,⁴ or in some adjacent portion in which the physical conditions were substantially similar;⁵ that a crack in the roof had made its appearance;⁶ that the supporting

appeared to be solid up to the time of the accident. This ruling was followed in *Kennedy v. Chicago & C. Coal Co.* (1914) 188 Ill. App. 355.

In *Williamson v. Blue Grass Fluorspar Co.* (1913) 156 Ky. 226, 160 S. W. 920, the uncontradicted evidence for the defendant showed that behind the walls of the entry in question there was a slit in the clay which could not be detected by an inspection, and this slit in the clay caused the earth to fall out when the claimant hammered upon the post leaning against it. Held, that the danger was a hidden one, unknown to the defendant, and not discoverable by ordinary care.

⁴*Hotchkiss Mt. Min. & Reduction Co. v. Bruner* (1908) 42 Colo. 305, 94 Pac. 331; *Cushman v. Carbondale Fuel Co.* (1902) 116 Iowa, 618, 88 N. W. 817.

⁵*Union P. R. Co. v. Jarvi* (1892) 3 C. C. A. 433, 10 U. S. App. 439, 53 Fed. 65; *Highland Boy Gold Min. Co. v. Pouch* (1903) 61 C. C. A. 40, 124 Fed. 148.

In *Haynes v. Saline County Coal Co.* (1917) 206 Ill. App. 264, the evidence was to the effect that there was a "slip" in the vein of coal in the room where plaintiff was at work; that the existence of this "slip" was unknown to him; that falls of coal had occurred in several other rooms when the slip was reached; and that coal was likely to fall whenever it was reached. Held, that the existence of such slip was sufficiently brought to the notice of defendant company, and that the jury were warranted in finding that it was negligent in not bringing the unsafe condition to the attention of plaintiff.

⁶*James v. Emmet Min. Co.* (1884) 55 Mich. 335, 21 N. W. 361 (crack in roof had appeared).

timbers erected at the place in question had shown signs that they were bearing an excessive weight.⁷

In one case where the trial judge had allowed the plaintiff to prove that a "squeeze" had occurred six months after the accident under discussion, in a room other than the one in which the plaintiff was working, it was held error to admit such evidence without showing that the conditions in both rooms were similar.⁸ But the validity of the assumption apparently implied in the form of this ruling, viz., that evidence of this sort would have been competent if the further testimony specified had been introduced, is very dubious. No authorities were cited.

The general rule is that the employer is chargeable with the knowledge, actual or constructive, possessed by any employee who is a vice principal in respect of the work which was being performed by the injured employee.⁹ The decisions showing what employees occupy this position with regard to the operators of mines are collected in XV., *infra*.

IV. *Employer's duty with regard to inspection.*

In other cases falling within the

scope of this monograph, one of the controlling issues was the applicability of the doctrine that constructive notice is imputed to the master whenever the evidence shows that the existence of abnormal conditions which caused the injury complained of might have been ascertained by a proper inspection. The duty to make such an inspection is one of a specific and positive character in such a sense that the failure to perform it constitutes an independent ground of liability, distinct from that which is inferred from the failure to protect the servant against extraordinary risks.¹

Ordinarily, however, the question whether the duty of inspection was properly discharged has been discussed merely as a preliminary point upon which the determination of the ultimate issue of culpability or non-culpability with regard either to the timbering of the dangerous place or to the removal of the materials which made it unsafe was viewed as being dependent.²

It has been laid down that the adequacy of an inspection cannot be inferred, as a matter of law, from the fact that the employee intrusted with

⁷ *Highland Boy Gold Min. Co. v. Pouch* (Fed.) *supra*.

⁸ *Kedea v. Christian County Coal Co.* (1909) 149 Ill. App. 434.

⁹ See *Labatt, Mast. & S.* §§ 1050 et seq.

¹ "The duty of maintaining a safe place must necessarily carry with it the duty of making such inspection as is necessary to maintain the safe place." *McKenzie v. North Coast Colliery Co.* (1909) 55 Wash. 495, 28 L.R.A.(N.S.) 1244, 104 Pac. 801.

"Generally speaking, however, the making safe of the miner's working place, i. e., the place where he is extracting coal, may be divided into three duties: (1) The duty of examining the roof and of determining when protection must be provided against possible falling of the roof, and whether ordinary props will be sufficient protection, or whether timbering is necessary; (2) the duty of placing the props in position, when ordinary props have been deemed sufficient protection; (3) the duty of timbering the place when ordinary

props have been deemed insufficient protection." *Eagle Coal Co. v. Patrick* (1914) 161 Ky. 333, 170 S.W. 960.

In *Lewis v. Detroit Vitriified Brick Co.* (1911) 164 Mich. 489, 129 N.W. 726, it was declared, *arguendo*, that "the court cannot take judicial notice of the fact that general inspection of the mine is necessary." No authorities were cited for the statement, and it is perhaps open to question whether all courts would take the same view as to the narrow scope of judicial notice in this regard.

² In *Union P. R. Co. v. Jarvi* (1892) 3 C. C. A. 433, 10 U. S. App. 439, 53 Fed. 65, the testimony tended to prove that the roof in the dip slope where the accident happened was composed of a clay rock about 3 feet thick, that defendant's inspectors, whose duty it was to keep this roof reasonably safe, knew to be a treacherous rock that needed constant watching,—one which water disintegrated and caused to become loose and fall. It also appeared that the only way such a

roof could be properly tested was by sounding it with the hand or a pick or cane, and there was no testimony that it had been so tested or sounded for weeks; that through the greater part of this dip slope the roof had proved so poor that the defendant had supported it with timber; that at a point only a few feet distant from the place of the accident, where the two slopes joined, this rock had so crumbled and fallen that defendant had blasted it all down, and removed it, two months previously. There was also testimony that the roof at the place of the accident had long been wet. Held, that it certainly was a fair question for the jury whether or not the defendant's failure to protect this particular portion of the roof by timbers, or to remove it by blasting, was not a lack of ordinary care.

In *Hotchkiss Mt. Min. & Reduction Co. v. Bruner* (1908) 42 Colo. 305, 94 Pac. 331 (verdict for plaintiff sustained), there was evidence to the effect that the accident in question had been caused by the fall of rock from the roof of a manway in an upraise; that the upraise had been driven through soft, veinous matter which, because of the action of the water upon it, frequently sloughed off and fell down the manway; that shortly before the accident in question other employees had been injured by falling rock in the same manway; that the night before the accident a coemployee of the plaintiff observed rock falling down the manway. Held, that the evidence tended to show that the falling of rock in this manway could have been prevented if the upraise had been properly timbered, and that the defendant knew, or, by the exercise of ordinary care, could have known, of the existence of danger.

In *Ahlson v. High Bridge Coal Co.* (1917) 180 Iowa, 302, 163 N. W. 219, where the plaintiff, a common laborer, was injured by the fall of slate from the roof of an entry, the evidence showed that the slate contained many "lime seams," which rendered its condition very treacherous, for the reason that the disintegration caused by the slacking of the lime was not observable, and there was no fixed time for its taking place; that the roof, upon tapping, might sound firm, and yet fall within a few minutes thereafter. The timbermen testified that they inspected the roof at half past 7 in the morning and twice

thereafter at appropriate intervals. The accident happened at 2:30 P. M. Held, that the trial judge had properly submitted to the jury the question whether these inspections were adequate. The court said: "This entry was 8 feet wide, and ought to have been timbered in the ordinary course of the practice of mining in that locality. The presence of lime seams was a recognized danger and emphasized the need of the timberers. The entry had been once timbered, but the timbers at this particular place had been blown out by some shot firing in the course of turning a room at such place. The shot firing always occurs at night, and frequently results in blowing out timbers. The timbers thus blown out are ordinarily replaced the following morning. The first timbers that were blown out at this place were replaced the following morning. Subsequently they were again blown out. Their replacement was then delayed for the period of from four days to a week. The lime seams disintegrate more rapidly in an entry than in a room because of the circulation of the air currents therein. One of the sure evidences of a settling roof is a cutting at the angle between roof and rib. This cutting was manifest in this entry for a day or two prior to the accident. It was observed by the timbermen in their inspections, but the warning thereof was ignored. The duty of inspection necessarily involves the question of its adequacy." The testimony of one of the timbermen, whose duty it had been both to inspect and timber the entry in question, specified the reason why he had delayed the timbering of the entry; viz., that, in consequence of the floor of the entry having been raised in a dip, it became necessary to take down a part of the roof in order to make the entry high enough for the mule. Held, that the testimony was competent, as having a clear tendency to show negligence on the part of the timbermen, in that they knowingly took chances of a falling roof, which they could readily have avoided by the use of temporary timbers.

In *Wilson v. Alpine Coal Co.* (1904) 118 Ky. 463, 81 S. W. 278, the evidence showed that the roof was unpropped, and that the material overhead was shelly and full of seams and cracks. Held, that the case should have been left to the jury.

In *Jellico Coal Min. Co. v. Woods*

the duty of making it believed that the place inspected was reasonably safe.⁸

In most instances, evidence which disproves negligence in regard to in-

spection will preclude recovery, for the reason that the usual juristic import of the situation thus established is simply that the employer is not

(1913) 154 Ky. 683, 159 S. W. 530, where slate fell on a miner from the roof of a cross entry through which he was passing in order to notify the car driver that cars were loaded, a lack of ordinary care was held to be inferable from evidence to the effect that the mine foreman, whose duty it was to inspect the entry in question, had not been in it on the day of the accident or on the preceding day; that an employee whose duty it was to prop the entry told the mine foreman about the time of the accident that the entry at the place where the roof fell ought to be timbered; that the mine foreman replied that the company did not intend to timber the cross entries, and were going to try to get the coal out without doing it; and that when this employee went to repair the roof after the plaintiff was injured he found 200 or 300 feet of the roof in such condition that it had to be repaired or made safe.

In *Norton Coal Co. v. Murphy* (1908) 108 Va. 528, 62 S. E. 268, it was held that the trial judge had properly overruled a demurrer to evidence which showed that a vice principal had failed to inspect the roof of a haulway after he had been notified by one of the claimant's fellow workmen that the roof at the place where the injury was received was in a dangerous condition. In *Norton Coal Co. v. Hanks* (1908) 108 Va. 521, 62 S. E. 835, involving the same facts, a judgment for the plaintiff was reversed, but merely on the ground of error in a certain instruction.

For other cases in which negligence with regard to the performance of the duty of inspection was treated as a ground of the employer's liability as predicated, see *Diamond Block Coal Co. v. Cuthbertson* (1906) 166 Ind. 290, 76 N. E. 1060; *Ashland Coal & I. R. Co. v. Wallace* (1897) 101 Ky. 626, 42 S. W. 744, 43 S. W. 207; *Fisher v. Central Lead Co.* (1900) 156 Mo. 479, 56 S. W. 1107 (verdict for plaintiff was set aside, but merely on the ground of error in a certain instruction); *Swearingen v. Consolidated Troup Min. Co.* (1908) 212 Mo. 524, 111 S. W. 545; *Hall v. Manufacturers' Coal & Coke Co.* (1914) 260 Mo. 351, 168 S. W. 927,

Ann. Cas. 1916C, 375; *Goode v. Central Coal & Coke Co.* (1912) 167 Mo. App. 169, 151 S. W. 508; *Ianne v. United States Gypsum Co.* (1908) 126 App. Div. 244, 110 N. Y. Supp. 496, reversed in (1909) 194 N. Y. 88, 86 N. E. 809, but merely on the ground of error in the admission of evidence. See also the cases cited in the following notes.

Compare also *Maloney v. Winston Bros. Co.* (1910) 18 Idaho, 740, 47 L.R.A. (N.S.) 634, 111 Pac. 1080, where the court laid it down with respect to work in a railway tunnel that it was, "as a matter of law, the duty of the master to have an employee there in the person of the shift boss or someone else whose specific duty it should be to examine and inspect the roof and walls of this tunnel following the firing of shots, and previous to setting men to work with machines and drilling holes, or to shoveling muck, or other work than the specific acts making the place safe."

In *Huddleston v. Straight Creek Coal & Coke Co.* (1910) 138 Ky. 586, 128 S. W. 589, a driver was killed by the fall of slate from the roof and side of an entry. The accident happened on the day after all the slate which then seemed to need attention had been taken down by one E., whose duty it was to do such work at the places designated by the "boss driver." The court rejected the contention that the trial judge had properly directed a verdict in favor of the defendant, because "there was no known cause which had interfered with or changed the condition of the entry during the interval between the time when the inspection was made and the time when the accident occurred."

⁸ *Williams Coal Co. v. Cooper* (1910) 138 Ky. 287, 127 S. W. 1000. The court said: "In the opinion of the 'loader' the room may have been reasonably safe, but the fact that the roof fell soon after his inspection demonstrates that it was not reasonably safe. If in cases like this the master could be relieved of liability upon the statement of the person charged with the duty of inspection that, in his judgment, the place was safe, there would be but few cases in which an employee who relied upon the inspec-

chargeable with notice of the unsafe conditions which caused the injury complained of.⁴

tion, and was injured, could recover, as it is fair to assume that in every instance the person charged with the duty of inspection would say that he had performed it."

The rulings of the supreme court of Illinois with regard to the adequacy of an inspection made in pursuance of the mining act of that state may usefully be compared with the above decision, see § 33 of the note to *Henry v. Missouri, K. & T. R. Co.* post, 1430.

⁴In *Snapp v. Steinbaugh* (1918) 187 Ind. 701, 121 N. E. 81, one of the grounds upon which a verdict was held to have been properly directed for the defendant was that the dangers created by the unsafe condition of the rock which fell on the plaintiff could not have been discovered by sounding the roof in the usual manner.

In *Brunson v. Southwestern Development Co.* (1907) 7 Ind. Terr. 209, 104 S. W. 593, it was shown that the miner for whose death the plaintiff sued had himself tunneled off the room in which he was working, and that after the fall of some of a substance called "boney," he had placed a bar at that point to support the roof. According to the testimony of every witness, the roof was thereafter reasonably safe, and the timbers were placed in a good and workmanlike manner. The decedent had the option to place such timbers as were needed, and receive pay for the same, or to call upon the timberman to put up the timbers. The foreman inspected the timbering put up by the decedent, and declared that the room was adequately timbered. The timberman examined the place the day before the accident, and it was free from any sign of weakness. Held, that a verdict had properly been rendered for the defendant.

In *Rowden v. Daniell* (1910) 151 Mo. App. 15, 132 S. W. 23, negligence in respect of failing to discover that a boulder in a wall of a shaft was loose and likely to fall unless supported by timbers was held not to be inferable, as the only evidence that anything was loose was derived from the fact that the boulder fell, and the uncontradicted testimony was that when it was unearthed it was tested by skilled miners, including the plain-

But it is clear that he cannot escape liability on this ground, if it is also proved that those conditions were

tiff, and in the opinion of all of them it was solid, and that this opinion was confirmed by subsequent examinations made from time to time while the shaft was being sunk.

In *Southwest Improv. Co. v. Andrew* (1889) 86 Va. 270, 9 S. E. 1015, where a laborer was killed while helping to lay a track in an entry, a declaration alleging that the defendant had negligently failed to provide the roofing of its coal mine with sufficient props and stays to keep the stones, slate, and coal that hung loosely in and about the said roofing from falling in upon the decedent while he was at work was held not to be sustained by evidence, not contradicted by the plaintiff, that the defendant company employed skilled, prudent, and competent servants, experienced in the business by long service; that at 2:30 A. M. daily a skilled inspector was sent into the mines to precede the laborers, who came at 7 o'clock; that this inspector passed through all the entries and other parts of the mine with a corps of assistants, and made a careful examination of the mine; that he thought the rock in question was beneficial in holding the overhead coal, as it pushed back into a solid bed; that he and his corps reported every morning to the mine boss the condition of the mine; that the mine boss reported to the manager by 6 o'clock; and that, on the morning of this accident, the entry in question was inspected, and the mark of the inspector, with the date, made there; that the manager of the mine and the mine boss, on Monday after the Saturday when the alleged statement was made to the mine boss that the rock was loose a little bit, went to the entry in question for the purpose of inspecting it, and from an experience of twenty-three years in such work pronounced it safe; that there was then no slip in the rock or roof; that it was the coal out of the ceiling that killed the deceased; that he was 12 or 15 feet from the rock when killed; that it fell after he was killed; that while the place in question was not timbered with props, it is not usual to timber entries; that new entries are never timbered; and that the rooms are timbered, but not the entries.

disclosed by the inspection as made, and that he failed to remedy them.⁵

On general principles it would seem that an inspection should not be considered adequate unless it extended to the whole of that particular section of the mine within which miners engaged in the same description of work as the claimant would be exposed to danger if materials should fall from the roof or walls.

⁵ In *Anderson v. Western Coal & Min. Co.* (1909) 138 Mo. App. 76, 119 S. W. 986, negligence was held to be inferable from the fact that the defendant's foreman had not taken down slate which an application of the usual tests had shown to be loose.

⁶ In *Northam v. Boston & M. Consol. Copper & S. Min. Co.* (1911) 111 C. C. A. 450, 190 Fed. 722, where a rock fell through a floor in a stope and killed a workman, one of the aspects of the case was thus discussed: "The plaintiffs in error contend that the facts shown on the trial were sufficient to carry to the jury the question of the negligence of the defendant in error on the ground of its failure to inspect the mine, and in permitting a large rock, projecting from the wall, to remain for several days, where it was in danger of falling as soon as it was touched. We are not convinced that there was evidence sufficient to show negligence in that particular. The rock, embedded, as it was, in the side of the wall, projecting, as witnesses variously testified, from 3 inches to a foot, would not necessarily import danger to the employees, working as they were in a stope which was furnished with a series of floors, each constructed with a view to arrest upon its surface any rock that was likely to fall from the sides of the stope. There was little or no danger to the employees from rocks falling from the stope, unless the rocks went through the lagging. In view of the protection against injury which the lagging was intended to furnish, we doubt whether the duty of inspection should have gone further than an inspection of the lagging." As these remarks were made with reference to a new trial, the conclusion seems to be strongly indicated that the position of the court was that a jury would not be warranted in finding that the duty of inspection extended to the portion

But the decisions which bear upon the point are not entirely consistent.⁷

The frequency with which reasonable care requires that the roof and walls of a mine should be inspected depends primarily upon the nature of the materials in which the work of excavation is being carried on.⁷

The extent of the employer's duty with regard to coal mines is a matter upon which very little light is thrown

of the stope from which the rock fell. The present writer ventures to express the opinion that there is no rational ground upon which such a limitation of the duty can be predicated as a matter of law, at all events. If responsibility in respect of every portion of a stope except that which is immediately affected by the operations of the person injured rests, under ordinary circumstances, upon the employer (see *infra*), the inference seems unavoidable that the scope of the duty of inspection must be equally extensive.

Such, apparently, was the theory which was taken for granted, although not explicitly formulated, in *Moilanen v. Washington Iron Co.* (1913) 176 Mich. 505, 142 N. W. 757, where a rock fell from the roof of a stope in a metalliferous mine, and dropped through a hole leading to the lower level in which the plaintiff was working. The declaration alleged in part that the defendant failed to use reasonable care in the inspecting, maintaining, propping, timbering, etc., of each place in which it ordered, permitted, or expected the plaintiff to work. The adequacy of the inspection was held to be a question for the jury.

⁷ In *Hurst v. Nineteen Hundred Nine Min. Co.* (1911) 160 Mo. App. 53, 141 S. W. 470, where all the witnesses were agreed that the roof of a drift which the plaintiff was timbering when he was injured was liable to become loose a short time after it had been trimmed, it was held to be a question for the jury whether the defendant's ground foreman could be held guilty of negligence upon testimony which showed that the interval between his last preceding inspection and the fall of the roof was from two and a half to three and a half hours. The court said: "The duty to inspect and trim a roof of this character

by the decisions. Where, as is probably the case in most mines, a daily inspection is required by a specific rule, failure to make such an inspection would be regarded, by some courts, at all events, as a circumstance warranting the inference of culpability.⁸

But to treat such an inspection as being obligatory in point of law would seem to be unwarrantable, in view of the fact that the legislatures of some of the states in which the subject is regulated by statute have deemed it sufficient to require inspection at less frequent intervals.⁹

Evidence which showed that the defendant's mine had been inspected twice a day was, in one case, treated as conclusive proof that he had exercised reasonable care.¹⁰

But in another case the court proceeded upon the theory that an inspection should always be made after the firing of shots, for the reason that

must be commensurate with the danger. If the danger be constant, then the vigilance to avert it must be constant, as far as danger would be apparent to a man of ordinary prudence and care."

In *Hamilton v. Alleghany Ore & Iron Co.* (1908) 108 Va. 700, 62 S. E. 957, a daily inspection of the defendant's iron mine was held to be sufficient.

⁸In *Consolidated Coal Co. v. Spencer* (1891) 177 Ky. 626, 197 S. W. 1069, one of the elements from which negligence was inferred was that the foreman had not performed the duty which, according to his own testimony, rested upon him, of inspecting the mine once a day.

The juristic consequences of an employer's violation of one of his own rules are discussed in *Labatt, Mast. & S. § 1888*.

⁹See *Labatt, Mast. & S. § 1888*, note.

¹⁰*Snapp v. Steinbaugh* (1918) 187 Ind. 701, 121 N. E. 81.

¹¹*Rowden v. Schoenherr-Walton Min. Co.* (1909) 136 Mo. App. 376, 117 S. W. 695. It was not practicable to timber the drift in question, and the only method that could be pursued to prevent the fall of material from the roof was that of trimming.

¹²For cases in which this mode of examination was referred to as being

such an operation is apt to render the place of work more unsafe than it was before the firing.¹¹

The usual and approved method of testing the roofs of the underground workings is to sound them with a pick or hammer.¹²

The employer may, of course, be chargeable with negligence on the ground of his failure to inspect timbers properly after they have been put in, as well as on the ground of his failure to make an inspection for the purpose of ascertaining whether timbers are needed.¹³

The effect of the statutory provisions with regard to inspection is discussed in §§ 32, 33, of the note to *Henry v. Missouri, K. & T. R. Co.* post, 1430.

The nature and extent of the miner's duty with reference to inspection is sometimes material in cases turning upon the question whether the employer's duty in that regard had been properly performed.¹⁴

the proper one, see *Union P. R. Co. v. Jarvi* (1892) 3 C. C. A. 433, 10 U. S. App. 439, 53 Fed. 65; *Snapp v. Steinbaugh (Ind.)* supra (negligence disproved by plaintiff's own testimony, which showed that, under the circumstances, this test would not have disclosed the unsafe conditions); *Ada Coal Co. v. Louisville* (1913) 152 Ky. 2, 153 S. W. 21; *Anderson v. Western Coal & Min. Co.* (1909) 138 Mo. App. 76, 119 S. W. 986; *Fisher v. Central Lead Co.* (1900) 156 Mo. 479, 56 S. W. 1107.

This is, of course, the appropriate method for the miners also. See, for example, *Carter Coal Co. v. Reynolds* (1917) 175 Ky. 325, 194 S. W. 311.

¹³In *Kelley v. Fourth of July Min. Co.* (1895) 16 Mont. 484, 41 Pac. 273, negligence on the part of the defendant's manager was held to be inferable from his testimony that he did not examine the particular stull which gave way,—that he just glanced at the timbers as he passed by; that he just held up his candle and looked at the stull as he went through.

¹⁴See, for example, *Bunker Hill & S. Min. & Concentrating Co. v. Jones* (1904) 65 C. C. A. 363, 130 Fed. 813; *Consolidated Coal Co. v. Music* (1916) 172 Ky. 153, 189 S. W. 200; *Hemmingson v. Carbon Hill Coal Co.* (1911) 62 Wash. 28, 112 Pac. 1111.

This phase of the subject lies beyond the scope of the present monograph.¹⁵

V. Employer's duty with regard to the timbering of completed entries and other passageways.

It is well-settled law that the doctrine referred to in the preceding sub-

division inures to the benefit of a miner whose injury was caused by the collapse of the roof or side of a completed entry or other passageway, along which he was required or invited to travel when going to or returning from his place of work.¹

As a general rule, therefore, the lia-

So far as regards completed entries, the duty of examination cannot be cast upon the miner even by a rule promulgated in accordance with a provision in a mining act. See *Consolidated Coal Co. v. Scheiber* (1897) 167 Ill. 539, 47 N. E. 1052.

¹⁵ It is fully discussed in *Labatt, Mast. & S. §§ 1330 et seq.*

It may not be out of place, however, to advert to *Consolidated Coal Co. v. Scheller* (1892) 42 Ill. App. 619, where the court, in discussing certain rules by which the miners were subjected both to the duty of examining their rooms and to that of propping, laid it down that, "where a timberman is employed, and the miners are thereby relieved of the duty and labor of setting props, . . . they are not also thereby relieved of the duty of observing the conditions, and promptly reporting to the mine manager or timberman any signs of danger they may discover which require his services."

¹ In the following cases, this doctrine was either explicitly affirmed or taken for granted:

United States.—*Union P. R. Co. v. Jarvi* (1892) 3 C. C. A. 433, 10 U. S. App. 439, 53 Fed. 65 (dip slope in metalliferous mine); *Bunker Hill & S. Min. & Concentrating Co. v. Jones* (1904) 65 C. C. A. 363, 130 Fed. 813, certiorari denied in (1904) 195 U. S. 629, 49 L. ed. 352, 25 Sup. Ct. Rep. 787; *Big Hill Coal Co. v. Clutts* (1913) 125 C. C. A. 526, 208 Fed. 526.

Alabama.—*Sloss-Sheffield Steel & I. Co. v. Green* (1909) 159 Ala. 178, 49 So. 301; *South Brilliant Coal Co. v. McCollum* (1918) 200 Ala. 543, 76 So. 901.

Arkansas.—*Mammoth Vein Coal Co. v. Looper* (1908) 87 Ark. 217, 112 S. W. 390; *Bauschka v. Western Coal & Min. Co.* (1910) 95 Ark. 477, 129 S. W. 1095.

Colorado.—*Hotchkiss Mt. Min. & Reduction Co. v. Bruner* (1908) 42 Colo. 305, 94 Pac. 331.

Illinois.—*Quincy Coal Co. v. Hood* (1875) 77 Ill. 68, 12 Mor. Min. Rep.

148 (verdict for plaintiff was set aside, but merely on the ground of error in a certain instruction); *Mt. Olive & S. Coal Co. v. Rademacher* (1901) 190 Ill. 538, 60 N. E. 888; *McCarthy v. Spring Valley Coal Co.* (1908) 232 Ill. 473, 83 N. E. 957, reversing (1907) 136 Ill. App. 473 (roof of entry fell on driver while going towards face of coal—judgment for plaintiff set aside on account of counsel's misconduct); *McCarthy v. Spring Valley Coal Co.* (1909) 243 Ill. 185, 90 N. E. 372, affirming (1909) 149 Ill. App. 275 (verdict for plaintiff sustained on the merits in the same case); *Coal Valley Min. Co. v. Haywood* (1902) 98 Ill. App. 258.

Indiana.—*Parke County Coal Co. v. Barth* (1892) 5 Ind. App. 161, 31 N. E. 585; *Hancock v. Keene* (1892) 5 Ind. App. 408, 32 N. E. 329; *Linton Coal & Min. Co. v. Persons* (1895) 15 Ind. App. 69, 43 N. E. 651; *Princeton Coal Min. Co. v. Howell* (1910) 46 Ind. App. 572, 92 N. E. 122 (complaint alleging in substance that the plaintiff's injury was occasioned by the failure of the mine boss to see that the roof of an entry, at a place where it was insufficiently propped, was made secure, was held to be good without an averment that the defect could have been remedied).

Iowa.—*Cushman v. Carbondale Fuel Co.* (1902) 116 Iowa, 618, 88 N. W. 817; *Cotton v. Center Coal Min. Co.* (1916) 147 Iowa, 427, 123 N. W. 381; *King v. Mendota Coal Co.* (1913) 163 Iowa, 181, L.R.A.1916F, 1228, 143 N. W. 539 (only point disputed was whether plaintiff was entitled to be in the entry in question when he was injured); *Ahlson v. High Bridge Coal Co.* (1917) 180 Iowa, 302, 163 N. W. 219.

Kentucky.—*Ashland Coal & I. R. Co. v. Wallace* (1897) 101 Ky. 626, 42 S. W. 744, 43 S. W. 207; *Wilson v. Alpine Coal Co.* (1904) 118 Ky. 463, 81 S. W. 278; *Smith v. Garrison* (1908) 32 Ky. L. Rep. 1278, 108 S. W. 293; *Rhodes v. Walker* (1909) — Ky. —, 115 S. W. 257; *Huddleston v. Straight Creek Coal & Coke Co.* (1910) 138 Ky. 506, 128 S.

bility of the employer may warrantably be inferred from evidence which shows that, before the injury complained of was received, he had notice, either actual or constructive, of the unsafe conditions by which it was caused (see III. and IV., *supra*), and failed to remedy them.

The duty of the employer with respect to the timbering of a completed entry extends to the whole of it. Consequently he cannot escape liability on the ground that the rock by the fall of

which the claimant was injured was "not in the direct path of the workmen using the entry."²

On general principles it would seem that the employer's duty to timber an entry or other passageway must be of such a quality that it is always, and under all circumstances, to be considered as one which rests upon him, irrespective of whether any affirmative evidence of that fact is introduced. The present writer has not found any judicial statements which

W. 589; *Trosper Coal Co. v. Crawford* (1913) 152 Ky. 214, 153 S. W. 211; *Jellico Coal Min. Co. v. Woods* (1913) 154 Ky. 683, 159 S. W. 530; *Main Jellico Mountain Coal Co. v. Young* (1914) 160 Ky. 397, 169 S. W. 841; *East Jellico Coal Co. v. Closterides* (1915) 166 Ky. 100, 178 S. W. 1152; *Stearns Coal & Lumber Co. v. Spradlin* (1917) 176 Ky. 405, 195 S. W. 781.

Michigan.—*Lewis v. Detroit Vitri-fied Brick Co.* (1911) 164 Mich. 489, 129 N. W. 726.

Missouri.—*State ex rel. Central Coal & Coke Co. v. Ellison* (1917) 270 Mo. 645, 195 S. W. 722 (quashing, but merely for error in instruction, the judgment in *Goode v. Central Coal & Coke Co.* (1916) — Mo. App. —, 186 S. W. 1122); *Teter v. Central Coal & Coke Co.* (1919) 201 Mo. App. 538, 213 S. W. 135; *Rogers v. Rundell* (1908) 128 Mo. App. 10, 106 S. W. 1096 (question whether the employer's duty to timber entry had been performed was treated as being one for the jury; but the ratio decidendi was error in an instruction as to assumption of risks by the plaintiff).

Montana.—*Kelley v. Fourth of July Min. Co.* (1895) 16 Mont. 484, 41 Pac. 273.

New York.—*Ianne v. United States Gypsum Co.* (1908) 126 App. Div. 244, 110 N. Y. Supp. 496, reversed in (1909) 194 N. Y. 88, 86 N. E. 809 (but merely on the ground of error in admitting certain evidence).

Ohio.—*Wellston Coal Co. v. Smith* (1901) 65 Ohio St. 70, 55 L.R.A. 99, 87 Am. St. Rep. 547, 61 N. E. 143, 10 Am. Neg. Rep. 445 (miner injured by fall of roof while running along entry, after lighting a fuse).

Pennsylvania.—*Vanesse v. Catsburg Coal Co.* (1893) 159 Pa. 403, 28 Atl. 200. In *Silliman v. Marsden* (1887) 6 Sadler, 570, 9 Atl. 639, where the setting of a car brake caused the car

to jump the track and strike a post, so a cap was let down and lagging fell on the driver, the question whether the timbering had been negligently constructed and maintained was held to be for the jury.

Texas.—*Lone Star Lignite Min. Co. v. Caddell* (1911) — Tex. Civ. App. —, 134 S. W. 841.

Utah.—*Cunningham v. Union P. R. Co.* (1885) 4 Utah, 206, 7 Pac. 795.

Virginia.—*Southwest Improv. Co. v. Andrew* (1889) 86 Va. 270, 9 S. E. 1015 (recovery was denied on the ground that negligence with regard to inspection was not shown by the evidence); *Norton Coal Co. v. Murphy* (1908) 108 Va. 528, 62 S. E. 268.

West Virginia.—*Davis v. Nuttalls-burg Coal Co.* (1890) 34 W. Va. 500, 12 S. E. 539.

* *Mammoth Vein Coal Co. v. Looper* (1908) 87 Ark. 217, 112 S. W. 390. There the evidence showed that a car which a shot firer had loaded in a room could not be taken through the adjoining entry, owing to the fact that it was obstructed by a prop; that he demanded the removal of the prop, and was ordered by the mine foreman to remove it himself; that he then went under the rock supported by the prop in order to change its location; and that before he had done anything the rock fell upon him and injured him. Held, that the jury was warranted in inferring negligence on the part of the company in failing to provide a safe roof for the entry. The prop being in the entry way, the plaintiff "had a right to assume that the master had exercised care in keeping the roof in a safe condition, and his going under it without a knowledge of its dangerous condition was no more an assumption of the risk than if he had passed under it going into his room to dig coal."

conflict with this theory. The converse question, viz., whether, in a particular instance, it is competent for the employer to defeat the claim of a miner by testimony which goes to show that the duty had been undertaken by the latter, involves elements of greater difficulty. But there are two grounds upon which the inadmissibility of such testimony may be predicated. In one point of view it is to be observed that, in the final analysis, the proposed question is merely a branch of the more general one which is concerned with the right of an employer to release himself by an anticipatory contract from the duties which he owes to his servant. Such a contract has been pronounced void by all the American courts which have expressed an opinion on the subject.³

In the second place, it is to be considered that the doctrine adopted by the great majority of the American courts is that the duty of the employer to provide a safe place of work is absolute in such a sense that, in an action brought by a servant to recover for injuries caused by unsafe conditions, the employer cannot relieve himself from liability by showing that the

performance of the duty had been intrusted to a fellow servant of the claimant.⁴

So far as respects cases in which the negligence of a fellow servant is not a factor, this doctrine seems to involve, by way of analogy, if not by direct implication, the corollary that the employer should be precluded from raising the defense that the duty had been assumed by the claimant himself. It is submitted that no satisfactory reason can be advanced for treating a transfer of the duty as effective in one of these classes of cases, and ineffective in the other.

If the conclusion indicated by the foregoing considerations is accepted as correct, it ought apparently to be regarded as one which is predicable under all circumstances. There is, however, some authority for the view that the incidence of the duty is to be treated as an open question where it appears that the injury complained of resulted from the unsafe condition of the roof of an entry, at a place where the injured workman was engaged in opening a lateral excavation which was eventually to serve as the neck of a room,⁵ but the reasoning of the court

³See Labatt, Mast. & S. § 1920.

In Consolidated Coal Co. v. Lundak (1902) 196 Ill. 594, 63 N. E. 1079, a rule which provided that the defendant's timberman should have no duty except to retimber places in the mine which had once been properly timbered and secured, and that in no case should he assume the duty of securing the roof except as therein provided, unless expressly directed to do so by the mine manager, was thus criticized: "The fact that it provides the timberman shall not perform a duty resting upon the defendant furnishes no exemption to it. It was the duty of defendant to have the roof over the track where plaintiff was required to work properly timbered and secured, and we apprehend it would scarcely be claimed that defendant could make a rule that it would not perform the duty or furnish anyone to do it. It was the duty of the defendant, whether discharged through the agency of the timberman or some other person."

⁴See Labatt, Mast. & S. §§ 1496 et seq.

⁵Teter v. Central Coal & Coke Co. (1919) 201 Mo. App. 542, 213 S. W. 135. There the plaintiff, while clearing away from the floor of an entry the coal dislodged by a blast from the wall, was injured by the fall of a rock and a layer of coal above it. The position taken by the court was thus explained: "Although plaintiff attempted to limit his working place to the precise spot against the wall where he would stand to cut the room neck, we think there is no question but that his working place extended beyond that, and that the place where he was injured was his working place. However, he was also injured in the main entry, a place that it is held is the master's duty to keep in a reasonably safe condition. . . . It is apparent that we cannot apply any fixed rule and say, as a matter of law, that plaintiff was required to keep the place at which he was injured in a reasonably safe condition, nor can we say that it was defendant's duty to do so. Plaintiff was hurt not only in his working place, but in the main entry; and it

in the case cited is scarcely convincing.

VI. Same subject further discussed.

Having regard to the different standards of liability which are applicable, according as the injury complained of was sustained in a completed entry or in a room or other

was clearly a question of fact, to be determined under proper evidence, as to whose duty it was to look after the rock and coal that fell upon plaintiff. As before stated, there was evidence pro and con that it was custom and practice in this mine for defendant to keep the place where plaintiff was injured in a reasonably safe condition, and defendant had ample time after it discovered that the rock was loose to have remedied the situation." The doctrinal standpoint indicated by the words italicized seems to be scarcely consistent with that denoted by the latter portion of the passage quoted. It should be pointed out, moreover, that there is a certain want of precision in the expression "working place," as here used. Manifestly, the essential question to be determined was not simply whether the place where the accident occurred was a "working place," but whether the employer or the miner was responsible for its safe condition.

The theory upon which the court proceeded in this case seems to be irreconcilable with that indicated by the decision in *Campbell Coal Min. Co. v. Smith* (1909) — Ky. —, 115 S. W. 256, where, under substantially similar circumstances, the employer was held liable on the broad ground that the entry was under his control.

¹In *Northern Coal & Coke Co. v. Allera* (1909) 46 Colo. 224, 104 Pac. 197, where a rock fell on a man directed to shoot down a pillar of coal, and then to remove the debris, and clear out the passageway leading to the room, a verdict in his favor was sustained on the ground that the evidence warranted the inference that, when injured, he was in the passageway. The court observed: "Had deceased received the injury at the time he was actually engaged in doing the inherently dangerous work of shooting the stump, or while he was needlessly loitering, through curiosity or otherwise, in the room whose roof was momentarily expected to fall as the

similar place, then in process of excavation (see X., XI., *infra*), a controlling importance sometimes attaches to two questions of fact; viz., whether the injury complained of was received in a place of the former or of the latter description,¹ or whether, under the circumstances, the duty of inspecting and securing the roof of a

result of the shock, the defendant would not be liable."

In *Blazenic v. Iowa & W. Coal Co.* (1897) 102 Iowa, 706, 72 N. W. 292, a verdict for the plaintiff was sustained, the evidence being conflicting as to whether the rock which struck him fell from the roof of the entry leading to the room in which he was working, or from that of the room itself.

In *Goode v. Central Coal & Coke Co.* (1914) 179 Mo. App. 207, 166 S. W. 844, plaintiff's decedent, who was, with other miners, engaged in the work of "drawing pillars," had been killed by the fall of a rock, while eating his lunch during the noon hour. Judgment for plaintiff was reversed.

In *Hyden v. Stearns Coal & Lumber Co.* (1917) 178 Ky. 228, 198 S. W. 775, the evidence was to the effect that the deceased, who was engaged in pulling stumps in a main entry, had gone, just before the accident, to a room which opened out of the same entry, for the purpose of finding out the time, and of ascertaining whether one G., who was mining coal in this room, was ready to shoot. While he was in the room a large piece of slate extending from the entry up to the face of the coal fell upon him. A verdict for the defendant was sustained. In answer to the objection that a part of the slate had fallen from the entry, and that the entry was not properly timbered, the court pointed out that the company was under no duty to timber the roof in the working place of G. Consequently, "if Hyden was not in the entry when he was struck, but was several feet from the entry, it was for the jury to say whether the failure of the company to use ordinary care to keep and maintain the roof of the entry in a reasonably safe condition was the proximate cause of his injuries."

In *Lewis v. Detroit Vitriified Brick Co.* (1911) 164 Mich. 489, 129 N. W. 726, the plaintiff was employed in one of the drifts of a mine from which shale was being taken out just below

subentry leading from a main traveling way to a room rested upon the miners or upon the employer.³

After such a subentry has passed under the control of the employer, he becomes as fully responsible for the safe condition of its roof and walls as he is for those of the main entries in the mine.³

the level on which the coal had previously been excavated. Directly over the drift was a tunnel made in pursuing a seam of coal, so that the roof of the drift was in fact the roof of the tunnel, which had been to some extent braced or propped. When these props were reached by the workmen drilling into the shale, they were taken out and either thrown to one side or used to make ties upon which to lay the rails for the trams. The shale mine itself was an untimbered mine. On the day in question the plaintiff had, after the discharge of a blast, re-entered the drift, and, while engaged in loading a car some 20 or 30 feet from the breast of the drift, was struck by a rock which fell from the roof of the old mine. It also appeared that it was usual for the mine boss to go into the drift after a blast had been discharged, and make some examination of the walls and roof. The court, taking the position that the portion of the drift where the accident was, as respected the plaintiff, was a permanent passageway, upheld a verdict in his favor on the ground that "the testimony for plaintiff tended to prove the negligence of defendant in not removing the rock or supporting it in the roof of the mine," and the absence of negligence on the part of the plaintiff.

In *Graves v. United States Smelting Co.* (1917) — Mo. App. —, 192 S. W. 472, a verdict for the plaintiff was set aside on the ground that, under the evidence as presented, it was merely a matter of conjecture whether the rock which struck plaintiff fell from the roof of a drift, or from that of the "goat path" (that is, runway) which he was blasting out at the side of the drift.

In *Cunningham v. Union P. R. Co.* (1885) 4 Utah, 206, 7 Pac. 795, where coal fell on a miner while sitting at the foot of a pillar alongside of the mouth of a room, waiting for a new job, the defendant's liability was held to be a question for the jury, there

VII. Employer's duty with regard to the timbering of entries and passageways in course of construction or alteration.

There is some authority for the broad doctrine that the duty of timbering an entry under construction rests upon the miners engaged in the work, and not upon the employer.¹

The rationale of this doctrine is the

being evidence that the mine foreman was aware of the dangerous condition of the roof.

See also *Mascott Coal Co. v. Garrett* (1908) 156 Ala. 290, 47 So. 149, where a complaint alleging that the death of a miner had been caused by a want of propping was held demurrable, on the ground that it failed to show whether he was in his room or in the main way leading thereto.

²*Taylor v. Star Coal Co.* (1899) 110 Iowa, 40, 81 N. W. 249 (evidence as to the usage or custom among mines in that particular district, with reference to the time when the duty of the master respecting the care of the roof began, held to have been properly admitted) followed in *Carnegie v. Crescent Coal Co.* (1913) 163 Iowa, 194, 143 N. W. 550.

³*Garard v. Manufacturers' Coal & Coke Co.* (1907) 207 Mo. 242, 105 S. W. 767 (evidence held to show that the entry was in the actual possession of defendant), followed in *Gambino v. Manufacturers' Coal & Coke Co.* (1914) 180 Mo. App. 643, 164 S. W. 264.

¹In *Lookout Fuel Co. v. Phillips* (1914) 11 Ala. App. 657, 66 So. 946, it was so laid down, arguendo.

That a miner working at the face of a tunnel has no remedy against his employer if a rock or other heavy substance is thrown against him by a blast, or falls upon him from the roof or walls, was laid down, arguendo, in *Kelley v. Fourth of July Min. Co.* (1895) 16 Mont. 484, 41 Pac. 273. The doctrine thus enounced was quoted with approval in *Bunker Hill & S. Min. & Concentrating Co. v. Jones* (1904) 65 C. C. A. 363, 130 Fed. 813, certiorari denied in (1914) 195 U. S. 629, 49 L. ed. 352, 25 Sup. Ct. Rep. 787.

In *Baldi v. Cedar Hill Coal & Coke Co.* (1909) 97 C. C. A. 505, 173 Fed. 781, the court seems to have assumed for the purposes of its argument that, if the plaintiff was actually working on the same footing as an ordinary

miner's assumption of the ordinary risks of the employment. In this point of view the employer's nonliability for injuries occasioned to the miner by the want of sufficient timbering is manifestly predicable as a matter of law. Substantially, therefore, the barrier which such a doctrine opposes to the enforcement of a miner's claims is identical with that created by the more restricted doctrine, which, under similar circumstances, has been held to preclude recovery, on the ground of the constantly changing conditions which are produced by the progress of the work. The proposition that a certain risk is assumed clearly involves, by implication, the proposition that the employer owes him no duty to protect him against that risk. But it is also possible to regard the incidence

of the duty as being, in every instance, a question of fact, determinable with reference to the actual terms, express or implied, of the contract between the employer and the miner, and not with reference to the general rule of the law of master and servant, which is based upon the idea of an appreciation of risks.²

In this point of view the fundamental duty of the employer to furnish a reasonably safe place of work (see *I. supra*) will be regarded as inuring to the benefit of the miner, unless it appears affirmatively from the evidence that the latter had agreed to protect himself. A doctrine of this scope and purport, although it was not formally enunciated, may be said to underlie the decisions cited below.³ It also derives, by way of analogy, a strong sup-

miner, he could not recover for injuries caused by the fall of rocks from the roof of the tunnel which he was excavating; but no specific ruling on this point was made, the reversal of the judgment against the defendant being based on the ground that there was no competent evidence upon which to base an instruction defining the remedial rights of a workman who contracts to drive a tunnel, and turn it over, when completed, to the employer.

²This was doubtless the criterion which the court had in mind when it made the following remarks, *arguendo*, in *Bauschka v. Western Coal & Min. Co.* (1910) 95 Ark. 477, 129 S. W. 1095: "It appears that the entries and air courses are mined out by the miners, and that they constitute the working place of the miners so engaged so long as they are engaged in taking out coal; but that thereafter it is the duty of the company, as employer, to keep the place safe as a common pass-way for the use of all employees whose duties call them there."

³In *Tremont Coal & Coke Co. v. Shields* (1909) 93 C. C. A. 346, 167 Fed. 946, the negligence alleged was that the defendant had failed to support the roof of a tunnel, which was being run through sandstone, the consequence being that the plaintiff, while working near the tunnel face, was injured by falling rocks. The defendant's superintendent testified that no timbers had been requested of

him, that there were timbers on hand for use when needed, that the tunnel, except at the entrance thereto, where timbers were placed, was in sandstone, and needed no timbers, and that he had carefully inspected it as late as 8 o'clock of the afternoon preceding the plaintiff's injury. The testimony of other witnesses also tended to negative the defendant's negligence. In this state of the evidence the ruling of the trial judge that the defendant company was negligent in point of law was held erroneous.

In *Pennsylvania Coal Co. v. Bowen* (1909) 159 Ala. 165, 49 So. 305, the action was held not to be maintainable, for the reason that the evidence showed an undertaking on the plaintiff's part to see to the timbering of the tunnel himself, and that the employer was not proved to have been negligent in respect of noncompliance with a request to furnish timbers.

In *Hemmingson v. Carbon Hill Coal Co.* (1911) 62 Wash. 28, 112 Pac. 1111, the evidence showed that, after the crew in which the plaintiff was employed as the helper of the machine man had gone to work on the day of the accident, the tunnel boss had inspected the portion of the roof, theretofore untimbered, which extended about 11 feet from the tunnel face; that he then ordered the men to clear out the muck or rubbish and erect the frames in this unprotected space; and that the plaintiff, while making a depression in which to set

port from several of the cases relating to rooms and similar places. See X. and XI., *infra*.

It is well settled that, where the injury complained of was received in a part of the entry which, at the time of the accident, was under the control of the employer, and used as a passage-

an upright, was injured by a falling rock. It was held that there was enough evidence to carry the case to the jury upon the common-law liability of the defendant; but a new trial was ordered on the ground that the submission of the case with reference to the Coal Mine Act was error. See post, 1506, § 53. It seems quite certain that some courts would have denied the right of recovery in this case, for the reason that the plaintiff was injured while engaged in making a dangerous place safe.

⁴*Bunker Hill & S. Min. & Concentrating Co. v. Jones* (1904) 65 C. C. A. 363, 130 Fed. 813; *Campbell Coal Min. Co. v. Smith* (1909) — Ky. —, 115 S. W. 256; *Kelley v. Fourth of July Min. Co.* (1895) 16 Mont. 484, 41 Pac. 273.

In *Big Hill Coal Co. v. Clutts* (1913) 125 C. C. A. 526, 208 Fed. 526, the evidence showed that, after the removal of the coal for a short distance beyond the end of the track laid in an entry, a blast was fired in the overhanging slate, and that, while the deceased was engaged in carrying pieces of this slate to and loading them upon the car, he was killed by falling slate. Held, that the action was maintainable. The court said: "It is a mistake to suppose, as counsel do, that the work deceased was doing, within the space about the car where he was killed, was neither opening that place for work nor making it safe. It should constantly be remembered that the work of the deceased within that space was simply to use it as a passageway to carry material to the car; and the decisions upon which counsel rely are inapplicable for that reason. The inquiry at last is whether, within the purview of the master's duty, this was a safe place to work."

In *Sloss-Sheffield Steel & I. Co. v. Green* (1909) 169 Ala. 178, 49 So. 301, the court thus commented on certain undisputed evidence to the effect that the entry extended 100 feet beyond the point where the plaintiff was injured:

way, the employer's liability is predicable upon the same footing and for the same reasons as if the accident had occurred in an entry in which the construction work had been entirely finished.⁴

In one case the court proceeded upon the theory that the duty of an em-

"It was not a place which the employee furnished for himself, but was a place over which he had no control. For these reasons it must be considered to have been a place which the defendant furnished, and in respect to which the law imposed on defendant the duty to exercise reasonable care, to the end of keeping it safe; and in this view the employee had the right to rely upon the defendant having fulfilled or performed this duty. . . . According to these principles and under the evidence, the court was authorized to consider it a question of law that it was the duty of the company to keep the roof of the entry in a reasonably safe condition." The conclusion drawn was that no injury could have accrued to the defendant from allowing the question to be propounded to a witness, whether it was the duty of the miners or of the defendant to keep up the roof of the entries in the mine.

In *East Jellico Coal Co. v. Closterides* (1915) 166 Ky. 100, 178 S. W. 1152 (verdict for plaintiff sustained), a laborer engaged, with two other men, in shooting up the slate in the bottom of an entry of the mine, so that the bottom might be lowered, was injured by a piece of slate falling on him. Held, that the jury had been properly instructed (1) that if the slate fell from the roof of the entry, they should find for the plaintiff; but if they believed that it came from the side of the entry, they should find for the coal company; and (2) that they should find for the plaintiff if they believed that the injury resulted from the failure of the company to exercise ordinary care to keep the roof of this entry in reasonably safe condition. The doctrine involved in this ruling, viz., that the action would not have been maintainable if the slate had fallen from the side of the entry, is, in the opinion of the present writer, essentially inconsistent with the general principle which requires an employer to provide his servants

ployer to see that the roof of an entry is kept in a reasonably safe condition was predicable in respect of a workman engaged in enlarging it.⁵

VIII. — of shafts.

In one case the court proceeded upon the theory that, as respected a miner who, at the time when he was injured, was not participating in the work of excavating the shaft in question, the employer was subject to the

with a reasonably safe place of work. See § 1, *supra*. No precedents for such a doctrine were cited.

In *Vanesse v. Catsburg Coal Co.* (1893) 159 Pa. 403, 28 Atl. 200, one of the laborers employed to shovel up the loose material, consisting of coal, bone, and slate which had been knocked down by timbermen in the course of their work of setting the additional timbers necessitated by the widening of a gangway, was struck by a large piece of coal and slate which fell from the side and angle at the top of the gangway; between two sets of timbers. For reasons thus explained, the question whether the defendant had been negligent was held to be for the jury: "The employer was constructing a tunnel or way into his mine, which he knew for years must be used by the miners and workmen, in moving to daylight thousands of tons of coal; above this gangway, always downward and inward, were hundreds of thousands of tons of rock and earth; the tendency would be, continually, to fracture and loosen the surface of the tunnel at the sides and top, and cause it to fall; and especially would this be the case at the time the timbers were being set, for necessarily, then, the surface of the gangway would be disturbed. The testimony on both sides showed that, in setting the timbers, immediately after they were in place, ordinary care required testing for loose and fractured parts between them, and the knocking of these down; this work of making safe was done under the immediate supervision and orders of defendant's superintendent and general manager, one of the owners of the mine; whatever risk was incident to and taken, in that special work, by those setting timbers, when that work was completed, and they were 40 or 50 yards in advance of where

duty of seeing that it was properly timbered.¹

The extent of that duty, as regards an employee engaged in that work, was not considered. In view of the facts presented in another case, the decision may perhaps be said to involve the doctrine that the duty is predicable, without any qualification, where such an employee is concerned.²

But there the court was not called upon to discuss the effect of evidence

that accident occurred, any special risk at that point, it was reasonable to presume, had ended; the gangway there was ready for use."

⁵*Stearns Coal & Lumber Co. v. Spradlin* (1917) 176 Ky. 405, 195 S. W. 781. There the place where the accident occurred was viewed as one which, "at the time, was used both as an entry and as a place for mining coal."

¹In *Severance v. New England Talc Co.* (1900) 72 Vt. 181, 47 Atl. 833, a verdict for the plaintiff was sustained, the evidence being to the effect that, while he was working on a platform at the entrance of a drift in a talc mine, he was injured by a rock which fell from the side of the shaft at a place where it had not yet been timbered. The court laid down the general rule that it is "the duty of the employer, in excavating the shaft, to be duly careful to leave the walls in a reasonably safe condition."

²In *Strahlendorf v. Rosenthal* (1872) 30 Wis. 674, 10 Mor. Min. Rep. 676, the evidence showed that the excavation of the shaft in question had reached a depth of something more than 50 feet; that all but the lower 12 feet thereof was properly curbed; and that when the plaintiff was at the bottom, engaged in loading the bucket with loose earth, preparatory to curbing the lower part of the shaft, a quantity of earth from the side of the excavation, and just below the curbing, fell upon him. It was held that the question of the defendant's negligence had properly been left to the jury, as there was testimony tending to prove that the defendant knew, when he sent the plaintiff into the shaft, that there was a dangerous fissure in the side thereof, which was liable to result in the caving of the earth near it at any moment.

tending to show the existence of an agreement, express or implied, on the part of the employee, to attend to the timbering of the place of work. It must be remembered, moreover, when the precise weight of the case as a precedent is being appraised, that it was decided before the formulation of the doctrine which affirms the nonliability of the employer for injuries received by servants in the course of work which creates constantly changing conditions.

IX. — of chambers intended for the installation of machinery.

In the case cited below, where the plaintiff's son, while engaged, together with several other employees, in excavating a chamber for a pumping station, was struck and killed by a falling rock, it was apparently taken for granted that the failure of the employer to see that the roof was properly timbered while the work was in progress would ordinarily have consti-

tuted a breach of duty in respect of the decedent. But the right of action was denied on the ground that, under the circumstances shown, the defendant's negligence was not the proximate cause of the accident, inasmuch as the decedent was, at the time of his death, a member of a gang engaged in remedying certain dangerous conditions which had supervened by reason of that negligence.¹

X. — of rooms and similar places in coal mines.

a. Where the injured person was engaged in the actual work of excavation.

There is some apparent authority for the doctrine that the duty which the employer owes to a miner of this class with respect to the safety of a room is similar in character and extent to that which he owes to a miner whose work is being performed in a completed entry or passageway.¹ But

¹ *Moon v. Anchor Consol. Gold Mines v. Hopkins* (1901) 49 C. C. A. 347, 111 Fed. 298. There the evidence showed that, when the work of excavation was nearly completed, a pillar of earth and rock which had been left to support the roof had been removed, and that, as a result of this removal, a large amount of rock dropped from the roof. All excavating work, except such as was necessary to permit timbers to be put in place, was at once stopped; and until the accident occurred, 10 or 11 days afterwards, the workmen were occupied solely in removing the fallen rock and debris, and timbering the roof. The work of timbering was begun in the portion of the chamber which was nearest to the shaft out of which the chamber was being excavated, the object being to enable the workmen, after the first timbers had been put in place, to do the remainder of the work under the protection of supporting timbers. During the whole time that this work was in progress, plaintiff's son was associated with the other men in the common purpose of cleaning out the chamber and putting it into a safe condition; and, in the opinion of the court, the physical facts, as well as the undisputed testimony of the witnesses, showed clearly that he was

fully aware of the changed situation resulting from the cave-in which followed the removal of the pillars. While the decedent was standing inside the covered portion of the chamber, and preparing, by means of a hook provided for the purpose, to pull back a rock, lying on the floor outside this screening, a large rock fell from the unsupported section of roof, and, having struck against a pile of rock, was deflected underneath the screening, and crushed him, causing his death. A verdict for the plaintiff was set aside on the ground that no want of due care on the part of the defendant in conducting the work after the cave-in, which followed the removal of the pillar, was disclosed by the evidence, and that the case was controlled by the doctrine laid down in *Finalyson v. Utica Min. & Mill. Co.* (1895) 14 C. C. A. 492, 32 U. S. App. 143, 67 Fed. 507. See, generally, *Labatt, Mast. & S.* § 1177.

¹ In *Tradewater Coal Co. v. Johnson* (1903) 24 Ky. L. Rep. 1777, 61 L.R.A. 161, 72 S. W. 274, where a verdict was sustained in favor of a machineman's helper who was injured while engaged in removing some loose coal which had been left hanging after the explosion of a blast, the contention that the accident was the result of

the weight of authority is distinctly opposed to this view. The cases which bear upon the nature of the responsibility imputed to the employer may be divided into the following categories:

(1) Cases in which the room in question had been partially excavated by workmen other than the injured miner himself, before he was sent into it. Under such circumstances, the responsibility for the condition of the room at the inception of the miner's work ordinarily rests upon the employer.* But this duty may be transferred to the miner by the operation of a specific agreement.³ Nor is the doctrine applicable where the actual task assigned to him was that of making the room safe. The duration of the employer's responsibility, and its scope in respect of each portion of the room, are, it may be pre-

sumed, determinable on the same footing as in cases belonging to the categories discussed below.

(2) Cases in which the injury complained of was received by a miner who was engaged in taking out coal at the working face of the room. The theory which, in the final analysis, may be said to underlie cases of this description, is, that the general doctrine referred to in I., *supra*, creates an initial presumption of fact as to the employer's responsibility for the timbering of the place of work, and that, in order to rebut this presumption, he must show by affirmative testimony that the duty of timbering rested on the miner himself. But as testimony of this purport was presented in all the cases which have been considered by courts of review, they have not had occasion to express any definite opin-

negligence on the part of the "loaders," and that they were the plaintiff's fellow servants, was thus answered: "It is the duty of the appellant to have the rooms in the mines inspected, and see that they are in reasonably safe condition for the servants to work in. *Ashland Coal & I. R. Co. v. Wallace* (1897) 101 Ky. 626, 42 S. W. 744, 43 S. W. 207. This was a duty that the master could not rid himself of by casting it upon a servant in his employ, as that was a duty which the master owed." It seems impossible to reconcile this ruling with several of the Kentucky decisions cited in the following notes. The single precedent relied upon involved the remedial rights of a track-layer working in an entry. It was therefore controlling only upon the assumption that the theory referred to in the text is to be regarded as correct.

In *Green v. Western American Co.* (1902) 30 Wash. 87, 70 Pac. 310, we find the following unqualified statement: "The general duty is also imposed upon the operator to see that the working places in the mine, where props are necessary to keep the mine from caving in, are propped, and that the working places are frequently inspected to ascertain whether the props are put up; and to see that the workmen put up the props as their work progresses."

**St. Bernard Coal Co. v. Southard*

(1903) 25 Ky. L. Rep. 638, 76 S. W. 167 (accident happened just after claimant began to work). So far as it goes, the decision in *Big Brushy Coal & Coke Co. v. Williams* (1910) 99 C. C. A. 102, 176 Fed. 529, is in harmony with the doctrine stated in the text. There the crucial points upon which his right of recovery was regarded as being primarily dependent were whether the rock had been exposed after or before he had begun to work, whether he had caused it to fall by his own operations on the face of the coal, and whether the mining company had, through its agents, inspected the room with reasonable care while he was at work. The evidence being conflicting on these points, a verdict for the plaintiff was sustained. But the presumption is subject to rebuttal by proof of an agreement, express or implied, that the claimant should undertake the work of timbering the place where he was injured.

³In *Ricardo v. Central Coal & Coke Co.* (1917) 100 Kan. 95, 163 Pac. 641, there was evidence which tended to show that the mine boss had furnished the plaintiff with props, had instructed him to set them in his room to make it safe, and had promised to pay him for doing this work. Held, that the case should have been submitted to the jury. Evidence as to a custom that the operator should put a room in safe condition when a miner was set to work in it was held competent.

ion as to the existence of such a presumption or its consequences. Except in cases which have turned upon the effect of the doctrine as to "changing conditions" in the place of work, the question considered with relation to the incidence of the duty has

been whether, having regard to the whole evidence bearing upon the nature of the understanding between the parties, it should be inferred that the responsibility for setting up the necessary timbers rested upon the employer or upon the miner.⁴

Duty incumbent upon employer.

⁴*Morris v. Taylor Coal Co.* (1917) 206 Ill. App. 100 (negligence not proved by evidence); *Breckinridge & P. Syndicate v. Murphy* (1897) 18 Ky. L. Rep. 915, 38 S. W. 700 (incidence of duty properly submitted to jury); *Consolidation Coal Co. v. Spradlin* (1917) 173 Ky. 229, 190 S. W. 1069 (similar ruling); and cases cited in following note.

⁵In *Owens v. Norwood-White Coal Co.* (1919) 188 Iowa, 1092, 174 N. W. 851, the evidence was held sufficient to take to the jury the question of due care in maintaining the roof of the mine in a safe condition, where there was testimony that the inspector had been watching the rock which fell upon the plaintiff, and he testified that he might have timbered the place if he had had time to get at it, and there was testimony by other employees that the threatening appearance of the rock had been noticed by them, and that it had been reported to the superintendent, and that the condition had existed for a month.

In *Snapp v. Steinbaugh* (1918) 187 Ind. 701, 121 N. E. 81, negligence in respect of propping was held to be negated by the testimony of the plaintiff himself, which showed that as many props had been placed in the room as could be used while the work was in progress, and that the props supporting the outer end of the rock which fell were as close to the coal face as the work would permit.

Duty incumbent on miner.

In *Brunson v. Southwestern Development Co.* (1907) 7 Ind. Terr. 209, 104 S. W. 593, where the plaintiff's decedent had the option to place the timbers himself in a room or to call on the timberman to set them up, the ground upon which a judgment for the defendant was reversed was that the testimony failed to show negligence with regard to an inspection made by the mine foreman and the timberman before the accident.

In *Big Hill Coal Co. v. Abney* (1907) 125 Ky. 355, 101 S. W. 394, the

gravamen of the petition was that the room of the mine in which Abney was directed to work, and those adjacent thereto, were unsafe and dangerous by reason of the failure of the defendant properly to brace or prop the roof overhead. The evidence showed that it was the duty of the miners to prop the roof in the rooms where they worked; that the company furnished them the props; that the necessary props were in the room at the time when Abney was killed, and had not been put up by the miners; and that Abney was killed by the falling of the roof at a point where he and Reynolds, his "buddy," had taken out the coal. The defendant offered to prove by Reynolds that he had taken out the coal from the end of the rib to the point where the accident occurred, and had not put up any props within this space; and that it was the custom of the mine that miners should put up the props as they got out the coal; that all of the miners were required to have numbers; and that Reynolds well knew the situation and the necessity of props. Held, that it was error to exclude this evidence. The court said: "As between Abney or Reynolds and the defendant, neither one of them was the agent of the defendant. They were simply partners in getting out the coal. The word 'buddy' was evidently used for 'brother' or 'partner.' If Abney's partner failed to put up props, and this caused the roof to fall, causing Abney's death, the defendant is not liable."

In *Eagle Coal Co. v. Patrick* (1914) 161 Ky. 333, 170 S. W. 960, an unqualified instruction to the effect that it was the duty of the defendant company to use ordinary care in inspecting the roof of the place where the claimant was at work was held erroneous, for the reason that the evidence as to the point was conflicting.

In *Lytte v. Rex Coal Co.* (1917) 177 Ky. 660, 197 S. W. 1070, the plaintiff, who was the helper of one M., who was mining coal at so much per ton, merely stated that he did not know whether

That the duty has been assumed by the employer is necessarily inferable where it appears that the work of timbering the rooms as the excavation proceeds is regularly performed by employees appointed by him for that purpose.⁵ Where the incidence of the duty "is not fixed by agreement between the miner and the operator, it

depends upon the rule or custom in force at the time of the injury; and this rule or custom may be shown by witnesses who exhibit sufficient and proper qualifications, knowledge, and ability to testify as to what the rule or custom was in that respect."⁶

There is no doubt that, in the great majority of coal mines, the prevailing

it was his duty to prop or not; while M. testified that he had agreed to do the propping, and that it was part of the plaintiff's contract that he should do the same work. Held, that a verdict had been properly directed for the defendant.

In the reported case (*ELKHORN MIN. CORP. v. VANHOOSE*, ante, 1378), the roof of a room which had previously been inspected by the mine foreman fell on the plaintiff, after he had fired a shot, and was loading coal on a car. He did not claim it was the duty of anyone to examine the roof after the shot was fired, but rested his case entirely upon the alleged negligence of the company in failing, after the inspection by the foreman, to place additional props under the roof, regardless of whether such props would have left room for the machines of the cutters who were to follow him. The court said: "His position seems to us untenable for several reasons: First, because there is no proof whatever that, when the foreman inspected the roof and before plaintiff fired the shots, the roof was unsafe and needed additional support for plaintiff's protection; nor can such unsafe condition be inferred, as argued by counsel for plaintiff, from the action of the foreman in sending Borders in to place such permanent timbers . . . as could be placed, since it is perfectly apparent it was only such permanent timbers as could be erected that the foreman instructed Borders to erect, and not temporary timbers for the protection of plaintiff. So, there is no inference, as there is no evidence, that temporary timbers, such as counsel for plaintiff argue could and should have been erected, were needed to make the place safe for plaintiff." The contention of the plaintiff that the defendant's rules by which the duty of propping was thrown upon him were not binding upon him, because all the propping was being done by defendant, was rejected for the reason that the rules

showed on their face that, except where the permanent timbering was concerned, the defendant was to do such propping "only when, in the progress of work such as plaintiff was doing, he discovered and notified the company of the necessity therefor."

See also *Mascott Coal Co. v. Garrett* (1908) 156 Ala. 290, 47 So. 149 (responsibility of miner was assumed for purposes of decision); *Gliebas v. Spring Valley Coal Co.* (1910) 159 Ill. App. 88; *Snapp v. Steinbaugh* (1918) 187 Ind. 701, 121 N. E. 81.

See also *Elkins v. New Livingston Coal Co.* (1909) — Ky. —, 115 S. W. 203 (where, however, the actual ratio decidendi was the contributory negligence of the plaintiff).

⁵In *Williams Coal Co. v. Cooper* (1910) 138 Ky. 287, 127 S. W. 1000, one of the grounds upon which the court sustained a verdict in favor of the operator of a cutting machine was that, under the system adopted in the mine, it was the duty of the "loaders" to prop the roofs of the rooms after the coal had been cut and shot down. The court said: "When it is kept in mind that Cooper was under no duty to examine or inspect or prop the roof, and that this duty was or should be performed by others, and further, that there was no reason why the room could not have been made reasonably safe by the exercise of reasonable care on the part of the master, it is difficult to perceive upon what ground it can be said that the master did not owe Cooper the duty of keeping the room in a reasonably safe condition." This decision was followed with reference to similar facts in *Proctor Coal Co. v. Price* (1916) 172 Ky. 627, 189 S. W. 923.

See also *United Coal Min. Co. v. Daugherty* (1911) 51 Ind. App. 165, 96 N. E. 477; *Consumers' Lignite Co. v. Grant* (1915) — Tex. Civ. App. —, 181 S. W. 202.

⁶*Eagle Coal Co. v. Patrick* (1914) 161 Ky. 333, 170 S. W. 960.

"rule or custom" is such as to cast the duty upon the miner.⁷

That this is the actual situation must have been assumed by the court which made the statement that, "ordinarily, it is the duty of the master to furnish the necessary props, and the duty of the miner to prop his own room."⁸ But it would manifestly be unwarrantable to treat this "ordinary" practice as the basis of a presumption, and, so far as the writer knows, no argument directed to such a conclusion has ever been judicially considered. The foregoing remarks, it should be stated, have reference only to those cases in which the incidence of the duty is viewed as a point turning upon the existence of an agreement, either express or implied, between the particular employer and employee whose rights and lia-

bilities are under discussion. Those in which the employer's exemption from the duty has been regarded as a deduction from the consideration that the work of excavating coal creates constantly changing conditions are discussed elsewhere.

(3) Cases in which the injury complained of was received in a section of the room which was more or less remote from the working face, and in which no excavation work was being carried on at the time of the accident. In cases of this type the liability of the employer has been viewed sometimes as a point depending upon whether this portion of the room was under his control,⁹ and sometimes as a point depending upon whether he was required by any agreement, express or implied, to see that it was properly timbered.¹⁰ But it is obvious

⁷In many jurisdictions this duty has been converted into a statutory obligation by the explicit provisions of the Mining Act. See note to *Henry v. Missouri, K. & T. R. Co.* post, 1430.

In *Alix Coal Co. v. Nelson* (1921) 146 Ark. 574, 226 S. W. 1052, a majority of the court were of the opinion that the rule, that one engaged in blasting and excavating in his working place in a mine assumes the risk incident to his employment, applied where rock in the roof of the plaintiff's working place had been loosened or sprung by a false shot in the entry by other workmen the night before the accident, the rock falling as the decedent wedged down the stratum of coal immediately under it. In this case the decedent knew that the night shift had been blasting down the roof in the entry near his working place, and that it was not an uncommon thing for the force of false shots to bound forward and spring or crack rocks 6 or 7 feet away from it.

⁸*Stringer v. York* (1914) 161 Ky. 125, 170 S. W. 527.

⁹In *Mitchell v. Phillips Min. Co.* (1917) 181 Iowa, 600, 165 N. W. 108, plaintiff's decedent, while loading coal on a car which was standing on the track about 20 feet from the working place and about 10 feet from the end of the track, was killed by slate which fell from a section of the roof which the mine foreman knew to be

in a dangerous condition, but had not secured by props. Held, error to direct a verdict for the defendant. The liability of the employer was discussed with reference also to the Iowa statute as to propping of mines.

¹⁰In *Stringer v. York* (Ky.) supra, where it was held error to direct a verdict for the defendant, in view of evidence that it was the master's duty to do the propping, the court said: "If that duty devolves upon the miner, and he is furnished with sufficient props for the purpose, and he is injured by reason of his failure to prop, of course there can be no recovery. On the other hand, if it is the master's duty to do the propping over the roadway, then the miner may recover unless he is guilty of contributory negligence."

In *Cook v. Smith-Lowe Co.* (1906) 135 Iowa, 31, 109 N. W. 798, there was evidence tending to show that plaintiff, an experienced miner, had, for about a month before the accident, been mining the coal in a room of defendant's mine which he had taken over from another mine; that he had reached a point about 65 feet from the entry; that he had propped the roof up to that point; that the roof over the track into the room had, for a portion of the distance, been double timbered, under the direction of defendant's pit boss; that plaintiff was injured by the falling of slate in the neck of the room, at a place where

that these questions, although, logically speaking, they are separate and distinct, are correlated in such a sense that evidence from which the existence of one of them may be inferred is also relevant for the purpose of establishing the existence of the others.

(4) Cases in which the injury complained of was received in a room in

there was no double timbering, and where defendant's pit boss had been advised by the other miner that double timbering was necessary; and that the pit boss had inspected the place after his attention had been called to it, and concluded that it was not dangerous. It was conceded that the fall of the roof which injured plaintiff could have been prevented only by double timbering, or taking down the slate and boulders so as to render double timbering unnecessary. The case was submitted by both parties on the theory that the relative duties of the plaintiff and defendant with reference to the safety of the roof in the room and the neck thereof connecting it with the entry were determined by the following resolutions of the agreement between the coal operators and the United Mine Workers of America for the district in question: "(a) That, in accordance with the state law, the company shall furnish all necessary timbers, and the miner shall keep his room securely propped. . . . (b) In case the room has been properly timbered, as above set forth, and the roof, from any cause, becomes so heavy as to require double timbering, the company shall, when notified by the miner, do the necessary work to protect the roadway." Held, that "after the attention of the pit boss had thus been called to the roof at this place, it became the duty of the defendant, under the resolution, to do such double timbering as the situation required, and we think that from that time on the responsibility for the safety of this roof rested on defendant, and that the question was for the jury whether, in the discharge of this duty, the defendant had been negligent."

In *Russell Creek Coal Co. v. Wells* (1898) 96 Va. 416, 31 S. E. 614, the right of a miner to recover for an injury caused by the fall of slate from the roof above the trackway in

which the plaintiff was engaged in taking out "stumps" or "pillars," after the remainder of the excavation work had been finished. All the cases involving this situation proceed upon the theory that the duty of seeing that the portion of the room previously excavated is securely timbered rests upon the employer.¹¹

According to one view the question

his room was denied on the ground that the evidence showed that it was his duty to watch the roof all over the room, including the trackway where stood the car he was loading; that, if it needed propping over the trackway, it was the rule and custom in the mine for the miner to prop it, that the only distinction between the miner's duty as to the roof over the trackway and elsewhere in the rooms was, that he received extra pay for removing slate off the trackway, or timbering the roof over it.

Compare also *Spevack v. Coaldale Fuel Co.* (1911) 152 Iowa, 90, 131 N. W. 653, reviewed in XIII., note 2.

¹¹In *Western Coal & Min. Co. v. Ingraham* (1895) 17 C. C. A. 71, 36 U. S. App. 1, 70 Fed. 219, a verdict for the plaintiff was held to be warranted by evidence of this purport: That the mine in question had been worked and many rooms therein driven up long prior to the employment of the plaintiff; that the roof of the mine had been timbered or propped by other miners months before the plaintiff went to work in the mine; that the plaintiff was set to work by the mining boss "pulling a pillar" in one of the rooms of the mine; that while he was engaged in this work the timbers or props which supported the roof were knocked down by a mule attached to a car used to haul coal out of the mine; that thereupon rocks and slate fell from the roof upon the plaintiff; that the props would not have been knocked down, or fallen, if they had been properly set in the first instance; that an inspection of the timbering or props in the mine by a reasonably capable mining boss or inspector would have disclosed the fact that the props which fell were insufficiently and defectively set, and rendered the mine insecure and dangerous to work in; that the mule which knocked the props down was ungovernable and vicious, and that fact was known to

whether he is bound to protect the miner against injury from substances which may fall from the roof or sides of the excavations

made during the progress of the work is to be regarded as one of fact, to be determined from the facts in evidence.¹² This theory is strongly

the defendant. It was held that the trial judge had properly refused a request for an instruction which was based upon the theory that "the plaintiff should have anticipated that this mule might at some time be brought to the room in the mine where the plaintiff was at work, and that, while there, the mule would come in contact with the timbers which supported the roof of the mine, and knock them down, because they were insecurely set, and that, as a result of all this, the roof would fall, and he might be injured, and that, anticipating all this, he ought to have quit the defendant's service."

In *Calumet Fuel Co. v. Rossi* (1915) 60 Colo. 87, 151 Pac. 935, plaintiff's testimony tended to show that he was injured at a point about 10 feet from the pillar where he had been working, he having ceased work and started for the entrance of the room, following the car track. His contention was that the track on which he was standing when the roof fell was a "traveling way" which the defendant was bound to keep in a safe condition, and that the fall of the stone showed a neglect of that duty. The defendant also introduced testimony tending to show a general custom, known to the plaintiff, under which miners assume the duty of keeping safe the rooms in which they work. It was held that, in the absence of a positive rule of law imposing upon the employer the safeguarding of such a "way," there was no reason why such a custom, if generally known to the miner, would not be binding upon him; that the defendant was consequently entitled to have the jury pass upon the matter of a custom and plaintiff's knowledge of it; and that the trial judge, when instructing the jury on the point, had erroneously limited the evidence admitted to "the purpose of enabling the jury to determine whether or not the parties had used ordinary care." The court said: "This withdrew from the jury the right to consider the evidence as to a custom, which, if established and known to the plaintiff, would have relieved the defendant of the very obligation upon a disregard of which plaintiff's claim was predicated. Al-

though the only passageway or entry involved in this case was the track in the room, and defendant was insisting, and offered evidence to show that from which the jury might find, that the plaintiff assumed the risk in every part of the room, the instructions repeatedly mention the employer's duty to keep the passageways safe."

In *East Jellico Coal Co. v. Golden* (1904) 25 Ky. L. Rep. 2056, 79 S. W. 291, a miner who was injured by the fall of the roof about 20 or 25 feet from the stump that he was removing was held entitled to recover. The court said: "If the debris fell upon appellee in a part of the mine which did not include the stumps he was removing, and the propping of which he was not charged with the duty of attending to, it was the duty of appellant to keep its roof at that point in a reasonably safe condition It was the primary duty of appellant to keep that part of its mine through which appellee had to pass to reach the place of the stumps securely propped, so as to make it reasonably safe for his use; but, after informing him of the danger of the work of removing the stumps, it was under no duty to protect him in that part of the mine where the stumps were situated from danger resulting from his manner of doing his work."

In *Jackson v. Richardson Coal Co.* (1908) 33 Ky. L. Rep. 289, 109 S. W. 902, a petition alleging negligence on the part of defendant in failing to prop the slate which fell was held not demurrable. The court declined to accept the contention of counsel that it was an established rule, in point of law, "that, in removing stumps or pillars, it is the duty of the miner to prop the roof, while the only duty of the mine owner is to furnish timber for that purpose."

See also *Allen v. Bear Creek Coal Co.* (1911) 43 Mont. 269, 115 Pac. 673.

¹² In *Sandy River Cannel Coal Co. v. Caudill* (1901) 22 Ky. L. Rep. 1175, 60 S. W. 180, a judgment for plaintiff was reversed, on the ground that four out of five of the witnesses called by him testified that, under the rules in the defendant's mine, it was the duty of the miner to prop the roof where

supported by the analogy of the cases cited under ¶¶ (2) and (3), *supra*. But there is also some authority for the doctrine that it is presumptively the duty of the miner to safeguard himself, so far as accidents of this description are concerned.¹³

(5) Cases in which the injury complained of was received in a mine oper-

ated by means of a system of chutes, and was occasioned by negligence in respect of the timbering of a chute above the one in which the claimant was working. The theory that, under such circumstances, the employer is presumptively liable, was applied in the case cited below.¹⁴

The rule regarding the nonliability

he was at work, and that the plaintiff told them after the accident that he knew the roof was going to fall, but that it was about quitting time, and he thought he could load and take out one more carload before it fell. The court disapproved an instruction in which the trial judge assumed that it was the duty of the defendant to keep the roof in safe condition at the point where the accident occurred.

In *Borderland Coal Co. v. Kirk* (1918) 180 Ky. 691, 203 S. W. 534, the plaintiff's decedent was injured by the fall of the roof at a place where it had just been propped by a timberman who, in accordance with a custom established in the mine, attended to such work. Held, that the action was maintainable. The court distinguished the case from those in which the injured miner "was actually engaged in removing the coal at the time of the accident, and the company had no opportunity to prop."

See also *Calumet Fuel Co. v. Rossi* (1915) 60 Colo. 87, 151 Pac. 935, note 12 *supra*.

¹³In *State ex rel. Central Coal & Coke Co. v. Ellison* (1917) 270 Mo. 645, 195 S. W. 722, the judgment in *Goode v. Central Coal & Coke Co.* (1916) — Mo. App. —, 186 S. W. 1122, was quashed on the ground of error in an instruction which broadened the issues. With regard to the merits of the case the court remarked: "According to his petition he [the plaintiff] was directed to remove these 'pillars' of coal, and thus close that portion of the mine from further mining operation. Under the well-established mining law of the state, it is the duty of the miner to keep his working place safe, and the duty of the master to keep the entries (the places generally used by many miners) in a condition of reasonable safety."

¹⁴In *McKenzie v. North Coast Colliery Co.* (1909) 55 Wash. 495, 28 L.R.A.(N.S.) 1244, 104 Pac. 801, the essence of the complaint was that,

while the plaintiff was engaged in digging coal from the pillars at a certain chute, by reason of negligence in failing to keep the walls in and about other chutes above the place where plaintiff was working, securely timbered, braced, and held apart and in place, the coal, stone, and earth of said walls gave way and fell down upon him. The evidence showed that, in removing the coal, two miners worked in each chute, and that, immediately above each of the cross-cuts between the chutes, the miners built a battery to protect themselves against the fall of coal, rock, and debris which was constantly falling by reason of the squeezing and settling of the walls. There was evidence tending to show that the mass in question fell from a particular battery; that this battery was in a dangerous condition when the plaintiff went to work; that N., the pit boss, knew of this condition; that plaintiff did not know of it, but worked under the explicit charge and directions of N. It appeared from the defendant's testimony that it was the duty of the pit boss to inspect the mine where the plaintiff was working, and from the testimony of plaintiff's witnesses, that, while the miners did the timbering and set the props, such work was done under the direction and control of the boss, who passed upon its efficiency and sufficiency. Held that, under the testimony presented, the jury was warranted in finding that the appellant was guilty of negligence. It was observed that conceding that the battery which gave way had been constructed by the servants, it had not been constructed by the respondent, and that the case was thus brought within the rule enounced in *Cheatham v. Hogan* (1908) 50 Wash. 465, 22 L.R.A.(N.S.) 951, 97 Pac. 499: "When one servant of a master constructs a scaffold for a particular purpose of the master, uses it for that purpose, and then leaves it standing, and the master

of the employer for an injury caused to a miner by the fall of materials from the roof of a room which it was his duty to timber has been held to be subject to the following qualification: "When defendant's vice principal . . . came into the room, and, in answer to plaintiff's question or request, undertook or assumed the duty of making an inspection as to the safety or soundness of the roof, it undoubtedly then (if not before) became the duty of the defendant to exercise ordinary care to ascertain the true condition of the roof, and (at least) to inform plaintiff of the facts that an ordinarily careful inspection would have revealed."¹⁵

b. Where the injured person was not engaged in the actual work of excavation.

On general principles it seems clear that, where a miner of this class is concerned, the duty incumbent upon

the employer with relation to the safe condition of a room is one which is of essentially the same absolute character as that to which he is subject with relation to the safe condition of an entry or passageway. With such a doctrine the decisions, so far as they go, are consistent; but it has never been formally enunciated.¹⁶

XI. — of stopes, drifts, and chambers in mines other than those producing coal.

So far as regards cases in which the dangerous conditions which eventuated in the fall of the rocks or other substances by which the claimant was injured were incidental to the progress of excavation work in which he was a participant, it is apparent that, as in the cases where a similar situation is presented with reference to a coal mine (see subd. X. *supra*), the right of action will depend upon the

afterwards directs another servant, who had no part in its construction, to use it for another purpose, the master adopts the scaffold as his own, and thereby guarantees that it is a safe place on which to work."

¹⁵ *Hall v. Manufacturer's Coal & Coke Co.* (1914) 260 Mo. 351, 168 S. W. 927, Ann. Cas. 1916C, 375.

¹⁶ *In Consolidation Coal Co. v. Spencer* (1917) 177 Ky. 626, 197 S. W. 1069, where the plaintiff, while removing slate which had fallen from the roof, was injured by another fall, a verdict in his favor was sustained on the ground that the defendant was bound to maintain the roof in reasonably safe condition for a man engaged in such work.

In *Carter Coal Co. v. Lay* (1918) 182 Ky. 540, 206 S. W. 769, where the roof of a room fell on a man whose duty it was to attach to the trolley wire in the adjoining entry a cable connected with the spool on the electric motor car in which coal was transported, it was shown that in order to make the top of the air course over the main track high enough for the motor to go under, the company had caused a trench to be shot in the roof of the mine, about a foot deep, thus leaving slate extending from the rib of the coal on either side of the air course to a point just

short of the main track, and presenting an abrupt break at the trench. There was further evidence going to show that, under these circumstances, the defendant should either have cross-timbered the roof at that point, or should have taken down the loose slate, and that its foreman was so advised. Held, that these facts, coupled with the additional fact that the slate at that point actually fell, were sufficient to warrant the conclusion that the defendant knew, or could have known, with the exercise of ordinary care, of the defective condition of the roof in time to take such steps as were reasonably necessary to avoid the accident.

In *James v. Emmet Min. Co.* (1884) 55 Mich. 335, 21 N. W. 361, where a common laborer, while engaged in moving machinery from a chamber in a metalliferous mine from which the "pillars" had just been removed, was killed as a result of the collapse of the roof, the court sustained a verdict against the defendant, based on the ground that the roof had not been adequately supported by timbers after the removal of the pillars, and that notice concerning the dangerous condition of the roof had been conveyed by the appearance of a crack in the roof rock before the accident.

answer to a question which, according to the weight of authority, is one to be determined from the particular facts in evidence; viz., whether the duty of timbering the place of work rested upon him or upon the employer.¹

¹In *Grant v. Varney* (1895) 21 Colo. 329, 40 Pac. 771, evidence tending to show that defendants had issued general rules and instructions to their workmen which provided, in substance, that the workmen who were engaged in running a drift should do timbering whenever they considered it necessary and essential for their safety, was declared to be competent. But it was held that the trial judge had properly excluded evidence which merely tended to show that such instructions had been given to individual workmen.

Compare also the remarks made, arguendo, in *Highland Boy Gold Min. Co. v. Pouch* (1903) 61 C. C. A. 40, 124 Fed. 148, and *Miller v. Utah Consol. Min. Co.* (1919) 53 Utah, 366, 178 Pac. 771.

For a case in which the evidence showed that it was the duty of the miners to set up their own timbering, but it was not their duty to oversee the timbering after it had been put in place see *Tomazin v. Shenango Furnace Co.* (1908) 103 Minn. 334, 114 N. W. 1128.

In *Anderson v. Pitt Iron Min. Co.* (1908) 103 Minn. 252, 114 N. W. 953, where the plaintiff was one of two men whose duty it was to put in the sets of timbers which were necessary to protect the men from falling ore which had been loosened by the blast, the ratio decidendi was that they had been expressly assured by the mining captain that the portion of the roof which fell was safe.

In *Miller v. Utah Consol. Min. Co.* (1919) 53 Utah, 366, 178 Pac. 771 (for facts, see note 2, *infra*), the court assumed that a miner is presumptively chargeable with the duty of keeping in safe condition the roof and sides of the particular set in a stope where he is working.

Negligence inferable.

²In *Highland Boy Gold Min. Co. v. Pouch* (1903) 61 C. C. A. 40, 124 Fed. 148, the entire hanging wall of the stope in which the plaintiff was operating a drilling machine caved in, and in his efforts to escape from the

Under any other circumstances than those stated, that duty is presumed to rest upon the employer, and the only question to be determined is whether it was discharged with reasonable care in respect of the injured person.³

falling rock and timber he was severely injured. The grounds upon which he sought to recover were that the defendant was negligent in failing properly to secure and timber the stope, and in permitting the timbers therein to become worn and defective. Held, that a verdict for the plaintiff was justified by testimony which tended to show that, for some time prior to the accident, the timbers in the stope indicated that they were bearing an excessive weight; that when this stope was combined with another one, the result had been to leave an extensive overhanging wall, which pitched at an angle of about 45 degrees, and was only supported by square sets and by a pillar of decomposed sulphide ore; that such supports were insufficient to support the hanging wall; that about a week before the accident the pressure on this pillar was so great that it had bulged and pushed out of place a number of posts standing at its base; and that the hanging wall in other stopes of the same mine had previously caved in.

In *Bunker Hill & S. Min. & Concentrating Co. v. Jones* (1904) 65 C. C. A. 363, 130 Fed. 813, affirming (1903) 124 Fed. 675, a verdict for the plaintiff was upheld for reasons thus stated: "If the jury believed the testimony on the part of the plaintiff, the safety of his employment depended upon the proper timbering of the stope above and immediately adjoining the place where he was set to work. He was not employed as a timberman, but as a miner and machineman, or driller. It was no more a part of his duty to inspect the timbering above him, or the condition of the rock in the chamber above, according to the custom in that mine, than it would have been to inspect the track on the tunnel floor, or the cars in which the ore was carried out. Other men were detailed for that part of the work. The shift boss, whose orders he was obliged to obey, indicated the place in which he was to work, directed the number of holes to be drilled in the breast of the tunnel, and that the blasts should be fired at noon. He

XII. Employer's duty in respect of supplying timbers demanded by the miner.

The nature and scope of the employer's duty in respect of sending down timbers, when he is asked by a miner to do so, are necessarily differ-

ent, according as the portion of the mine in which the miner desires to have them delivered is or is not one which he is bound to timber himself.

It seems reasonably clear that, if this portion is a place for the condi-

entered upon the performance of his duties, and was warranted in the assumption that the necessary precautions had been taken by the defendant to prevent the caving and falling of rock from the stope above."

In *Ohio Copper Min. Co. v. Hutchings* (1909) 96 C. C. A. 653, 172 Fed. 201, the evidence tended to show that, on account of the unstable and treacherous character of the formation in the portion of the copper mine in which the accident happened, it was the custom of the mining company to follow closely the extension of the drift with wooden frames, covered with lagging, the construction of which was intrusted to timbermen. The miners, of whom the decedent was one, besides performing their ordinary duties in extending the drift, also prepared the floor for the sills of these frames, and it was the custom of the company, through its timbermen, to protect these miners, while so engaged, by temporary timbering. Owing to the obviously defective character of the timbering at the place in question, the hanging wall of the drift, collapsed and crushed the decedent, while he was preparing the floor for the sills of the permanent timbers. Before commencing work the decedent had told the foreman that he did not want to go into the dangerous place, and was assured that it was all right and safe enough. Held, that this evidence was sufficient to support a verdict against the company.

In *Western Invest. Co. v. McFarland* (1908) 91 C. C. A. 504, 166 Fed. 76, the plaintiff's decedent was killed by the fall of the rock from the hanging wall of a "filled stope," while he was shoveling into a chute a pile of ore, or "muck," which had accumulated near the wall, and which, as long as it stood intact, stood as an effective protection against loose rock in the wall. Defendant's superintendent testified that the only safe way to draw off a filled stope was to have timbermen following right down, watching for loose rock on the wall, and prepared to put in a timber when required to make it safe. One of the defend-

ant's timbermen testified that, judging from his observation of the wall while the stope was being filled, and from his experience in timbering, which had been large, he believed that when the stope should be drawn it would probably need some timber to support the walls. There was also testimony to the effect that the superintendent's attention had been called to certain physical conditions in the wall, which indicated that it was insecure. The evidence also tended to show that no timbering was done in the stope for some time before the fatal accident; that, in the meantime, a large portion of the muck had been drawn, thereby removing to a considerable extent the support of the hanging wall; and that no critical inspection of the condition of the walls had been made after the drawing of the stopes. Held, that the jury were warranted in finding that the defendant was guilty of negligence.

In *Northam v. Boston & M. Consol. Copper & S. Min. Co.* (1911) 111 C. C. A. 450, 190 Fed. 722, where the plaintiff's decedent, while working on the ninth floor of a large stope, was struck by a rock which fell from the wall and crashed through the floor above him, the court laid it down that he was "entitled to the protection of a reasonably safe roof over his head." For further information as to this case, see I. *supra*.

In *Stratton Cripple Creek Min. & Development Co. v. Ellison* (1908) 42 Colo. 498, 94 Pac. 303, where a verdict for plaintiff, on conflicting evidence, was sustained, the lower portion of the stope from the wall of which the rock in question had fallen was viewed, for the purpose of the decision, as forming a receptacle for ore and waste, preliminary to the transmission thereof through the chute to a lower level, and thus, in effect, as constituting a permanent room or place wherein the day shift worked a part of the mine.

In *Oliva v. Calumet & H. Min. Co.* (1914) 178 Mich. 645, 146 N. W. 181, where a trainman, while loading a car at the foot of a stope, was injured by a piece of rock which fell from the

tion of which the terms, expressed or implied, of the contract of employment, render the employer responsible, the effect of the demand is to cast upon him both the duty of examining the place promptly, and the duty of

erecting the timbers if the necessity for them is indicated by the examination. Under such circumstances the receipt of the demand should, it is apprehended, be regarded merely as an event which affects the employer with

hanging wall, a verdict for the defendant company was affirmed on the ground that the evidence was sufficient to prove contributory negligence on the plaintiff's part. But the court approved an instruction to the effect that it was the duty of defendant to timber the overhanging wall, if that was the only means by which it could be made reasonably safe.

In *Bergquist v. Chandler Iron Co.* (1892) 49 Minn. 511, 52 N. W. 186, where the plaintiff, while loosening earth which adhered to the sides of a "raise," or well, leading to a drift below the one which he was excavating, was struck by a mass of soapstone which fell from the roof over the well, a verdict for the plaintiff was sustained, the evidence being conflicting with regard to the question whether the stone fell from the roof of the new drift or from that of an old drift which intersected the new one at right angles, and whether, if it fell from the roof of the old drift, the defendant was negligent in failing to observe its condition and remove the stone or support it.

In *Neeley v. Snyder* (1917) — Mo. App. —, 193 S. W. 610, the testimony tended to prove that plaintiff was at work in a drift near the bottom of the stope that rose at an angle of about 45 degrees; that, on the top of said stope, a level section had been prepared for the purpose of catching the stone and dirt that would fall from the soapstone formation in the roof above it, spoken of by the witnesses as a "chimney;" that stones and dirt occasionally fell from this "chimney" onto the level place at the top of the stope; and that, while most of these materials went off on the other side, yet it also frequently happened that portions of them rolled down on the side of the stope where plaintiff worked; and that he was struck by a rock or some hard substance which fell from the "chimney" part of the roof onto the stope, and then rolled or bounced down to where he was. An instruction by which the jury were told to find for the plaintiff if they believed that the defendants knew, or

could, by the exercise of reasonable care, have known, these facts, was approved.

In *Carter v. Baldwin* (1904) 107 Mo. App. 217, 81 S. W. 204, a rock fell from the roof of a drift, and broke up a scaffold on which the plaintiff, an inexperienced workman about twenty years old, was standing, the consequence being that he was thrown to the bottom of the drift, 30 feet below. Held, that he was entitled to recover. The actual ratio decidendi was that he was warranted in relying on the foreman's assurance that the place of work was safe.

In *Kinsel v. North Butte Min. Co.* (1912) 44 Mont. 445, 120 Pac. 797, the evidence was held to warrant a finding that the defendant had been negligent in respect of placing two stringers in such a manner that they rested upon a set previously constructed, and of allowing rocks to accumulate on them, the consequence being that the set collapsed and fell on the plaintiff immediately after he began work. The ratio decidendi was that the accident had been "caused by . . . latent defective conditions surrounding the place of work, rendering it extraordinarily dangerous, and such latent defective conditions are the proximate result of a negligent and faulty plan or method adopted by the master for doing the work."

In *Friel v. Kimberly-Montana Gold Min. Co.* (1906) 34 Mont. 54, 85 Pac. 734, where the plaintiff, while shoveling rock on one of the floors of a stope, was injured by a rock which fell from the defectively supported roof of the next floor above him, a nonsuit was held to be erroneous for the reason that "if, as the evidence also tends to show, the part of the stope from which the rock fell was one in which the mining had been completed, it was the duty of the defendant to timber and lag the same in order that that part of the place already created might be kept safe." But the theory indicated by this passage, that the right of recovery was conditional upon the plaintiff's ability to prove that the rock fell from a

notice that timbering may be needed. In this point of view his failure to

"completed part" of the stope, is clearly more favorable to the employer than that reflected in some of the cases cited in this note.

In *Arras v. Standard Plaster Co.* (1907) 121 App. Div. 61, 105 N. Y. Supp. 440, the claimant was injured by a mass of rock which fell from the unpropped roof of a chamber in a gypsum mine a few days after a blast had been set off. He testified that he was not a miner; that he had never done anything except common labor in a mine; that the superintendent told him where to work, and showed him the particular place to dig in the chamber; that the superintendent examined the place and said it was all right, that the arch had been left all right; that the rock overhead in the chamber was roof rock and perfectly safe; that plaintiff believed this statement and thought that the place was safe; that he was directed to bore a hole in the side wall, load with a cartridge, and explode it; that, after the blast had been set off, he and a fellow workman re-entered the chamber; and that, while they were engaged in prying off with a bar the plaster which had been loosened by the blast on the side wall of the mine, a portion of the ceiling fell upon the claimant. It was held error to grant a nonsuit, and exclude evidence offered by the claimant for the purpose of showing that the mine was inherently dangerous; that numerous so-called chimneys of earth extended from the surface of the ground to the interior of the mine, through which moisture was carried, thereby disintegrating and loosening the earth and rock so that they would fall in the mine; that, even with the best of timbering, it would be dangerous to carry on mining operations in this mine; and that this condition would be so apparent to a person familiar with such conditions, that the defendant knew it, or ought to have known it, in the exercise of reasonable care for the safety of its workmen, although the danger was not apparent to an ordinary workman. The court said: "The duty of making the plaintiff's working place reasonably safe devolved upon the defendant. It was not a mere detail of the work, if the plaintiff is right in his claim as to the effect to be given to the evidence and

comply with the demand does not constitute a particular form of negli-

the inferences to be drawn therefrom. Had the material fallen upon the plaintiff while he was engaged in placing the pillars, or otherwise making the mine more secure, a different question might be presented; but this particular part of the mine where the material fell was held out to the plaintiff as being safe and requiring no further security or means of safety. In fact, he was assured by the superintendent that it was safe and that the material would not fall. Whether he was justified in relying upon the presumably superior knowledge of the superintendent, and whether the superintendent was negligent in not discovering the true condition, necessarily depended, to some extent, at least, upon the formation and other conditions of the material in which the mine was being worked. It is contended on behalf of the plaintiff that the testimony which was offered by him and excluded would have shown a condition inherently dangerous, and that, while ordinary workmen might discover its true condition, a person familiar with the operations of mining, and skilled in that kind of work, ought to have appreciated the danger. We are clearly of the opinion that the evidence offered was competent and material, and that it was improperly excluded."

In *Trihay v. Brooklyn Lead Min. Co.* (1886) 4 Utah, 469, 11 Pac. 612, 15 Mor. Min. Rep. 535, where earth and rock fell from the upper portion of a stope upon a workman who was engaged in timbering it, the liability of the defendant for the resulting injury was held to be a warrantable inference from evidence which tended to show that it was necessary to timber closely the mine at the point where the accident occurred, in order to make it safe, and that this was not done; that the plaintiff only carried out the instructions of the foreman and relied upon his judgment; and that he had never been in the stope where the accident occurred, and did not know that it was dangerous by reason of the want of timbering.

In *Miller v. Utah Consol. Min. Co.* (1919) 53 Utah, 366, 178 Pac. 771, the evidence showed that the claimant was directed to operate a machine drill in the sixth step of a stope which

gence, creating a distinct and independent cause of action. It is sim-

had previously been protected by lagging; that, just before the accident, he had, in compliance with an order, ascended the ladder leading to the seventh set for the purpose of handing over his machine to the miners working there; and that, while he was on the seventh set, he was injured by slate which fell from the face of the stope. Held, that the question whether the defendant company was guilty of negligence in respect of its having failed to timber this part of the stope was for the jury. It was also ruled that, in view of the fact that the claimant was an entire stranger to the mine, the defendant owed him the duty of informing him as to the dangerous conditions that would be known to it and not apparent to him, which would surround him while complying with its orders. An instruction to the effect that the claimant "had the right to assume that the defendant had used reasonable care to discover and remedy all dangerous defects in and about his place of work, discernible by proper inspection," was held to be correct, in view of the claimant's inability to appreciate the risk he was taking in going from the sixth set to the seventh, in obedience to orders.

Upon the authority of the *Miller Case* it was held in *Wooton v. Dragon Consol. Min. Co.* (1919) 54 Utah, 459, 181 Pac. 593, that as the evidence made it plain that plaintiff from his place of work could not inspect the "raise," and that his only protection from falling therefrom lay in the care and precaution exercised by the master, he had not assumed the risk of injury.

In *Faulkner v. Mammoth Min. Co.* (1901) 23 Utah, 437, 66 Pac. 799, a workman upon whom a rock fell while he was excavating a hole in which to set a post was held to be entitled to recover on the ground of the defendant's negligence in failing to timber the roof. But the correctness of the decision is disputable in view of the fact that the work in course of performance was that of making the place safe.

In *Ainslie Min. & R. Co. v. McDougall* (1909) 42 Can. S. C. 420 (for first appeal see (1908) 40 Can. S. C. R. 270), the claimant's son was, with other workmen, employed in a barytes mine to deepen the cut along a vein

ply one of the evidential elements bearing upon the ultimate question

which was already some 30 feet below the surface. To protect the workmen from falling stones and earth a scaffolding was constructed about half way down the cut, with timbers placed across at intervals and covered with small poles, lying close together, which were covered with earth. A mass of rock, having broken away from the hanging wall, crashed through this scaffolding and fell to the bottom, killing the claimant's son. The accident happened just after work had been resumed. It had been suspended for about eighteen months. The jury found (1) that the defendants were negligent in not having the timbering overhead sufficiently strong to hold stone liable to fall from the overhanging wall; (2) that if the walls had been properly examined the stone which fell would have been noticed as dangerous; and (3) that the unsafe condition of the working was discoverable by a reasonably careful inspection. Held, that on these findings plaintiff was entitled to judgment.

Negligence not inferable.

In *Hamilton v. Alleghany Ore & I. Co.* (1908) 108 Va. 700, 62 S. E. 957, where a miner, while engaged in blasting out ore, was killed by a rock which fell through an uncovered space which had been left near the breast of the ore, in the lagging erected for protection purposes above the level on which the deceased was working, the contention that this space should not have been thus left open was thus dealt with: "The uncontradicted evidence is that, while the mine had been worked for many years, neither the defendant nor any of its predecessors who had worked it had ever done this, and that, in working such veins in other mines, it was not customary to do this, and very difficult, if not impossible, to keep timbers or 'lagging' above the mining, because of the blasting which was going on every day immediately under it. The evidence of the plaintiff, as well as that of the defendant, shows that, while there is always some danger from falling stones in working such mines, the method of work and the precautions taken and required by the defendant for the protection of its employees engaged in blasting ore were such as were usual, and that nothing more could reason-

whether he is chargeable with negligence in respect of securing the place of work.¹

In considering the situation created by a demand which proceeds from a miner whose contract requires him to timber the place in question, we have to take into account the fact that it is the ordinary, if not invariable, rule of mining practice that, whenever the

duty of safeguarding the place of work rests upon the miner, the duty of supplying the timbers required for that purpose rests upon the employer.² Under such an arrangement the employer is clearly responsible for any injuries which may be caused by the nondelivery of the timbers which were actually demanded,³ unless it appears that the demand was not received a

ably have been done than was done for their protection."

In *Creed United Mines Co. v. Hawman* (1912) 23 Colo. App. 125, 127 Pac. 924, involving a fall of the hanging wall in a "filled stope," i. e., "one where the waste rock taken out of the vein is left on the floor of the stope, thus raising the floor as work proceeds," it was laid down that "in such a stope no timbers, stull timbers, or lagging are necessary, or could be used therein, unless it could be said that lagging might be used to construct a crib, such as plaintiff was building at the time of his injury." In this point of view the allegations of negligence on the part of defendant in not keeping on hand near the stope "square sets of timbers, stulls, and lagging," so as to prevent the stopes, etc., from being unsafe, were eliminated from consideration.

The "filled stope," mentioned in some of the above cases, has been defined in the case just cited as "one where the waste rock taken out of the vein is left on the floor, thus raising the floor as the work proceeds."

¹It must be admitted, however, that this statement is, to some extent, inconsistent with the ground assigned for the decision in *Rowden v. Daniell* (1910) 151 Mo. App. 15, 132 S. W. 23. There the plaintiff was injured by the fall of a boulder from the northeast corner of a shaft which he was engaged in excavating. One of the claims advanced was that the defendants were chargeable with negligence in having failed to comply with a request to send down timbers to support the sides of the shaft. This contention was rejected for the reason that the evidence showed that the timbers requested were intended for a drift which, at the time of the accident, was being opened from the northwest corner of the shaft, but had not yet been excavated far enough to need timbers. The consideration mainly relied on by the court was the

absence of any evidence going to show that the dangerous condition of the boulder could have been discovered by a reasonably careful inspection. But it is not at all clear from the opinion which of the two situations adverted to in this and the following paragraphs was contemplated by the court. Nor is there anything in the language used which indicates that the essential difference between the duties incidental to the two situations was appreciated.

²That this is the usual system in the United Kingdom is indicated by the following remarks made by Lord Gifford in *Stewart v. Coltness Iron Co.* (1877) 4 Sc. Sess. Cas. 4th series 952, with regard to the responsibility of the manager of the mine in question, who had been joined with the mine owner as a codefendant: "It was not the personal duty of the manager to convey the prop wood from the proper stores or deposits thereof. The manager can only be made responsible for that if the complaint be made to him, and if he knew that those whose duty it was to bring forward the wood to the working faces had failed or refused to do so."

In *Allen v. Bear Creek Coal Co.* (1911) 48 Mont. 269, 115 Pac. 673, the plaintiff and his two sons were employed in "drawing" pillars in a room and loading the coal into cars. As they removed the coal, beginning at the face, it was their duty to put in other timber supports to prevent falls of rock during the work. Timbers were furnished for this purpose by the company, through the superintendent or foreman, upon request being made to the motorman in charge of the cars. But the actual ground upon which the defendant was held liable was that the plaintiff's injury had been caused by conditions existing when he began work.

³In *Rowden v. Daniell* (Mo.) supra, the right of the claimant to recover on this footing was denied, for the

sufficiently long time before the accident occurred to enable him, by the exercise of reasonable diligence, to deliver the timber at the place specified.⁴ Such a failure is deemed to be equally culpable as regards the injured miner himself, whether the request came from him or from a fellow workman.⁵

The employer is clearly responsible for any injury which may be caused by the defective quality of the timbers which he furnishes.⁶

As to the statutory duty of the employer to send down timbers, upon demand being made by the miner, see subd. III. of the note to *Henry v. Missouri, K. & T. R. Co.* post, 1430.

XIII. Employer's Liability for injuries caused by the improper emplacement of timbers.

It is the duty of the employer to

reason that the timbers demanded were intended for use in a drift which was being opened out of the shaft in which he was working, and consequently that the failure to furnish them had no connection with the accident from which his injury resulted; viz., the fall of a boulder from one of the walls of the shaft.

See also *Pennsylvania Coal Co. v. Bower* (1909) 159 Ala. 165, 49 So. 305, where the absence of evidence going to show a refusal by the employer to supply timbers was referred to as one of the factors which precluded recovery.

In *Zukas v. Lehigh Valley Coal Co.* (1919) 187 App. Div. 315, 175 N. Y. Supp. 408, a verdict for the plaintiff was set aside on the ground that the evidence did not establish the two facts declared to be vital, viz.: "(a) That, prior to the accident, plaintiff had notified defendant's superintendent (not merely mine foreman) of the dangerous condition and want of proper props to remedy it, and had been by the superintendent directed to continue working, and told that he (the superintendent) would send the props when he got them; and (b) that there was in the mine a want of suitable props,—here, those of sufficient length."

⁴In *Wojtylak v. Kansas & T. Coal Co.* (1905) 188 Mo. 260, 87 S. W. 506, an instruction which authorized the jury to find "that, prior to said day, plaintiff had called upon defendant

exercise reasonable care in seeing that the timbering erected by him for the purpose of protecting the miners against injury from falling substances is so constructed that they will not, while passing it, in the course of their employment, be exposed to danger by reason of the position which it occupies. Where the injury complained of was received in a completed entry or passage, the only point to be determined is whether the duty so predicated was properly discharged.¹ On the other hand, if the claimant was injured in a room in which the work of excavation was still being carried on, there was also a preliminary question to be settled; viz., whether, as a matter of fact, the responsibility for the safe condition of the timbering in the portion of the room in which the

for such props, and defendant had failed to furnish them," was disapproved for reasons thus stated: "There was absolutely no evidence of any demand by the plaintiff upon the defendant to furnish such props, or that the defendant had failed to furnish them on any day prior to plaintiff's injury; on the contrary, the plaintiff testified unequivocally, in answer to a question propounded by his own attorney on direct examination, that he had never experienced any shortage of props except on the very day of the accident. It was error to submit such a state of facts as this, and the jury might have well concluded that they were authorized to find a previous demand and denial of the props, although plaintiff testified that he had not been short of props on any other day."

⁵In *Bauschka v. Western Coal & Min. Co.* (1910) 95 Ark. 477, 129 S. W. 1095, the exclusion of evidence as to a demand made by a fellow workman was held error.

⁶In *Hackart v. Decatur Coal Co.* (1909) 243 Ill. 49, 90 N. E. 257, affirming (1909) 149 Ill. App. 661, the admission of incompetent evidence with relation to a count based upon the statute was held not to be a sufficient ground for setting aside the verdict, because a violation of a common-law duty had been clearly established by the evidence as to the bad quality of the props and cap pieces furnished.

¹In *Madden v. Saylor Coal Co.*

accident happened rested upon the employer or the miners.²

XIV. — by the adoption of certain methods of work.

For an injury occasioned by the em-

(1907) 133 Iowa, 699, 111 N. W. 57, the evidence showed that while the plaintiff was driving some empty cars along an entry, his mule, having swerved from the track, was struck by a train of loaded cars then moving in the opposite direction, and thrown against one of a row of props erected between the tracks. The consequence was that the prop was displaced, and some slate fell on the plaintiff. Held, that the jury were justified in finding that the roof of the entry at the point in question was insecurely supported by the prop installed, and that it was negligence on the part of the defendant to place the props between the two tracks without securely fastening them at both ends, so that they could not be displaced by such a collision. The contention that the question whether the entry at the point in question should have been timbered by cross timbers was immaterial to any issue in the case was thus disposed of: "This cannot be so, because it was incumbent upon the plaintiff to show that the defendant was negligent in using props in the way and manner that it did, and, for the purpose of so showing, it was clearly competent to show another safe and convenient way of supporting the roof of the entry."

In *Hiller v. Mt. Olive & S. Coal Co.* (1918) 211 Ill. App. 91, an action to recover for the death of a laborer, alleged to have resulted from his head having come into collision with a crossbar supporting the roof, while he was sitting on a car, the question whether the place was reasonably safe was held to be one for the jury, the evidence being that, at the point where the accident occurred, the roof became abruptly 6 inches lower, that this portion of the entry was dark, the nearest light being 90 feet away; and that the roof was only 3 feet above the seat on which deceased and other drivers were accustomed to ride.

For other cases in which the question of liability was held to be one for the jury, see *Birmingham Fuel Co. v. Taylor* (1919) 202 Ala. 674, 81 So. 630 (prop placed so close to track

ployers having prescribed a certain method for carrying out the work of timbering a portion of his mine, an action may be maintained against him if the method was one which a reasonably careful man would not have

that driver was caught and injured); *Consolidated Coal Co. v. Lundak* (1902) 196 Ill. 594, 63 N. E. 1079 (case properly left to jury, where the evidence showed that the prop in question had fallen down of itself, or that it had been knocked down by the car while the plaintiff was driving, and that the ensuing fall of the slate by which he was injured was occasioned by the removal of the support of the roof); *Vandalia Coal Co. v. Price* (1912) 178 Ind. 546, 97 N. E. 429 (driver of motor was killed by coming into collision with a crosstie which had been dislocated on the preceding trip, owing to the fact that a leg placed too close to the track had been knocked down by one of the cars); *Corson v. Coal Hill Coal Co.* (1897) 101 Iowa, 224, 70 N. W. 185, 1 Am. Neg. Rep. 230 (man in charge of coal cars was thrown off, owing to a collision of the car on which he was riding with a piece of slate which had fallen from the roof); *Main Jellico Mountain Coal Co. v. Parker* (1910) — Ky. —, 124 S. W. 871 (miner's hand was crushed by coming into collision with a post set too close to the car track, while he was holding back a loaded car in which coal was being conveyed from a room to the adjacent entry).

²In *Spevack v. Coaldale Fuel Co.* (1911) 152 Iowa, 90, 131 N. W. 653, the evidence showed that a tie with a spike projecting from its lower side had been used as a cap piece on top of a prop in the room in question; that, as a mule driven by the decedent passed under it, the spike caught in the hames of the mule, and caused him suddenly to stop, so that the loaded car ran against him, thus crushing decedent, who was riding in the usual position between the mule and the car. The room had been in use for more than a year, and had been excavated to a length of over 225 feet. About 125 feet from the entry, another room had been opened. As the decedent was killed between the mouth of this room and the entry, the portion of the main room where the accident happened was then serving as a roadway

adopted under the circumstances.¹ The fact that he "pursued his own

method carelessly" also constitutes a ground of liability, irrespective of

for both rooms. The contention on the defendant's part was that, under this agreement, the safety of the roof and the sufficiency of the timbering were left to the miners in charge of the rooms, and that, if the timbering was defective, the fault was with the miners themselves, who had erected the props, and who were fellow servants of the decedent. The defendant introduced in evidence, from "The Des Moines Agreement of the United Mine Workers and Operators," applicable to the operation of this mine, certain resolutions, by one of which it is recited that the company should furnish all necessary timbers, and the miners should keep their rooms securely propped. On the other hand plaintiff offered evidence tending to show a custom and usage under which it was the duty of the pit boss and the timberman working under him to maintain all the tracks and roads in the mine in a safe condition for the drivers, after the miners had set up their timbers as they worked out the room. After the admission of this testimony, the trial judge, on the defendant's motion, struck it out, as being irrelevant to any issue in the case, and directed a verdict for the defendant. Held error. The court said: "The resolution above referred to evidently related to the duty of the defendant with reference to the safety of the miners, and not with reference to its duty as to the safety of drivers employed in their work in operating cars, and the removal over such tracks of coal from distinct portions of the room, or from other rooms which had been opened from it. It is conceded that defendant was chargeable with the duty of maintaining the entries in a safe condition for use by the drivers, and the portion of room 7 in which the accident happened was not, in the nature of its use, different from an entry. If it was customary for the pit boss and the timberman working under him to inspect the entries and those portions of the rooms which were used practically as entries through which coal should be hauled, decedent had, we think, a right to rely upon such custom as a protection against danger from improper timbering." The principal controversy was as to whether, at the

place where the accident happened, the defendant was chargeable with the condition of the props and cap pieces supporting the roof which had been originally placed by the miners working in room 7 as the work progressed. Compare also the cases cited under ¶ (3) of subd. X., supra.

¹In *Swearingen v. Consolidated Troup Min. Co.* (1908) 212 Mo. 524, 111 S. W. 545, the plaintiff was a member of a gang of laborers who were engaged in the work of timbering and of cutting a side drift, under the supervision and direction of a ground foreman. The sets of timbering consisted of four posts surmounted by caps, and a superstructure reaching near the roof of the drift. After this last set had been erected, the ground boss directed the plaintiff and his work mate to drill a hole in the face of the drift and blast it with dynamite, and then went off to another part of the mine. The explosion drove one of the posts of the superstructure considerably out of place, and the plaintiff was injured as a result of obeying an order of the foreman to climb up and take it down. The gravamen of the petition was that the plaintiff had been injured by reason of the negligence of the ground foreman in failing properly to brace the posts and properly wedge and key the timber to the roof of the drift; in failing to properly inspect and ascertain the defective and dangerous condition of the timbering, and in ordering plaintiff to climb to the top of the same, and in assuring him that it was safe to do so, when, in fact, it was not safe. The testimony of both witnesses for the defendant indicated that there was a safer method to get the timbers down than that of sending a man to climb up the tottering structure, but the foreman did not even examine it from the slope of the pile of earth. A verdict for the plaintiff was sustained. The objection that it was error to admit plaintiff's evidence tending to prove that the ground foreman stopped the work of building the last set of timbers before it was properly wedged against the roof and braced was held untenable, because such evidence was relevant with regard to all the alleged acts of negligence.

whether that method was or was not a proper one.²

XV. Employer's liability considered with reference to the quality of his duty in respect of the timbering of the mine.

In any jurisdiction in which the duty of an employer to furnish a safe place of work for his servants is regarded as absolute and non-delegable, a description applicable to nearly all the American states,¹ the fact that the unsafe conditions created by the want of timbering, or by defective timbering, were attributable to the

negligence of a fellow servant of the person injured by reason of the existence of those conditions, does not absolve the employer from liability for the injury.³ In this point of view the operator of a mine is considered to be answerable for the negligence of various classes of superior employees invested with functions of control as respects the whole underground workings of the mine, or the particular portion of those workings in which the injury complained of was received.⁴ Other employees of

² *Vanesse v. Catsburg Coal Co.* (1893) 159 Pa. 403, 28 Atl. 200. There the evidence was held to warrant the inference that "leaving this ton or two of loose material to fall on and crush those who came after [the timbermen] was not the result of a mistaken judgment as to method, but of indifference to the consequences of carelessness in carrying out that method."

¹ See, generally, *Labatt, Mast. & S.* chap. 64.

³ This doctrine and its rationale are clearly stated in the following passage of the opinion in *Western Coal & Min. Co. v. Ingraham* (1895) 17 C. C. A. 71, 36 U. S. App. 1, 70 Fed. 219: "After a mine is once opened and timbered, it is the duty of the owner or operator to use reasonable care and diligence to see that the timbers are properly set, and keep them in proper condition and repair. For this purpose it is his duty to provide a competent mining boss or foreman to make timely inspections of the timbers, walls, and roof of the mine, to the end that the miners may not be injured by defects or dangers which a competent mining boss or foreman would discover and remove. This is a positive duty which the master owes the servant. A neglect to perform this duty is negligence on the part of the master, and he cannot escape responsibility for such negligence by pleading that he devolved the duty on a fellow servant of the injured employee. It is an absolute duty which the master owes the servant to exercise reasonable care and diligence to provide the servant with a reasonably safe place in which to work, having regard to the kind of work and the conditions under which it must necessarily be performed; and

whenever the master, instead of performing this duty in person, delegates it to an officer or servant, then such officer or servant stands in the place of the master, and the negligence of such officer or servant is the negligence of the master; and any servant injured by such negligence may recover from the master for such injury regardless of the relation the injured servant sustained to the officer or servant whose negligence resulted in inflicting the injury. . . . The question as to whose duty it was to keep the mines when once opened and timbered in a reasonably safe condition was one of law, and not one of fact, depending upon the varying opinions of the miners, and the testimony introduced or offered on that subject was irrelevant and immaterial."

⁴ The following employees have been treated as vice principals:

Manager. *Kelley v. Fourth of July Min. Co.* (1895) 16 Mont. 484, 41 Pac. 273.

Superintendent. *Western Invest. Co. v. McFarland* (1908) 91 C. C. A. 504, 166 Fed. 76; *Republic I. & Steel Co. v. Pshonko* (1918) 163 C. C. A. 576, 251 Fed. 582; *Sloss-Sheffield Steel & I. Co. v. Green* (1909) 159 Ala. 178, 49 So. 301; *Quincy Coal Co. v. Hood* (1875) 77 Ill. 68, 12 Mor. Min. Rep. 148; *Stearns Coal & Lumber Co. v. Spradlin* (1917) 176 Ky. 405, 195 S. W. 781; *Tetherton v. United States Talc Co.* (1899) 41 App. Div. 613, 58 N. Y. Supp. 55, affirmed in (1901) 165 N. Y. 665, 59 N. E. 1131; *Ainslie Min. & R. Co. v. McDougall* (1909) 42 Can. S. C. 420.

Mine foreman or boss.

Colorado.—*Cripple Creek Min. Co. v. Brabant* (1906) 37 Colo. 423, 87 Pac. 974.

the higher grades who have been treated as vice principals are the following: Mine inspectors;⁴ foreman appointed to inspect the timbers, walls, and roofs of the mine;⁵ foreman appointed to direct and superintend the timbering work.⁶ It has also been held that the employer is chargeable with the negligence of

employees who perform the manual work of timbering a roof,⁷ or of securing it by taking down loose rocks.⁸

In a few instances the nonliability of the operator has been affirmed with respect to the negligence of employees belonging both to the higher and lower grades.⁹ But in a jurisdiction in which the negligence of

Indiana.—Diamond Block Coal Co. v. Cuthbertson (1906) 166 Ind. 290, 76 N. E. 1060; Antioch Coal Co. v. Rocky (1907) 169 Ind. 247, 82 N. E. 76 (statutory mine boss); Linton Coal & Min. Co. v. Persons (1895) 15 Ind. App. 69, 43 N. E. 651.

Kentucky.—Ada Coal Co. v. Linville (1913) 152 Ky. 2, 153 S. W. 21; Jellico Coal Min. Co. v. Helton (1914) 157 Ky. 610, 163 S. W. 744.

Michigan.—Lewis v. Detroit Vitri-fied Brick Co. (1911) 164 Mich. 487, 129 N. W. 726.

Minnesota.—Tomazin v. Shenango Furnace Co. (1908) 103 Minn. 334, 114 N. W. 1128.

Missouri.—Hall v. Manufacturers Coal & Coke Co. (1914) 260 Mo. 351, 168 S. W. 927, Ann. Cas. 1916C, 375; Anderson v. Western Coal & Min. Co. (1909) 138 Mo. App. 76, 119 S. W. 986.

Ohio.—Wellston Coal Co. v. Smith (1901) 65 Ohio St. 70, 55 L.R.A. 99, 87 Am. St. Rep. 547, 61 N. E. 143, 10 Am. Neg. Rep. 445.

Virginia.—Russell Creek Coal Co. v. Wells (1898) 96 Va. 416, 31 S. E. 614.

Mining captain. Anderson v. Pitt Iron Min. Co. (1909) 108 Minn. 261, 121 N. W. 915.

Ground foreman or boss. Hurst v. Nineteen Hundred Mine Min. Co. (1911) 160 Mo. App. 53, 141 S. W. 470; Swearingen v. Consolidated Troup Min. Co. (1908) 212 Mo. 524, 111 S. W. 545.

Pit boss. Hancock v. Keene (1892) 5 Ind. App. 408, 32 N. E. 329; Tether-ton v. United States Talc Co. (1899) 41 App. Div. 613, 58 N. Y. Supp. 55, affirmed in (1901) 165 N. Y. 665, 59 N. E. 1131; McKenzie v. North Coast Colliery Co. (1909) 55 Wash. 495, 28 L.R.A.(N.S.) 1244, 104 Pac. 801; Gennaux v. Northwestern Improv. Co. (1913) 72 Wash. 268, 130 Pac. 495.

Bank boss. Smith v. Garrison (1908) 32 Ky. L. Rep. 1278, 108 S. W. 293; Virginia Iron, Coal & Coke Co. v. Munsey (1909) 110 Va. 156, 65 S. E. 478.

Shift boss. Bunker Hill & S. Min. & Concentrating Co. v. Jones (1904) 65 C. C. A. 363, 130 Fed. 813; Ander-son v. Pitt Iron Min. Co. (1909) 108 Minn. 261, 121 N. W. 915.

⁴Bunker Hill & S. Min. & Concen-trating Co. v. Jones (Fed.) supra; Blazenic v. Iowa & W. Coal Co. (1897) 102 Iowa, 706, 72 N. W. 292.

⁵Western Coal & Min. Co. v. Ingra-ham (1895) 17 C. C. A. 71, 36 U. S. App. 1, 70 Fed. 219.

⁶Ohio Copper Min. Co. v. Hutch-ings (1909) 96 C. C. A. 653, 172 Fed. 201.

⁷Grant v. Varney (1895) 21 Colo. 329, 40 Pac. 771; United Coal Min. Co. v. Daugherty (1911) 51 Ind. App. 165, 96 N. E. 477; Corson v. Coal Hill Coal Co. (1897) 101 Iowa, 224, 70 N. W. 185, 1 Am. Neg. Rep. 230; Williams Coal Co. v. Cooper (1910) 138 Ky. 287, 127 S. W. 1000; Consolidated Coal Co. v. Music (1916) 172 Ky. 153, 189 S. W. 200; Borderland Coal Co. v. Kirk (1818) 180 Ky. 691, 203 S. W. 534.

In Consolidated Coal Co. v. Scheiber (1897) 167 Ill. 539, 47 N. E. 1052, the court went no further than to decline to say, as a matter of law, that the timberman who propped the roof was a fellow servant of a driver of a car.

⁸Rhodes v. Walker (1909) — Ky. —, 115 S. W. 257. Contra, see Fosburg v. Phillips Fuel Co. (Iowa) note 9, infra.

⁹In Tutwiler Coal, Coke & I. Co. v. Farrington (1906) 144 Ala. 157, 39 So. 898, it was held that a mine foreman, intrusted with the duty of seeing that the "ways, works, machinery, and plant" are maintained in proper con-dition, was not a vice principal. Eureka Co. v. Bass (1886) 81 Ala. 200, 60 Am. Rep. 152, 8 So. 216, 13 Am. Neg. Cas. 141, was overruled.

In Fosburg v. Phillips Fuel Co. (1894) 93 Iowa, 54, 61 N. W. 400, a laborer engaged in taking down loose slate from the roof of an entry was held to be the fellow servant of a miner who was killed by a rock which fell upon him at the place where this

such employees is not imputed to the employer, an action may be maintained against him if the evidence shows that his own negligence, or

that of an employee who is considered to be a vice principal, was a concurrent cause of the injury complained of.¹⁰

work was being performed, while he was carrying timber towards his room. Contrast *Rhodes v. Walker* (Ky.) note 7, *supra*.

In *Golden v. Mt. Jessup Coal Co.* (1909) 225 Pa. 164, 73 Atl. 1103, it was held that a mine owner was not liable for the negligence of a certified foreman in placing a prop so near a track that there was not a "sufficient clearance for cars ordinarily employed."

In *Hall v. Johnson* (1865) 2 Hurlst. & C. 589, 159 Eng. Reprint, 662, 34 L. J. Exch. N. S. 222, 11 Jur. N. S. 80, 11 L. T. N. S. 779, 13 Week. Rep. 411, 9 Mor. Min. Rep. 684, an underlooker in a mine, whose duty it was to examine the roof, and prop it up, if dangerous, was a fellow servant of a workman.

In *Stewart v. Coldness Iron Co.* (1877) 4 Sc. Sess. Cas. 4th series, 952, where it was held that a mine owner is not liable for the negligence of his employees in failing to prop a

passage securely, Lord Ormsdale observed: "The company having supplied plenty of wood, no case can be maintained on that point (the ground of its failure to do so). And if the wood being supplied was not carried to and laid down in suitable places in the pit, that must have been the fault, not of the company, but of others employed in the pit."

In *United States Gypsum Co. v. Sliwienska* (1910) 106 C. C. A. 38, 183 Fed. 688, a prop setter and tracklayer was held to be the fellow servant of the decedent, another prop setter, who was assisting him to shift the track in a gypsum mine,—an operation which required the removal of standing props.

¹⁰ *Freeman v. Sand Coulee Coal Co.* (1901) 25 Mont. 194, 64 Pac. 347; *Tetherton v. United States Talc Co.* (1899) 41 App. Div. 613, 58 N. Y. Supp. 55, affirmed in (1901) 165 N. Y. 665, 59 N. E. 1131. C. B. L.

JOHN FENOGLIO, Admr., etc., of Antonio Fenoglio, Deceased, Plff. in Err.,
v.

FOLSOM-MORRIS COAL MINING COMPANY.

Oklahoma Supreme Court — May 3, 1921.

(— Okla. —, 198 Pac. 69.)

Master and servant — failure to furnish mine props — assumption of risk.

1. In an action for damages for the wrongful death of a coal miner alleged to have occurred as the direct and proximate result of the failure of the employer to furnish props and cap pieces, and of the mine foreman to abate all dangerous conditions reported to him and to inspect said mine as provided in §§ 3984 and 3988 of Rev. Laws 1910, the defendant cannot take advantage of the defense of assumption of risk; and it is the duty of the trial court, where there is evidence which reasonably tends to support the plaintiff's theory that the employer has failed to perform his statutory duty in safeguarding a coal mine as required by the statute, to instruct the jury as to the duty of the employer as prescribed by the statute, and a failure to do so constitutes reversible error.

[See note on this question beginning on page 1430.]

—violation of statutory duty—contributory negligence.

2. In an action for damages by the administrator of the estate of a de-

ceased person for wrongful death, wherein it is alleged that the death of the deceased resulted from a violation

(— Okla. —, 198 Pac. 69.)

of a statutory duty imposed upon an employer, the contributory negligence of the person injured may be urged as a defense thereto, unless the statute

prescribing the duty of the employer expressly excludes such defense.

[See 8 R. C. L. 780, 781; 18 R. C. L. 634.]

ERROR to the District Court for Coal County (Linebaugh, J.) to review a judgment in favor of defendant in an action brought to recover damages for the wrongful death of plaintiff's decedent, alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. J. R. Wood and E. N. Holland, for plaintiff in error:

If the company failed to comply with any statutory requirement, and if as a result of such failure an employee is injured or killed, the defense of assumed risk is not available.

Jones v. Oklahoma Planing Mill & Mfg. Co. 47 Okla. 477, 147 Pac. 999; Curtis & G. Co. v. Pribyl, 38 Okla. 511, 49 L.R.A. (N.S.) 471, 134 Pac. 71; Great Western Coal & Coke Co. v. Coffman, 43 Okla. 404, 143 Pac. 30.

Mr. George Trice for defendant in error.

Kenamer, J., delivered the opinion of the court:

This action was filed in the district court of Coal county on April 24, 1917, by John Fenoglio, administrator of the estate of Antonio Fenoglio, deceased, against the Folsom-Morris Coal Mining Company, a corporation, to recover damages on account of the death of Antonio Fenoglio. The material allegations of the petition filed by the plaintiff in error, John Fenoglio, as the administrator of the estate of Antonio Fenoglio, plaintiff below, alleges that Antonio Fenoglio was, on the 14th day of March, 1917, employed by the Folsom-Morris Coal Mining Company in the capacity of a coal digger in mine No. 8; that while working at his employment in the last room of said mine, not numbered, off of second south entry in mine No. 8, at which place he had been directed by the defendant to work, and while so engaged in said work and service of the defendant company, without negligence on his own part, the said Antonio Fenoglio was killed by a fall of coal from the roof at or near the point and just above where he was working; that

his death was caused by the neglect and carelessness of the defendant; that the defendant's negligence consisted of its failure to furnish the necessary timbers for propping the overhanging coal in the roof in the room in which the deceased was working; failure to inspect the mine and supervise the work as required by law; and in substance pleaded a general violation of §§ 3983, 3984, 3988, and 3989 of the Revised Laws of 1910.

The defendant filed answer denying the allegations of the petition pleading assumption of risk and contributory negligence. The cause was tried and the issues of fact submitted to a jury on the 3d day of October, 1917, which resulted in a verdict in favor of the defendant. The plaintiff in due time filed a motion for a new trial, which was overruled by the court, and judgment entered in favor of the defendant. The plaintiff brings the case here for review, having assigned numerous grounds of error. There is one question of law involved in this cause that is decisive of this appeal, and all the different assignments of error may be considered under the one proposition. The question presented is the correctness of the instructions of the court to the jury in which the court in substance instructed the jury that the right of the plaintiff to recover in the action was governed by the ordinary common-law liability. It appears upon a careful examination of the record that the court assumed that the deceased was killed by the falling of coal, which was caused by his work in undermining it, and that he assumed the risk incident to his em-

ployment. Therefore the employer would not be held liable.

The court in his instruction to the jury failed to specifically instruct the jury what the statutory duties of the employer were, but presented the case to the jury upon the theory that the common-law rule of master and servant applied. The plaintiff, by different instructions, requested the court, almost in the language of the statute, to instruct the jury upon the statutory duties of the defendant. The court, in failing to instruct the jury as to the duties of the defendant under the statute, committed reversible error.

In an action for damages, where the plaintiff relies upon acts of negligence which constitute a violation of a statutory duty which the plaintiff claims was the direct and proximate cause of the injury, the defendant cannot take

Master and servant—failure to furnish mine props—assumption of risk.

advantage of the defense of assumption of risk. Jones

v. Oklahoma Planing Mill & Mfg. Co. 47 Okla. 477, 147 Pac. 999; Whitehead Coal Min. Co. v. Schneider, 75 Okla. 175, 183 Pac. 49; Curtis & G. Co. v. Pribyl, 38 Okla. 511, 49 L.R.A. (N.S.) 471, 134 Pac. 71; Great Western Coal & Coke Co. v. Coffman, 43 Okla. 414, 143 Pac. 30.

The rule appears to be well settled in this jurisdiction that, upon a failure of the employer to comply with his statutory duties which resulted in injury to the employee, the defense of assumption of risk is not available. The de-

—violation of statutory duty—contributory negligence.

fense, however, of contributory negligence, is available.

Jones v. Oklahoma Planing Mill & Mfg. Co. supra.

In the case at bar the defendant in error failed to file briefs as re-

quired by rule No. 7 of this court, and it is not incumbent upon the court to search the record to find some theory upon which to sustain the judgment if the errors assigned and presented by the plaintiff in error appear to be reasonably sustained. However, we have carefully gone over the record in this cause, and have reached the conclusion that the trial court committed reversible error in failing to instruct the jury upon what constituted the statutory duties of the defendant in operating its mine, and that the defendant would be liable if the jury found, from the evidence introduced, that the defendant had failed to perform its statutory duties, and its failure was the proximate cause of the deceased's death.

The judgment is therefore reversed, and the cause remanded, with directions to the trial court to grant the plaintiff a new trial and proceed with said cause in harmony with the views herein expressed.

Harrison, Ch. J., and Pitchford, Kane, and Johnson, JJ., concur.

NOTE.

The questions as to assumption of risk and contributory negligence under statutes in relation to the timbering of mines are considered in subd. V., at p. 1485, of the annotation following HENRY v. MISSOURI, K. & T. R. Co. post, 1430, on the general subject of the duty of an employer with respect to a mine under statutes relating specifically to the subject. The duty of the employer in this regard, under the common law and general employers' liability acts, is considered in the annotation following Elk Horn Min. Corp. v. Vanhooose, post, 1380.

STITH COAL COMPANY, Appt.,
v.
DAVE SANFORD.

Alabama Supreme Court — May 13, 1915.

(192 Ala. 601, 68 So. 990.)

Master and servant — duty to furnish props for mine — length.

1. Failure of a mine owner to furnish props of the exact height of the room where they are to be used, as ordered by the employee, does not render him liable for breach of statutory duty to furnish timbers of suitable length if those furnished are the proper length when used in connection with the customary cap board.

[See note on this question beginning on page 1430.]

Trial — jury — utility of mine props.

2. The jury must determine whether compliance with a statute requiring the furnishing of props of suitable length has been met by furnishing them an inch longer than the exact height of the room, as ordered, if they could be used by digging a small hole in the floor of the mine as is usual and customary, and could be done without unusual or extraordinary efforts, and a request that it be done

would be reasonable and expected of the ordinarily prudent miner; and also whether or not it was possible to dig a hole in the floor at the place where the props were needed.

— suitability of props with caps.

3. The jury must determine whether or not the furnishing of mine props which, with their caps, were of the length ordered, complied with a statute requiring the furnishing of props of suitable length.

APPEAL by defendant from a judgment of the Law and Equity Court for Walker County (Sowell, J.) in favor of plaintiff in an action brought to recover damages for breach by defendant, of its statutory duty to furnish mine props of a suitable length. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Stokeley, Scrivner, & Dominick and Bankhead & Bankhead for appellant.

Messrs. Ray & Cooner for appellee.

Gardner, J., delivered the opinion of the court:

Suit by an employee against the employer for damages arising out of an injury received while digging coal in the employer's mine. The employee was at work in a "room" in the mine, which was his working place, when a rock fell upon him from the roof, resulting in the injuries of which he complains. The case was tried upon count 6 of the complaint, the general issue, and special pleas of contributory negligence Nos. 3, 4, and 7, resulting in a judgment for the plaintiff, from which this appeal is prosecuted.

The sixth count, after adopting

that portion of count 2 which alleged the relationship of master and servant, and that the plaintiff was engaged in the discharge of his duties under such employment at the time of the injury, and how the said injury occurred, then proceeds to allege in substance that the plaintiff gave notice of a demand or request to the person whose duty it was to deliver, or have delivered, certain props or timbers needed in the mines; and that it was the duty of the defendant to promptly deliver the said props; and that this duty was breached by it, in that it failed to deliver or have delivered said props, and as the proximate consequence thereof plaintiff was injured.

It is thus seen that this count of the complaint rested for recovery upon the breach of the statutory

duty set out in § 38 of an act entitled, "An Act to Regulate the Mining of Coal in Alabama," approved April 18, 1911. Said section reads as follows: "Sec. 38. It shall be the duty of persons operating coal mines in this state to keep at a convenient place at or near the main entrance of the mine, or in the mines, a sufficient supply of props and other timbers useful for propping therein, of suitable lengths and sizes, for those working in such mines. It shall be the duty of those working in said mines who need props or other timbers to select and mark the same when needed for propping by them, designating on such props or timbers the place at which the same are to be delivered, or give notice to the person whose duty it is to deliver or have the same delivered, of the number and kind of props or other timbers needed and of the place at which they are to be delivered. It shall then be the duty of the operator to promptly deliver or cause to be delivered such props or other timbers at the place designated." Acts 1911, p. 500.

No question is here presented as to whose duty it was to prop the roof of the mine in the room where the plaintiff was at work (*Tutwiler Coal, Coke & I. Co. v. Farrington*, 144 Ala. 157, 39 So. 898; *Mascott Coal Co. v. Garrett*, 156 Ala. 290, 47 So. 149), as that question is foreclosed by the plaintiff himself, who testified that it was his "duty to prop the roof when it was to be propped, and the company's duty to furnish the timbers."

Testimony for the plaintiff tended to show that he requested that the company furnish him with props to be used at that place, and that defendant failed to do so, and therefore violated its statutory duty, and as the proximate consequence thereof the rock fell from the roof, resulting in his injury.

There was also proof tending to show that the coal in that room, where the rock fell, was 3 feet and 5 inches high. It was the contention of the defendant that it fur-

nished plaintiff with props 3 feet 4 inches, 3 feet 6 inches, and 3 feet 8 and 10 inches, and that in this particular place a prop 3 feet 4 inches, as well as one 3 feet 6 inches, was suitable and proper to be used, the height of the coal being 3 feet 5 inches.

It was further insisted by defendant that it was customary and proper in all well-regulated mines to use with the props what is known as a "cap board." Indeed, this seems not to be controverted, as the following quotation from the testimony of the plaintiff discloses: "A cap board is an instrument in general use in the mines, used for the purpose of propping. Cap boards have been used in all mines where I have worked. It is a board from 4 to 5 inches wide and about 12 inches long and about 1 inch thick. When a prop is an inch short, you can use that other inch by putting in a cap board. A man needs a cap board under a prop when he uses it; that is the way to set it up. If the coal is 4 feet 5 inches, you can prop it with a prop 4 feet 4 inches and a cap board 1 inch."

The defendant did not have timbers cut 3 feet 5 inches, or other odd-numbered inches; but the insistence was they had furnished props 3 feet 4 inches, as well as 3 feet 6 inches, which were entirely proper to be used in propping the roof of the mine where the height of the coal was, as previously stated, 3 feet 5 inches. There was evidence to show that it was proper to use cap boards over all props, as testified to by the plaintiff himself. There was also evidence tending to show that a prop 3 feet 6 inches was suitable and was used in well-regulated mines for propping purposes where the height of the coal was 3 feet 5 inches, as here; the same being done by digging an inch or more in the floor of the mine and in using a "cap" on the prop where it touches the roof.

The defendant offered to show that the props so furnished were entirely suitable, and such as were

used in all well-regulated mines. Objection to such testimony was sustained by the court, and the same question was presented by various objections sustained, as well as charges refused. The defendant insisted that such proof was offered not only in support of his defense of contributory negligence, but also to show that by furnishing such props, it had substantially complied with its statutory duty and with the request of the plaintiff, and that there was no breach or violation of such statutory duty as was the proximate cause of the injury.

On the other hand, it seems to have been the insistence of counsel for the plaintiff that, as the testimony for the plaintiff tended to show that he had demanded props 3 feet 5 inches in length, therefore the testimony of the defendant to the effect that it had furnished props 3 feet 4, and 3 feet 6, inches in length, was not competent, for the reason that it would not be in compliance with the statute, and, as stated in the grounds of objection, "was in violation of the terms of the statute;" that, the plaintiff having demanded props 3 feet 5 inches, it was necessary, to comply with the statute, that the defendant furnish props of the exact length and dimensions so demanded; and that proof that it had furnished props entirely suitable for the purpose needed was incompetent.

Counsel for plaintiff argue that the above-quoted statute is mandatory, as has been held by other states having statutes of similar character, citing the following cases dealing with the question: *McDaniels v. Royle Min. Co.* 110 Mo. App. 706, 85 S. W. 679; *Leslie v. Rich Hill Coal Min. Co.* 110 Mo. 31, 19 S. W. 308; *Springfield Coal Min. Co. v. Gedutis*, 227 Ill. 9, 81 N. E. 9; *Western Anthracite Coal & Coke Co. v. Beaver*, 192 Ill. 333, 61 N. E. 335; *Kellyville Coal Co. v. Strine*, 217 Ill. 516, 75 N. E. 375; *Sugar Creek Min. Co. v. Peterson*, 177 Ill. 325, 52 N. E. 475; *Donk Bros. Coal & Coke Co. v. Lucis*, 226 Ill. 23, 80 15 A.L.R.—90.

N. E. 560; *Lowe v. Clear Creek Coal Co.* 140 Ky. 754, 33 L.R.A. (N.S.) 656, 131 S. W. 1007, Ann. Cas. 1912B, 574; 5 *Labatt, Mast. & S.* pp. 5811-5819; *Druglis v. Northwestern Improv. Co.* 41 Wash. 398, 88 Pac. 101; *Morris Coal Co. v. Donley*, 73 Ohio St. 298, 76 N. E. 945. The holdings of these authorities—that a statute of this character places an imperative duty upon the owner or operator, and is therefore mandatory, and not directory, and that, the statute being intended for the preservation and protection of human life, it should be so construed that the ends for which it was intended may be accomplished—are in accord with the holdings of this court on questions of like character, and we so construe the statute here. *Howels Min. Co. v. Grey*, 148 Ala. 535, 42 So. 448; *De Soto Coal Min. & Development Co. v. Hill*, 179 Ala. 186, 60 So. 583.

While we construe this statute as mandatory, yet the law is a reasonable master, and it should be so construed in the light of common sense in ascertaining the legislative intent. The language of the above-quoted section plainly shows the purpose of the act (the object being the preservation of human life) is to have furnished at a convenient place, either in the mine or near its main entrance, a sufficient supply of props and other timbers useful for propping therein, and of suitable lengths and sizes, when needed for such purpose by the miner.

This cause of action is based upon the latter portions of the above-quoted section, and plaintiff claims that he gave notice of the number and kind of props needed, and that they were not delivered. Upon such demand being made, it becomes, of course, under the statute, the duty of the operator to comply therewith; the demand itself being reasonable and timely. *Springfield Coal Min. Co. v. Gedutis*, 227 Ill. 9, 81 N. E. 9. But there is nothing in the act indicating in the least that the operator would be required to furnish props of the exact length, as con-

tended by the plaintiff, if he in fact furnished a sufficient supply of props of suitable length and sizes and useful for propping the mine in the place where desired by the plaintiff. Our attention is directed to the language of the opinion in *Western Anthracite Coal & Coke Co. v. Beaver*, 192 Ill. 333, 61 N. E. 335, where it was said that the miner must be the one to determine the length and dimensions of the props and cap pieces which he deems necessary to properly secure the roof for his own safety. And the opinion proceeds: "If he ordered 6½ feet props, the owner or operator has not complied with the statute when he has furnished props which must be spliced or sawed in two before they can be used."

But this opinion by no means lends color to the argument that, where the operator has furnished props entirely suitable for the purpose for which they were ordered and which require no unusual effort or inconvenience in setting them up, it would be in violation of his duty as a matter of law, although they might vary an inch from the exact dimensions ordered. The reasoning of the above-cited authority is well understood when it is considered that the purpose of the act was the preservation of human life, and as a duty rested upon the operator to furnish suitable props, that duty is not met when he furnishes props which must be "worked over," as it were, before they can be used.

The contention of counsel for the plaintiff would lead to a construction of the statute wholly unreasonable. Following the logic of the insistence, it would leave it to the whim or caprice of the miner to order props of most unusual lengths and sizes unheard of in mining operations. Doubtless having this in view, the supreme court of Illinois, in *Springfield Coal Min. Co. v. Gedutis*, *supra*, said: "We are of the opinion that under this statute, when the miner makes a reasonable and timely demand for timbers of a particular and specified kind, to be

used in propping the roof of his working place, the operator should furnish him with such timbers as are called for"—thus recognizing that the demand of the miner must be reasonable.

The insistence would further lead to the result that if the props furnished were not of the exact length demanded, but varied therefrom only a fraction of an inch, which might in no way affect their suitability for the purpose for which they were ordered, nevertheless the operator had breached his statutory duty, and liability had attached. It is clear that the legislature intended no such result, and such a construction of the statute would be out of harmony with all reason, and, as previously stated, the statute itself shows that its purpose was to require the operator to furnish suitable props upon the demand of the miner.

All the above-cited cases have been carefully reviewed, and we find none which go to the length contended for by counsel for the plaintiff, or, we think, even tending in that direction; they are by no means in conflict with the conclusion we have here reached. The evidence is in conflict as to whether or not props 3 feet 6 inches and 3 feet 4 inches were furnished. It would seem that timbers 3 feet 6 inches would require that a small hole be dug in the floor of the mine. If this was usual and customary, and could be done in this particular place without extraordinary or unusual effort, and that to request it to be done would be reasonable and expected of an ordinarily

**Trial—jury—
utility of
mine props.**

prudent miner, it would be a question for the jury as to whether props of that length were entirely suitable, and that in furnishing them the defendant had substantially complied with the demand. The plaintiff, however, testified that it was practically impossible to dig a hole in the floor of that mine. This also would be a question for the jury; and so as to the props 3 feet 4 inches. The court should have

admitted evidence to the effect that props of that length were entirely suitable for the purposes intended,

Master and servant—duty to furnish props for mine—length.

and that in all well-regulated mines they are used with a cap; and it should

have been left to the jury to determine whether or not the furnishing

Trial—suitableness of props with caps.

of such props was a substantial compliance with the plaintiff's demand and with the statutory duty placed upon the operator; also, as to whether or not the failure to furnish props of the exact length of 3 feet 5 inches was the proximate cause of the injury. It was admitted by the plaintiff that no timbers were laid aside and marked by him, but he insisted that he gave notice, and made verbal demand for the props upon the person whose duty it was to deliver or have the same delivered; and this was sufficient notice or demand under provision of the above-quoted statute.

The question here discussed is presented in several forms, but there is no necessity for treating separately each assignment of error. What is here said shows that a reversal of this case is necessary, and will be sufficient for the purposes of another trial.

Counsel for appellee urge upon us that, even should error have been committed in the trial of this cause,

it was error without injury and should not work a reversal; and they insist that the defendant got the benefit of the testimony notwithstanding the objections, which were sustained, and that charges given cured any error which might have been committed in the refusal of charges asked upon the theory above indicated. To this insistence we have given careful consideration, and, after a painstaking review of the record in the case, we are persuaded that the errors complained of probably injuriously affected substantial rights of the parties, and that therefore there is no room for the application in this case of the rule as to error without injury.

The judgment of the court below is reversed, and the cause remanded.

Anderson, Ch. J., and McClellan and Sayre, JJ., concur.

NOTE.

The duty of an employer with respect to the timbering of a mine, under statutes relating specifically to the subject, is treated in the annotation following *HENRY v. MISSOURI, K. & T. R. Co.* post, 1430. The duty of the employer in this regard, under the common law and general employers' liability acts, is considered in the annotation following *Elk Horn Min. Corp. v. Vanhooose*, ante, 1380.

VICTOR HENRY, by Next Friend,

v.

MISSOURI, KANSAS, & TEXAS RAILWAY COMPANY, Appt.

Kansas Supreme Court—April 8, 1916.

(97 Kan. 682, 155 Pac. 578.)

Master and servant — mines — duty to furnish props.

The furnishing of prop timber at a point half a mile from the place where miners are working is not a compliance with the statutory requirement that those in charge of a coal mine shall keep in easy access to the miner props of suitable length and size for the places where they are to be used, although a miner may obtain them, in accordance with a custom

Headnote by JOHNSTON, Ch. J.

in the mine, by requesting a driver who may pass his room to select the props at the place where they are kept and bring them when he returns from depositing his load of coal.

[See note on this question beginning on page 1430.]

(Porter and Dawson, JJ., dissent.)

APPEAL by defendant from a judgment of the District Court for Crawford County (Curran, J.) in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by failure of defendant to comply with a statutory provision requiring miners to be supplied with prop timbers. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. W. W. Brown, James W. Reid, and D. H. Woolley, for appellant:

The operator is not obligated to inspect the room of the miner to determine whether props are needed.

Brooks v. Central Coal & Coke Co. 96 Kan. 530, 152 Pac. 616.

Plaintiff's own action caused his injury.

Burgin v. Missouri, K. & T. R. Co. 90 Kan. 194, 133 Pac. 560.

Messrs. C. A. McNeill and C. S. Denson, for appellee:

No demand for prop timbers, under the statute, is necessary or required.

Le Roy v. Missouri, K. & T. R. Co. 91 Kan. 548, 138 Pac. 646.

Whether or not the statute had been complied with was a question of fact for the jury.

Ozorkiewicz v. Carr Coal Min. & Mfg. Co. 83 Kan. 473, 112 Pac. 135.

Where the statute makes it a duty to furnish props, that duty cannot be delegated to another, and when that other fails, liability be escaped.

Cheek v. Missouri, K. & T. R. Co. 89 Kan. 247, 131 Pac. 617.

Johnston, Ch. J., delivered the opinion of the court:

This is an appeal from a judgment secured by Victor Henry, a minor, against the defendant railway company, for damages sustained as a result of a large rock falling upon him while at work in one of the rooms of the defendant's coal mine in Cherokee county.

It was alleged in the petition that the injury was caused by the failure of the defendant to comply with the provisions of § 4987 of the General Statutes of 1909, requiring mines to be supplied with prop timbers of

suitable length and size, and easy of access, and that, if such timbers had been properly placed at the disposal of the plaintiff, he could have used them to prevent the rock from falling upon him. The answer of the defendant alleged that at the time of the accident there was a supply of these prop timbers kept at a certain location in the mine, in accordance with a custom common to all such mines, and known to and acquiesced in by the plaintiff, under which a miner, working in a room of a mine, was to notify the owner or operator of the mine when he needed prop timbers at the place in which he was working. It was further alleged that the defendant never received any request for such timbers from the plaintiff before the accident occurred, and did not know that the plaintiff had any need of them; and that the injuries suffered by the plaintiff were due, in whole or in part, to his own negligence.

The rock, about 3,000 pounds in weight, which injured the plaintiff, had been embedded in the roof of the chamber or room where he was working, and about three days before the accident occurred, noticing that it was loose, he made an unsuccessful attempt to pull it down. He testified that he notified the superintendent of the mine of the condition of the roof, and asked for timbers to prop it up, specifying the kind wanted, and the superintendent said, "All right," but did not furnish any, and he said that he

made no attempt other than this to get the prop timbers for his room. In the testimony of the superintendent he denied that he had had any conversation with the plaintiff with regard to the condition of the roof of the room. It seems that the supply of prop timbers for the mine was kept at a place called the "parting," which is the place where the drivers deposit their loads and take back their empties, and ordinarily, when a miner needs props, he asks the driver as he passes the room to bring him the size and kind wanted, and the latter goes to the parting where the props are kept, selects the proper ones, and leaves them in front of the miner's room on his return trip. This parting is about half a mile from the room where the plaintiff was working. The plaintiff testified that he knew where the props were situated and how to get them, but that he made no attempt to procure them, except when he notified the superintendent that he needed them. There was testimony that after the accident some props were seen near the plaintiff's room, as well as eight or ten in a "breakthrough" across the way from his room, and the superintendent testified that those in the "breakthrough" had been there for three or four weeks. A witness of experience in mining testified that, in his opinion, it would not have been good practice to have timbered the rock, but that it should have been taken down.

The principal question upon which the parties divided is whether there was a reasonable compliance with the statutory provision requiring the owner, agent, or operator of a coal mine to supply mines with prop timbers of suitable length and size and kept within easy access. Gen. Stat. 1909, § 4987. Under the statute providing for the health and safety of miners, an owner, lessee, or operator of a mine is liable for any injury suffered by the miner resulting from a violation of the act or a wilful failure to comply with its provisions. Gen. Stat.

1909, § 4992. In respect to a compliance with the statute it has been said: "No voluntary act in violation of the statute is excused, and no inaction where the statute requires something to be done is excused, unless it be involuntary. In the case of omissions neither bad purpose nor determined obstinacy is required, and one charged with the duty to observe the statute, who intentionally suffers mining operations to proceed without taking prescribed precautionary measures when the circumstances demand that they should be taken, is guilty of a wilful failure within the meaning of the law." *Cheek v. Missouri, K. & T. R. Co.* 89 Kan. 247, 267, 131 Pac. 624.

Were the props which were kept at the parting about half a mile from the room where the plaintiff was working, and which he could have obtained upon a request of a driver, who would have brought them on his return for another load, within easy access? The principal purpose of the requirement to keep props within easy access was the safety of the miners, but that was not the only consideration. It has been said that "these props are placed within convenient reach of the miner, so that he can get them and put them in proper place, when needed, without unreasonable loss of time." *Ozorkiewicz v. Carr Coal Min. & Mfg. Co.* 83 Kan. 473, 112 Pac. 135.

Ordinarily the compensation of the miner is measured by the quantity of coal mined by him, and delay occasioned by waiting for props to be brought by drivers would proportionately diminish the coal mined and the miner's compensation. Although plaintiff could have obtained props by that means, it would have been necessary for him to await the coming of a driver and, after the request was made, to wait until the driver took his load to the parting, a distance of half a mile, and when the load was dumped, and the props obtained and loaded on the car, he must still wait and lose the time it

takes for the return trip. After learning of the necessity of the props and requesting that they be furnished, the miner must either suspend his work and lose the time that will elapse while waiting for the bringing of the props, or risk the danger of falling rocks, slate, or earth while at work. In making the requirement, the legislature evidently intended that props should be within easy reach of the miner in order that there should be no loss of time, and certainly it did not intend that miners should work under a defective or dangerous roof.

It has been held that the obligation imposed by the statute with reference to props is not conditioned upon the making of a demand for them by the miner. *Le Roy v. Missouri, K. & T. R. Co.* 91 Kan. 548, 138 Pac. 646. Ordinarily it is a question of fact for the determination of the jury whether the props furnished are of easy access to the

miner, and under the testimony and finding it must be held that no props were kept for the miner nearer than the parting. Assuming, as we must, that suitable props were kept at the parting, and that, in accordance with the practice in the mine, props could have been obtained by the miner upon request of the drivers, it must be held that the props were not within easy access to the miner, and that the method used by the defendant did not constitute a reasonable compliance with the statutory requirement. The instructions of the trial court accord with the view which we have taken of the question, and nothing substantial is found in the objections to the instructions, or to the rulings in the admission of testimony.

The judgment of the District Court is affirmed.

Porter and Dawson, JJ., dissent.

Master and
servant—mines
—duty to furnish
props.

ANNOTATION.

Duty of an employer with respect to the timbering of a mine under statutes relating specifically to the subject.

I. Introductory:

- § 1. Footing on which these statutes are to be construed, 1432.
- § 2. Effect of statutes considered with relation to the common-law duties of the employer, 1432.
- § 3. Reasonable care, how far a relevant factor in determining the employer's liability, 1433.
- § 4. Impracticability or inconvenience of compliance with statutes, 1439.
- § 5. Employees deputed to perform the statutory duties ordinarily considered to be vice principals, 1441.
- § 6. Contrary doctrine, how far adopted, 1443.
- § 7. Accidents within the scope of the statutes, 1445.
- § 8. Wilfulness of the act by which the statute is alleged to have been violated, 1445.

I.—continued.

- § 9. Applicability of statutes to workmen employed by independent contractors, 1446.
- § 10. Causal connection between the breach of the statutory duty and the injury, 1447.

§ 11. Conflict of laws, 1450.

II. Statutes by which a continuously subsisting duty with respect to the timbering of the employer's mine is imposed upon him in unqualified terms:

- § 12. Provisions by which the duty is imposed with respect to working places, 1450.
- § 13. Construction and effect of these provisions, 1452.
- § 14. Same subject: illustrative decisions, 1452.
- § 15. Provisions applicable to portions of mines other than the working places, 1455

II.—continued.

- § 16. Construction and effect of these provisions, 1456.
- § 17. General provisions regarding the supply of necessary materials, 1456.
- § 18. Construction and effect of these statutes, 1457.

III. Statutes by which certain conditions precedent to the supervision of the employer's duty are specified:

- § 19. Contents of provisions, 1457.
- § 20. Verbal construction of these provisions, 1461.
- § 21. Maintenance of supply of suitable timbers, 1463.
- § 22. Delivery of the timbers; in general, 1463.
- § 23. Notification by miner that timbers are needed, 1464.
- § 24. Notification addressed directly to employer or his agent, 1465.
- § 24a. Notification in manner prescribed by statute, 1466.
- § 25. Notification in manner specified or authorized by the employer or his agent, 1468.
- § 26. Notification in a manner sanctioned by custom, 1469.
- § 27. Timeliness of miner's notification that props were wanted, 1472.
- § 28. Refusal or negligent failure to deliver timbers, 1472.
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VII. Effect of statutes imposing duties on miners with regard to the protection of their working places:

- § 40. In general, 1492.
- § 41. Provisions as to notifying the employer that timbers are needed, 1493.
- § 42. Provisions importing by implication the subjection of the miner to the duty to timber his working place, 1493.
- § 43. Provisions expressly imposing that duty upon miners, 1495.
- § 44. Effect of these provisions, 1496.
- § 45. Provisions imposing upon the miner the duty of discontinuing work until timbers are furnished, 1497.
- § 46. Effect of these provisions, 1497.

VII.—continued.

§ 47. Provisions imposing upon the miner the duty to examine his working place, 1497.

§ 48. Effect of these provisions, 1498.

VIII. Places to which the statutory duties of employers and miners are applicable:

§ 49. In general, 1499.

I. Introductory.

§ 1. *Footing on which these statutes are to be construed.*

In most of the cases in which this subject has been considered, it has been held that statutes which provide for the health and safety of miners are to be construed liberally.¹ "While they are penal, they are also remedial, and should not receive so strict a construction as to destroy the very object of their enactment."²

The converse doctrine has been laid down in Pennsylvania.³

§ 2. *Effect of statutes considered with relation to the common-law duties of the employer.*

Some of the statutes discussed in the following subdivisions are, by their terms, applicable to all descriptions of employees in the underground workings of mines. These embody what is essentially, so far as their scope extends, a legislative declaration of the employer's common-law duty with regard to the maintenance of the place of work in safe condition.

Others have reference only to such employees as are engaged in the actual

VIII.—continued.

§ 50. Scope of provisions applying specifically to "working places," 1500.

§ 51. — to places "under the control" of the miner, 1503.

§ 52. — to "traveling ways," 1504.

§ 53. Applicability of statutes to prospecting tunnels, 1506.

work of excavation, and are consequently exposed to conditions which render it necessary for them to use timbers from time to time for protective purposes. Those belonging to the latter category are, it will be observed, in the position of persons who would, in respect of injuries resulting from the want of sufficient timbering, be precluded, under some circumstances, from holding the employer liable at common law, either on the theory that they have agreed, expressly or by implication, that the duty of timbering the place of work is to rest upon themselves, and not upon the employer,¹ or on the theory that they are occupied in making a dangerous place safe, or on the theory that their work is of such a character that it is constantly creating new elements of unsafety.²

The language used by the courts in some cases reflects the view that the second and third of these theories are controlling, under appropriate circumstances, in actions based upon statutes.³ But the soundness of this view is, to say the least, disputable. As the statutes themselves clearly import that the responsibility for securing the

¹ *Beard v. Skeldon* (1885) 113 Ill. 584; *Western Anthracite Coal & Coke Co. v. Beaver* (1901) 192 Ill. 333, 61 N. E. 335; *Carterville Coal Co. v. Abbott* (1899) 81 Ill. App. 279, affirmed in (1899) 181 Ill. 495, 55 N. E. 131, 7 Am. Neg. Rep. 40; *Davis v. Missouri & I. Coal Co.* (1914) 186 Ill. App. 478; *Lindquist v. Pacific Coast Coal Co.* (1914) 81 Wash. 73, 142 Pac. 445.

² *Princeton Coal Min. Co. v. Lawrence* (1911) 176 Ind. 469, 95 N. E. 423, 96 N. E. 387. This remark was quoted with approval in *Peabody-Alwert Coal Co. v. Yandell* (1913) 179 Ind. 222, 100 N. E. 758.

³ *Reeder v. Lehigh Valley Coal Co.* (1911) 231 Pa. 563, 80 Atl. 1121.

¹ For cases illustrating this situation, see subds. X., XI. of the monograph appended to *Elk Horn Min. Corp. v. Vanhooose*, ante, 1380.

² For a general discussion of the theories, see *Labatt, Mast. & S.* §§ 1176, 1177, and 1518.

³ The rule that the duty to furnish a safe place of work is inapplicable to employees who are engaged in making it safe was apparently assumed to be an operant factor in *Barrett v. Dessy* (1908) 78 Kan. 642, 97 Pac. 786, and *Macketta v. Missouri, K. & T. R. Co.* (1914) 92 Kan. 362, 140 Pac. 877.

In *Diamond Block Coal Co. v. Cuthbertson* (1906) 166 Ind. 290, 76 N. E. 1060, where it was contended that the

place of work, by means of the timbers which the employer is required to furnish, shall rest upon the miners, it would seem to be more consistent with general principles to take the position that, in actions founded upon the statutes, the importation of extrinsic considerations derived from the common law is not permissible. For this view there is some explicit judicial authority.⁴

The question how far the statutes which belong to the second of the categories above specified affect the remedial rights of miners, other than those to which they are directly applicable, has not been much considered. In the case cited below, the court declined to accept the doctrine that the Mining Act of Illinois "has formulated a com-

plete code of rules by which all liability of the operator or owner of the mine is to be governed, and that there is no longer any common-law duty resting upon such owner or operator, for a violation of which an action will lie."⁵

§ 3. Reasonable care, how far a relevant factor in determining the employer's liability.

The enactments discussed in this monograph are, generally speaking, couched in peremptory, unqualified language, which, on its face, is susceptible of the construction that the right of action for an injury alleged to have resulted from the breach of one of the duties imposed is determinable without any reference to the question

plaintiff could not recover, because he was voluntarily engaged in making a dangerous place safe, the sole ground on which the point thus raised was pronounced untenable was that it was not applicable under the circumstances shown. For a similar ruling, see *Harting v. Vandalia Coal Co.* (1912) 50 Ind. App. 98, 98 N. E. 135.

In one case we find the following statement: "Inasmuch as the accident occurred in decedent's room, where the conditions were constantly changing by reason of the removal of the coal by decedent and his coemployee, and where the duty of propping or removing the slate devolved not upon the company, but upon the decedent himself, it is clear that the 'safe place doctrine' has no application." *Stearns Coal & Lumber Co. v. Crabtree* (1916) 168 Ky. 8, 181 S. W. 615. For similar phraseology, see *Central Coal & Coke Co. v. Graham* (1917) 129 Ark. 550, 196 S. W. 940.

In another case the same court argued thus: "As deceased and his son had sole charge of the room,—were creating the dangers with which they were from time to time confronted,—the defendant is not liable for the injuries which resulted in Lammey's death unless it appears that by custom or law, written or unwritten, it was bound to furnish sufficient and proper props upon request, that it failed and neglected to do so, and that this failure was the proximate cause of the injury." *Lam-*

mev v. Center Coal Min. Co. (1909) 144 Iowa, 640, 123 N. W. 356.

⁴In *Antioch Coal Co. v. Rockey* (1907) 169 Ind. 247, 82 N. E. 76, where the claimant was injured while operating a coal-cutting machine, the defendant argued that it appeared from the complaint that the place where the accident occurred was one in which the conditions were constantly changing, and in which it was impossible to employ props, and that it must be considered and held to be a place which was furnished by the servant, and not by the master. But the court said that this argument was not warranted or in any manner supported by the facts alleged. The cases cited by counsel as ruling such questions were declared not to be applicable.

In *Kellyville Coal Co. v. Bruzas* (1906) 223 Ill. 595, 79 N. E. 309, it was laid down that the common-law doctrine concerning the assumption of risks by servants engaged in "making dangerous places safe" was not applicable in actions brought under the statute. This ruling was approved in *Piazzi v. Kerens-Donnewald Coal Co.* (1914) 262 Ill. 30, 104 N. E. 200, reversing (1913) 179 Ill. App. 540.

⁵*Consolidated Coal Co. v. Scheiber* (1897) 167 Ill. 539, 47 N. E. 1052, affirming (1896) 65 Ill. App. 304. The theory rejected was that, whatever might have been the rule at common law, the duty of propping and securing the roof of the mine had been imposed upon the workmen themselves, by § 16 of the Mining Act.

whether the defendant did or did not exercise reasonable care with regard to the performance of that duty. The extent to which this construction has been approved or condemned is shown by the decisions reviewed under the following paragraphs, the headings of which correspond with those of subdivisions II., III., and IV. *infra*. Among the decisions assumed to be relevant are those which either declare or deny that notice of the dangerous conditions is a prerequisite to the imputation of liability. An adoption of that doctrine obviously involves by implication a recognition of the materiality of the question whether the dangerous conditions could have been ascertained by the exercise of reasonable

care on the employer's part. See *La-batt, Mast. & S.* § 1025. Not less clearly, on the other hand, does a rejection of that doctrine involve the position that such a question is immaterial.

1. Statutes by which a continuously subsisting duty is imposed upon the employer in unqualified terms.—The cases cited in the footnote show a distinct preponderance of authority in favor of the doctrine that, in an action founded upon a clause which purports to subject the employer to an obligation of a general character with respect to "securing" some specified portion of his mine, reasonable care is a factor which may and should be considered in determining the extent of his responsibility.¹ The unqualified

¹With respect to the Indiana statute, which provides that the mining boss shall see that every working place is "properly secured by props or timbers," and that "a sufficient supply of props, caps, and timber is always on hand at the working places," it was laid down in *Antioch Coal Co. v. Rockey* (1907) 169 Ind. 247, 82 N. E. 76, that the provisions of the statutes "do not contemplate that the operator of a coal mine shall become an insurer of his employees working therein, but his omission to comply with the provisions therein is negligence per se." It seems clear that the second of these propositions, unless it was intended to embody merely the doctrine that the failure to take any steps at all towards the performance of the statutory duty is negligence per se, must be taken as importing that the failure to perform the duty with reasonable care amounts to such negligence. Otherwise, the two clauses of the statement would be essentially inconsistent, because a denial of the existence of an obligation to insure safety necessarily involves, by implication, an assertion that reasonable care is the criterion with reference to which compliance with the statute is to be tested.

In *Pittsburgh & W. Coal Co. v. Estie-venard* (1895) 53 Ohio St. 43, 40 N. E. 725, the Ohio enactment (§ 12, *infra*) was thus discussed: "The statute makes it the duty of the owner, agent, or operator to have the timber constantly on hand, and to deliver it to the working place of the miner; and

hence the miner is not concerned as to the manner in which the delivery is made. All he has to prove to make his case, as to that point, is that in fact the delivery was not made. He is not required to ask for the timber, or give any notice. It is his right to have the timber delivered at his working place at all times, without request on his part, and without notice to anyone; and a failure on the part of the owner, agent, or operator to so deliver timber to the working place of the miner is negligence, and if injury is thereby proximately caused to the miner, an action will lie therefor." This language might, if taken literally, be construed as importing that, in the opinion of the court, a failure to deliver the timber, which an accident had proved necessary, constituted a breach of the duty imposed, irrespective of whether a want of reasonable care was chargeable with respect to the delivery. But it seems quite clear that the attention of the court was not directed at all to this aspect of the duty. The real gist of the statement is that the duty was one which rested continuously upon the employer, and was not, like those imposed by the enactments reviewed in subd. III. *infra*, dependent upon a previous demand by the workman.

The point which the state court thus omitted to deal with was explicitly determined in *Cecil v. American Sheet Steel Co.* (1904) 64 C. C. A. 72, 129 Fed. 542, where the court made the following remarks: "It is very clear that this [Ohio] statute imposes on

language used by the courts which have adopted this doctrine may, it is apprehended, be taken as indicating that it is deemed by them to be equally applicable, irrespective of whether the gravamen of the charge against the

employer is entire inaction as regards the performance of his obligation, or fault in respect of what he did in attempting to perform it.

The writer has not found any judicial statement which has a definite

the owner or operator of a coal mine the duty to keep constantly on hand a sufficient supply of timber, without undertaking to declare or define the degree of care which the mine owner or operator must exercise in that regard. The degree of care, therefore, which must be exercised, is left to be determined on common-law principles, and this statute may therefore be put aside without further discussion." In its opinion the court proceeded upon the doctrine that "the master's duty is to exercise reasonable care to furnish sound and suitable material and timber for the work, and to make reasonable and proper inspection in that regard." A new trial was ordered on the ground that the question whether the defect, if any, which existed in a post cap furnished, could have been discovered by a reasonably careful inspection, had entirely escaped attention in the court below.

The position that reasonable care is the criterion by which the performance or nonperformance of the statutory duty is to be tested, has been distinctly taken with regard to the New York statute (see § 12, *infra*), which provides that mines shall be "properly timbered," and places of work "properly secured." *Tetherton v. United States Talc Co.* (1899) 41 App. Div. 613, 58 N. Y. Supp. 55, affirmed in (1901) 165 N. Y. 665, 59 N. E. 1131; *Arras v. Standard Plaster Co.* (1907) 121 App. Div. 61, 105 N. Y. Supp. 440. As to these two cases see § 14, *infra*.

In *Deep Vein Coal Co. v. Rainey* (1916) 62 Ind. App. 608, 112 N. E. 392, the ratio decidendi was that the unsafe condition in question might have been discovered by a reasonably careful inspection. The inspection with reference to which the ruling was made was that prescribed by the statute itself. But there seems to be no sufficient ground for supposing that the decision would have been different, if the statute had contained no specific direction on the subject.

For cases in which it was held or assumed that the defendant could not be held liable, unless it was proved

that he had notice of the unsafe condition from which the injury resulted, see *Harder & H. Coal Min. Co. v. Schmidt* (1900) 43 C. C. A. 532, 104 Fed. 282, 9 Am. Neg. Rep. 227; *Zeller, McC. & Co. v. Vinardi* (1908) 42 Ind. App. 232, 85 N. E. 378; *Princeton Coal Min. Co. v. Howell* (1910) 46 Ind. App. 572, 92 N. E. 122.

On the other hand, the Kansas statute, which provides that traveling ways shall be secured against falling rocks (see § 15, *infra*), has been held to be absolute in such a sense that the employer is deemed to be liable, irrespective of whether he was or was not affected with notice of the unsafe conditions which caused the injury complained of. *Little v. Norton Coal Co.* (1910) 83 Kan. 232, 109 Pac. 768. It was declared that the theory of the defendant company, that "it was only bound to use ordinary diligence to furnish a safe place for its employees to work, would deprive the statute of all force. It is not to be assumed that the legislature intended merely to declare that to be the duty of the master which the common law already imposed upon him." One of the precedents cited was *Schwarzschild & S. Co. v. Weeks* (1905) 72 Kan. 198, 4 L.R.A.(N.S.) 515, 83 Pac. 406, 19 Am. Neg. Rep. 242, wherein the court approved the statement in 5 *Thomp. Neg.* § 5404, that "the employer is chargeable with knowledge of whatever it is his duty to find out and know." But the context of this extract, as well as the other portions of the treatise to which the learned author refers for further information concerning the subject, shows that it was intended simply as an abbreviated enunciation of the rule that an employer is liable for injuries caused by unsafe conditions, the existence of which might have been discovered by the exercise of reasonable care. Manifestly, therefore, the statement relied upon by the court is in reality an authority adverse to the doctrine in support of which it was invoked. The other precedent cited was *Madison v. Clippinger* (1906) 74 Kan. 700, 88 Pac. 260, in which the general rule

bearing upon the applicability of the standard of reasonable care, in cases turning upon an alleged breach of one of the minor provisions in statutes of this type. This standard would seem to be appropriate where the fault alleged is that the timbers furnished were not of "suitable" dimensions, or "of suitable length and size," or "of proper length." It is difficult to see what other criterion than that of the presumptive conduct of a person of average intelligence, possessing the expert knowledge required for the operation of a mine, is available for the purpose of ascertaining whether the timbers supplied in a given instance belonged to a category denoted by such expressions as these.

On the other hand, the pertinency of that criterion would seem to be distinctly negated, where the breach of duty alleged is noncompliance with a clause designating the place at which

the timbers are to be delivered. The questions whether they were deposited at the "working place," or "in easy access" thereto, or "conveniently," or at the point specified by the rules governing the operation of the mine, seem to lie entirely outside the domain within which reasonable care is the measure of juristic responsibility.²

2. Statutes by which certain conditions precedent to the supervision of the duty imposed are specified.—There is a remarkable conflict of authority with regard to the question whether reasonable care is an element proper for consideration, in determining the enforceability of a claim based upon an alleged breach of the general duty imposed by these statutes, with respect to delivering timbers, when the circumstances contemplated by their terms have supervened.³

But inconsistency is not the only criticism to which the cases which

was approved that "the violation of a duty expressly imposed by a statute upon an owner or operator of machinery is negligence, which prima facie imposes liability for damages resulting therefrom." But the rule, as thus stated, is not necessarily inconsistent with the theory disapproved by the court. The formula quoted is plainly one which does not conclude the question whether a "violation" of a statutory duty can be predicated, apart from the element of notice.

In *Cherokee & P. Coal & Min. Co. v. Britton* (1896) 3 Kan. App. 292, 45 Pac. 100, where the action was brought under the common law and on the statute, the absence of notice was treated as a factor which precluded recovery. This ruling, if it was intended to apply to the statutory liability of the defendant,—which is not clear from the report,—has been overruled by the later case, in which, however, it was not referred to.

For cases, decided with reference to statutes other than mining acts, in which the employer's liability was held to be conditional upon proof of actual or constructive knowledge on his part, see *Labatt, Mast. & S.* § 1644.

² This was assumed with regard to the phrase "in easy access," in *HENRY v. MISSOURI, K. & T. R. Co.* (reported herewith) ante, 1427. But the

general question referred to in the text was not discussed.

³ An acceptance of the theory that reasonable care is the standard with relation to which the right of action is determinable is indicated by the language used, and the conclusion arrived at, in *Consolidated Coal Co. v. Scheller* (1892) 42 Ill. App. 619, where the statute under review provided for the delivery of timbers "as required." See § 19, *infra*. It was held that the trial judge had properly directed the jury to disregard three of the counts in the declarations, by which it was averred, in substance, that the defendant wilfully failed to perform an alleged statutory duty absolutely to keep the roof so propped that it would not fall. The precedent cited in support of the doctrine that no such duty was imposed by the statutes was *Consolidated Coal Co. v. Yung* (1887) 24 Ill. App. 255. The ruling as to the evidence was that it did not fairly support a finding that, in failing to discover before the accident the dangerous condition from which it resulted,—viz., a "slip" in the roof,—the employer personally fell short of the measure of its legal duty to appellee.

In *Leslie v. Rich Hill Coal Min. Co.* (1892) 110 Mo. 31, 19 S. W. 308, the ground assigned for the ruling on an instruction was that the right of

bear upon that question are open. They are also unsatisfactory in this respect, that they contain nothing which evinces an appreciation of the fact that, in actions founded on statutes of this type, several distinct situations may be presented, and that, of these situations, some may, and some may not, afford a suitable field for the

application of the standard of reasonable care.

Where recovery is sought on the ground that the defendant had explicitly refused to comply with a demand for timbers, or that he had made no attempt to comply with such a demand, the immateriality and irrelevancy of the question whether the defendant's

action under the Missouri statute (§ 19, *infra*) was given only in respect of injuries caused by a "wilful" failure to comply with it; that a wilful or intentional failure to supply props necessarily implied a knowledge that they were needed; and consequently that the instruction in question was faulty in not requiring the jury to find, as a condition precedent to a recovery, that the defendant had notice that the timber and props were required, and, with such notice, neglected and refused to supply them. It should be observed that the phrase "when required," in the statute, was here construed as meaning "when needed," and not "when requested." The difference of opinion as to this point is discussed in § 20, *infra*.

In *Adams v. Kansas & T. Coal Co.* (1900) 85 Mo. App. 486, the conclusions of the court were thus stated: "Even though it be conceded that it [the roof] did appear to be safe, yet if coal had been taken out to such an extent as to leave a space of roof, as in this case, large enough to reasonably suggest that it should be propped, and props were requested and refused, then a liability was incurred for resulting injury. In such a state of case the defendant cannot be allowed to excuse itself by reason of false appearance of safety. If it could, the statute would be of no importance or beneficial consequence to miners. The statute imposes the duty to furnish these props on request of the miner, and when it fails to perform that duty it assumes the risk of resulting accident." In this case the court proceeded upon the theory that the statutory phrase "when required" signified "when requested." The point of view was, in this important respect, different from that of the supreme court, in the *Leslie Case* (Mo.) *supra*. But it seems impossible to avoid the inference that the general theories entertained in the two cases with regard to the element of reason-

able care must have been essentially dissimilar.

The same remark is applicable to *McDaniels v. Royle Min. Co.* (1905) 110 Mo. App. 706, 85 S. W. 679, in which we find the following statement: "When the desired amount of timbers is furnished in the mine to properly secure the workings, the mine owner has performed his duty, and it is then left to the miners to use them for their own security. But they must be furnished with all the timbers necessary for that purpose, and the mine owner cannot excuse himself by furnishing what may be deemed ordinarily sufficient. This is not a question of reasonable diligence, but an imperative requirement of the statute." The contention that, if the judgment for the plaintiff was allowed to stand, it resulted in making the mine owner an insurer for the safety of his miners, was thus dealt with: "We do not think so. But the statute does insure the miner the means to protect himself to the fullest extent against cavings of the workings, leaving it to him, wisely, to use such means for his own protection. The term 'properly secure' is not used in a restrictive sense. It does not mean reasonably safe, but safe from danger; not absolutely safe, for that, perhaps, would be impossible, but such security as a reasonable and humane person, watchful of the almost constant peril to his workmen, would afford, commensurate with the impending or threatened danger. Extraordinary care is required of the mine owner." The two portions of the argument of the court, when read in connection with each other, indicate that the degree of care connoted by the phrase "reasonable diligence" was assumed to be the same as that connoted by the phrase "ordinary care," and that the domain of obligation covered by the former phrase was distinct from, and extraneous to, that which is covered by the phrase "extraordinary care."

conduct was or was not in conformity with the standard of reasonable care are strongly, if not decisively, indicated by the consideration that evidence which establishes either of these situations establishes a complete breach of the duty which is brought into existence by the demand. See § 23, *infra*.⁴

No general rule can be laid down with respect to cases in which the employer had undertaken to perform the duty of delivering the timbers demanded, and the theory upon which the claim is based is that he was guilty of misfeasance or nonfeasance in regard to some special incident of the duty. The nature of the subject-mat-

The more accurate view, it is submitted, is that the former phrase is applicable to "extraordinary," as well as to "ordinary," care, both of these epithets being simply descriptive of the degree of care which a man of average prudence is supposed to exercise under certain circumstances. A more general criticism, to which this, as well as the other cases cited above, may fairly be deemed open, is stated in the text.

In *Bowerman v. Lackawanna Min. Co.* (1903) 98 Mo. App. 308, 71 S. W. 1062, the court took the position that "if props are needed in the mine, he [the ground foreman] is presumed to know it, and his knowledge is that of the company," and that "it is the duty of the company to furnish them because they are needed, and of this fact it is conclusively presumed to be apprised." It should be observed that, while the construction placed in this case upon the phrase "when required" was the same as that accepted by the supreme court in the *Leslie Case* (1892) 110 Mo. 31, 91 S. W. 308, *supra*, the theory of that case with regard to the necessity of proving notice was rejected. The ruling of the higher tribunal was apparently not brought to the attention of the court of appeals.

In *Wojtylak v. Kansas & T. Coal Co.* (1905) 188 Mo. 260, 87 S. W. 506, the doctrine of the *Bowerman Case* was explicitly disapproved, in so far as it had proceeded upon the ground that the phrase "when required" meant "when needed." Apparently the doctrine of the court of appeals as to a

ter involved would seem to constitute an adequate ground for treating reasonable care as an inadmissible criterion, where the fault charged is that the timbers were not delivered at the place designated by the statute;⁵ that they were not of the shape prescribed in the statute;⁶ or that they were not of the dimensions specified by the miner who demanded them.⁷ But the extent of the employer's liability under such circumstances as these has not yet been discussed in this point of view.⁸

On the other hand, there is apparently no sufficient reason for excluding the factor of reasonable care from consideration, in cases where the particu-

conclusive presumption of knowledge on the employer's part was also regarded as incorrect.

⁴ It would seem that the decisions of the Missouri court of appeals, cited in note 2, *supra*, must have involved one or other of these situations. If so, the exclusion of the element of reasonable care was clearly proper under the circumstances. But exceptions may fairly be taken to the unqualified language used in regard to this point.

A similar comment may be made upon *Collins v. Northern Anthracite Coal Co.* (1913) 241 Pa. 55, 88 Atl. 75, where the reason assigned for holding that the question whether defendant failed to furnish the necessary props had been properly submitted to the jury was that, "if it did fail to furnish them at the proper place when requested, it was, under the statute, guilty of negligence per se."

The cases cited in § 28, *infra*, involved one or other of the situations mentioned in the text, but the element of reasonable care was not referred to.

⁵ For cases in which the liability of the employer for breach of duty in this regard was affirmed, see § 29 *infra*.

⁶ As in the Kentucky and Pennsylvania provisions (§ 19, *infra*), which require that props shall be "cut square at both ends."

⁷ Such was the situation presented in the cases cited under § 30, *infra*.

⁸ It is not out of place, however, to advert to the analogy of the cases in which the duty of the employer to comply with specific requirements as to the quantity of fresh air to be sup-

lar questions to be determined are, whether the timbers sent down were delivered as promptly as they should have been,⁹ or whether, in a case where the miner's demand was not specific, they were sufficient in respect of number, size, or dimensions.¹⁰ The authorities, so far as they go, are in accord with the opinion thus expressed.

3. Statutes by which a duty of examination is imposed.—All the cases under this head proceed upon the theory that the duty of examining a mine is adequately discharged, if reasonable care is exercised in respect of its performance; and not otherwise.¹¹

It may be suggested that, in those classes of cases in which reasonable care is the measure of the employer's responsibility, his duty with regard to the exercise of such care is absolute, in the same qualified sense as that which the common law imposes upon "the occupiers of buildings, or persons having control of other structures intended for human use and occupation."¹² Some support for such a theory seems to be derivable, by way of analogy, from those decisions which have established the rule that the fail-

ure of a mine examiner to mark a dangerous place in the manner prescribed by the Illinois Mining Act renders the employer liable as for a violation of the statute, although the examiner believed, "in good faith," that the place was not dangerous.¹³

§ 4. Impracticability or inconvenience of compliance with statutes.

It has been held by the supreme court of Indiana that, in an action founded upon a breach of the provision by which the employer is required to "secure working places properly by props or timbers," the fact that a cutting machine could not have been operated if additional props had been erected in the place in question does not constitute a valid defense. "If, for any reason, it becomes impracticable to secure loose coal, slate, or rock overhead in the working place in the mine, by means of timber or props, such loose coal, slate, or rock should be removed before the miners are permitted to resume their work."¹⁴ The case in which this doctrine was laid down was one of the precedents cited in support of another ruling of the

plied in the underground workings was treated as being absolute. *Edwards v. Lam* (1909) 132 Ky. 32, 116 S. W. 283, 119 S. W. 175, 131 S. W. 795; *Nicholson Coal Min. Co. v. Moulden* (1911) 143 Ky. 348, 136 S. W. 620.

⁹ In the three cases cited in § 27, *infra*, it was assumed that reasonable care was the standard with reference to which the employer's liability was determinable.

¹⁰ In *Hackart v. Decatur Coal Co.* (1909) 243 Ill. 49, 90 N. E. 257, it was laid down that, under such circumstances, "the mine manager may supply what in his best judgment will suffice for the purpose." Compare also *Sugar Creek Min. Co. v. Peterson* (1898) 177 Ill. 324, 52 N. E. 475, where the same measure of the employer's obligation seems to have been assumed for the purposes of the argument.

In *McDaniels v. Royle Min. Co.* (1905) 110 Mo. App. 706, 85 S. W. 679, language inconsistent with the opinion expressed in the text was used. But see note 3, *supra*, where this case is criticized.

¹¹ *Mertens v. Southern Coal & Min. Co.* (1908) 235 Ill. 540, 85 N. E. 743; *Peebles v. O'Gara Coal Co.* (1909) 239 Ill. 370, 88 N. E. 166; *Aetitus v. Spring Valley Coal Co.* (1910) 246 Ill. 32, 138 Am. St. Rep. 221, 92 N. E. 579, affirming (1909) 120 Ill. App. 497; *Eichhorn v. St. Louis & O'F. Coal Co.* (1919) 288 Ill. 351, 123 N. E. 603, reversing (1918) 212 Ill. App. 152; *Davis v. Missouri & I. Coal Co.* (1914) 186 Ill. App. 478; *Wilkins v. Madison Coal Corp.* (1914) 188 Ill. App. 416; *Deep Vein Coal Co. v. Rainey* (1916) 62 Ind. App. 608, 112 N. E. 392.

¹² *Pollock, Torts*, 10th ed. p. 530, where the nature of the duty is thus stated: "Personal diligence on the part of the occupier is immaterial. The structure has to be in a reasonably safe condition, so far as the exercise of reasonable care and skill can make it. To that extent, there is a limited duty of insurance."

¹³ See § 33, note 13, *infra*.

¹⁴ *Antioch Coal Co. v. Rockey* (1907) 169 Ind. 247, 82 N. E. 76. In that case the contention rejected was that, even if the mining boss had discovered the

same court that a complaint is not subject to demurrer, on the ground that it does not contain an averment that it was practicable to use timbers at the place in question, without unduly interfering with the progress of the work of excavation.²

dangerous place, he could not have avoided the accident, because the place where the roof fell was between the props already erected and the face of the coal.

The above decision may be said to destroy the significance of any inference which might be drawn, by a somewhat loose *e converso* implication, from the fact that in some Indiana cases one of the specific elements which were adverted to as being favorable to the miner's claim was that the stone which fell upon him might have been propped, without obstructing the operation of a cutting machine. *Diamond Block Coal Co. v. Cuthbertson* (1906) 166 Ind. 290, 76 N. E. 1060; *Deep Vein Coal Co. v. Rainey* (1916) 62 Ind. App. 608, 112 N. E. 392.

It would seem that cases in which it is absolutely impracticable to arrange the props and the machine in such a manner as to admit of the continuance of the work of excavation can, very seldom, if ever, occur in mining practice. As a general rule, the situation is that which was referred to in *Williams Coal Co. v. Cooper* (1910) 138 Ky. 287, 127 S. W. 1000 (a common-law case), where the court observed that, if props were placed within less than 10 or 12 feet of the coal face, the machine could be located so as to cut between them.

²*Peabody-Alwert Coal Co. v. Yandell* (1913) 179 Ind. 222, 100 N. E. 758. The precedent upon which the defendant mainly relied was *Laporte Carriage Co. v. Sullender* (1905) 165 Ind. 290, 75 N. E. 277, in which it was held that, in a complaint in an action brought under the Factory Act to recover for injuries caused by the defendant's failure to guard a machine, it was necessary to allege that it was possible to guard the machine in question, without rendering it useless for purposes of operation. But the court said: That "doctrine is not applicable here. When the Factory Act was passed, it is well known that there was machinery impossible to operate, when so guarded as to avoid all

The question whether impracticability excuses the nonperformance of a duty imposed upon the miner was in one case raised by the form of the declaration. But the point was not definitely determined, the court being of the opinion that the circum-

danger. The use of such machinery was not prohibited. . . . The several mining acts, in unmistakable terms, declare that the mine boss shall see that every working place is properly secured by timbering, and that a sufficient supply of timbers is always on hand at the miner's working place, and that, when an unsafe place is reported to him, no one shall enter the place except for the purpose of making it safe. *Burns's Anno. Stat.* 1908, § 8580; *Acts* 1905, p. 65, § 12. Under such conditions, it was not contemplated by the act that the ordinary mine work should continue in the dangerous place, but, on the contrary, that it should cease until the place should have been made safe." The ruling in *Zeller, McC. & Co. v. Vinardi* (1908) 42 Ind. App. 232, 85 N. E. 378, where the *Sullender* Case was followed, was disapproved. With regard to the point thus decided, the judges of the appellate court had been equally divided in opinion, and it was for this reason that the case had been certified to the supreme court. See (1911) 48 Ind. App. 615, 96 N. E. 388. Yet only a year previously the *Vinardi* Case had been explicitly condemned by that tribunal, in *Princeton Coal Min. Co. v. Howell* (1910) 46 Ind. App. 572, 92 N. E. 122, where the consideration relied on was that the effect of adopting that doctrine "would be to abrogate the law, and substitute therefor the notion of the mine boss or operator as to what is 'undue interference' with the operation of the mine, the very subject upon which the legislature was convinced they could not be trusted. The measure of the owner's duty is prescribed. He must make the dangerous place safe, and exclude his employees therefrom until it is safe, excepting only those who are engaged in doing the work."

In *Peacock Coal & Min. Co. v. Crawford* (1917) 65 Ind. App. 401, 117 N. E. 504, the court disapproved an instruction to the effect that it was no defense that it was impossible or impracticable to prop the roof of a room where there was overhanging loose

stances alleged merely showed that compliance with the statute would have been inconvenient.³

§ 5. Employees deputed to perform the statutory duties ordinarily considered to be vice principals.

So far as regards most of the states in which enactments as to the timbering of mines have been adopted, it is fully settled that the duties imposed by the legislature are non-delegable.¹ In this point of view, any person to

coal, slate, or rock, for, if that were the case, it was the duty of the defendant, if he had notice, actual or constructive, of the conditions, to remove such loose overhanging coal. The doctrinal standpoint indicated by this ruling seems to be essentially at variance with that of the supreme court in the cases cited above. It was held that in *Zeller, McC. & Co. v. Vinardi (Ind.) supra*, the court had erred in applying the same rule to the Mining Act as was applied in the *Sullender Case (Ind.) supra*, to the Factory Act.

³ *Morris Coal Co. v. Donley (1906) 73 Ohio St. 298, 76 N. E. 945. See § 43, note 3, infra.*

¹ "When the statute prescribes the measures that shall be taken by the operator of a coal mine to render the place safe where the miner is working, it imposes a specific duty upon the master, which he must perform to escape the charge of negligence." *Green v. Western American Co. (1902) 30 Wash. 87, 70 Pac. 310.*

The principle thus formally enounced is taken for granted in all cases cited in the following notes.

For a general discussion of the quality of statutory duties, see *Labatt, Mast. & S. § 1495*, and (as regards Mining Acts) § 1882.

² *Continental Coal Corp. v. York (1914) 159 Ky. 334, 167 S. W. 131.*

Left Fork Coal Co. v. Owens (1913) 155 Ky. 212, 159 S. W. 703. In plaintiff's petition the grounds of action relied on are that the coal company committed a breach of its duty towards him in failing to furnish for his use and protection a sufficient number of timber props and caps to support the roof of the mine at the place where he was working; that Roark, the mine foreman, was habitually drunk for many months before and up to the time of the accident, 15 A.L.R.—91.

whom the employer deposes the performance of those duties is a vice principal, for whose negligence in respect of the performance he is responsible. This doctrine has been affirmed with respect both to statutes in which the employer himself is specified as the person subjected to the duty prescribed,² and to statutes which provide for the performance of that duty by a mine foreman whom the employer is required to appoint.³ The effect of this doctrine obviously is that the re-

and consequently unfit to perform his duties as mine foreman, and the officers of the coal company knew this habit of the mine foreman; that Owens complained to the mine foreman of the unsafe condition of the roof, and requested that he furnish him timber to prop it, but was assured by the foreman that the roof was not dangerous, and he could work with safety in the manner indicated by the foreman, who also promised to furnish the necessary timbers.

In *Le Roy v. Missouri, K. & T. R. Co. (1914) 91 Kan. 548, 138 Pac. 646*, one of the points argued, viz., that there was no evidence showing wilfulness in failing to comply with the provisions of the statute, was thus dealt with: "The defendant established its own method of conducting the operations of this mine, including the method and means for complying with its statutory obligation in respect to furnishing prop timber. It made the driver its agent to receive and forward requests for props, and to deliver the props to the miners. It must have realized that drivers were likely to become careless and indifferent, and at times would fail to perform these duties. Having chosen the method by which the mine was operated, it is responsible for a failure resulting from any deficiency in the means by which its statutory obligation was to be complied with. Its primary duty was to furnish suitable props and keep them easy of access to the miners, whose safety and lives depended upon the performance of this duty; and it cannot be permitted to avoid its liability for failure to comply with the statute, because some agency employed by it has proved untrustworthy."

³ *Baldi v. Cedar Hill Coal & Coke Co. (1909) 97 C. C. A. 505, 173 Fed.*

medial rights of a miner, in respect of an injury occasioned by the violation of a duty of a particular scope, are determinable upon the same footing, and with relation to the same considerations, whether the controlling statute belongs to the former or the latter of these categories.

According to one decision, the general doctrine enunciated above is subject to an exception as respects cases in which the injury complained of was caused by the failure of a miner to perform his duty to make a proper use of timber delivered for the purpose of enabling him to secure his working place, but the person injured was an

employee whose functions merely required him to make occasional visits to that place.⁴ But the argument by which the court was led to this conclusion is scarcely convincing. It seems to be based essentially upon the theory that, because the statute under discussion had reference specifically to the protection of one class of workmen, it could not inure to the benefit of any other class. Such a theory involves, in the opinion of the present writer, a complete non sequitur. The mere fact that a statute casts upon one class of workmen the duty of safeguarding themselves, by means of certain instrumentalities to be furnished

781 (Colorado statute); *Henrietta Coal Co. v. Martin* (1906) 221 Ill. 460, 77 N. E. 902; *Mertens v. Southern Coal & Min. Co.* (1908) 235 Ill. 540, 85 N. E. 743; *Donk Bros. Coal & Coke Co. v. Lucas* (1906) 127 Ill. App. 61 (decision affirmed in (1907) 226 Ill. 23, 80 N. E. 560, but without any reference to this point); *Southern Coal & Min. Co. v. Hopp* (1907) 133 Ill. App. 239; *Antioch Coal Co. v. Rockey* (1907) 169 Ind. 247, 82 N. E. 76; *Linton Coal & Min. Co. v. Persons* (1894) 11 Ind. App. 264, 39 N. E. 214; *Collins Coal Co. v. De Pugh* (1909) 43 Ind. App. 648, 88 N. E. 317; *Miami Coal Co. v. Kane* (1909) 45 Ind. App. 391, 90 N. E. 13; *Princeton Coal Min. Co. v. Howell* (1910) 46 Ind. App. 572, 92 N. E. 122; *Harting v. Vandalia Coal Co.* (1912) 50 Ind. App. 98, 98 N. E. 132; *Coal Bluff Min. Co. v. McMahon* (1913) 54 Ind. App. 131, 102 N. E. 862; *Peacock Coal & Min. Co. v. Crawford* (1917) 65 Ind. App. 401, 117 N. E. 504; *Little v. Norton Coal Co.* (1910) 83 Kan. 232, 109 Pac. 768; *Ricardo v. Central Coal & Coke Co.* (1917) 100 Kan. 95, 163 Pac. 641; *Cherokee & P. Coal & Min. Co. v. Britton* (1896) 3 Kan. App. 292, 45 Pac. 100; *Rock Island Coal Min. Co. v. Davis* (1914) 44 Okla. 412, 144 Pac. 600.

In *Island Coal Co. v. Risher* (1895) 13 Ind. App. 98, 40 N. E. 158, a decision of the question whether the mine boss was a fellow servant of the miners was deemed to be unnecessary for the purposes of the case, as personal negligence on the employer's part was shown by the special verdict to the effect that he, as well as the mine boss, had for a long time known that the roof which fell in the room

where the plaintiff was working was dangerous and unsafe.

In § 29 of Virginia Acts of Assembly 1912, chap. 178, it is expressly declared that the various superior servants upon whom the statute imposes the specified duties are to be considered as vice principals. The provision was presumably inserted for the purpose of excluding the application of the doctrine adopted with reference to the Pennsylvania statute, upon which that of Virginia was modeled. See *Big Vein Pocahontas Co. v. Repass* (1916) 51 C. C. A. 348, 238 Fed. 232, where a "slate boss" was treated as a vice principal.

⁴In *Southern Coal & Min. Co. v. Hopp* (1907) 133 Ill. App. 239, it was laid down, with regard to a provision requiring the delivery of props: "That the purpose of the statute was to aid the miners in protecting themselves against the dangers of a hazardous occupation, and not a measure for the greater security of other employees, is manifest, and, for a failure to comply with this duty, only those having use for the props and the right to demand them may complain of a wilful failure on the part of the manager to comply with such demand." In this point of view, the defendant in the case cited was held not to be liable for the death of a "shot firer" upon whom a quantity of slate had fallen, after the mine manager had failed to comply with the demand for props of two miners who were taking out the coal in the room where the accident occurred. The court said: "The common-law duty of the master to furnish a reasonably safe place to work is not involved in this case. It is not alleged

by the employer, does not, it is submitted, justify the inference of an intention on the part of the legislature to abrogate *pro tanto*, as respects other classes of workmen, the general obligation of the employer with regard to the maintenance of the safe condition of the place of work.

§ 6. Contrary doctrine, how far adopted.

Pennsylvania.

In this state, it has been "uniformly held that a [statutory] mine foreman

is a fellow servant of the other employees engaged in the mine."¹ Accordingly an action to recover for an injury occasioned by his negligence in respect of the performance of his prescribed duties cannot be maintained, unless the negligence of the employer himself, or his superintendent, was a concurrent cause of the dangerous condition from which the injury resulted.²

Where the superintendent has knowledge of the fact that the mine

that appellant failed in its common-law duty to appellee; only that appellant wilfully failed in a statutory duty. The contention of appellee's counsel that the miners may be held to be the representatives of the master, the appellant, in the performance of a non-delegable duty,—that is, that the master, through its servants, the miners, was required to set the props so as to secure the roof of that place,—is not tenable under the declaration. The allegation is that appellant wilfully failed to deliver the props and cap pieces to the miners, not that it failed to properly set up the props and secure the roof."

¹ *Wolcutt v. Erie Coal & Coke Co.* (1910) 226 Pa. 204, 75 Atl. 197. The accidents involved in most of the cases in which this doctrine was the ratio decidendi were of such a nature as to place them outside the scope of this monograph. They are collected in Labatt, Mast. & S. § 1435a, note 4.

Action maintainable.

² *Collins v. Northern Anthracite Coal Co.* (1913) 241 Pa. 55, 88 Atl. 75; *Sudnik v. Susquehanna Coal Co.* (1917) 257 Pa. 226, 101 Atl. 318.

Action not maintainable.

In *Peters v. Vesta Coal Co.* (1914) 243 Pa. 241, 90 Atl. 65, the plaintiff averred in his statement of claim that a short time prior to the date of the accident he had complained to the defendant company that this roof of said room was "improperly supported, in that the posts used were too short;" that at that time the defendant promised him to have posts of the proper length provided, and assured the plaintiff that it was safe to go on working until such time as posts of proper length were supplied; and that he relied upon this promise and assurance, and continued to work in the

room. But it was held that he had been properly nonsuited, as the evidence adduced by him was "too vague, indefinite, and lacking in detail to justify a finding that the superintendent should have understood that the mine foreman was in default, and that an emergency existed which required the immediate delivery of the posts."

In *Iwanauskas v. Philadelphia & R. Coal & I. Co.* (1919) 227 N. Y. 34, 124 N. E. 157, an action in New York under the Pennsylvania statute for death of a miner, attributable to the erroneous judgment of the mine foreman that a rock in the roof would not fall before the timbering reached it, the court reversed a judgment for the plaintiff upon the ground that the courts of Pennsylvania have held in numerous cases that where the act places an obligation on the mine foreman to see to or to do a particular thing, the execution of which involves the exercise of judgment or discretion, his negligence in that regard cannot be imputed to the mine owner.

In *Sulin v. Rochester & P. Coal & I. Co.* (1915) 170 App. Div. 302, 155 N. Y. Supp. 883, the plaintiff, a man employed as a "spragger," whose duties were principally to throw small blocks of wood called "sprags" between the spokes of the wheels to stop the cars in a heading, and to throw switches, and to couple cars, was riding on the front of an electric motor car, when part of the roof of the heading fell upon the tracks at the front end of the train, or between and upon some of the cars near the front end. The consequence was that from ten to thirteen cars were thrown off the track, and the plaintiff's foot was caught between the bumper on the motor car and the bumper on the car ahead, to which it was coupled. His testimony tended to show that, about three or four months prior to

foreman, or a person employed by him, "has neglected his duties, and the mine is in a defective or unsafe condition, . . . the duties of the superintendent are not discharged by merely calling upon the mine foreman to remedy the defect and make the mine safe. . . . He is required to remedy the defects and make the mine safe himself, in the event that the mine foreman fails so to do."³ For the non-performance of his statutory duties by a foreman who was also acting as superintendent, the operator of a mine is held to be responsible, on the ground that the tenure of both positions necessarily implies that the dangerous conditions created by such performance were known to an agent whose knowledge was imputable to the employer.⁴

the accident, part of the roof of the heading fell in at the same point, and that some of the timbers supporting it also fell; that the mine foreman caused the roof to be propped up again; and that the men who did the work used two old cracked timbers, and one new timber which was also somewhat cracked and contained a knot. A verdict in his favor was set aside, on the ground that, assuming that the notice to the superintendent was sufficient to charge him with knowledge that these timbers were in the condition described by the plaintiff, there was no evidence that the accident was in any manner due to the defects in the timbers shown by his testimony.

See also *Lehigh Valley Coal Co. v. Washko* (1916) 145 C. C. A. 230, 231 Fed. 42 (Anthracite Act); *Vagaszki v. Consolidation Coal Co.* (1915) 141 C. C. A. 37, 225 Fed. 913 (Bituminous Act).

³ *Firment v. Rochester & P. Coal & I. Co.* (1915) 170 App. Div. 307, 155 N. Y. Supp. 879, stating what the court considered to be the effect of the Pennsylvania decisions.

⁴ In *Wolcutt v. Erie Coal & Coke Co.* (1910) 226 Pa. 204, 75 Atl. 197, the court said: "The duties imposed by the act on the mine foreman do not relieve the superintendent from the duties which he owes to the employees of the mine. . . . If the roof in the haulage way was defective, and Mitchell had knowledge of it, as

West Virginia.

The Mining Law of this state being modeled upon that of Pennsylvania, the supreme court has followed the Pennsylvania decisions affirming the nonliability of the employer for the negligence of a mine foreman.⁵

Tennessee.

In a case decided with reference to the Statute of 1881, the supreme court deliberately rejected the Pennsylvania doctrine, although that statute was a transcript of the Pennsylvania one, and held that a mine foreman was a vice principal.⁶

In a later case the language of the Statute of 1903 was construed as operating to relieve the employer of responsibility for the negligence of such

the evidence justified the jury in finding, the superintendent, representing the owner, had knowledge of the defect and of the neglect of the foreman to remove it. If Mitchell, as mine foreman, neglected his duty in removing the defect, it is clear that, if another party had been superintendent and had had this knowledge, it would have been his duty to have taken immediate steps to remove it, and thereby protect the employees in the mine. Mitchell acting in a dual capacity, his knowledge of the defect in the roof of the haulage way was not only as mine foreman, but as superintendent, and in the latter capacity the defendant is liable for his failure to remedy the defect which caused the injury to the plaintiff."

⁵ *Williams v. Thacker Coal & Coke Co.* (1898) 44 W. Va. 599, 40 L.R.A. 812, 30 S. E. 107.

In *Majestic Collieries Co. v. Bradley* (1909) 132 Ky. 533, 116 S. W. 738, decided with reference to the West Virginia statute, it was conceded by counsel that a mine foreman who had failed to supply suitable timbers was a fellow servant of the miner injured by his negligence. But the liability of the defendant company was affirmed, on the ground of its having employed the tort-feasor and retained him in its service with knowledge of his incompetency.

⁶ *Smith v. Dayton Coal & I. Co.* (1905) 115 Tenn. 543, 4 L.R.A. (N.S.) 1180, 92 S. W. 62.

a foreman.⁷ But, in the year after the decision to this effect was rendered, the doctrine laid down was abrogated by an amendment of the statute.

England.

It has been held that a certified mine manager employed in pursuance of the statute is a mere fellow servant of the miners.⁸

§ 7. Accidents within the scope of the statutes.

In nearly all the cases reviewed under the following subdivisions, the injury was caused by the collapse of a portion of the roof of a working place, or entry, or traveling way. But, except in one instance, it seems to have been assumed that the remedial rights conferred by the statutes are predicable, irrespective of whether the substances which fell came from the roof or the sides of such places. This exception is a Washington decision to the effect

that the fall of a rock from the wall of the plaintiff's working place was not a "caving in," within the meaning of that phrase as used in the Washington statute.¹ It is not easy to see how such a ruling can be reconciled with the doctrine, accepted in that state, that the mining statutes are to be liberally construed. See § 1, *supra*.

§ 8. Wilfulness of the act by which the statute is alleged to have been violated.

By some of the enactments of the type under review, the liability of the party charged is explicitly declared to be predicable only where his violation of the duty or duties imposed was "wilful."¹ For a general discussion of the connotation of this epithet, the reader is referred to § 1882 of Labatt, Mast. & S. It has been construed as imputing "conscious,"² or "intention-

⁷Sale Creek Coal & Coke Co. v. Priddy (1906) 117 Tenn. 168, 96 S. W. 610, 10 Ann. Cas. 745 (action held not to be maintainable on the ground that the foreman had failed to inspect the props which gave way). The court relied partly on the Pennsylvania decisions, and partly on the fact that the statute included a provision, not contained in the earlier one, construed in the Smith Case (Tenn.) *supra*, viz., that the mine foreman "should not be subject to the control of the operator or owner in the discharge of the duties required of him by the act."

⁸Howells v. Landore Siemens Steel Co. (1874) L. R. 10 Q. B. (Eng.) 62, 44 L. J. Q. B. 25, 32 L. T. N. S. 19, 23 Week. Rep. 335.

¹Pachko v. Wilkeson Coal & Coke Co. (1907) 46 Wash. 422, 90 Pac. 436.

¹Provisions of this tenor are inserted in the statutes of Arkansas, Illinois, Indiana, Kansas, and Missouri.

In Donk Bros. Coal & Coke Co. v. Stroff (1902) 200 Ill. 483, 66 N. E. 29, an instruction "that where an owner, operator, or manager so operates his mine that he knowingly operates it without conforming to the provisions of the Mining Act of this state, he wilfully disregards its provisions," was held not to be open to the objection that it was intended "to procure the word 'wilful' to be defined to the jury," and was "a mere abstract

proposition of law." The court said that "it was not improper to advise the jury as to the legal meaning of the word as used in the statute."

Whether the alleged failure to comply with the law was wilful is a question of fact for the jury. Ozorkiewicz v. Carr Coal Min. & Mfg. Co. (1910) 83 Kan. 473, 112 Pac. 135.

In Coal Bluff Min. Co. v. McMahon (1913) 54 Ind. App. 131, 102 N. E. 862, the court, relying upon the theory that "wilful misconduct includes both intentional and wrongful action," held that the language of the statute did not require that the complaint shall charge wilful misconduct.

On the other hand, the decision in Leslie v. Rich Hill Coal Min. Co. (1892) 110 Mo. 31, 19 S. W. 308, merely goes to the extent of laying it down that a complaint is sufficient, after verdict, where the facts constituting such wilfulness are fully stated, although it does not specifically charge a wilful disregard of the statutory duty.

It has been held that "the right to recover under the Indiana act may be based on the inadvertent failure to comply with its provisions, as well as on the intentional violation thereof." Peabody-Alwert Coal Co. v. Yandell (1913) 179 Ind. 222, 100 N. E. 758, citing some earlier cases.

²Mertens v. Southern Coal & Min.

al."³ Neither "evil intent,"⁴ nor "bad purpose,"⁵ nor "determined obstinacy"⁶ are ingredients in the situation to which it is applicable.

Unless the statute in question includes language which distinctly imports that a violation of its provisions must be "wilful" in order to affect the delinquent with liability, he is answerable for such violation, irrespective of whether it was of that nature or not.⁷

§ 9. Applicability of statutes to workmen employed by independent contractors.

The phraseology used in the statutes

under discussion, for the purpose of designating the party upon whom the prescribed duty is imposed, is ordinarily susceptible of the construction that they are intended to inure to the benefit of all persons working in a mine controlled by that party, whether he is their immediate employer or not.¹ It is observable, however, that the courts have sometimes shown a disposition to evade the determination of this point, in cases where the decisions could be referred to other considerations.²

Co. (1908) 235 Ill. 540, 85 N. E. 743; *Aetitus v. Spring Valley Coal Co.* (1910) 246 Ill. 32, 138 Am. St. Rep. 221, 92 N. E. 579.

³ *Leslie v. Rich Hill Coal Min. Co.* (Mo.) *supra*.

⁴ *Odin Coal Co. v. Denman* (1900) 185 Ill. 413, 76 Am. St. Rep. 45, 57 N. E. 192; *Donk Bros. Coal & Coke Co. v. Peton* (1901) 192 Ill. 41, 61 N. E. 330; *Mertens v. Southern Coal & Min. Co.* (Ill.) *supra*.

⁵ *Le Roy v. Missouri, K. & T. R. Co.* (1914) 91 Kan. 548, 138 Pac. 646; *HENRY v. MISSOURI, K. & T. R. Co.* (reported herewith) *ante*, 1427.

⁶ See cases cited in note 4, *supra*.

⁷ *Le Roy v. Missouri, K. & T. R. Co.* (Kan.) *supra*.

In *New Bell Jellico Coal Co. v. Sowders* (1913) 154 Ky. 101, 156 S. W. 1046, the provision in § 7, subsec. 8, of the Kentucky Statute of 1908, to the effect that any wilful neglect or failure or refusal of any owner, etc., of a coal mine, or of any person employed in such mine, to comply with its provisions, or any attempt to obstruct or interfere with any person in the discharge of the duties imposed on such person, shall be deemed a misdemeanor, was held to be applicable only to criminal prosecutions. The court said that the remedial rights of an injured miner in a civil action were governed by the general provision in § 466 of Ky. Stat., by which damages are declared to be recoverable in respect of the violation of a penal statute.

¹ In *Leslie v. Rich Hill Coal Min. Co.* (1892) 110 Mo. 31, 19 S. W. 308, an instruction was approved by which the jury were told that the defendant, if the actual owner of all the property, was responsible for nonobservance of

the law, though the coal was, in fact, taken out by one Wilson, under an arrangement by which the defendant was to furnish all material, machinery, and appliances necessary for getting out the coal, and the snaffing, timbers, props, etc., necessary for the operation of the mine and the safety of the miners, and that Wilson should be paid a certain price per bushel for the coal when delivered aboveground, and though the miners were employed and paid by Wilson. The court said: "Section 16 of the act imposes the duty of providing timbers and props upon the 'owner, agent, or operator' of the mine, and not necessarily and exclusively on the employer of the miners. The duty enjoined, as the title of the act indicates, was intended to secure the health and safety of the persons employed in the mines, no matter by whom employed. The relation of master and servant is not, therefore, necessarily involved, nor the principles of law governing that relation. For the safety of the operatives the statute requires certain precautions to be observed by the 'owner, or operator,' and liability is confined to such persons. . . . The statute defines the word 'owner,' as used therein, to mean 'the immediate proprietor, lessee, or occupant of any coal mine, or any part thereof.' . . . The owner cannot, however, be permitted to relieve himself of this statutory duty, and at the same time retain any joint occupancy or proprietorship of the mines. To relieve himself he must part with all immediate proprietorship and occupancy of the mine and control of its operation."

² Such was the course followed in *Clark v. Choctaw Min. Co.* (1918) 201

§ 10. Causal connection between the breach of the statutory duty and the injury.

The cases in which the courts have affirmed the doctrine that liability for the violation of a statutory duty in respect of the timbering of a mine is not predicable, unless that violation was a proximate cause of the injury complained of, are divisible, broadly speaking, into two categories:

(1) Cases in which evidence is offered which tends to show that the injury was attributable, not to a violation of the particular duty upon which

the action is founded, but to the negligent failure of the injured miner himself,¹ or of a fellow servant,² to use timbers which had been furnished; or to the failure of the injured miner to provide for his security by inspecting the place of work with the degree of care which was incumbent upon him,³ or by taking down such substances as were likely to fall from the roof;⁴ or to the failure of the injured miner to use timbers which had been furnished, owing to a want of judgment on the part of the miner himself, or of a fellow servant;⁵ or to the fact

Ala. 466, 78 So. 872, where the court said that the question whether the later Alabama enactment "has application otherwise than as between the master and servant, the mine operator and its employee only, was one of doubtful solution."

¹ In *Kentucky Block Cannel Coal Co. v. Davis* (1910) — Ky. —, 128 S. W. 888, the question whether injury was caused by failure to furnish timbers, or by plaintiff's failure to use suitable timbers as furnished, was held to have been properly left to the jury. As to the statutory duty of miners in respect of propping, see §§ 43 and 44, *infra*.

² In *Lammey v. Center Coal Min. Co.* (1909) 144 Iowa, 640, 123 N. W. 356 (miner killed by fall of slate from roof), it appeared from uncontradicted testimony that the son of the decedent, who was working in the same room with him, knew that the props called for had not been delivered, and that he went into another room and got such props as he thought were necessary, and used them in a way that he thought had made the roof safe, and so informed his father. Held, the accident "was not due to defendant's failure to send down props of sufficient length, but to the failure of the son to use the necessary number of props. . . . If he did not get and use a sufficient number, it was his own fault, and defendant is not to be held responsible for the damage resulting therefrom."

³ *Edgren v. Scandia Coal Co.* (1915) 171 Iowa, 459, 151 N. W. 519. As to the miner's statutory duty of inspection, see § 47, *infra*.

⁴ *Carter Coal Co. v. Prichard* (1915) 166 Ky. 776, 179 S. W. 1038 (verdict properly directed for defendant on the evidence).

⁵ In *Western Coal & Min. Co. v. Fountz* (1911) 101 Ark. 206, 142 S. W. 160, it was held that a peremptory instruction for the defendant should have been given, where the following facts were shown by the evidence of the plaintiff's only witness, a man working in the same room as that in which the plaintiff's husband was killed by the fall of a rock: That the decedent and the witness had made two requests for props; that some props of insufficient length had been delivered; that, after taking down the slate on one side of the room, they had discovered the loose rock which killed the decedent; that if the rock did not fall that night when shots were fired, and if they had found it the next morning not loose enough for them to pull down, they would have propped it, but they had no intention of propping it until then. The court said: "This being the state of the case, we cannot see how the failure to furnish props can be deemed the cause of the injury, either proximately or remotely. The timbers were not ordered to prop up the loose rock, and would not, according to the positive testimony of the witness, have been used for that purpose if they had been furnished before the injury occurred. That being true, the failure to furnish props had nothing to do with the injury, and the result would have been the same if the props had been furnished."

In *Western Coal & Min. Co. v. Watts* (1917) 131 Ark. 562, 199 S. W. 921, where a rock fell upon plaintiff from the roof of a cross entry which he was driving, the *Fountz Case* (Ark.) *supra*, was distinguished on the ground that, in the case under review, the jury were justified in finding from the testimony of the

that the injured miner refrained from using timbers furnished because he considered that his work would be too much hampered, if they were used.⁶

(2) Cases in which the question of

plaintiff and his assistant, who was working with him at the time he was injured, that the props were ordered by them so as to enable them to keep the rock from falling and to make the place safe while they were working under the same. Under these circumstances, the trial judge had correctly instructed the jury that if appellant failed to furnish props, and this failure was the proximate cause of appellee's injury, the defendant would be liable, even though the jury should find that the appellee made a mistake of judgment, and that but for such mistake he would not have been injured.

⁶Branson v. Clover Fork Coal Co. (1914) 157 Ky. 763, 164 S. W. 304. See also Pana Coal Co. v. Becker (1906) 130 Ill. App. 40, where it was held error to instruct the jury that it was their duty to find for the plaintiff, if they believed from the evidence that the negligence of the defendant contributed to the injuries.

⁷In Williams v. Norwood-White Coal Co. (1910) 146 Iowa, 489, 125 N. W. 232, the plaintiff placed his order for props as he entered the mine in the morning. The general rule in the mine was that props were sent within a day or two after they were ordered. It was asserted by plaintiff that, when he placed his order on this particular morning, the boss assured him that they would be sent "right away," but he did not allege either that he requested that they be sent "right away," or that he believed, at that time or later, that he had immediate need for them. The accident happened at 11:30 in the forenoon. At no time did the plaintiff discover or suspect a condition which would require a prop, nor was there any evidence tending to show that he would have used a prop at this time and place if he had had it. The use of a prop under the particular part of the roof which fell would have rendered it very difficult, if not impossible, for him to pick the column of coal at the place at which he was working, and he himself testified that he was "an experienced miner, and knew as well as any man how to sound a roof, and

proximity of cause was considered without reference to the issues raised by evidence of the descriptions mentioned above.⁷

(3) Cases which illustrate the doc-

when it is beginning to get loose, and when it is likely to fall." Held that, even if it were assumed that the foreman assured the plaintiff that the props would be sent "right away," and that the plaintiff was expecting them accordingly, there was no causal relation between the failure of the foreman to send the props and the accident.

In Branson v. Clover Fork Coal Co. (Ky.) supra, the evidence showed that while Branson, an inexperienced minor, was digging coal in company with two other men, one of whom was a miner of long experience, it was discovered that slate was falling from the roof of this room, or in the adjacent entry. Thereupon they knocked the props from under the roof at this place, and a great quantity of slate fell in the room or entry, and on the car track, so that they were not able to do any work. The mine boss told them that it would take some time to clear the track, and that the quickest and best way to open up their room would be to widen the passageway where the slate fell, so that a new track could be laid around the old track and the slate. They followed these instructions, and cars were run in on the new track to a point within 20 or 30 feet distant from where they were digging coal. It was further shown that, for a space of 18 or 20 feet from the place where Branson was working when injured, the roof of the room was not propped, but he said that he did not know the roof was dangerous. There was also evidence that the attention of these men was called, two or three times before the accident, to the danger of working where they were, without the roof being propped. The gravamen of the petition was that the plaintiff's injuries were "caused by the failure of the coal company to build a track, or passageway, to permit props to be put in place, and which he was assured could be done." But it was held to be quite clear that "the failure to build the track had nothing whatever to do with causing the slate to fall from the roof, or with making the place unsafe in which to work."

trine that the employer may be held liable for an injury occasioned partly by the breach of a duty imposed upon him, and partly by an event or condition for which he is not responsible.⁸

The question of proximity of cause

In *Grim v. Lehigh Valley Coal Co.* (1916) 171 App. Div. 493, 157 N. Y. Supp. 585, affirmed without opinion in (1919) 227 N. Y. 558, 124 N. E. 898, (decided with reference to the Pennsylvania statute), where the plaintiff was injured by the fall of coal from the roof of a chute, while he was cleaning a hole previously prepared to receive the prop, or just as he arrived at the place for that purpose, a verdict in his favor was set aside on the ground thus stated: "Had the requisite prop been at hand, it would not have been in place supporting the roof, inasmuch as the plaintiff would have been in the course of putting it in place. The material fell because the prop was not there; it was not there because the man was making final preparation to set it, or was surveying the conditions preparatory to setting it, or had just come there to set it. What effect on the accident could the fact have that the props in the gangway were too short or that they were not there at all, if such had been the case? . . . The proposition that the failure to furnish a proper prop permitted the roof to fall on the man who was making ready to put up such prop is not tolerable in law or logic. The plaintiff was not there to do work other than that relating to the erection of the prop." Administration of the law would go awry did it permit a suitor to recover for an injury received while necessarily doing, or about to do, an act to eliminate the cause of the injury. It will be observed that the court, in the latter portion of these remarks, shifted its ground from the conception of proximate cause to a theory which, in the final analysis, depends upon the theory of an assumption of risks. See monograph appended to *Elk Horn Min. Corp. v. Vanhooose*, ante, 1380.

In *Bisko v. Braznell Gas Coal Co.* (1909) 223 Pa. 186, 72 Atl. 504, the plaintiff, while engaged in repairing a brattice which was to be used in diluting or carrying off any gas which had accumulated in the pocket made

is for the jury exclusively, whenever the evidence is conflicting,⁹ or of such a purport that different conclusions may reasonably be deduced from it.¹⁰

It has been declared that the duty of the mine operator in the premises is

by a fall in the roof of an entry, was injured by an explosion resulting from the ignition of the gas in the pocket by the blaze from his open lamp. Held that, even if it were assumed that there was not an adequate supply of material on the surface or in the mine for the purpose of repairing the brattice, this circumstance could not impose liability upon the defendant, since it was not the cause of the plaintiff's injuries. It was conceded that if it had been engaged in mining coal in another entry, and had been there injured by the explosion, there might have been some ground for the contention that the defendant company was liable for not furnishing an adequate supply of materials for constructing or repairing the brattice.

⁸In *Tetherton v. United States Talc Co.* (1899) 41 App. Div. 613, 58 N. Y. Supp. 55, affirmed without opinion in (1901) 165 N. Y. 665, 59 N. E. 1131, a verdict was sustained in favor of a miner who was injured by the fall of a pillar, which was the result, partly of an excessive blast discharged by the pit boss in violation of the superintendent's instructions, and partly of the failure of the defendant to perform his statutory duty with regard to the timbering of the mine.

See, generally, *Labatt. Mast. & S.* §§ 1580 et seq.

⁹*Arkley v. Niblack* (1916) 272 Ill. 356, 112 N. E. 67; *Wilson v. Danville Collieries Coal Co.* (1914) 264 Ill. 143, 106 N. E. 194; *Diamond Block Coal Co. v. Cuthbertson* (1906) 166 Ind. 290, 76 N. E. 1060; *Interstate Coal Co. v. Trivett* (1913) 155 Ky. 825, 160 S. W. 728.

¹⁰*Cecil v. American Sheet Steel Co.* (1904) 64 C. C. A. 72, 129 Fed. 543; *Donk Bros. Coal & Coke Co. v. Peton* (1901) 192 Ill. 41, 61 N. E. 330; *Mertens v. Southern Coal & Min. Co.* (1908) 235 Ill. 540, 85 N. E. 743; *Davis v. Missouri & I. Coal Co.* (1914) 186 Ill. App. 478; *Mitchell v. Swanwood Coal Co.* (1918) 182 Iowa, 1001, 166 N. W. 391; *Proctor Coal Co. v. Beaver* (1913) 151 Ky. 839, 152 S. W. 965, and the cases cited in notes 1 to 7, *supra*.

not to be limited by the actual anticipation of its bank boss or superintendent.¹¹

§ 11. Conflict of laws.

Some cases which fall within the scope of the present monograph illustrate the general rule that, where an action for the recovery of damages in respect of an injury occasioned to a servant by the violation of a statutory duty imposed upon the employer is brought in a jurisdiction other than that in which the statute was enacted, the remedial rights of the plaintiff are determinable with reference to its provisions.¹

For a general discussion of this rule, see Labatt, Mast. & S. § 1994.

II. Statutes by which a continuously subsisting duty with respect to the timbering of the employer's mine is imposed upon him in unqualified terms.

§ 12. Provisions by which the duty is imposed with respect to working places.

The provisions under this head fall under two categories, viz.: (1) Those which simply impose a duty in respect of the delivery of timbers at the working place of the miner; and (2) those which impose a duty in respect of seeing that the working place is properly timbered.

By some of the provisions the specific duty is laid upon the employer

himself; by others, upon some superior employee. But the essential effect of both types is manifestly the same, so far as the ultimate responsibility of the employer is concerned.

England.

Coal Mines Regulation Act 1887, § 49, rule 21. The roof and sides of every working place shall be made secure. (There was a similar provision in the earlier Act of 1872, § 51, rule 16.)

Coal Mines Regulation Act 1887, § 49, rule 22. Where the timbering of the working places is done by the workmen employed therein, suitable timber shall be provided at the working place, gate end, pass-by, siding, or other similar place in the mine convenient to the workmen.

Colorado.

Laws 1883, p. 104, § 4, as amended by Laws 1885, p. 137, § 4 (Mills's Anno. Stat. 1891, § 3184; Colo. Anno. Stat. § 641). The "mining boss" . . . shall see that sufficient timber, of suitable length and sizes, is furnished for the places where they are to be used, and placed in the working places of the miners.

Indiana.

Laws 1891, chap. 49, § 12 (Burns's Stat. 1894, § 7472). The mining boss shall see that each and every working place is properly secured by props or timber, and that safety in all respects is assured, and, when found unsafe, he shall order and direct that no per-

¹¹ Brilliant Coal Co. v. Barton (1920) 205 Ala. 89, 87 So. 830, where the prop sustaining a rock was set at a point where it was hit and displaced when a mule driven by the plaintiff swerved from the path, in consequence of which the rock fell, injuring the plaintiff.

¹ Majestic Collieries Co. v. Bradley (1909) 132 Ky. 533, 116 S. W. 738 (West Virginia statute applied); Proctor Coal Co. v. Beaver (1913) 151 Ky. 839, 152 S. W. 965, s. c. second appeal in (1914) 159 Ky. 578, 167 S. W. 885 (Tennessee statute applied); Sulin v. Rochester & P. Coal & I. Co. (1915) 170 App. Div. 302, 155 N. Y. Supp. 883 (Pennsylvania statute applied); Firment v. Rochester & P. Coal & I. Co. (1915) 170 App. Div. 307, 155 N. Y. Supp. 879 (Pennsylvania

statute applied); Vagaszi v. Consolidation Coal Co. (1915) 141 C. C. A. 37, 225 Fed. 913 (Pennsylvania statute applied by the Federal court sitting in New York district).

In Wojtylak v. Kansas & T. Coal Co. (1905) 188 Mo. 266, 87 S. W. 506, the remedial rights of the plaintiff in respect of an injury sustained in Kansas were determined with reference to common-law principles. But the court discussed arguendo the meaning of the Missouri statute, and undertook to settle a point concerning which the earlier decisions were not in accord. See § 20, post, 1461. In so far as this discussion imparts an assumption on the part of the court that the plaintiff might have brought an action upon the statute, it reflects a theory opposed to the weight of authority.

son shall be permitted in an unsafe place, unless it be for the purpose of making it safe. He shall see that a sufficient supply of props, caps, and timber are always on hand at the miners' working places.

Laws 1897, p. 168, § 4; Laws 1905, p. 65, § 12 (Burns's Rev. Stat. 1901, § 7472; Burns's Rev. Stat. 1908 and 1914, § 8580). Provision similar to the above.

Iowa.

Laws 1911, chap. 106, § 41 (Code Supp. 1913, § 2439-132). The mine foreman or pit boss in charge of any mine shall see that the mines are supplied with props of proper length, caps, and other timbers necessary to prop securely the roof of such mine and the rooms wherein the men are employed, and such material shall be conveniently placed for the use of the miners. The contents of another section in this statute are set out in § 19, *infra*.

Kansas.

Act of May 15, 1875, § 21; Laws 1883, chap. 117, § 6 (Gen. Stat. 1889, § 3850; 1899, § 3963; 1901, § 4129; 1909, § 4987; 1915, § 6276). Every mine shall be supplied with sufficient prop timber of suitable length and size for the places where it is to be used, and kept in easy access to. (The final clause is so printed, but seems to be grammatically defective.)

Kentucky.

Laws 1914, chap. 79, Act 5, § 4 (Stat. 1915, § 2726, subd. 4). The mine foreman or assistant shall see that every working place is properly secured by props or timber. . . . He shall also see that props are cut or sawed as square as practicable at both ends, and as near as practicable to the proper length required or designated for the place where they are to be used. The contents of the other provisions of this statute, and of an earlier enactment, are set out in § 19, *infra*.

Montana.

Coal Mining Act, Laws 1911, chap. 120, § 73. The mine foreman or his assistant shall see that each working

place is secured by timbering, so that the safety of the miners is assured.

New York.

Laws 1890, chap. 394, §§ 9, 10; Laws 1897, chap. 415, § 122; Consol. Laws, chap. 31. Each owner, agent, manager, or lessee of a mine or tunnel shall cause it to be properly timbered, and the roof and sides of each working place shall be properly secured. No person shall be required or permitted to work in an unsafe place, or under dangerous material, except to make it secure.

Ohio.

Act of April 15, 1889, Rev. Stat. 1892, § 6871; Gen. Code 1910, § 921). The owner, agent, or operator of every coal mine shall keep a supply of timber constantly on hand, and shall deliver the same to the working place of the miner; and no miner shall be held responsible for accidents which may occur in the mine where the provisions of this section have not been complied with by the owner, agent, or operator thereof.

Oklahoma.

Laws 1907, chap. 54, Act 7, § 2 (Rev. Laws 1910, § 3984). The mine foreman shall see that all miners are supplied at all times with such timbers, props, and cap pieces as are necessary to keep their working places in a safe condition.

Laws 1907, chap. 54, Act 7, § 6 (Rev. Laws 1910, § 3988). The mine foreman or his assistants shall direct that each and every working place be properly secured by props or timbers.

Pennsylvania.

Anthracite Coal Mines Act (Act of June 2, 1891) art. 11, § 1. It shall be the duty of the owner, operator, superintendent, or mine foreman of every mine to furnish to the miners all props, ties, rails, and timbers necessary for the safe mining of coal and for the protection of the lives of the workmen. Such props, ties, rails, and timbers shall be suitably prepared and delivered to the workmen as near to their working places as they can be conveyed in ordinary mine cars, free of charge. Brightly's Dig. 12th ed. p. 134.

Anthracite Coal Mines Act of June 2, 1891, art. 12, rule 12. The mine foreman or his assistants shall direct that each and every working place is assured, by directing that all loose coal or rock shall be pulled down or secured, and that no person shall be permitted to work in an unsafe place unless it be for the purpose of making it secure. *Brightly's Dig.* p. 149.

Bituminous Coal Mines Act of May 15, 1893, P. L. p. 52, art. 6, § 6. The mine foreman shall give prompt attention to the removal of all dangers reported to him, . . . and shall direct that each and every working place be properly secured by props and timbers.

Bituminous Coal Mines Act 1911, art. 4, § 6. The mine foreman shall direct and see that every working place is properly secured by props or timbers, and shall see that no person is directed or permitted to work in an unsafe place, unless it be for the purpose of making it safe. He shall also see that the props are cut square at both ends, and as near as practicable to the proper length required or designated for the places where they are to be used.¹

Virginia.

Laws 1912, chap. 178, §§ 4 and 13. Same provision as in West Virginia Act of 1883. See next paragraph.

West Virginia.

Laws 1883, chap. 70, § 6; Laws 1907, chap. 78, § 15 (*Code* 1891, p. 994; *Code Supp.* 1907, chap. 78, § 410; *Anno.* *Code* 1913, § 483). The mine foreman shall see that sufficient props, caps, and timbers, as nearly as possible of suitable dimensions, are furnished for the places where they are to be used, and such props, caps, and timbers shall be delivered and placed

at such points as the rules for the government of each respective mine provide for them to be delivered.

Nova Scotia.

Regulations of Coal Mines Act, *Rev. Stat.* 1900, p. 224, rule 16. Same provision as the English one, *supra*.

Rule 31. In any mine, whenever required by the inspector, the coal shall, during the operation of holding or undercutting, be supported by coal or wooden props, under the direction of a person appointed for that purpose.

§ 13. Construction and effect of these provisions.

The effect of the provisions tabulated in the preceding section is obviously to impose upon the employer duties which are continuous in their nature, and not dependent, like those discussed in subd. III. *infra*, upon his receipt of a request from the miner for the delivery of the timbers needed for securing the place of work.¹

The question whether the circumstances alleged and proved import a breach of the duty imposed by the provision upon which the claim is founded is primarily one for the jury.²

The connotation of the words and phrases used in those statutes for the purpose of designating the portions of a mine to which they are applicable is discussed in subd. V. *infra*.

§ 14. Same subject: illustrative decisions.

The circumstances under which the liability of the employer has been affirmed or denied, in actions brought to recover for injuries alleged to have been caused by a breach of the duties imposed by these provisions, are shown by the subjoined note.¹

¹ *Bisko v. Braznell Gas Coal Co.* (1909) 223 Pa. 186, 72 Atl. 504 (*Anthracite Act*).

¹ *Erickson v. Maple Block Coal Co.* (1918) 183 Iowa, 1292, 167 N. W. 105 (error to give an instruction inconsistent with this doctrine); *Le Roy v. Missouri, K. & T. R. Co.* (1914) 91 Kan. 548, 138 Pac. 646 (ruling approved in *HENRY v. MISSOURI, K. & T. R. Co.* (reported herewith) ante, 1427; *Pittsburgh & W. Coal Co. v. Estieven-*

ard (1895) 53 Ohio St. 43, 40 N. E. 725, and the cases cited in the following section.

² See cases cited in the following section.

In *Ozorkiewicz v. Carr Coal Min. & Mfg. Co.* (1910) 83 Kan. 473, 112 Pac. 135, it was held error to decide the case on demurrer to evidence, the evidence being conflicting as to whether props had been supplied.

¹ In *Cecil v. American Sheet Steel*

It will be observed that in some of the cases cited it was taken for

granted that the employer cannot be held liable, in the absence of proof

Co. (1904) 64 C. C. A. 72, 129 Fed. 542, it was held error to withdraw the case from the jury, where the evidence was to the effect that, while the plaintiff was removing a pillar in a side entry, he was injured by the fall of a rock from the roof about two hours after he had placed in position three posts, with caps, from timber furnished and placed conveniently close by the master. The court pronounced untenable the theory apparently entertained by the trial judge, that, in order to recover, the plaintiff must show positively that "this rock would not have fallen, except for the rottenness of this cap." It was pointed out that "in the very nature of the case, it could never be established demonstratively that the stone would not have fallen, except for the rotten condition of the cap. The case could be determined and disposed of only on the reasonable and stronger probabilities of the situation, in the light of all the attending circumstances and conditions."

In **Baldi v. Cedar Hill Coal & Coke Co. (1909) 97 C. C. A. 505, 173 Fed. 781,** a tunnel which the plaintiff and another workman were constructing, with a view to its being used as an entry after it was completed, was treated as their "working place," for the protection of which the defendant was bound to furnish timbers, as the work progressed. The evidence with regard to the question whether this duty had been performed was pronounced to be "conflicting and unsatisfactory," but sufficient to go to the jury.

In **Diamond Block Coal Co. v. Cuthbertson (1906) 166 Ind. 290, 76 N. E. 1060,** the evidence showed that on the day when the plaintiff was injured he had been directed to go to work in two specified rooms, as a helper of one Miller, an experienced miner who was operating a cutting machine; that, after having finished the work in one of the rooms, they moved the machine into the other room; and that the plaintiff had never before been in the latter room, and knew nothing whatever in regard to its condition. After they had entered the room they discovered a large stone over the roadway, which Miller pronounced dangerous, and said it must be taken

down, as there were no props on hand by which it could be propped. The plaintiff testified that, knowing that Miller was an experienced miner and older than himself, he believed that what Miller said should be done under the circumstances was all right. By means of a pick and crowbar, Miller, aided by plaintiff, succeeded in pulling the stone down. Some two or more minutes afterwards another stone, 5 feet or more from the one which had been removed from the roof, fell upon plaintiff. The second stone had no connection with the one that had been pulled down. Defendant's mine boss had neglected to furnish props for the second room, and the evidence tended to prove that, if he had discharged his duty in this respect, the stone which injured plaintiff could have been propped, and thereby supported, without interfering with the operation of the machines. That defendant was shown by the evidence to be guilty of negligence, both at common law and under the statute, was held to be clear. The theory that the plaintiff could not recover because he was voluntarily engaged in making a dangerous place safe was held not to be applicable under the circumstances.

The effect of **Antioch Coal Co. v. Rockey (1907) 169 Ind. 247, 82 N. E. 76,** in so far as it bears on the operation of a provision of the type under discussion, is stated in § 3, note 1, *supra*.

In **Deep Vein Coal Co. v. Rainey (1916) 62 Ind. App. 608, 112 N. E. 392,** a verdict in favor of a plaintiff whose decedent, while pushing a car towards the face of a room, was killed by the fall of a piece of slate, was held to be warranted by evidence showing that some of the props in the room had been removed to facilitate the laying of the tracks, and had not been replaced up to the time of the accident; that their removal deprived the roof as a whole of support, and this effect necessarily extended to the section which fell; that the loose condition of the rock which fell might have been ascertained by the process of sounding, which is called "drumming," but the only inspection made was a visual one; that the kind of rock that formed the roof is always treacherous, and should be inspected

that he had notice, actual or constructive, of the dangerous conditions

carefully; that, after the props were removed, the decedent's fellow workman called the attention of the mine boss to the situation, and requested him to support the roof with cross-bars and props; and that workmen came into the room thereafter for that purpose, under the direction of the mine boss, but failed to secure the roof, because they did not have timbers of the proper size.

The fact that such timbers as might be needed could be obtained by the workman from other abandoned rooms by taking them down would be no defense against the failure to comply with the requirement of the statute to keep a supply of timbers on hand at the working place of the miners. *Jackson Hill Coal & Coke Co. v. McDaniel* (1921) — Ind. App. —, 131 N. E. 408.

In *Edgren v. Scandia Coal Co.* (1915) 171 Iowa, 459, 151 N. W. 519, the evidence was held to be ample to justify a finding that the defendant's failure to furnish the props was the sole reason for the failure of the plaintiff to prop. But a new trial was ordered on account of erroneous instructions.

In *HENRY v. MISSOURI, K. & T. R. Co.* (reported herewith) ante, 1427 (verdict for plaintiff sustained), the court, after laying it down that it was ordinarily for the jury to say whether the props furnished were of "easy access" to the miner, held that a compliance with the statutory requirement was not shown by evidence to the effect that the defendant supplied props which were kept at a place about half a mile from the room where the plaintiff was working, and which he could, in accordance with a custom of the mine, have obtained, upon request of a driver, who would have brought them on his return for another load. The following remarks were made: "The principal purpose of the requirement to keep props within easy access was the safety of the miners, but that was not the only consideration. . . . Ordinarily the compensation of the miner is measured by the quantity of coal mined by him, and delay occasioned by waiting for props to be brought by drivers would proportionately diminish the coal mined and the miner's compensation. Although plaintiff could have obtained props by

that means, it would have been necessary for him to await the coming of a driver, and, after the request was made, to wait until the driver took his load to the parting, a distance of half a mile, and when the load was dumped, and the props obtained and loaded on the car, he must still wait and lose the time it takes for the return trip. . . . In making this requirement the legislature evidently intended that props should be within easy reach of the miner in order that there should be no loss of time, and certainly it did not intend that miners should work under a defective or dangerous roof."

In *Ricci v. Cherokee & P. Coal & Min. Co.* (1914) 92 Kan. 349, 140 Pac. 884, a verdict for the plaintiff was held to be sustained by evidence to the effect that the props which he himself placed had failed to support the roof which fell on him, that more props would have been placed by him if those available had not been too long, and that two requests which he had made for props of suitable length had not been complied with.

In *Tetherton v. United States Talc Co.* (1899) 41 App. Div. 613, 58 N. Y. Supp. 55, affirmed in (1901) 165 N. Y. 665, 59 N. E. 1131, where an action was held to be maintainable by a miner who had been injured by the fall of a "pillar" which he was taking out in a room, and the evidence showed that timbers had been procured for the purpose of protection, but not used, the court said: "Its [i. e., the pillar's] sloping position, and the very slippery character of the talc, would naturally cause apprehension of danger. A quantity of water had accumulated at one point on the upper side, and had been there for a month or two. The water dripping down the crevices between the layers, after a blasting, increased the tendency of the layers to slide, by softening the greasy material between them. Blasting had been going on for several months. The evidence was, I think, sufficient to sustain the conclusion of the jury that the defendant was liable."

In *Arras v. Standard Plaster Co.* (1907) 121 App. Div. 61, 105 N. Y. Supp. 440, a nonsuit was held error, for the reason that the evidence tended to show that the insecure

which caused the accident in question.⁸ But there is a difference of opinion with respect to this point. See § 3, *supra*.

The question upon which some of the cases involving the effect of provisions of this type have turned was whether the place where the claimant was injured was a "working place," or a "working place under his control." See §§ 50 and 51, *infra*.

§ 15. Provisions applicable to portions of mines other than the working places.

The provisions of this type fall under two categories, in both of which, it will be observed, Indiana and Pennsylvania are represented.

(1.) Provisions by which the duty of keeping traveling roads, passages, etc., is imposed in general terms.

Indiana.

Laws 1891, chap. 49, § 12 (Burns's Rev. Stat. 1894, § 7472).

Laws 1897, p. 168, § 4; Laws 1905, p. 65, § 12 (Burns's Rev. Stat. 1908 and 1914, § 8580). The mining boss shall see that all loose coal, slate, and rock overhead, where miners have to travel to and from their work, are carefully secured. For the other Indiana enactment, see *infra*.

Pennsylvania.

Anthracite Act of June 2, 1891, art. 12, rule 43. The mine examiner shall examine at least once every day all slopes, shafts, main roads, traveling ways, and timbering, and see that they are in safe and efficient working condition.

England.

Coal Mines Regulation Act 1887, § 49 (21).

Nova Scotia.

Rev. Stat. chap. 19 (coal mines) § 44 (16); Rev. Stat. chap. 20 (metalliferous mines) § 19 (12).

condition of the mass of rock which fell on the plaintiff from the roof of a chamber in a gypsum mine might have been discovered by a reasonably careful inspection.

In *Pittsburgh & W. Coal Co. v. Estlievenard* (1895) 53 Ohio St. 43, 40 N. E. 725, it was laid down that "only such quantity of timbers need be delivered

Ontario.

Rev. Stat. 1914, chap. 32, § 164 (26); Mines Act 1908, § 164.

British Columbia.

Rev. Stat. 1897, chap. 138 (coal mines) § 82 (17); Rev. Stat. 1897, chap. 134 (metalliferous mines) § 25 (20).

New South Wales.

Coal Mines Regulation Act 1896, § 47 (22).

Victoria.

Mines Act 1890, § 351 (10).

New Zealand.

Mining Act 1906, § 255 (10).

(2.) By other enactments it is provided that the mine foreman whose appointment is prescribed shall see that, as the miners advance their excavations, all "loose" (or dangerous) coal, slate, or rock shall be secured against falling on the "traveling ways" (or upon the "entries" and "traveling ways").

Colorado.

Laws 1883, p. 104, § 4, as amended by Laws 1885, p. 137, § 4 (Mills's Anno. Stat. 1891, § 3184); Colo. Stat. Anno. § 641.

Indiana.

Laws 1891, chap. 49, § 19 (Burns's Stat. 1894, § 7479); Laws 1905, chap. 50, § 11 (Burns's Stat. 1908 and 1914, § 8579).

The mining boss shall see that, as the miners advance their excavations, all loose coal, slate, and rock overhead are carefully secured against falling therein, on the traveling and airways. For the other provisions in *pari materia*, see *supra*.

Kansas.

Mines Act of May 15, 1875, § 21 (Gen. Stat. 1889, § 3850; 1901, § 4129; 1909, § 4987; 1915, § 6276).

from time to time, as the miner may in fact need to securely prop the roof of his room."

⁸In *Zeller, McC. & Co. v. Vinardi* (1908) 42 Ind. App. 232, 85 N. E. 378, an allegation of knowledge was held to embrace constructive, as well as actual, knowledge.

Oklahoma.

Laws 1907, chap. 54, art. 7, § 11
(Rev. Laws 1910, § 3983).

Pennsylvania.

Bituminous Coal Mines Act of May
15, 1893, P. L. p. 52, art. 6, § 1.

Bituminous Coal Mines Act of 1911,
P. L. p. 756, art. 4, § 90.

Tennessee.

Laws 1881, chap. 170, § 8; Laws
1903, chap. 237, § 20; Laws 1915, No.
1691, § 19 ("entries, traveling ways,
and timbers").

Virginia.

Laws 1912, chap. 178, § 4.

West Virginia.

Laws 1883, chap. 70, § 6; Laws 1907,
chap. 78, § 15 (Code 1891, p. 994; Code

Supp. 1907, chap. 78, § 410; Anno.
Code 1913, § 483).

As to the scope of the expression
"traveling way," see § 52, *infra*.

§ 16. Construction and effect of these provisions.

The effect of the cases which have
been decided with reference to the
provisions belonging to each of the
two categories specified in the preced-
ing section is shown below.¹

As to the connotation of the expres-
sion "traveling way," see § 52, *infra*.

§ 17. General provisions regarding the supply of necessary materials.**Pennsylvania.**

Bituminous Coal Mines Act (Act of
May 15, 1893, art. 7, § 1). It shall be

Provisions imposing duty in general terms.

¹In *Harder & H. Coal Min. Co. v. Schmidt* (1900) 43 C. C. A. 532, 104 Fed. 282, 9 Am. Neg. Rep. 227, in which the claimant's right of action was considered with reference to both the Indiana provisions, the defendant's liability was held to be inferable from evidence tending to show that there was no timbering or other protection to the passageway in question, and none at the place where the new room was to be turned by the claimant and his "buddy;" that immediately above this point was a fissure or seam in the ceiling of the passageway, of such a nature that a portion of the rock in the seam was supported by the piece of the wall which was to be blasted away to make the doorway; that the danger arising from this fissure could have been avoided by the putting in of appropriate timbers; that the mine boss, when the claimant's "buddy" had called his attention to the place on the day before the accident, declared that it was quite safe; that the claimant had no knowledge of the danger created by the fissure; and that the rock overhanging the seam fell after the first blast had been fired off, and injured the claimant, soon after he resumed work. "The case made out," said the court, "is that of an employee permitted by the employer to go to a certain place in the mines, and there receiving injuries from causes of which he had no previous knowledge, but which were known to the employer, and which should, in compliance

with its duty to provide a safe place to work in, have been obviated."

In *Lehigh Valley Coal Co. v. Washko* (1916) 145 C. C. A. 230, 231 Fed. 42, where the action was brought on the Pennsylvania enactment, the court thus commented upon one aspect of the evidence: "There is nothing to show that this gallery, when constructed, was not of the proper width, with proper passageway and safety holes, free from obstructions and well drained, with the roof and sides then secure. Since the roof at this place had stood for some two years, it cannot be inferred that it was unsafe when the owner finished the construction of the gallery."

In *Princeton Coal Min. Co. v. Howell* (1910) 46 Ind. App. 572, 92 N. E. 122, a verdict for the plaintiff was held to be warranted by evidence which tended to show that, for more than ten days before he was injured by the fall of rocks from the roof of an entry, the mine boss had known that the supporting timbers were broken, weak, and insufficient to sustain the roof, and had failed to perform the prescribed duties of making the dangerous place safe, and excluding the employee therefrom until it was safe.

In *Vandalia Coal Co. v. Alsopp* (1915) 61 Ind. App. 649, 109 N. E. 421, it was held that, having regard to the obligations imposed by the two Indiana provisions and to the consideration that the effect of § 3 of the Employers' Liability Act 1911 is to eliminate the defense of assumption of the risk in a

the duty of the superintendent, on behalf of and at the expense of the operator, to keep on hand at the mine, at all times, a full supply of all materials and supplies required to preserve the health and safety of the employees as ordered by the mine foreman and required by this act. *Brightly's Dig.* p. 263. For corresponding provisions in Act of 1911, see art. 3, § 1.

Kentucky.

Same provision as in Pennsylvania Acts 1914, chap. 79, art. 4, § 1, Stat. 1915, § 2725.

case where the injury arises from obedience to orders or directions from the employer, or any person whom the employee is bound to obey, a good cause of action under that act was shown by a complaint which in substance averred that plaintiff's decedent was ordered by the mine boss and his assistant to repair the entry in a particular manner; that the method selected was dangerous, and known to them to be dangerous, but nevertheless they negligently selected the unsafe way of propping the roof, when they could have selected the safe way of taking down the loose slate and rock; and that the decedent, while attempting to perform the work in obedience to the order given, was killed by the fall of the loose slate. The court said: "The statute recognizes two ways of making such places safe, and if the mine boss and his assistant negligently selected the unsafe way, as alleged, and ordered appellee to do work in that particular manner, and he was injured while obeying such order, the appellant is liable under the statute."

In *Harting v. Vandalia Coal Co.* (1912) 50 Ind. App. 98, 98 N. E. 132, a demurrer to the complaint was overruled on the ground that it showed that the plaintiff's decedent, a "jerry man" employed to clean up coal, rock, and debris in entries, was killed by the fall of insecure overhead rock and coal, in an entry through which he was passing while discharging the duties of his employment. The theory relied upon by the defendant, that the action was not maintainable for the reason that the decedent was "engaged in making and keeping place safe," was held not to be

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§ 18. Construction and effect of these statutes.

Whether the materials were "ordered," in such a sense as to enable a miner to recover under a provision of this tenor, is a question of fact, to be determined from the evidence.¹

III. Statute by which certain conditions precedent to the supervision of the employer's duty are specified.

§ 19. Contents of provisions.

By some of the provisions tabulated in this section, the duty as de-

applicable under the circumstances. Provisions imposing duty with relation to advancing excavations.

In *Macketta v. Missouri, K. & T. R. Co.* (1914) 92 Kan. 362, 140 Pac. 877, a good cause of action was held to be shown by evidence to the effect that, while the plaintiff and his "buddy" were at work in an entry, they observed that an untimbered portion of the roof was defective, and asked the mining boss to allow them to make it safe; that he refused permission, telling them he would have the roof "fixed" by the timberman before the following morning; that when they returned in the morning there were rocks on the traveling way, and, supposing that the timberman had taken down the dangerous rock in the roof in accordance with the promise of the boss, they proceeded to clean away the rocks on the floor, and that, while they were so engaged, the rock in the roof fell on plaintiff.

In *Cherokee & P. Coal & Min. Co. v. Britton* (1896) 3 Kan. App. 292, 45 Pac. 100, the ground on which a verdict for the plaintiff, whose decedent, a driver, had been killed by the fall of a rock, was set aside, was merely that neither the evidence nor the findings of fact showed that the superintendent or bosses in the mine had any knowledge, actual or constructive, of the defect. But the reason thus assigned for the decision is no longer valid in this state. See *Little v. Norton Coal Co.* (1910) 83 Kan. 232, 109 Pac. 768, the effect of which is stated in § 3, note 1, *supra*.

¹In *Bisko v. Braznell Gas Coal Co.* (1909) 223 Pa. 186, 72 Atl. 504, the plaintiff, while repairing a brattice

fined is imposed upon the employer himself; by others, upon some designated agent. But as the liability of the employer is not affected in any wise by this difference in the phraseology, it is unnecessary to segregate the two categories.

Alabama.

Gen. Acts 1911, No. 493, pp. 500, 514, § 38. "It shall be the duty of persons operating coal mines in this state to keep at a convenient place at or near the main entrance of the mine, or in the mines, a sufficient supply of props and other timbers useful for propping therein, of suitable lengths and sizes, for those working in such mines. It shall be the duty of those working in said mines, who need props and other timbers, to select and mark the same when needed for propping by them, designating on such props or timbers the place at which the same are to be delivered, or give notice to the person whose duty it is to deliver, or have the same delivered, of the number and kind of props or other timbers needed, and of the place at which they are to be delivered. It shall then be the duty of the operator to promptly deliver, or cause to be delivered, such props or other timbers at the place designated."

This provision supersedes the earlier one in Laws 1897, p. 1099, § 12.

Arkansas.

Act of April 4, 1893, § 14, Kirby's Dig. § 5352. The owner, agent, or operator of any mine shall keep a sufficient amount of timber when required to be used as props, so that the workmen can [sic] at all times be able to properly secure the said workings from caving in, and it shall be the

duty of the owner, agent, or operator to send down all such props when required, and deliver said props to the place where cars are delivered.

Illinois.

Mining Law of July 1, 1879 (as amended by Laws 1887, p. 235), § 16; Starr & C. Anno. Stat. p. 2730, chap. 93, § 16. The owner, agent, or operator of every coal mine shall keep a supply of timber constantly on hand of sufficient length and dimensions to be used as props and cap pieces, and shall deliver the same as required, with the miner's empty car, so that the workmen may at all times be able properly to secure said workings for their own safety.

Laws 1887, p. 235, § 16 (Starr & C. Anno. Stat. p. 2730). The owner, agent, or operator of every coal mine shall keep a supply of timber constantly on hand, of sufficient length and dimensions to be used as props and cap pieces, and shall deliver the same as required, with the miner's empty car, so that the workmen may at all times be able to secure said workings for their own safety.

Mines and Mining Act, Laws 1899, p. 300, § 16; Hurd's Rev. Stat. 1905, p. 1388; 4 Starr & C. Anno. Stat. p. 855. The mine manager shall always provide a sufficient supply of props, caps, and timber delivered on the miners' cars at the usual place when demanded, as nearly as possible, in suitable lengths and dimensions for the securing of the roof by the miners, and it shall be the duty of the miner to properly prop and secure his place with materials provided therefor.

Coal Mine Act, Laws 1911, No. 544, § 20, subsec. 6; Hurd's Rev. Stat.

designed to protect the mine from any gas there might be in the hole formed by a break in the roof of an entry, was injured by an explosion of gas which escaped from the hole. The court thus discussed the evidence: "In the case at bar, the most that can be said of the plaintiff's testimony is that it shows that the witness told the superintendent of the necessity for supports for the roof and brattice in butt entry No. 2, and that the superintendent promised to have the neces-

sary work done to put the mine in proper shape at that place. The plaintiff also testified that he heard the mine foreman tell the superintendent that the roof was bad, and ought to be fixed; but there is not a particle of evidence tending to show that the foreman made any demand at any time upon the superintendent for any material with which to do the work, or for material for any of the workmen to construct or repair a brattice at that point."

1911, chap. 93; Jones & A. Rev. Stat. chap. 93, § 7494. The mine manager shall provide a sufficient number of props, caps, and timbers, when demanded, delivered on the miners' cars at the usual place, in suitable lengths and dimensions for the securing of the roof by the miners.

Indiana.

Act of July 18, 1885, § 3 (Burns's Rev. Stat. 1894, § 7444). The owner, agent, or operator of any coal mine shall keep a sufficient supply of timber at the mine, so that the workmen may, at all times, be able to secure the workings from caving in, and the agent, owner, or operator shall deliver, when selected, all props of proper length and timbers to the rooms of the workmen, when needed and required.

The provision in the Act of June 3, 1891, § 6, as amended by Acts 1893, p. 147 (Burns's Rev. Stat. 1894 and 1901, § 7466), is couched in similar terms.

Burns's Rev. Stat. 1908, 1914, § 8585. The owner, operator, agent, or lessee of any coal mine in this state shall keep a sufficient supply of timber at the mine, and the owner, operator, agent, or lessee shall deliver all props, caps, and timbers (of proper length) to the rooms of the workmen when needed and required, so that the workmen may at all times be able to secure properly the workings from caving in. Every operator operating mines shall be required to place a blackboard near the mine entrance sufficiently large, stating thereon in figures the lengths of all timber in use in said mine. The miners shall register thereon, when needing timber for securing their working places, their respective numbers, under the figure indicating the proper lengths of the timber required. [The clause relating to the blackboard differs verbally from the corresponding one in the earlier enactment.]

Iowa.

Acts of 1884, chap. 21, § 18 (McClain's Code, § 2465). This is a transcript of the Missouri provision, set out *infra*.

Acts of 1911, chap. 106, § 33 (Code Supp. 1913, 2489-5a): "The owner, lessee, operator or person in charge of any mine shall at all times keep a sufficient supply of caps and timbers to be used as props or otherwise, convenient and ready for use, and shall send such caps, timbers, and props down when requested, and deliver them to the places where needed." The substitution of the word "requested" for "required," as used in the earlier provision, is noteworthy, in view of the difference of views as to the connotation of the latter word. See § 20, *infra*.

Kentucky.

Laws 1908, chap. 59, § 7 (Stat. 1909, § 2489a7). "Each owner, lessee or operator . . . shall provide and furnish to the miners employed in said mine a sufficient number of caps and props, said props to be sawed square at each end, to be used by said miners in securing the roof in their rooms, and at such other working places where by law or custom of those usually engaged in such employment it is the duty of said miners to keep the roof propped, after the miner has selected and worked [marked] the same."¹

Laws 1914, chap. 79, art. 5, § 4 (Stat. 1915, § 2726, subsec. 4). By one of the clauses in this provision it is declared that the mine foreman shall see that the workmen are provided with sufficient props, cap pieces, and timbers of suitable size, which shall be delivered to the working place, when ordered or selected by the workmen as specified in the mine rules.

Laws 1914, chap. 79, art. 5, § 5 (Stat. § 2726, subsec. 5). Every workman in need of props, cap pieces and

¹The word "worked" was pronounced to be clearly a mere clerical error for "marked," in *Old Diamond Coal Co. v. Denney* (1914) 160 Ky. 554, 169 S. W. 1016, *Palmer v. Empire Coal Co.* (1915) 162 Ky. 130, 172 S. W.

97, and *Stearns Coal & Lumber Co. v. Crabtree* (1916) 168 Ky. 8, 181 S. W. 615. In the second of these cases, it was declared to be equally clear that the words "the same" referred to "caps and props."

timbers shall notify the mine foreman, or assistant mine foreman, or any other person delegated by the mine foreman, of the fact at least one day in advance, giving the number, size, and length of props, cap pieces, and timbers required. In case of emergency, the timber may be ordered immediately upon the discovery of danger. If for any reason the necessary timbers cannot be supplied when required, the workman shall vacate the place until the timber needed is supplied.

Missouri.

Act of March 23, 1881, § 16 (Rev. Stat. 1889, § 7076; Rev. Stat. 1899, § 8822; Rev. Stat. 1909, § 8473). "The owner, agent, or operator of any mine shall keep a sufficient supply of timber, when required to be used as props, so that the workmen may at all times be able to properly secure the said workings from caving in, and it shall be the duty of the owner, agent, or operator to send down all such props when required."

Oklahoma.

Laws 1907, chap. 54, art. 7, § 1 (Rev. Laws 1910, § 3983). This provision is virtually a transcript of the first of the Pennsylvania ones, set out infra.

Pennsylvania.

Bituminous Coal Mines Act of May 15, 1893, art. 6, § 1. The mine foreman appointed under the statute shall see that sufficient props, caps, and timbers of suitable size are sent into the mine, when required, and all props shall be cut square at both ends, and as near as practicable to a proper length at the places where they are to be used, and such props, caps, and timbers shall be delivered in the working places of the mine. Brightly's Dig. 12th ed. p. 254.

Art. 6, § 2. Every workman in want of props or timbers and cap pieces shall notify the mine foreman or his assistant of the fact at least one day in advance, giving the length and number of props or timbers, and cap pieces required, but in an emergency the timbers may be ordered immediately upon the discovery of any danger. And if for any cause the

timbers cannot be supplied when required, he shall instruct the person to vacate all said working places until supplied with the timber needed. Brightly's Dig. p. 254.

Bituminous Coal Mines Act of 1911, P. L. p. 756, art. 4, § 6. A portion of this provision runs as follows: "The mine foreman shall . . . see that the workmen are provided with sufficient props, cap pieces, and timbers of suitable size, which shall be delivered at the working places, or as near thereto as they can be conveyed in the mine cars, *when requested* by the workmen, in accordance with § 7 of this article."

Anthracite Coal Mine Act of June 1, 1883, § 1. The owner, agent, lessee, or foreman of any anthracite mine shall furnish to the miners at his request all props and timbers necessary for the same mining of coal. Such props shall be suitably prepared, and shall be delivered at such places in the mine as shall be designated by the inside foreman.

Anthracite Coal Mines Act (Act of June 2, 1891) art. 11, § 2. Every workman in want of props, ties, rails, or timbers shall notify the mine foreman or his assistant of the fact at least one day in advance, giving the length of the props or timber required; and in case of danger from loose roof or sides, he shall not continue to cut or load coal until the said props and timbers have been properly furnished and the place made secure. Brightly's Dig. p. 135.

Tennessee.

Laws 1903, chap. 237, § 20; Laws 1915, chap. 169, § 19. The mine foreman shall see that sufficient props, caps, and timbers are kept at some convenient point near the mine entrance, which shall be selected and loaded on the cars by the miners, and shall then be hauled to the mouth of the room or the face of the entry where the miner is working.

Virginia.

Acts 1912, p. 419, § 13. The mine foreman shall "see that sufficient props, caps, and timbers, as nearly as possible of suitable dimensions, are furnished for the places where they

are to be used, and such props, caps, and timbers shall be delivered and placed at such points as the rule for the government of each respective mine provides for them to be delivered; and every workman in want of props, cap pieces, and timbers shall notify the mine foreman, or such other person who may be designated for that purpose, at least one day in advance, giving the length and number of props, or timbers and cap pieces, he requires, but in case of emergency the timbers may be ordered immediately upon the discovery of any danger."

(The portion of this clause relating to "notification" by the miner is also inserted in § 4.)

Washington.

Laws 1891, p. 158, § 10 (Hill's Code, § 2233; Bal. Code, § 3178; Rem. & Bal. Code, § 7394). The owner, agent, or operator of any coal mine shall keep a sufficient supply of timber at any such mine where the same is required for the use as props, so that the workmen may at all times be able properly to secure the said workings from caving in, and it shall be the duty of the owner, agent, or operator to send down into the mine all such props when required, the same to be delivered at the entrance of the working place.

Illinois.

¹In *Western Anthracite Coal & Coke Co. v. Beaver* (1901) 192 Ill. 333, 61 N. E. 335, it was remarked: "Appellant cannot excuse a wilful failure on its part to furnish suitable props and cap pieces to deceased, upon his request, to make his room safe, as required by the statute, by showing that Beaver was guilty of negligence which contributed to the injury."

The synonymy of "requested" with the statutory term "required" was here taken for granted; but the question of construction was not specifically raised, and in two later cases it was treated by the court of appeals as being still an open one.

In *Thompson v. Dering Coal Co.* (1910) 158 Ill. App. 289, an instruction in which the words "required" and "demanded" were used interchangeably, as applying to the statu-

West Virginia.

Laws 1883, chap. 70, § 6; Laws 1907, chap. 78, § 15 (Code 1891, p. 994; Code Supp. 1907, chap. 78, § 410; Anno. Code 1913, § 483). Enactment similar to that of Virginia.

§ 20. Verbal construction of these provisions.

An initial difficulty with respect to the classification of some of the provisions tabulated in the preceding section is produced by the fact that the phrases used in them for the purpose of designating the circumstances under which the imposed duty is to supervene are "when required," or "as required." As the word "required" is susceptible of two constructions, viz., "requested," or "needed," it is permissible, as a matter merely of verbal interpretation, to view the provisions of this term as belonging either to the category discussed in the present subdivision, or imposing, like those considered in subd. II., a continuous duty which is called into active operation whenever a necessity arises for timbering the place of work.

The effect of the decisions which bear upon the annotation of this word is stated in the footnote.¹

The conflict of opinion which is disclosed by those decisions shows that the meaning of the phrases "when re-

tory duty of the owner or operator of a coal mine, was held erroneous. The court said: "In its common acceptance the word 'required' is not a synonym for the word 'demanded,' as employed by the statute. The former may relate to a condition arising by implication, and is more commonly used as synonymous with 'necessary,' while the latter, in the sense in which it is employed in the statute, relates to an express overt act." This ruling was approved in *Meunier v. Chicago & C. Coal Co.* (1913) 180 Ill. App. 114. In neither of these cases was the above-quoted language of the supreme court referred to.

Missouri.

In *Leslie v. Rich Hill Coal Min. Co.* (1892) 110 Mo. 31, 19 S. W. 308, it would seem that the court must have assumed that the phrase "when required" imported "when needed," for

quired" and "as required" is still an arguable point, so far as respects the jurisdictions in which it has not yet been judicially settled. The more reasonable position, however, seems to be this—that, although the expression "required" may, as an examination of a dictionary will show, be used without impropriety in the sense of "requested," the conclusion that it should be taken as importing "necessary" or "needed" is strongly indicated by an application of the general rule of statutory construction, under which words are assumed to bear their "popular meaning," unless

(which is clearly not the situation involved here) they have a well-recognized technical one.² But as the preponderance of American authority is distinctly in favor of ascribing to it the connotation of "requested," it will be convenient for the purposes of the present discussion to treat that connotation as the true one.

It has been held that a provision applicable to "caps and props" embraces "headers," that is, pieces of plank longer than caps, and extending over a larger portion of the roof.³

The connotation of the words and phrases used in these provisions for

the gist of one of its rulings was that the employer could not be held liable unless he was shown to have had notice of the conditions which caused the injury complained of.

In *Adams v. Kansas & T. Coal Co.* (1900) 85 Mo. App. 486, the following remarks of the court showed that it assumed "required" to be synonymous with "requested." "The statute imposes the duty to furnish these props *on request* of the mirer, and when it [the operator] fails to perform that duty it assumes the risk of resulting accident. . . . The statute was intended (when violated) to cut off the excuse of the operator that he had furnished what he thought was, and what appeared to be, a safe place to work, even though the servant also thought it was safe, if he, nevertheless, out of reasonable caution against accident, had demanded the props." The *Leslie Case*, *supra*, was not referred to.

Nor was that case mentioned in *Bowerman v. Lackawanna Min. Co.* (1903) 98 Mo. App. 308, 71 S. W. 1062, where the argument of the court proceeded on the theory that "required" meant "needed." The view thus taken was approved in *Weston v. Lackawanna Min. Co.* (1904) 105 Mo. App. 702, 78 S. W. 1044, but condemned in *Wojtylak v. Kansas & T. Coal Co.* (1905) 188 Mo. 260, 87 S. W. 506, where the court expressed the opinion, *arguendo*, that "§ 8822, Rev. Stat. 1899, means that the mining company shall keep on hand a sufficient supply of props, so that, when a miner requests them, they shall send them to him, without unnecessary delay, to enable him to prop his room." No

comments were made on the *Leslie Case*, *supra*.

In *McKinnon v. Western Coal & Min. Co.* (1906) 120 Mo. App. 148, 96 S. W. 485, the contention that this expression of opinion should be disregarded as being merely an obiter dictum, and that the *Bowerman Case*, *supra*, should be followed, was rejected.

Pennsylvania.

The phrase "when required" was treated as being equivalent to "when requested," in *Collins v. Northern Anthracite Coal Co.* (1913) 241 Pa. 59, 88 Atl. 75.

Washington.

The language used in *Green v. Western American Co.* (1902) 30 Wash. 87, 70 Pac. 310, seems to warrant the inference that the phrase "when required" was assumed to be synonymous with "when necessary," and to have no reference to a precedent demand on the part of the miner.

England.

In *Gibbon v. Phillips* (1894) 64 L. J. Mag. Cas. N. S. 42, the phrase "where props are required," in § 49, rule 22, of the English Coal Mines Regulation Act, was construed as meaning "where props are necessary." But in this instance the context was different from that with relation to which the American decisions were rendered.

² See Endlich, *Interpretation of Statutes*, § 4.

³ *Big Branch Coal Co. v. Wrenchie* (1914) 160 Ky. 668, 170 S. W. 14. Compare also *Old Diamond Coal Co. v. Denney* (1914) 160 Ky. 554, 169 S. W.

the purpose of designating the portions of a mine to which they are applicable is discussed in subd. VIII. *infra*.

§ 21. Maintenance of supply of suitable timbers.

One of the duties imposed upon the employer by the statutes discussed in the present subdivision is that of keeping on hand at some reasonable accessible place a supply of timbers suitable to use for the support of the roof and sides of the working places of the mines.

An action is obviously maintainable for an injury caused by his failure to perform this duty, irrespective of whether the claimant had or had not made a previous request for the delivery of the timbers.¹

It has been held that "headers," that is to say, planks extending over a larger portion of the roof than that covered by caps, are among the ma-

terials which the employer is required to furnish, under an enactment applicable by its terms only to "caps and props." The ratio decidendi was that headers served the purpose of caps, and their use was customary and frequently necessary.²

§ 22. Delivery of the timbers; in general.

Another of the duties imposed by these statutes upon the employer is that of delivering suitable timbers at the working places of the miners.¹

In order to affect him with liability on the ground of his having violated this duty, it must be proved:

1. That the employer himself, or some superior employee representing him with respect to the supervision of the mine, had been notified that certain timbers were needed.

2. That the notification was made in the manner prescribed by the legislature, or in accordance with the rec-

1016, where this connotation was taken for granted.

¹In *Mt. Olive & S. Coal Co. v. Rademacher* (1901) 190 Ill. 538, 60 N. E. 888, affirming (1900) 92 Ill. App. 442, where the plaintiff's decedent was killed by a fall of slate from the roof of the room in which he was digging coal, the complaint included specific allegations, both as to the defendant's failure to keep props at the bottom of the shaft, and as to his failure to deliver them after they had been demanded.

Several witnesses testified that, when timber was on hand, it was ordinarily kept at the bottom of the shaft. Held, that to allow the further question to be asked whether there were props on hand at the bottom of the shaft was not error, although the statute does not require them to be kept at any particular place. Such evidence tended to show the absence of the props which the statute requires the operator to have on hand.

In *Lehigh Valley Coal Co. v. Washko* (1916) 145 C. C. A. 230, 231 Fed. 42 (decided with reference to the Pennsylvania Anthracite Act), one of the grounds on which recovery was denied was that "there was no testimony to support any theory that the owner had failed to provide [props].

They were not stacked up in the galleries where they would have interfered with operations, but there was always a sufficiency of them elsewhere, ready for the foreman whenever he might direct their emplacement."

²*Big Branch Coal Co. v. Wrenchie* (1914) 160 Ky. 668, 170 S. W. 14.

¹In *Left Fork Coal Co. v. Owens* (1913) 155 Ky. 212, 159 S. W. 703, the court, citing the earlier cases, *Low v. Clear Creek Coal Co.* (1910) 140 Ky. 754, 33 L.R.A.(N.S.) 656, 131 S. W. 1007, Ann. Cas. 1912B, 574; *Goins v. North Jellico Coal Co.* (1910) 140 Ky. 323, 131 S. W. 28, and *New Bell Jellico Coal Co. v. Sowders* (1913) 154 Ky. 101, 156 S. W. 1046, said that the doctrine enounced in them was that "the statute puts on the mine owner the peremptory and nonassignable duty of furnishing to the miners the caps and props necessary to protect the roof of the room or place at which they are working, when so requested to do by the miners, and, if a miner is injured by the failure of the mine owner to perform this duty, he may maintain an action to recover damages for the injury so sustained, unless it be that his own contributory negligence will defeat a recovery."

That this is the effect of the enact-

ognized system of the employer's mine.

3. That the notification was made in time to enable the party notified to procure a delivery of the timbers before the injury complained of was received.

4. That the party notified either refused or neglected to deliver any timbers, or delivered timbers which were not suitable for the miner's purpose, or delivered them too late to prevent the occurrence of the accident in question.

These prerequisites to recovery will be considered in the following sections.

ment in other states was taken for granted in all the cases cited in the following section.

² This doctrine is taken for granted in all the cases cited in the following sections.

"The initial duty of the employer is to 'keep' 'props ready for use.' He is not required at this point to send them down to the miner. Before this duty arises, the duty of request must be performed by the miner. Thereupon the duty to send the props down to the miner is imposed upon the employer." *Edgren v. Scandia Coal Co.* (1915) 171 Iowa, 459, 151 N. W. 519.

A declaration which averred, in substance, that it was the duty of defendant not only to furnish props, but also to put them in, and prop the roof of the mine so as to make it safe for the workmen, was assumed to be bad in *Consolidated Coal Co. v. Yung* (1887) 24 Ill. App. 255, in so far as the action was viewed as being based upon the statute.

The actual ground upon which the case was decided was that the declaration did not show a good cause of action at common law.

¹ That this is the effect of the statutes is taken for granted in all the cases reviewed in the following sections.

In *Oleson v. Maple Grove Coal & Min. Co.* (1901) 115 Iowa, 74, 87 N. W. 736 (miner injured while taking out pillars), the evidence showed that it was customary for the miner to call for props when required, and for the mine operator to send them down, and there was no evidence whatever that decedent called for props which were

The employer's duty is limited to the operation of delivering the timbers. The correlative duty of using them after the delivery is placed upon the miners.²

§ 23. Notification by miner that timbers are needed.

So far as most of these statutes are concerned, it is clear that their phraseology distinctly and unmistakably imports that the duty to which the employer is subjected with regard to the delivery of timbers to the miner does not come into existence until the latter has notified the former that the timbers are needed,¹ the applicant

not furnished. Held, that the action was not maintainable.

If the instructions given with reference to the element of the demand for timbers are not accurately worded, the error is one which constitutes a sufficient ground for setting aside a verdict against the party prejudiced by it. *Meunier v. Chicago & C. Coal Co.* (1913) 180 Ill. App. 114, where it was held that, having regard to the words of the Illinois Act of 1899, by which the liability of the employer was controlled, it was error to instruct the jury "that the law provides that the owner, agent, or operator of every coal mine shall keep a supply of timber constantly on hand of sufficient lengths and dimensions to be used as props and cap pieces; and shall deliver the same as required on the miners' cars, at the usual place, so that the workmen may at all times be able to properly secure the workings for their own safety." The court said: The miner "must designate the kind of timber he needs to prop his room. Under this instruction the jury could readily have found that the defendant had wilfully violated the statute because there was need of props and caps, although no demand had been made for them by the miner."

In a Kentucky case it was apparently assumed by the court for the purposes of its decision that, in a case where the miner is so inexperienced that he does not know that the use of props is necessary for his security, the statutory duty of the employer to provide him with props at the working place itself is absolute, in the sense that it exists independently of the making of a previous demand for them by the miner. *Bartley v.*

being also required, in some jurisdictions, to designate specifically the number and kind of timbers to be delivered,³ and the place where they are to be delivered.³

Whether a proper demand for timbers was made by the injured miner is a question of fact which is primarily for the jury.⁴

Elkhorn Consol. Coal & Coke Co. (1913) 151 Ky. 830, 152 S. W. 955, where a boy of seventeen was injured by a fall of slate, while engaged in digging coal for an engine operated by him. The actual point decided was that it was error to direct a verdict for the defendant on the ground that, under the circumstances shown, recovery was barred by the defenses of assumption of risks and contributory negligence. But the court made the following remarks: "Here no props were provided by appellee, but, had they been furnished, it is questionable whether appellant was sufficiently skilled in mining to set them up without instruction from an experienced miner, for, as previously indicated, he had not, according to the evidence, been advised, nor did he know, that the use of props was necessary, or that, without them, there was danger of the slate's falling from the roof upon him." But, on general principles, it seems to be clearly unwarrantable to except any class of persons from the scope of an unqualified enactment. There seems to be some confusion in the opinion between the obligations of the employer at common law and under statute.

³In *STITH COAL CO. v. SANFORD* (reported herewith) ante, 1423, the claimant had satisfied this requirement, one of the disputed points being whether the defendant had adequately performed its duty in respect of delivery. See § 30, *infra*.

⁴In *Clark v. Choctaw Min. Co.* (1918) 201 Ala. 466, 78 So. 372, it was declared to be clear from the terms of the Alabama Statute of 1911 that "the duty to designate the props or timbers desired, or to give notice of the number and kind of props or other timbers needed and of the place at which they are to be delivered, is laid upon the workman himself, and that he (the workman) must make the required designation, or give the notice, to the end that the duty to

§ 24. Notification addressed directly to employer or his agent.

A notification of this sort is sufficient to call into existence the duty of the employer to furnish the miner with props.¹ It has been held that such a notification is effective, although the controlling statute provides that the demands of the miners

deliver the props or other timbers may be imposed upon the operator." It was held that a verdict had been properly directed for the defendant, because the notice in question did not designate the place where the props demanded were to be delivered. A compliance with the statutory prerequisite in this regard was not shown by plaintiff's testimony that it was his duty of the contractor who was his immediate employer "to set the timbers up." This case was followed in *Altoona Coal Co. v. Kelly* (1919) 203 Ala. 338, 83 So. 62.

¹See *Dickerson v. Henrietta Coal Co.* (1911) 251 Ill. 292, 96 N. E. 225, affirming (1910) 158 Ill. App. 454 (not error to leave case to jury, the evidence being conflicting); *McKinnon v. Western Coal & Min. Co.* (1906) 120 Mo. App. 148, 96 S. W. 148 (direction of verdict for defendant properly refused, the evidence being conflicting as to whether there were sufficient props in plaintiff's room, and whether he had called for them); and the cases cited in the following sections.

¹In *Big Branch Coal Co. v. Wrenchie* (1914) 160 Ky. 668, 170 S. W. 14, the court sustained a verdict in favor of a miner whose repeated demands, made upon the bank boss, for headers to support the roof of a "break-through," or "room neck," which was being opened, had not been complied with. A second ground assigned for the decision was that the employer was bound, by the express provisions of his contract with the miner, to furnish "props, caps, headers, and timbers necessary to prop the roof."

In *Bauschka v. Western Coal & Min. Co.* (1910) 95 Ark. 477, 129 S. W. 1095, a verdict for the defendant was set aside on the ground that the trial judge had improperly excluded evidence to the effect that one of the miners, who was working in the same air course as the plaintiff, had called on the defendant for timbers to prop the roof at the place from which the

for the timbers which they need shall be communicated by a specified channel.²

§ 24a. Notification in manner prescribed by statute.

The sufficiency of a notification conveyed to the employer by some channel of communication designated by the statute itself was the ratio deci-

rock which injured the plaintiff had fallen, and that another miner, who was on a committee of the local union, had made a similar request. The competency of this evidence, which was affirmed upon the ground that it had a tendency to show that the company had notice of the dangerous condition of the roof, was apparently considered with reference solely to the common-law liability of the defendant. But presumably such evidence should be regarded as equally admissible in support of a claim based upon the statute. There seems to be no satisfactory ground upon which it can be held that the liability of an employer who has failed to comply with a request to "send down props" is predicable only in respect of the particular person or persons by whom the request was made.

²In *Muren Coal & Ice Co. v. Cope-land* (1910) 46 Ind. App. 230, 90 N. E. 489, 91 N. E. 508, it was held that evidence of the following purport was sufficient to sustain a verdict against the defendant; that three days before the accident the plaintiff had verbally notified defendant's mine boss that timbers were needed in his room; that defendant maintained a blackboard at the entrance to its mine, as required by statute, where miners could register their requirements in regard to timbers; that the decedent did not register any request for timber on said blackboard; that, on the evening previous to the happening of the accident, the decedent had fired a blast by which coal was loosened which in part supported the piece of slate or soapstone which afterwards fell on him; that immediately before the accident happened decedent called the attention of the assistant mine boss, and of another miner and another workman in the mine, to the condition of the roof in the place where the accident happened; that there then appeared cracks in the

dendi in several cases involving the effect of the earlier Kentucky enactment. The doctrine applied was that "the duty of the operator to furnish props was dependent upon the miner having first 'selected and marked' the props he desired, from a supply to be maintained by the operator in the mine, or within a reasonable distance therefrom."¹ This doctrine, however,

stone forming the roof; that the assistant mining boss advised decedent to put a prop under the stone, and decedent said he would do so; that the miner consulted told the decedent that he did not think there was any danger, but advised the putting of two props underneath the stone before mining the coal loosened by the blast; that no prop was put under the stone, and that decedent mined out the coal loosened by the blast. It was unsuccessfully urged by the defendant that, "in order to impose on the operator of the mine the duty of furnishing timbers to the miners engaged at work in the mine, it was essential that the miner should have registered upon the blackboard." The court said that with "the fact conceded that the mining boss, who for this purpose represents the operator, has knowledge of the fact that the necessary timbers are not supplied in the miner's working place, the duty to supply them imperatively follows." The ruling on this point was approved in *Peabody Alwert Coal Co. v. Yandell* (1911) 48 Ind. App. 615, 96 N. E. 388, where the complaint was held not to be rendered demurrable by the omission of an averment to the effect that the miner registered his request on the blackboard, and that after such request appellant neglected or refused to furnish such timbers. This point was not discussed when the case came before the supreme court. See (1913) 179 Ind. 222, 100 N. E. 758.

¹In *Thacker v. Shelby Coal Min. Co.* (1917) 177 Ky. 193, 197 S. W. 633, it was stated that this was the effect of *Sneed & McG. Coal Co. v. Legere* (1916) 168 Ky. 3, 181 S. W. 617. In the earlier case the evidence showed that the plaintiff and a miner named Hodge worked near together, one on each side of an entry, and that they used each other's props whenever needed; that, on the afternoon of the day preceding the one on which he was injured, he told Hodge to select props

was held to be subject to a qualification thus formulated: "If the mine owner does not supply props at a place in the mine, or within a reason-

and send them in, the props being a mile or more from the place of work; that on his way out of the mine Hodge went to the place where the company kept the props, and selected the kind wanted, and piled them up near the track on which they would be taken into the place where appellee needed them; that one Hibbard, employed to load the props on cars after they had been selected and picked out to be taken in to the miners, had loaded the props in the car, promising to send them in to the plaintiff on the first trip the next morning; and that Hodge put his own number on the props, the consequence being that a rule of the mine under which it was the duty of a miner, when he selected props, to mark them with his number, was not complied with, so far as the plaintiff was concerned. Hibbard, supposing that the props were intended for Hodge, and knowing that he would not be at work on the following day, did not deliver the props until the day after the plaintiff was injured. Counsel for plaintiff undertook to overcome the significance of the fact that the wrong number had been marked on the props by introducing evidence that Hodge told Hibbard they were for the plaintiff. Held, that such a notification was "not sufficient to take the place of the statutory requirement, or, under the circumstances of this case, to subject the company to liability for failure to deliver the props. . . . The purpose of requiring them to be marked with the number of the miner was to avoid the very condition that arises in this case, where there is a dispute between the miner, or rather his agent, Hodge, and the employee Hibbard, as to what was said with reference to these props. The number on the props was especially misleading, and, if they had not been marked, we are not prepared to say that the evidence of Hodge would not have been sufficient to take the case to the jury."

In *Left Fork Coal Co. v. Owens* (1913) 155 Ky. 212, 159 S. W. 703, there was evidence showing that it was the custom of the miners, when they needed timbers, to go to a large pile of timber deposited by the defend-

able distance therefrom, so that they can be conveniently reached by the miner, the miner is not required to select and mark the props, but a re-

ant company near the mouth of the mine, select such timbers as they needed, and place the same near the track on which cars ran to and from the rooms, marking the timber in such a manner as to indicate the room to which it was to be sent, and that the timber so marked and placed would then be hauled by a driver to the designated point. It was also shown that this custom and habit of the miners was known to and approved by the company, which treated the placing and marking of timber as notice by the miners that the timber was needed for protection in places at which they worked. The timbers needed by the plaintiff's decedent were duly selected by him in accordance with this custom, but not delivered on the day when they were ordered. After ceasing to work for one day, he complained to the foreman about the failure to deliver, and was directed to go ahead and make light shots, which he might do without danger. Three days later, the timber being still undelivered, he was killed a few minutes after beginning work by the fall of a large piece of slate, extending back perhaps 6 or 8 feet from the face of the coal. Held, that the trial judge had properly refused to direct a verdict in favor of the defendant.

See also *Continental Coal Corp. v. York* (1914) 159 Ky. 334, 167 S. W. 131 (recovery allowed where timbers were selected and marked, but taken by driver to wrong room); *Stratton v. Northeast Coal Co.* (1915) 164 Ky. 299, 175 S. W. 332 (statute excluded from consideration, as there was no evidence that props and caps were not on hand, or that plaintiff had marked any timbers for delivery); *Stearns Coal & Lumber Co. v. Crabtree* (1916) 163 Ky. 8, 181 S. W. 615 (verdict for the plaintiff was set aside on the ground that the evidence failed to show that the plaintiff had selected and marked the props to be delivered).

In *Low v. Clear Creek Coal Co.* (1910) 140 Ky. 754, 83 L.R.A. (N.S.) 656, 131 S. W. 1007, Ann. Cas. 1912B, 574, a demurrer to the petition was held to have been improperly sustained, as it alleged that the plaintiff had selected and marked the props ne-

quest of the miner will be sufficient to impose on the owner the duty of furnishing props."²

Where the employer is required, as in Indiana, to provide a blackboard, to be used for the purpose of registering the needs of the miners with regard to timbers, he is clearly bound by a notification given in this manner.³

In a case involving the effect of the Illinois statute, which provides that the mine manager shall furnish props when demanded, it was laid down that the demand must be made upon the mine manager himself, and that, in

the absence of an express regulation or custom, he is not bound by a demand addressed to a driver, or any other agent or servant.⁴

§ 25. Notification in manner specified or authorized by the employer or his agent.

The sufficiency of a notification of this sort has been affirmed in cases where the miner's request or demand for timbers was conveyed to the employer, or his agent, by a statement chalked on a blackboard or slate kept near the mouth of the mine,¹ by a written order deposited in a box sim-

by him. The discussion turned mainly on the availability of the defenses of assumption of risks and contributory negligence. See §§ 34 and 35, *infra*.

**Peerless Coal Co. v. Copenhaver* (1915) 165 Ky. 195, 176 S. W. 1002. This statement was approved in *Thacker v. Shelby Coal Min. Co.* (1917) 177 Ky. 193, 197 S. W. 633. There the plaintiff's evidence tended to show that, in response to a request for props, which the plaintiff's decedent and his fellow workman had sent through a driver to the bank boss, it was reported that there were no props the proper length, but that the boss would have some cut and send them in on the next trip, but that the accident happened before the driver made another trip; that there were no props of a suitable length in the mine; that it was customary, when props were needed, for the bank boss to saw them the requested length; and that such props as were provided by the defendant were kept in an inaccessible place, halfway down an incline, 1,000 or 1,200 feet long, which was located some 300 feet from the mouth of the mine. Held, that the action of the lower court in sustaining the motion for a peremptory instruction could not be upheld upon the ground of the failure of the deceased to select and mark the props needed, because there was proof that the defendant had not supplied the props at a place in the mine, or within a reasonable distance therefrom, and that the accident resulted from this failure. The further contention of defendant, that the peremptory instruction was proper because the petition was defective in failing to allege that deceased had selected and marked the needed props,

was rejected. The court said: "Since . . . the duty of selecting and marking props by the miner is dependent upon the operator having provided them in a proper place, the plaintiff was not required to allege a selection and marking, unless it was made to appear that they were provided by the defendant. The allegations of the petition that defendant negligently failed to furnish props, and violated its statutory duty in reference to furnishing props, are sufficient to cover every necessary step in furnishing them, and necessarily included the prior duty of providing them, for, if defendant did not even provide them, it did not, of course, furnish them."

**In Collins Coal Co. v. De Pugh* (1909) 43 Ind. App. 648, 88 N. E. 317, the sufficiency of a complaint was affirmed, which in substance averred that the defendant neglected to deliver the necessary props, etc., although often requested so to do by the plaintiff, not only through the driver in said mine, but also by posting such requisition on the blackboard furnished for that purpose. The objection that it was necessary to allege that it was the custom to order props of the driver was pronounced untenable. "It was only necessary to register on the board the needs of the miner. But whether information of the need of props was made through the driver, or by posting on the blackboard, would seem to be immaterial, if the information was actually given."

**Brack v. B. F. Berry Coal Co.* (1914) 187 Ill. App. 609. Only an abstract of this case is reported.

¹In *Dork Bros. Coal & Coke Co. v. Peton* (1901) 192 Ill. 41, 61 N. E. 330, affirming (1900) 95 Ill. App. 193,

ilarly placed,² and by a channel of communication authorized by a custom recognized in the defendant's mine. See next section.

§ 26. Notification in a manner sanctioned by custom.

With reference to the Illinois stat-

certain instructions required the jury to find from the evidence that the claimant asked the mine manager of the defendant to deliver props and caps of suitable lengths and dimensions for the securing of the roof in his room, and that the mine manager failed to furnish such props and caps, etc. It was objected that there was no evidence in the record showing that the claimant made any such demand. But this objection did not prevail. The court said: "The evidence tends to show that the appellee was in need of some props and caps, and that, for three successive days before he was injured, he placed his order for them on the board or slate used for that purpose, according to the custom or usage, . . . and that they were not furnished to him. This mode of making a demand for props and caps was a reasonable and proper one, and, as it was the mode adopted and in general use, it constituted a sufficient demand on the mine manager, within the meaning of the statute."

²In *Vindas v. Dering Coal Co.* (1908) 145 Ill. App. 528, the court approved an instruction to the effect that, where a general custom or usage exists in a mine that timber orders shall be signed by the miner and placed in a box provided for that purpose by the mine operator, the signing of such order by a miner and depositing the same in such box constituted, in law, a demand for timbers upon the mine manager and mine operator.

¹*Russell v. O'Gara Coal Co.* (1914) 188 Ill. App. 328.

²In *Donk Bros. Coal & Coke Co. v. Lucis* (1907) 226 Ill. 23, 80 N. E. 560, affirming (1906) 127 Ill. App. 61, the evidence showed that the mine manager had instructed the claimant and other miners, when they needed props, to order them from the drivers; that this instruction had been very generally followed by the miners; and that, owing to the size of the mine and the large number of employees, it was impracticable to require the miners to make a personal demand upon the

ute, it has been held that a demand addressed to such subordinate employees as a timberman,¹ or sent through a driver,² is sufficient to cast upon the employer the prescribed obligation in respect to the delivery of timbers, if such methods of making a request therefor are authorized by his

mine manager for props. The court said: "If, as contended by plaintiff in error, every one of the several hundred miners employed in this mine was required to leave his room and go in search of the mine manager, in order to request him to supply props, and if it then became the duty of the mine manager to look up the driver for the particular room where the props were wanted, and deliver the order for props to the driver in person, it is apparent that a great deal of confusion and unnecessary loss of time, both to the manager and miner, would result. To avoid this, the manager instructed the miners to make their requests for props direct to the drivers. This appears to be a very reasonable and common-sense method, the adoption of which in a large mine, such as this is shown to be, promoted the best interests of both employer and employee. The advantages of such a method are readily seen. The drivers and the miners are brought in contact with each other at frequent intervals when the mine is running, thus affording an opportunity for the miner to request, and the driver to deliver, props to meet the necessities which are continually arising in the various rooms of the mine."

In *Vaughan v. O'Gara Coal Co.* (1912) 173 Ill. App. 268, it was held that the refusal of the trial judge to direct a verdict for the defendant was proper, as the plaintiff's evidence showed that he had on several occasions sent through the driver a demand for props, and that it was the custom in the mine to demand props of the driver, and for a timberman to come to the room and saw the props of proper lengths.

In *Jvanowski v. Spring Valley Coal Co.* (1913) 183 Ill. App. 232, it was held that evidence of a custom to demand props of the driver, instead of the manager, is admissible, although such custom is not pleaded; and that the refusal of a requested instruction, informing the jury as to the legal effect of the evidence relating to

specific instructions, or are sanctioned by a recognized custom. Otherwise it is not effective for that purpose.³

In construing the earlier Kentucky enactment, it was laid down broadly that the specific statutory requirement as to the manner in which timbers are to be demanded "could not be changed

the alleged custom, was error, as the point was not covered by other instructions given.

For other cases in which the sufficiency of a demand addressed to a driver in accordance with a recognized custom was affirmed, see *Pana Coal Co. v. Becker* (1906) 130 Ill. App. 40; *Kedes v. Christian County Coal Co.* (1909) 149 Ill. App. 434; *Brack v. B. F. Bery Coal Co.* (1914) 187 Ill. App. 609.

³In *Dickerson v. Henrietta Coal Co.* (1911) 251 Ill. 292, 96 N. E. 225, affirming (1910) 158 Ill. App. 454, the admission of evidence to the effect that, when the claimant failed to receive props in sufficient numbers in response to his demand upon the manager during the morning of the day in question, he ordered others from the driver, was held improper, as he had not proved, or offered to prove, that the driver communicated this demand to the manager, or that it was the manager's duty to call on the driver to ascertain whether any such request or demand had been made of the driver. The court remarked that, "if the driver failed to convey the order to the manager, the driver would be at fault, and not the manager, and the proprietor could not be held liable for such negligence on the part of the driver." Under the circumstances, however, the error was held to be harmless, in view of the fact that the court had instructed the jury that there could be no recovery, unless the plaintiff had shown, by a preponderance of the evidence, that he demanded the props of the mine manager.

In *Yanloniz v. Spring Valley Coal Co.* (1914) 185 Ill. App. 563, it was held that the admission of testimony concerning a demand upon the driver was error, in view of the fact that the evidence showed clearly that the recognized custom was that the demand should be made upon either the mine manager or his assistant, the so-called "face boss," and not upon the drivers.

by a custom of the mine, so as to impose upon the mine owner a liability for failure to furnish props, when the statute itself was not complied with."⁴ But it has been held that the provision in the later statute of 1914, which requires "every workman in need of props" to notify the mine

In *Chicago, W. & V. Coal Co. v. Peterson* (1891) 39 Ill. App. 114, a notification to a car driver was held to be sufficient, although, so far as the report shows, no evidence as to a custom in this regard had been introduced. Under such circumstances, the ruling was inconsistent with the more recent authorities.

⁴*Borderland Coal Co. v. Kirk* (1918) 180 Ky. 691, 203 S. W. 534, stating this to be the effect of *Palmer v. Empire Coal Co.* (1915) 162 Ky. 130, 172 S. W. 97. There the plaintiff's decedent was killed by a fall of slate, while engaged in picking down coal and loading it on a car. On the first trial, a peremptory instruction was given in favor of the defendant company. Subsequently a new trial was granted, on the ground that evidence of defendant's failure to furnish plaintiff's decedent sufficient props and caps to support the roof was not admissible in support of a complaint of which the gravamen was the failure of the defendant itself to prop the roof. After the new trial was granted, plaintiff filed a second amended petition, pleading, in substance, a failure on the part of the defendant to furnish decedent a sufficient number of props and caps properly to protect and support the roof of his working place, although decedent had selected and marked a sufficient number of props and caps for that purpose. On the second trial plaintiff showed that her decedent had requested props, and that the mine foreman had promised to furnish them, but she did not show that the decedent had selected and marked any props. To overcome the effect of this failure on his part, plaintiff sought to prove that, under the custom of the mine in question, it was not the duty of the miner to select and mark his props, but merely to request the foreman to furnish props, which he would always do upon request. Held, that this evidence was not admissible for the purpose of establishing a compliance by the decedent with his statutory duty, and

foreman "of the fact at least one day in advance," is applicable "only to those workmen charged with the duty of propping, and does not in terms impose upon every miner the duty of complying with the statute." The conclusion drawn in this point of view was that it was competent for

the plaintiff to introduce evidence as to the custom of the mine for the purpose of showing that the duty of propping devolved upon the "timberman" employed for that purpose.⁵

The admission in evidence of a custom contrary to a statutory provision specifying the manner in which props

that the trial judge had properly directed a verdict for the defendant. The court said: "A miner is in a position to know what character of props he needs. The purpose of marking them is to indicate where they should be taken. As before stated, plaintiff did not show that the decedent had selected and marked any props. . . . Here it is sought to recover under a statute, by pleading a custom inconsistent therewith. Were we to uphold plaintiff's contention, every case like this would depend, not on the statute which the legislature saw fit to enact, but on the custom of the particular mine, and the rules of law applicable would vary according to the particular circumstances of each case. The very purpose of the statute was to do away with this uncertain condition, and prescribe with reasonable certainty the duties and liabilities of the miner and mine owner. . . . While the duties and liabilities of the miner and of the mine owner may sometimes depend upon the custom of the mine where there is no statute covering the subject (*Old Diamond Coal Co. v. Denney* (1914) 160 Ky. 554, 169 S. W. 1016), we take it that, where a statute speaks on the subject, the terms of the statute cannot be modified by custom."

⁵ *Borderland Coal Co. v. Kirk* (Ky.) *supra*. There it appeared that Lewis, the fellow workman of the plaintiff's decedent in a room where they were "drawing pillars," had, on the morning of the day when the accident occurred, requested one Lock, the assistant mine foreman, to prop the working place, and showed him where to set three timbers, one of the designated places being under that portion of the roof from which the slate afterwards fell which killed the decedent. Lock, after having finished his work, told the miners that everything was all right; but, instead of setting three timbers, he had set only one. A few minutes after the miners resumed work the slate fell. The company introduced a book of rules which, as

its manager testified, had been approved by the state mine inspector, and printed and properly posted throughout the mine. One of these rules provided that each miner should take down the dangerous slate and do his own propping and timbering. It further provided that props, caps, and other timbers could be procured by placing an order therefor with the mine foreman, or his assistant, at least twenty-four hours in advance of the time they were needed, and giving the number, sizes, and lengths required. The manager also testified that it was Lock's duty to set timbers wherever he thought they were necessary to be set to preserve the lives of the men and the property of the company, and, when so directed by the assistant foreman, to set posts at pillar work such as decedent was employed in—that this had been the custom of the mine ever since it began operations. It was urged that, as both the statute and the company's rules imposed on the decedent the duty of requesting props at least one day in advance, and of doing his own propping, and the statutory duty could not be changed by custom, the trial judge had erred in refusing to overrule the demurrer to the petition, and the motion for a peremptory instruction for the defendants, on account of the alleged failure of the decedent to comply with the statute and rules of the company. But this contention was rejected. The court said: "The custom of the mine may be proved for the purpose of showing upon whom the duty of propping devolves, and the effect is not to change the statutory requirement by custom. Even if the company's rules imposed upon every miner the duty of doing his own propping, the uncontradicted evidence shows that these rules had been waived, and that it was the custom of the mine, ever since it began operations, to have a timberman whose duty it was to do the propping at such places as decedent and Lewis were required to work."

are to be obtained is harmless where it appears that notice was given both in accordance with the custom and the statute.⁶

§ 27. *Timeliness of miner's notification that props were wanted.*

There is authority for the doctrine that liability cannot be imputed to the employer on the ground of his having failed to deliver timbers in response to a request or demand, unless it appears that the miner's notification reached him a sufficiently long time before the injury complained of was received, to render it possible for him or his agent, in the exercise of reasonable diligence, to send down the props soon enough to prevent the accident caused by the want of them;¹ or, as it was laid down in another case,

soon enough to afford him or his agent a reasonable opportunity to act upon the notification before the danger arising from the want of them became imminent.²

On the other hand, it would seem clear, on general principles, that a demand may be premature in such a sense that the failure to comply with it would not be treated as a violation of the statutory duty.³

§ 28. *Refusal or negligent failure to deliver timbers.*

The question whether the employer or his agent refused or neglected to comply with the demand of the injured miner for a certain kind of timber is one of fact, to be determined from the evidence.¹

⁶ *Collins Coal Co. v. De Pugh* (1909) 43 Ind. App. 648, 88 N. E. 317.

¹ *Donk Bros. Coal & Coke Co. v. Stroff* (1903) 200 Ill. 483, 66 N. E. 29 (case for jury, the evidence being conflicting as to the time when props were asked for).

² *Edgren v. Scandia Coal Co.* (1915) 171 Iowa, 459, 151 N. W. 521.

³ In the reporter's abstract of the effect of the decision in *Russell v. O'Gara Coal Co.* (1914) 188 Ill. App. 328, one of the paragraphs is as follows: "The fact that a miner orders props before they are needed does not relieve a mining company from liability to furnish them." But this statement doubtless requires some qualification, even under statutes worded like that of Illinois.

¹ *Mammoth Vein Coal Co. v. Johnson* (1910) 94 Ark. 621, 127 S. W. 971 (judgment for plaintiff upheld in a case where the question mainly discussed was whether he had been negligent in continuing to work after having asked for props); *Peebles v. O'Gara Coal Co.* (1909) 239 Ill. 370, 88 N. E. 161; *Davis Coal Co. v. Pollard* (1902) 158 Ind. 607, 92 Am. St. Rep. 319, 62 N. E. 492, affirming (1901) 27 Ind. App. 697, 60 N. E. 1124 (certain special findings, not stated, were held not to overcome the general verdict in favor of the plaintiff); *Gliebas v. Spring Valley Coal Co.* (1910) 159 Ill. App. 88 (evidence showed that a full supply had been delivered); *Druglis*

v. Northwestern Improv. Co. (1906) 41 Wash. 398, 83 Pac. 101 (verdict for plaintiff sustained, the evidence being conflicting as to the question whether his request for props had been complied with by the employee whose duty it was to furnish them): and the cases cited passim in the following sections.

In *Beaver v. Proctor Coal Co.* (1914) 159 Ky. 578, 167 S. W. 885 (decided with reference to the Tennessee enactment), where the action was brought to recover for the death of a miner, killed by falling slate, owing, as was alleged, to the failure of the mine foreman to comply with a demand for crosspieces, the evidence of plaintiff's only witness, a fellow workman of the decedent, was simply to the effect that at the shop he had asked for certain car boards, which were refused; that he was then offered other cross timbers, which were not suitable; and that this took place two or three days before the accident. Held, that a verdict had been properly directed for the defendant. The court said: "So far as this testimony is concerned, there may have been any number of cross timbers at the place where he got the props. In the absence of evidence going to show that he went to the place at the entrance of the mine where it is customary to keep cross timbers, and that there were none there, it cannot be said that there was either a failure

§ 29. Place of delivery.

The delivery of props near the place where the claimant was working does not constitute a performance of the statutory duty, unless those props were supplied for the use of the claimant himself.¹

The duty of the employer is not discharged where the props are delivered at the wrong place, owing to the negligence of the person intrusted with the work of delivering them.²

With reference to the earlier Kentucky enactment which provided for the delivery of timbers which had been "selected and marked" by the miner, it was held that the employer's duty was not discharged by merely deposit-

ing the timbers so designated at the mouth of the mine.³

§ 30. Sufficiency of the timbers delivered.

a. In general.

Either expressly, or by implication, all the statutes impose upon the employer the duty of seeing that the timbers delivered are sufficient in quantity and of suitable dimensions.⁴ The mere fact that timbers were furnished and used at the place where the miner wanted them will not excuse the employer.¹

The mere fact that certain unused timbers were lying at the miner's working place at the time when he was in-

or refusal on the part of defendant to furnish sufficient cross timbers, merely because the foreman, two or three days before, had refused to furnish certain car boards which were over at the shop, and had suggested that he take certain 2x4 timber, which was also at that point." For the earlier appeal, upon which a new trial was ordered, see (1913) 151 Ky. 839, 152 S. W. 965.

In *Kansas & T. Coal Co. v. Chandler* (1908) 71 Ark. 518, 77 S. W. 912, the court thus stated its position: "If we felt certain that the jury found that the attention of the foreman was called to the dangerous and unsafe condition of the room, and that he was requested by plaintiff to furnish timbers with which to make it safe, but that, instead of doing so, he directed plaintiff to go ahead with his work in the room, promising to furnish the timbers in time, and that plaintiff, relying on this advice and promise of the foreman, remained at the work, and in consequence was injured as alleged, we should affirm the judgment, as on that theory of the case there is evidence to sustain it."

¹ *Donk Bros. Coal & Coke Co. v. Lucis* (1907) 226 Ill. 23, 80 N. E. 560, holding that this qualification had been properly introduced into an instruction given at the defendant's request.

² *Continental Coal Corp. v. York* (1914) 159 Ky. 334, 167 S. W. 131 (fault of driver whose duty it was, under the prevailing custom, to take props to place designated).

³ *New Bell Jellico Coal Co. v.* 15 A.L.R.—93.

Sowders (1913) 154 Ky. 101, 156 S. W. 1046. It was laid down that "the statute contemplated that the mine owner shall furnish the props at the place where they are to be used." The court also adverted to the fact that the conclusion arrived at was corroborated by evidence which showed that this mode of delivery was in accordance with the custom of the defendant's mine.

⁴ In *Subiaco Coal Co. v. Krallman* (1920) 143 Ark. 469, 220 S. W. 664, an instruction, broad enough to impose the duty on a mine operator to furnish crossbars, or other timbers, to secure the working place of miners, was held not erroneous as fixing a broader duty than was imposed by a statute providing that the operator of any mine should keep a sufficient amount of timber, when required to be used as props, so that the workmen may at all times be able to properly secure the workings from caving in, and further providing that it should be the duty to send down all such props when required, and deliver them.

¹ *McDaniels v. Royle Min. Co.* (1905) 110 Mo. App. 706, 85 S. W. 679. The court said: "Witnesses testified that the proper manner would have been to have keyed timbers against the roof. And it seems to us that this would have been the proper way to have proceeded. Timbers so placed would have been props in the sense of the word as used in the statute. If the caving was from the hole in the roof in defendant's mine, the necessity did exist for additional timbers to make it secure."

jured will manifestly not preclude him from holding the employer liable, if those timbers were unsuitable in respect of their length or otherwise.² Whether the timbers available ought to have been used by the miner is a question to be determined from the facts in evidence.³

b. Delivery in response to a specific demand.

With reference to the Illinois provision by which the mine manager is required to furnish "props, caps, and timbers in suitable lengths and dimen-

sions," it has been laid down that "the miner has a right to determine the length and dimensions of the props and caps necessary to secure the roof of the mine, and if he makes a demand for props and caps of particular and specified lengths and dimensions, and the demand is not unreasonable, the mine manager must furnish the particular and specified kind."⁴

This doctrine had been approved in Missouri.⁵ A similar rule is applicable in cases where the gravamen of the fault alleged is that timbers of a certain description were not supplied,⁶

² *Russell v. O'Gara Coal Co.* (1914) 188 Ill. App. 328 (only abstract reported); *Majestic Collieries Co. v. Bradley* (1909) 132 Ky. 533, 116 S. W. 738 (applying West Virginia statute); *Kentucky Block Cannel Coal Co. v. Davis* (1910) — Ky. —, 128 S. W. 888.

³ *Donk Bros. Coal & Coke Co. v. Stroff* (1903) 200 Ill. 483, 66 N. E. 29, affirming (1902) 100 Ill. App. 576.

⁴ *Hackart v. Decatur Coal Co.* (1909) 243 Ill. 49, 90 N. E. 257, affirming (1909) 149 Ill. App. 661. The precedent cited was in *Western Anthracite Coal & Coke Co. v. Beaver* (1901) 192 Ill. 333, 61 N. E. 335, affirming (1901) 95 Ill. App. 95, where it was laid down that "if . . . [the miner] orders 6½ foot props, the owner or operator has not complied with the statute when he has furnished props which must be spliced or sawed in two before they can be used."

In *Kellyville Coal Co. v. Strine* (1905) 217 Ill. 516, 75 N. E. 375, the rule laid down in *Beaver Case* (Ill.) supra, was approved. An objection made to one of the instructions, on the ground that the jury were told by it that the miner was the sole judge of the kind of timbers he should use, was thus met by the court: "The instruction . . . distinctly told the jury that they must condition their finding upon several considerations, and also upon their belief, from the preponderance of the evidence, that the timbers in the neck of plaintiff's room were rejected timbers that had been taken down from the neck of his room, and had lain there for some time, and that they were broken, or bent, or cracked, and that they were not suitable timbers to use in plain-

tiff's room. In other words, the jury, by the terms of instruction, were to determine themselves from the evidence whether the timbers in question were suitable or not."

⁵ *Wojtylak v. Kansas & T. Coal Co.* (1905) 188 Mo. 260, 87 S. W. 506, citing the *Beaver Case* (Ill.) supra.

⁶ In *Springfield Coal Min. Co. v. Gedutis* (1907) 227 Ill. 9, 81 N. E. 9, it was held, in an action based upon the failure of the mine foreman to furnish "crossbars," that the trial judge had properly refused an instruction based on the theory that the mine manager is the sole judge of the suitability of the timbers which he furnishes on the demand of the miner, and that, if the manager should be mistaken as to the suitability of the timbers furnished, the employer is not guilty of a wilful violation of the statute. The court said: "We are of the opinion that, under this statute, when the miner makes a reasonable and timely demand for timbers of a particular and specified kind to be used in propping the roof of his working place, the operator should furnish him such timbers as are called for. The practical miner who is at work in a given room, and whose life is at stake, is quite as likely to call for the proper timbers, as the mine manager would be to furnish suitable props if the selection was left to his choice or convenience." Adverting to the fact that the phrase, "in suitable lengths and dimensions," was not included in the provision with reference to which the *Beaver Case* (Ill.) supra, was decided, the court expressed the opinion that the alteration in the later statute was not such as to require a different construction with relation to

In Alabama, the contention that the duty of the employer is not discharged, unless the timbers furnished are of the precise length specified by the miner, has been rejected.⁷

Whether any timbers of the dimensions or description specified by the miner were furnished in compliance with his demand is a question to be determined by the facts in evidence.⁸

c. Delivery in response to a general demand.

The rule applicable in this connection has been thus stated: "If the

the facts under review. It was pointed out that the Beaver Case had been approved in *Kellyville Coal Co. v. Strine* (Ill.) *supra*, where the action was brought under the amended provision. As to the special interrogatory which it was held that the trial judge had properly refused to submit to the jury, see § 39, *infra*.

⁷*STITH COAL CO. v. SANFORD* (reported herewith) ante, 1423.

But in *Altoona Coal Co. v. Kelly* (1919) 203 Ala. 338, 83 So. 62, the court said that if the plaintiff had made the proper designation as to props or timbers desired, or made the demand therefor as prescribed by the statute, the authority of *STITH COAL CO. v. SANFORD* (reported herewith) ante, 1423, would sustain the contention that the mine operator had not complied therewith if props were furnished which must be worked over before they could be used. But in this case plaintiff had failed to make the demand, and for that reason could not recover.

⁸*Arkley v. Niblack* (1916) 272 Ill. 356, 112 N. E. 67, reversing (1915) 193 Ill. App. 686 (case for jury, evidence being conflicting); *Mama Coal Co. v. Adams* (1920) — Ark. —, 217 S. W. 454.

In *Carter Coal Co. v. Reynolds* (1917) 175 Ky. 325, 194 S. W. 311, it appeared that after timbers of a particular length, selected by the plaintiff's fellow workmen under his directions for the purpose of being used as props, had been sent into the mine, he declined to use them, because he thought, from observation only, that they were too short, and that they had not in fact been prepared for props, but for ties to be used under the mine

miner does not specify the number, size, or dimensions of props, caps, or timbers that he requires, the mine manager may supply what in his best judgment will suffice for the purpose. Manifestly, the number and kind to be supplied will necessarily vary with the situation and circumstances of the case, and the mine manager is guilty of a wilful violation of duty only in case he knows that those furnished are insufficient."⁹

The fact that the props furnished were not of the length required for the height of the room, or the particular

track. On the other hand, it was shown that the timbers which the company furnished were the same kind that plaintiff had theretofore used for props; and that the ties used for the track would necessarily have to be at least as long as the timbers required for the props. Held, that in this state of the evidence, showing, as it did, that the timbers were suitable for the purpose, a violation of the statute had not been proved.

⁹*Hackart v. Decatur Coal Co.* (1909) 243 Ill. 49; 90 N. E. 257, affirming (1909) 149 Ill. App. 661. In that case the evidence showed that, in response to a demand for props and caps, a car containing about twenty props and only four caps had been sent down. Evidence of previous failures on the defendant's part to furnish as many cap pieces as the miners thought were necessary was held to have been improperly admitted, because it "did not tend to prove either a demand by the plaintiff at the time of the accident, or failure of the defendant to comply with the demand, which was alleged to have caused the injury. Its only tendency was to prove that on previous occasions the defendant had disregarded its duty, and to prejudice the jury against the defendant as being habitually negligent in supplying caps." This error was held to be fatal to the plaintiff's claim, in so far as it rested upon the statute. But the judgment in his favor was allowed to stand, for the reason that a count charging a violation of the common-law duty of the defendant was proved by uncontradicted evidence.

In *Meunier v. Chicago & C. Coal Co.* (1913) 180 Ill. App. 114, the court sustained the contention of defendant that, as there was no evidence from

place in the room where the miner desired to set them, does not render the employer liable unless he or his agent failed, after notification, to

make them of the proper length.¹⁰ Nor can a breach of his statutory duty be predicated on the ground that some of the props were "a few inches too short

any witness that any particular length of props, caps, and timbers had been demanded, an instruction telling the jury that they should be of suitable length was erroneous, as leaving it for the jury to determine what lengths were needed. The court said: "The statute requires the miner to designate the length and sizes of the timbers he wishes to use in his room, and if no timbers are demanded of a particular length, the miner cannot be heard to complain if the timbers are not of the length suitable to properly prop the roof." The inference thus drawn seems to be scarcely reconcilable with the doctrinal position of the supreme court in the Hackart Case (Ill.) supra. The theory that, when the demand is "general," the operator is warranted in supplying the timbers which "in his best judgment will suffice for the purpose," must, it is submitted, involve the corollary that the ulterior question whether his "best judgment" was in fact consistent with the legal standard of care under the given circumstances may properly be determined by the jury.

¹⁰*Sugar Creek Min. Co. v. Peterson* (1898) 177 Ill. 324, 52 N. E. 475, reversing (1897) 75 Ill. App. 631. There the ground on which recovery was sought was that the props which had been furnished plaintiff were too long for the place where they were to be used, and that there was such delay in sending someone to saw them off as constituted negligence. The verdict rendered for the plaintiff was set aside, partly on account of error in the admission of certain evidence (see § 37, note 5), and partly on account of the giving of improper instructions. The objection to one of these was that its phrasology imported an assumption that the room in which the plaintiff was working was in an unsafe condition. The justification for this assumption, offered by counsel, was that the fact was conceded. But the court, adverting to plaintiff's testimony that he tested the roof with his pick and by the use of a wedge and sledge hammer, and that, being unable to loosen the coal, he regarded it as safe to go to work under, said: "It could scarcely be as-

sumed as a conceded fact, in view of this testimony, that the roof was actually dangerous before the time when he called for the props." The same instruction, and another one, submitted to the jury the questions whether plaintiff requested of the defendant to deliver to him props of sufficient length and dimensions properly to secure the workings, and whether defendant failed to furnish said props. These instructions were criticized as follows: "There was no evidence whatever that plaintiff called for props of any particular length or dimensions, and that there was a failure to furnish according to his requirement. Props were furnished, and after they were furnished he simply said that they were too long. The height of the roof differed in different parts of the mine, and in different parts of this room. Plaintiff was the one who was to secure himself by putting up these props, and he could adjust them in his own way. He certainly could not complain that the props were not fitted in length, without letting defendant know what lengths were required. . . . He made no requirement as to length, and the props were furnished, so that his case must rest solely on the claim that there was unreasonable delay in sawing them off to meet his requirement, as made known to the straw boss. If there had been any delay in furnishing props before that time, no harm had resulted from it to anyone, and if there was any fault it was in the delay in sawing them off after they were furnished, so that they could be put up." The second and third of the faulty instructions were condemned because they submitted to the jury the question whether the defendant wilfully neglected or failed to furnish props, when there was no evidence which would justify an instruction on the theory of a wilful violation of the statute. "Plaintiff," said the court, "was to put up the props where he pleased, and as he pleased, and after his request to the foreman to send someone to saw them the length to suit him, it was only a short time until the accident. Defendant had a boy employed to do that work

or too long to fit between the floor and roof." ¹¹

It has been laid down that, if the employer "furnishes a sufficient quantity of props, and some, for different reasons, are unsuitable in strength, while others are suitable, the miner is charged with the duty of selecting for himself," and that a failure to perform that duty will preclude him from recovery. ¹² But, having regard to the restricted nature of the duty which the law imposes upon a servant with respect to the examination of the appliances furnished by the employer (see *Labatt, Mast. & S. § 1330*), the scope of this doctrine must, it is apprehended, be confined to cases in which the "unsuitability in strength" is obvious, upon such a cursory inspection as a miner is able to make at his working place.

The duty imposed by the Pennsylvania Anthracite Act of 1883, to furnish "suitably prepared" props, was held by a court of inferior jurisdiction not to have been discharged, where the employer had merely furnished the props and required the miners to cut them to the necessary lengths. ¹³

§ 31. Necessity for the props asked for.

In a case where the injury complained of was caused by the fall of coal from the roof of the plaintiff's working place, it was assumed for the purpose of the decision that one of the prerequisites to maintenance of the action was the production of af-

firmative evidence warranting the conclusion that props were actually needed to secure the roof. ¹ It is submitted, however, that, having regard to the nature of the accidents upon which the claim is founded in this and similar instances, the principle *res ipsa loquitur* is controlling. The fact that a portion of the roof fell is surely sufficient of itself to demonstrate that props were required at the place where the collapse occurred. ²

about the mine. It does not appear where he was at the time, but there was nothing in the circumstances to indicate a wilful and deliberate intention to disregard the statute, or from which such an inference could be drawn."

¹¹ *Kube v. Northwestern Coal & Min. Co.* (1919) — Mo. App. —, 209 S. W. 614. The court observed that, "in the nature of the work and the place, props would necessarily need to be lengthened by putting pieces of timber or board under them, or between their tops and the roof, or shortened by being cut off or sunk a few inches."

¹² *Kube v. Northwestern Coal & Min. Co.* (Mo.) supra.

firmative evidence warranting the conclusion that props were actually needed to secure the roof. ¹ It is submitted, however, that, having regard to the nature of the accidents upon which the claim is founded in this and similar instances, the principle *res ipsa loquitur* is controlling. The fact that a portion of the roof fell is surely sufficient of itself to demonstrate that props were required at the place where the collapse occurred. ²

Another criticism to which this decision seems to be open is that it is essentially inconsistent with the doctrine, propounded in an earlier case, that "the miner has a right to determine the length and dimensions of the props and caps necessary to secure the roof of the mine." ³ Manifestly, the effect of such a doctrine is to render the miner, under ordinary circumstances at least, the sole judge of the necessity for timbers.

IV. Effect of statutes by which a duty in respect of examining the mine is imposed upon the employer.

§ 32. In general.

Provisions by which the duty of examining the underground workings at certain intervals is imposed upon a designated agent of the employer are included in nearly, if not quite, all of the statutes relating to coal mines. ¹ So far as regards most of these statutes, it will, for the purposes of the present monograph, be suffi-

¹³ *Com. v. Richmond*, 2 C. P. Rep. (Pa.) 189.

¹ *Dickerson v. Henrietta Coal Co.* (1911) 251 Ill. 292, 96 N. E. 225, affirming (1910) 158 Ill. App. 454 (Mining Act 1899).

² A controversy as to whether a dangerous condition existed, at the time when an examination of the mine was last made before the plaintiff was injured, raises, of course, an essentially different question. See § 33, *infra*.

³ *Hackart v. Decatur Coal Co.* (1909) 243 Ill. 49, 90 N. E. 257, affirming (1909) 149 Ill. App. 661. See § 30, note 4, *supra*.

¹ For a brief résumé of the purport of enactments regarding the examination of mines, see *Labatt, Mast. & S. § 1888*.

cient merely to state the effect of the cases which have been decided with reference to provisions in which a clause prescribing a duty of examination is immediately associated with one prescribing a duty of timbering.² But the Illinois provision calls for a more detailed treatment.

§ 33. Illinois statute, effect of.

The following provisions are contained in Laws 1899, p. 300, § 18 (Hurd's Stat. 1905, p. 1388); Laws 1911, p. 388, § 21 (Jones & A. Stat. ¶ 7495). A mine examiner shall be required at all mines. His duty shall be to visit the mine before the men are permitted to enter it. . . . He shall inspect all places where men are expected to pass or to work, and observe whether there are any recent falls or obstructions in rooms or roadways. As

evidence of his examination of all working places, he shall inscribe on the walls of each, with chalk, the month and day of the month of his visit.

When working places are discovered in which . . . recent falls or any dangerous conditions exist, he shall place a conspicuous mark thereat as notice to all men to keep out, and at once report his finding to the mine manager. No one shall be allowed to enter the mine to work therein, except under the direction of the mine manager, until all conditions shall have been made safe.

In the present section only those cases will be reviewed in which the injuries complained of were caused by the want of proper timbering. Some decisions relating to injuries of other descriptions are collected in Labatt, Mast. & S. § 1888.

²In *Deep Vein Coal Co. v. Rainey* (1916) 62 Ind. App. 608, 112 N. E. 392, it was held that the duty of inspection "is not discharged by mere visual examination, where the nature of the material forming the roof is of a kind that such an inspection will not be effective."

Rock Island Coal Min. Co. v. Davis (1914) 44 Okla. 412, 144 Pac. 600, the right of a shot fired to recover for an injury caused by the fall of a rock from the roof of an entry was affirmed, on the ground that the duty of daily inspection imposed upon the mine foreman or his assistant was non-delegable, and had not been discharged.

In *Lehigh Valley Coal Co. v. Washko* (1916) 145 C. C. A. 230, 231 Fed. 42, a compliance with the statute was held to be shown by evidence that the examination prescribed had been made every day, either by the mine foreman or the assistant foreman, and that in making these examinations they carried a torch, looked carefully at the roof, and tested it by striking it with the end of a steel-tipped rod; such being, as the foreman testified, the usual and ordinary method used in all mines.

For other cases in which negligence in respect of the examination of the mine was held to be inferable from the evidence, see *Antioch Coal Co. v. Rockey* (1907) 169 Ind. 247, 82 N. E. 76 (evidence warranted the conclusion that, if the roof had been

tested by means of tapping or sounding, its unsafe condition would have been discovered); *Collins Coal Co. v. De Pugh* (1909) 43 Ind. App. 648, 88 N. E. 317; *Mitchell v. Swanwood Coal Co.* (1918) 182 Iowa, 1001, 160 N. W. 391.

In *Elk Horn Min. Corp. v. Vanhose* (1918) 179 Ky. 529, ante, 1378, 200 S. W. 921, one of the reasons assigned for the decision was thus stated: "It is made the duty of the mine foreman, by statute, to visit all working places in the mine at least twice a week, and manifestly it would be impossible for him to watch the progress of each employee's work for dangers that might develop in the progress of the work, and consequently no such duty was upon him."

In *Big Vein Pocahontas Co. v. Repass* (1916) 151 C. C. A. 348, 238 Fed. 332, where the ratio decidendi was that the "slate boss" had not taken down certain rock which he had tested and found "drummy," the contention of the defendant was that it was not liable, because the duty of inspection was imposed by the statute upon the mine foreman or his assistant, and the "slate boss" was not within either of these categories, was rejected for the reason that, even in this view of the case, the evidence would have justified the jury in finding that the accident resulted from the defendant's failure to have a proper inspection made.

In *Timson v. Manufacturers Coal &*

This enactment imposes upon the mine examiner duties in respect of the various matters specified in the following subdivisions.¹

a. Examination in the manner prescribed.

The general doctrine applicable with regard to this subject and that which is considered in the following paragraph has been thus formulated: "It is the duty of the owner or operator of a mine to have his mine examined, and, if it is in a dangerous condition, to have the dangerous places designated by the statutory marks, and if he fails in either particular, with knowledge of its dangerous condition or with knowledge of

facts from which he ought to know of its dangerous condition, he is liable to a person in the mine, under his employ, who is injured as a result of his wilful failure to obey the mandates of the statute."² From this statement it is manifest that the initial condition precedent to the maintenance of an action in the present point of view is that a dangerous condition should have existed at the time when an examination was actually made, or ought to have been made, by the mine examiner.³ In a case where that fact is established, the further prerequisites to recovery are that the evidence should be such as to warrant either the conclusion that the mine examiner had made no examination of the place

Coke Co. (1909) 220 Mo. 580, 119 S. W. 565, the complaint was held bad for the reason that it did not aver that the defendant's mine belonged to the "gas-generating" class, to which alone the statute in question applied.

¹For cases in which the plaintiff declared on a violation of the statute in respect of all these matters, see *Henrietta Coal Co. v. Martin* (1906) 221 Ill. 463, 77 N. E. 902; *Sellars v. Peabody Coal Co.* (1912) 178 Ill. App. 220.

In *Donk Bros. Coal & Coke Co. v. Peton* (1901) 192 Ill. 41, 61 N. E. 330, affirming (1900) 95 Ill. App. 193, an instruction, to which exception was taken upon the ground that it stated all the duties of a mine examiner without specifying the particular omission of duty relied upon, was upheld on the ground that it was substantially in the language of the statute itself. The opinion was also expressed that, if such an instruction should be regarded as erroneous when standing by itself, it could have done the appellant no harm when considered in connection with other instructions, as given, by which the jury were informed as to the particular violation of the statute upon which the plaintiff based his claim.

²*Aetitus v. Spring Valley Coal Co.* (1910) 246 Ill. 32, 138 Am. St. Rep. 221, 92 N. E. 579, affirming (1909) 150 Ill. App. 497. For other cases in which the employer's liability was declared to be equally predicable, irrespective of whether he was affected with actual or with constructive notice of the dangerous condition, see

Peebles v. O'Gara Coal Co. (1909) 239 Ill. 370, 88 N. E. 166; *Eichhorn v. St. Louis & O'F. Coal Co.* (1919) 288 Ill. 351, 123 N. E. 603, reversing (1918) 212 Ill. App. 152.

³In *Mertens v. Southern Coal & Min. Co.* (1908) 235 Ill. 540, 85 N. E. 743, the evidence tended to show that when the plaintiff and his fellow workman returned to the room, on the morning after they had fired a shot, they noticed that a piece of the roof near the face of the coal was loose. So far as the evidence showed, there was no change in the roof between the time when the shot was fired and the time when it was found to be in a dangerous condition. Held, that the jury were justified in finding that, if the mine examiner of the defendant had made a proper examination, he would have discovered the dangerous condition, and that from such evidence they were justified in concluding that the mine examiner did not examine the room on that morning, or that, if he did examine it, he discovered its condition and failed to comply with the statute by marking the place, noting the same in his record, and reporting it to the mine manager.

In *Wilson v. Danville Collieries Coal Co.* (1913) 184 Ill. App. 183, affirmed in (1914) 264 Ill. 143, 106 N. E. 194, the existence of the dangerous condition at the time of the examination was held to be indicated by the fact that the plaintiff was injured very soon after he entered the mine.

See also *Arkley v. Niblack* (1916) 272 Ill. 356, 112 N. E. 67 (conflicting

in question,⁴ or the conclusion that the examination which he had made was not made with reasonable care.⁵

b. Marking the dangerous places discovered in the course of the examination.

The duty which is imposed on the mine examiner in this regard is

evidence; question for jury); *Alsdurf v. Big Four Wilmington Coal Co.* (1916) 198 Ill. App. 15.

⁴ That an entire failure to make the statutory examination would be a good cause of action is clear; but no case has been found in which this point was specifically adverted to.

⁵ In *Eichhorn v. St. Louis & O'F. Coal Co.* (1919) 288 Ill. 351, 123 N. E. 603, the following remarks were made: "The statute imposes a liability for, and only for, a wilful failure to comply with its terms, and to say that, if a proper examination has been made and no dangerous condition was discoverable by such examination, there has been a wilful failure to make an examination and mark dangerous conditions, would be to pervert language and confound all distinctions between the meaning of words. It will not be presumed that the court has intentionally adopted false reasoning, leading to such a result. A 'wilful' failure to comply with the act, as used in the statute, means a conscious failure to perform a duty enjoined by the act."

In *Wilkins v. Madison Coal Corp.* (1914) 188 Ill. App. 416, a verdict for the plaintiff was set aside, as it appeared that the mine examiner and other employees had sounded the roof, and found no loose condition existing therein, and there was no evidence to show that the dangerous condition existed at the time the mine examiner inspected it. On the subsequent appeal in (1918) 210 Ill. App. 661, the evidence was held to show that the roof was not in a dangerous condition when it was examined.

See also *Mertens v. Southern Coal & Min. Co.* (1908) 235 Ill. 540, 85 N. E. 743 (note 3, supra); *Wilson v. Danville Collieries Coal Co.* (1912) 171 Ill. App. 65, affirmed in (1914) 264 Ill. 143, 106 N. E. 194 (commenting on instruction held to be erroneous); *Davis v. Missouri & I. Coal Co.* (1914) 186 Ill. App. 478 (action held main-

deemed to be sufficiently performed where the marking is done by the mine manager or his assistant.⁶ On the other hand, it has been held that actual notice to a miner with respect to a dangerous place is not the legal equivalent of the notice which, under the statute, is to be given by marking.⁷ The right of action is not negated by the circumstance that the work in

tainable and ground that evidence of the witnesses of plaintiffs tended to show that the roof which fell was in a dangerous condition, and that a proper examination of it would have disclosed that condition); *Alsdurf v. Big Four Wilmington Coal Co.* (1916) 198 Ill. App. 15.

In the *Alsdurf Case* (Ill.) supra, all the witnesses agreed that the proper method of testing a roof was by tapping it with a bar, pick, or other implement.

⁶ *Arkley v. Niblack* (1916) 272 Ill. 356, 112 N. E. 67, where it was held error to refuse an instruction by which the jury were told to find in favor of the defendant, if they believed from the evidence that the defendant's assistant mine manager found a loose rock in the roof of the room in question, and placed a conspicuous mark on it, and told the plaintiff to take it down or prop it up; that such loose rock extended over and rested partly upon the rock which afterwards fell; and that the latter rock became loose and fell, solely because the rock marked by the assistant mine manager had rested partly upon it. The court said: "If the plaintiff in error had failed to mark a dangerous place, the failure was not beyond his power to correct. It was corrected if the dangerous condition was made known to the miner, and he was told to make the place safe. This was what would have happened if the dangerous condition had been reported by the examiner."

⁷ *Mertens v. Southern Coal Co.* (1908) 235 Ill. 546, 85 N. E. 743, followed, as to this point, in *Davis v. Missouri & I. Coal Co.* (1914) 186 Ill. App. 478.

In *Noonan v. Saline County Coal Co.* (1912) 173 Ill. App. 541, the contention that it was immaterial whether any examination was made, because it would not have given any more information to the plaintiff than he already had when he set out for the

which the miner was engaged at the time of the accident produced the dangerous conditions in question;⁸ nor by the circumstance that he was occupied in making a dangerous place safe.⁹ The latter circumstance, however, is a bar to recovery, where it appears that the place in which he was injured

place of work, was rejected, on the ground that, as the evidence did not show he was employed to make dangerous roofs safe, his knowledge of the danger would be no defense to a claim based upon a wilful failure to mark the dangerous place.

⁸In *Wells v. Lumaghi Coal Co.* (1913) 183 Ill. App. 404, it was held that the trial judge had properly excluded evidence offered to show that the conditions at the time of the accident were the usual and ordinary conditions, and the very conditions that the deceased was attempting to produce.

⁹*Piazzi v. Kerens-Donnewald Coal Co.* (1914) 262 Ill. 30, 104 N. E. 200, affirming (1913) 179 Ill. App. 540. This decision was followed in *Riggio v. Chicago-Sandoval Coal Co.* (1918) 212 Ill. App. 234, where it was held that, "whether the appellee was employed generally to make dangerous places safe in his room, and was engaged at such work, or was pursuing his usual duties as a miner and was injured by reason of a dangerous condition in his room that had not been marked as such, as required by statute, in either case the appellant would be liable for such injury."

¹⁰See cases cited in note 16, *infra*.

¹¹*Aetitus v. Spring Valley Coal Co.* (1910) 246 Ill. 32, 36, 138 Am. St. Rep. 221, 92 N. E. 579, affirming (1909) 150 Ill. App. 497. There the plaintiff's evidence tended to show that, in order to prepare a location for a mule stable, the defendant cleared out a space in an old entryway in the mine, some 13 feet square; that the space had been timbered about twenty years, and was situated beneath about 400 feet of rock and earth; that the sides were perpendicular for 4 or 5 feet from the floor of the entryway, and came together in the form of an arch at the top, the highest place, near the center, being from 12 to 13 feet from the floor of the entryway; that, on the Friday before the accident, defendant had caused certain timbers, and the rock and debris which had fallen

was one which he had been directed to secure, after it had been marked in accordance with the statute.¹⁰

It is for the jury to determine from the evidence whether such a dangerous condition existed at the place in question as to create a duty to mark it;¹¹ and whether a mark had been

down, to be removed from the space cleared; that on the morning of the day when the injury was received the plaintiff and another workman were directed by the mine manager to make, in one of the ribs of the cleared space, two cuts some 5 feet apart, to the height of about 8 or more feet from the floor, to serve as receptacles for timbers as a support for the wall and roof of the stable; that the manager made chalk marks where the cuts for the upright timbers were to be made; that he told two workmen to be careful, as the rock might fall; that there were no marks or other signs notifying them that the place was dangerous; that the only lights in the place were from small lamps worn upon the caps of the men; that they pulled down some loose rock, and tested the roof above them with their picks so far as they could, and then commenced to make the cuts in the rib; that, after they had worked about two hours, about 2 tons of rock fell from the roof, which struck the plaintiff. The mine manager, the assistant mine manager, and the mine examiner testified that they had each examined the space where the stable was to be built after the timbers and other debris had been removed, and that it was not a dangerous place in which to work at the time the plaintiff was set to work; and that no report had been made showing the place to be dangerous, and no danger marks placed, because the place was not dangerous. The mine manager testified that the fall of rock was caused by the work done by the two miners. Held, that the trial judge had properly refused to take the case from the jury, as the evidence fairly tended to show that the roof of the cleared space was a dangerous place, which should have been marked.

See also *Kedes v. Christian County Coal Co.* (1909) 149 Ill. App. 434 (several witnesses testified that a fault like the "slip" which fell was dangerous); *Wells v. Lumaghi Coal Co.* (1913) 183 Ill. App. 404; *Price v.*

made in accordance with the statutory requirements.¹² From the liability arising from the failure of the mine examiner or mine manager to mark a dangerous place, the employer cannot absolve himself by showing that his agent inspected the place in question, and in good faith concluded that there was no dangerous condition.¹³

Clover Leaf Coal Min. Co. (1914) 188 Ill. App. 27; Dougherty v. Spring Valley Coal Co. (1917) 204 Ill. App. 141 (evidence, not stated, held to be insufficient to show necessity); and the other cases cited under this paragraph.

¹² Kedes v. Christian County Coal Co. (1909) 149 Ill. App. 434; Smith v. Illinois Collieries Co. (1910) 155 Ill. App. 148; Wilkerson v. Willis Coal & Min. Co. (1910) 158 Ill. App. 620; Vaughn v. O'Gara Coal Co. (1912) 173 Ill. App. 268 (direction of verdict for defendant properly refused, because evidence tended to show breach of duty); Price v. Clover Leaf Coal Min. Co. (1914) 188 Ill. App. 27 (only abstract reported); Nagalil v. Shoal Creek Coal Co. (1916) 201 Ill. App. 220 (only abstract reported).

¹³ Aetitus v. Spring Valley Coal Co. (1910) 246 Ill. 32, 138 Am. St. Rep. 221, 92 N. E. 579, affirming (1909) 150 Ill. App. 497. The court said: The employer's liability "does not rest upon the ground that in good faith or bad faith he thought there was no danger in the mine, but upon the ground that he has, knowing the facts which made the mine dangerous, failed to have the statutory marks properly placed in the mine. When the mine owner or operator is advised of the conditions in the mine, he must place in the mine, if it is dangerous, the statutory marks, and if he fails to do so he acts at his peril, and he cannot excuse himself because he, or his examiner, or manager, may think the mine safe. To so hold would be to permit the mine owner or operator, or his examiner or manager, to usurp the functions of the court and jury, and to pass upon a question which, in every case like this, is a matter of proof, and is to be determined as a fact, by the jury."

The above case was followed, as to this point, in *Piazzi v. Kerens-Donnewald Coal Co.* (1914) 262 Ill. 30, 104 N. E. 200, where the plaintiff was injured by the fall of a clod. The mine in question had been shut down for

c. Excluding workmen from the mine, after the discovery of dangerous conditions, until they have been made safe.

Whether the requirement that "all conditions shall have been made safe" had been complied with before the injured workman was sent into the mine is a question of fact for the jury.¹⁴

several months, and at the time when he was injured the plaintiff was one of a force of men who were employed in preparing for the resumption of work by cleaning up the crosscuts and entries in the mine. The work was company work, and it was his duty to do whatever the mine manager directed him to do. The mine examiner testified that he saw the clod both before and after it fell. He had examined the clod about four hours before the accident, and sounded it with his rod. It sounded solid, and he placed no danger mark there. He testified that clod, when it becomes exposed and is not supported, is liable to fall in a certain length of time—that clod is treacherous and apt to fall. Held, that whether, from the nature of the clod and the condition of the roof, the clod was likely to fall, and the place should have been marked by the examiner as dangerous, was a question of fact for the jury, and that the evidence was sufficient to support their finding in the plaintiff's favor with regard to these points.

The doctrine stated in the text has been applied by the court of appeals in *Vaughn v. O'Gara Coal Co.* (1912) 173 Ill. App. 268; *Noonan v. Saline County Coal Co.* (1912) 173 Ill. App. 541 (disapproving an instruction that all the examiner was required to do was to make a reasonable, honest examination, in good faith); *Kemp v. Southern Coal & Min. Co.* (1915) 197 Ill. App. 17; *Monasterolo v. Superior Coal Co.* (1917) 206 Ill. App. 513; *Riggio v. Chicago-Sandovel Coal Co.* (1918) 212 Ill. App. 234.

In so far as the ruling in *Cook v. Big Muddy-Carterville Min. Co.* (1911) 249 Ill. 41, 94 N. E. 90, is inconsistent with the later decisions of the supreme court, above referred to, it is no longer good law. See *Monasterolo Case* (1917) 206 Ill. App. 513, *supra*. But the accident involved was not one of the type discussed in the present monograph.

¹⁴ In *Wilkerson v. Willis Coal &*

The mine manager is not "justified in leaving the place dangerous, simply because he in good faith believed, or feigned to believe, he had made it safe, when the conditions are such that he ought to know that it is dangerous."¹⁵

A workman who is sent into the mine by the manager, to remedy a dangerous condition which had been suitably marked, reported, and recorded by the examiner, assumes the

special risks incidental to the process of making the dangerous place safe.¹⁶ On the other hand, such a workman is not precluded from recovering in respect of such injuries as he may sustain, by reason of the failure of the mine examiner to perform a specific statutory duty with respect to the place in which he was ordered to work. In other words, he does not assume any risks of the work which are produced by a breach of those duties.¹⁷

Min. Co. (1910) 158 Ill. App. 620, the refusal of the trial judge to direct a verdict for the defendant was approved, the court being of opinion that the evidence showed clearly that the timbermen sent to prop the place in question had left it in a dangerous condition, and that the deliberate judgment was that it was unsafe as they left it. It was remarked that "a place is not made safe, within the meaning of the statute, when it is knowingly left with 'treacherous' slate in the roof that will probably 'come down in a very short time,' and which could be removed in fifteen minutes' work."

For a case in which the evidence was held to warrant the conclusion that it was wilful negligence to permit the plaintiff to enter this room, except under the direction of the mine manager, until the dangerous condition had been repaired, see *Vaughn v. O'Gara Coal Co. (1912) 173 Ill. App. 268*.

¹⁵ *Wilkerson v. Willis Coal & Min. Co. (Ill.) supra*.

¹⁶ *Kellyville Coal Co. v. Bruzas (1906) 223 Ill. 595, 79 N. E. 309* (member of the "rock gang," whose business it was to go over all the entries for the purpose of removing dangerous conditions, was killed by the fall of a dangerous rock, which had been reported). The declaration counted upon the wilful ordering of the deceased to work at a dangerous place without the mine manager being present to direct the work. The essence of the ruling of the court was that the statute did not require the mine manager to accompany the rock men, and personally direct them in removing dangerous conditions from the mine.

See also *Piazzi v. Kerens-Donnewald Coal Co. (Ill.) note 17, infra*, and *Galatin Coal & Coke Co. v. Andrewzewski (1907) 137 Ill. App. 1*.

In *Noonan v. Saline County Coal Co. (1912) 173 Ill. App. 541*, the applicability of the doctrine of assumption of risks, with respect to a miner engaged in cleaning up rocks which had fallen, was denied on the ground that he was not in the position of a workman ordered to remove the dangerous condition, i. e., the loose roof, and was not, as to that danger, working under the direction of the mine manager.

The above cases qualify, pro tanto, the general doctrine applied in those cited in note 10, supra.

¹⁷ In *Piazzi v. Kerens-Donnewald Coal Co. (1914) 262 Ill. 30, 104 N. E. 200*, the claimant, who was one of a gang engaged, under the direction of the mine manager, in cleaning up a coal mine after a shutdown of several months, and working under his general directions to make dangerous places safe, was injured by the fall of a clod from the roof of a crosscut. Held, that he was entitled to recover on the ground that the mine examiner failed to place a mark at the plaintiff's working place. The court said: "If the general instructions to make all dangerous places safe caused the men to assume the hazards of the employment, then there was no necessity for, and no use of, an examination. The men could ascertain the dangerous places in their own way, and make them safe at their own risk. The conditions under which a miner may work at a dangerous place at his own risk are where the owner has complied with the law by having the mine examined, the dangerous place has been marked by the mine examiner, and the miner is sent to that place, by the direction of the mine manager, to make safe the particular dangerous conditions there existing."

This decision was followed in *Wilson v. Danville Collieries Coal Co. (1914) 264 Ill. 144, 106 N. E. 194*, af-

d. Making and keeping a record of the conditions in the mine.

An action is maintainable on the ground of a breach of this requirement, "although plaintiff was employed as a timberman, and it was his duty to make all dangerous places safe, and although he was working, at the time of the injury, under the direction of the mine manager, and was not permitted to enter the mine

except under the direction of the mine manager." ¹⁸

The theory that a defect in the roof of a room in which the injured person was working is not within the purview of this statute has been explicitly rejected in one case.¹⁹ Several of the other cases cited in this section are manifestly inconsistent with such a theory.²⁰

But there is authority for the doc-

firming (1912) 171 Ill. App. 65, where the failure of the mine examiner to mark the rock which fell, and make a record thereof, was held to create a good cause of action in favor of a timberman engaged in making safe the place where the accident occurred. The following instruction was held to have been properly refused: If you believe that the plaintiff was engaged in timbering the entry in question at the place where he was injured, under the direction of defendant's mine manager, then you should find in favor of the defendant as to the first count of the declaration.

In *Sellars v. Peabody Coal Co.* (1912) 173 Ill. App. 220, the conclusions of the court were thus stated: "We do not think the evidence in this case shows that appellee was working under the direction of the mine manager in such a way as to deprive him of the protection afforded by the statute. He, with the other two men, had been employed to clean up the fall and clear the tracks at the place in question by the manager, and he had given them certain directions for protecting themselves, which they appear to have substantially followed. The fall which caused the injury, however, occurred three days later, and in the meantime the men had not been given any directions by the manager, or visited by him, or anyone for him, nor had the place been examined, marked, or reported by the mine examiner. The provision in the statute that the operator of a mine may permit a man to enter the mine to work, under the direction of the mine manager, even where unsafe conditions exist, must be held to mean that the manager, under such conditions, will be vigilant to care for the safety of the men under his charge. . . . To hold that appellee was, at the time of the injury, working under the direction of the mine manager, would be to set at naught the provisions made by the

statute for his safety. Nor were appellee and his companions, in our opinion, engaged, at the time of his injury, in making a dangerous place safe. All the evidence shows that they were engaged in removing the fall from the track and clearing the entry so that cars could pass over the track, and the work of mining therein, and in new rooms 22 and 23, be proceeded with. The danger point was the roof above them, and that they had no instructions to make safe, other than those originally given them by the mine manager for temporary purposes, which they had obeyed."

¹⁸ *Wilson v. Danville Collieries Coal Co.* (1912) 171 Ill. App. 65, affirmed in (1914) 264 Ill. 143, 106 N. E. 194.

¹⁹ *Mertens v. Southern Coal & Min. Co.* (1908) 235 Ill. 540, 85 N. E. 743. Defendant's contention was that, having regard to the rule of ejusdem generis, the words, "or any dangerous condition exists," following, as they do, the words, "accumulations of gas in recent fills," cannot be construed as including the defective condition of the roof of a room. The court said: That rule "is only a rule of interpretation, and when it clearly appears from the context that such general words are not so limited, they will not be so construed. The words, 'any dangerous conditions exist,' were, we think, when the object of the Mines & Mining Act and the constitutional provision under which the said act was passed, are taken into consideration, clearly intended to cover all dangerous conditions which might exist in a coal mine which would endanger the life, limb, or health of men working in such mine."

²⁰ In the *Mertens Case* (Ill.) supra, the court referred to *Kellyville Coal Co. v. Strine* (1905) 217 Ill. 516, 75 N. E. 375, and *Henrietta Coal Co. v. Martin* (1906) 221 Ill. 460, 77 N. E. 902, as being, by implication, precedents for the doctrine laid down.

trine that if the materials which fell upon the miner came from the coal face, and were of such a kind that he would have taken them down in the usual course of the work of getting out coal, no legal liability can be predicated on the ground of the mine examiner having failed to mark the dangerous place.²¹ Whether such a doctrine is sustainable, in view of the unqualified language of the statute, is a point which, to say the least, seems to demand some further discussion.

In one case the doctrine was propounded that the duty imposed upon the miner in another section of the statute, with regard to the examination of his place of work (see § 47, *infra*); is merely "an additional precaution provided by the legislature for the safety of the miner, and should not be held to relieve the operator of any duty enjoined upon him under the statute."²² But the theory that a plaintiff can recover for an injury resulting from the defendant's breach of a statutory duty, although his own breach of duty was a contributory cause of that injury, is clearly repugnant to general principles. Its incorrectness was, moreover, assumed or asserted in all the cases cited in subd. VII. *infra*.

V. Defenses to actions based on violation of statutory duties in respect of the timbering of mines.

§ 34. Assumption of risks.

a. In general.

A general review of the decisions

bearing upon the availability of the defense of assumption of risks, in an action based on the violation of a specific statutory duty, will be found in Labatt's Master & Servant.

In cases falling within the scope of the present monograph we find rulings to the effect that upon failure of the employer to comply with his statutory duties, resulting in injury to the employee, the defense of assumption of risk is not available;¹ that the theory of an assumption of risks cannot be invoked, "where the nature of the menace is so uncertain as to cause discussion between the employees and the employer, with the result that the employer dissuades the employee of his apprehension; and especially so where the particular employee injured is without any knowledge of its existence;"² that an assumption of the risks incidental to the existence of dangerous conditions produced by the nonperformance of a statutory duty of the employer with respect to the timbering of a mine is imputable to a miner who continues working with a full appreciation of those risks;³ and that the fact of his continuance of work under such circumstances does not render him chargeable, as a matter of law, with an assumption of the risk to which he is exposed.⁴

By the supreme court of Kentucky the last-mentioned of these doctrines has been affirmed in language, and referred to considerations, which are strongly suggestive of a confusion between the conceptions of assumption

²¹ *Meunier v. Chicago & C. Coal Co.* (1913) 180 Ill. App. 114.

²² *Davis v. Missouri & I. Coal Co.* (1914) 186 Ill. App. 478.

¹ *FENOGLIO v. FOLSOM-MORRIS COAL Co.* (reported herewith) ante, 1420; *Whitehead Coal Min. Co. v. Schneider* (1919) 75 Okla. 175, 183 Pac. 49.

² *Harder & H. Coal Min. Co. v. Schmidt* (1900) 48 C. C. A. 535, 104 Fed. 282, 9 Am. Neg. Rep. 227.

³ *Vagaski v. Consolidation Coal Co.* (1915) 141 C. C. A. 37, 225 Fed. 913; *Williams v. Norwood-White Coal Co.* (1910) 146 Iowa, 489, 125 N. W. 232; *Peters v. Vesta Coal Co.* (1914) 243 Pa. 241, 90 Atl. 65.

⁴ *Johnson v. Mammoth Vein Coal Co.* (1908) 88 Ark. 243, 19 L.R.A.(N.S.) 646, 114 S. W. 722 (overruling *Patterson Coal Co. v. Poe* (1907) 81 Ark. 345, 99 S. W. 538); *Western Coal & Min. Co. v. Watts* (1917) 131 Ark. 562, 199 S. W. 921; *Kellyville Coal Co. v. Strine* (1905) 217 Ill. 516, 75 N. E. 375; *Davis Coal Co. v. Pollard* (1902) 158 Ind. 607, 92 Am. St. Rep. 319, 62 N. E. 492, affirming (1901) 27 Ind. App. 697, 60 N. E. 1124; *Miami Coal Co. v. Kane* (1909) 45 Ind. App. 391, 90 N. E. 13; *Macketta v. Missouri, K. & T. R. Co.* (1914) 92 Kan. 362, 140 Pac. 877; *Green v. Western American Co.* (1902) 30 Wash. 87, 70 Pac. 310; *Pachko v. Wilkeson Coal & Coke Co.*

of risk and contributory negligence.⁴ A similar failure to differentiate the two defenses is indicated by a case in which the same court afterwards held

(1907) 46 Wash. 422, 90 Pac. 436; *Lindquist v. Pacific Coast Coal Co.* (1914) 81 Wash. 73, 142 Pac. 445.

The above decisions of the supreme courts of Illinois and Indiana have destroyed the authority of rulings to the contrary effect in *Russell v. O'Gara Coal Co.* (1914) 188 Ill. App. 328, and *L. T. Dickason Coal Co. v. Unverferth* (1902) 30 Ind. App. 546, 66 N. E. 759.

In *Johnson v. Mammoth Vein Coal Co.* (Ark.) *supra*, the argument that the cases rejecting the doctrine of an assumption of risk were not controlling, for the reason that the Arkansas statute did not extend to the safety of the working place of the miner, was thus disposed of: "It is true that according to the mining custom as developed from the evidence here, as in the preceding similar cases, the duty rests upon the miner himself to examine the roof and determine when it needs props; but it is for the company to furnish him the props with which to make his room safe, when he discovers the need of props and demands them. The relation of the master's duty in this regard, to the working place, was explained in *Kansas & T. Coal Co. v. Chandler* (1903) 71 Ark. 518, 77 S. W. 912, where the court said: 'The duty of the master to use due care to furnish a safe place for the servant to work would, under the circumstances here, be discharged by furnishing the servant an ample supply of suitable timbers with which to make the room safe.' Thus the court recognized, and properly so, that the furnishing of props rested upon the master, in order to provide a safe place for the servant to work. While it is true that the immediate act of making safe the room is in the hands of the miner himself, yet he cannot make brick without straw."

In *Big Branch Coal Co. v. Wrenchie* (1914) 160 Ky. 668, 170 S. W. 14, it was unsuccessfully contended that the plaintiff assumed the risk caused by the defendant's failure to furnish "headers," because he was employed under a contract whereby he was to receive 45 cents per ton for coal mined and loaded, was to be furnished all necessary props, caps, and headers,

that a miner who had infringed a rule, promulgated in accordance with general provision of the Kentucky enactment in that regard, assumed the

and was to set the props, caps, and headers as needed, and take care of all his slate.

⁴*Low v. Clear Creek Coal Co.* (1910) 140 Ky. 754, 33 L.R.A. (N.S.) 656, 131 S. W. 1007, Ann. Cas. 1912B, 574. The court argued thus: "It was true then [i. e., before the statute was passed], and is no less true now, that if the owner or operator neglects to furnish props or caps, the miners will go ahead with their work and take chances. They know that the conditions are inherently unsafe. Yet, as it is not apparent to them that they are immediately so, they take the chance, so to speak, of coming out without injury. Now, if the statute be so construed as to impose on the miners the consequences of the situation if they should be injured, then the wholesome benefit of the legislation is lost. On the other hand, if it be so construed as to let the miner shut his eyes to obvious and imminent dangers, it would carry the statute to an unreasonable length and place a premium on sheer recklessness. We think the safe rule is to hold that, unless the danger from the lack of props is not only imminent but so obvious that an ordinarily careful man would not have worked under the conditions, the owner has the responsibility. He having failed in this statutory duty, the liability for all consequences is upon him, unless the miner could see, or know by ordinary care, that the situation was dangerous, and imminently so. In other words, there is no assumption of risk by the laborer, where the master neglects a statutory duty. But such laborer is still liable for his contributory negligence. The two propositions are not identical. To constitute contributory negligence there must be some act of failure on the part of the laborer, in addition to the ordinary risks imposed by the character of his work under the conditions created by the master's conduct, which would amount to culpable negligence on the laborer's part." For an earlier Kentucky case in which a similar confusion of ideas is apparent, see *Majestic Collieries Co. v. Bradley* (1909) 132 Ky. 533, 116 S. W. 738.

risks to which he might be exposed as a result of such infringement.⁵ It is difficult to admit that a breach of a positive duty on the miner's part can be assigned to any other category than that of negligence.

b. By virtue of a special contract.

In one case, the defendant relied upon the theory that the Illinois statute which provides that props shall be kept on hand and furnished to miners, to enable them to prop and secure their working places, was not applicable, because the injured miner had agreed, for extra wages, to take down certain overhanging slate, and thus obviate the necessity of props. But the jury found, in answer to a special interrogatory, that no such contract had been made.⁶

§ 35. Contributory negligence.

The availability of this defense, also, is fully discussed in Labatt's Master & Servant, §§ 1648 and 1649. Here it will be sufficient to mention that, in

There is abundant authority for asserting that the proposition contained in the last sentence of the above extract is erroneous. See Labatt, Mast. & S. §§ 1206 et seq., where numerous cases are cited which recognize the doctrine that contributory negligence may be predicated from the mere fact of a continuance of work with knowledge of a danger. See also §§ 1223 and 1224, where the confusion between these two defenses is discussed.

⁵Elk Horn Min. Corp. v. Vanhoose (Ky.) ante, 1378.

In Kenmont Coal Co. v. Patton (1920) — C. C. A. —, 268 Fed. 334, a case arising in Kentucky, the court said that the questions of assumption of risk and contributory negligence were at least for the jury's consideration; that is, neither question could, as a matter of law, be answered in defendant's favor.

⁶Mt. Olive & S. Coal Co. v. Rademacher (1901) 190 Ill. 543, 60 N. E. 888.

¹FENOGLIO v. FOLSOM-MORRIS COAL MIN. CO. (reported herewith) ante, 1420; Corona Coal & I. Co. v. Spann (1919) 203 Ala. 194, 82 So. 444.

In Jackson Hill Coal & Coke Co. v. McDaniel (1921) — Ind. App. —, 131 N. E. 408, the defendant, having re-

cases reviewed elsewhere in this monograph, we find instances of the application of the following doctrines: That contributory negligence is available as a defense;¹ that contributory negligence is inferable simply from the fact that the injured miner continued to work with a full knowledge of the dangerous conditions created by the want of timbers;^{1a} that contributory negligence cannot be imputed, as a matter of law, to a miner, on the ground that he continued to work with full knowledge that the timbers needed had not been furnished, and that he was thus exposed to any danger which might be incidental to their absence;² that contributory negligence is not inferable from the fact that the miner continued to work after he observed the conditions which caused his injury, unless the danger of such continuance was "not only imminent, but so obvious that an ordinarily careful man would not have worked under the circumstances,"³ or

jected the Workmen's Compensation Act, was debarred from the defense that plaintiff was injured as a result of his own negligence.

^{1a}Lammey v. Center Coal Min. Co. (1909) 144 Iowa, 640, 123 N. W. 356; Pittsburgh & W. Coal Co. v. Estievenard (1895) 53 Ohio St. 43, 40 N. E. 725; Morris Coal Co. v. Donley (1906) 73 Ohio St. 298, 76 N. E. 945; Peters v. Vesta Coal Co. (1914) 243 Pa. 241, 90 Atl. 65; Heald v. Wallace (1902) 109 Tenn. 348, 71 S. W. 80; Williams v. Norwood-White Coal Co. (1910) 146 Iowa, 489, 125 N. W. 232.

²Western Coal & Min. Co. v. Watts (1917) 131 Ark. 562, 199 S. W. 921; Chicago, W. & V. Coal Co. v. Peterson (1891) 39 Ill. App. 114 (miner justified in continuing to work for a reasonable time, after having asked for timbers); Le Roy v. Missouri, K. & T. R. Co. (1914) 91 Kan. 548, 138 Pac. 646; Macketta v. Missouri, K. & T. R. Co. (1914) 92 Kan. 362, 140 Pac. 877; Adams v. Kansas & T. Coal Co. (1900) 85 Mo. App. 486; McKinnon v. Western Coal & Min. Co. (1902) 120 Mo. App. 148, 96 S. W. 485; Lindquist v. Pacific Coast Coal Co. (1914) 81 Wash. 73, 142 Pac. 445.

³New Bell Jellico Coal Co. v. Sowders (1913) 154 Ky. 101, 156 S. W. 1046. For other Kentucky rulings of

was "immediately threatening;"⁴ that the question whether the miner was negligent in continuing to work after the employer, or his vice principal, had promised to remedy the dangerous conditions, is primarily for the jury;⁵ that the defense of contributory negligence is not available in an action brought under a statute declaring an action for damages to be maintainable for injuries caused by a "wilful" violation of its provisions;⁶ and that a miner cannot be held negligent, in

similar purport, see *Left Fork Coal Co. v. Owens* (1913) 155 Ky. 212, 159 S. W. 703 (foreman had assured plaintiff that place was safe); *Continental Coal Corp. v. York* (1914) 159 Ky. 334, 167 S. W. 131; *Peerless Coal Co. v. Copenhagen* (1915) 165 Ky. 195, 176 S. W. 1002. It is somewhat curious that the precedent relied on for this theory was *Low v. Clear Creek Coal Co.* (1910) 140 Ky. 754, 33 L.R.A. (N.S.) 656, 131 S. W. 1007, Ann. Cas. 1912B, 574, a case in which the defense discussed was assumption of risks. See preceding section, note 4.

For other cases in which the "imminence" of the danger was specified as the test, see *Mammoth Vein Coal Co. v. Bubliss* (1907) 83 Ark. 567, 104 S. W. 210, and *Green v. Western American Co.* (1902) 30 Wash. 87, 70 Pac. 310.

⁴*Davis Coal Co. v. Polland* (1902) 158 Ind. 607, 92 Am. St. Rep. 319, 62 N. E. 492. The court rejected the contention that the general verdict should be set aside, on the ground that the answers to interrogatories were to the following effect: That the plaintiff was an experienced miner; "that slate from the roof fell upon him while he was working at the face of the coal vein; that slate is liable to fall at any time suddenly and without warning; that the falling of slate, if not propped, is an inherent danger in coal mining; that appellee had knowledge of such danger; that he knew that the roof of the room in which he was working was composed largely of slate; that he knew that large quantities of slate had been falling almost daily; that it is not impossible nor difficult to tell whether slate is in the roof of a mine before it suddenly falls; that appellee examined the slate that fell on him a few minutes before it fell, and believed it was

point of law, on the ground that he failed to appreciate the full extent of the risk to which he was exposed by conditions known to be, in some degree, dangerous."⁷

VI. Pleading and practice.

§ 36. Sufficiency of complaint.

A complaint is sufficient which, in apt terms, states facts which, if proved, show a violation of the particular statute relied upon, and an injury resulting from such violation.¹

safe; that appellant's bank boss could not have made any other test than appellee made; that the driver delivered props at appellee's room on the Saturday preceding the accident on Tuesday; and that slate can be safely propped."

⁵*Kansas & T. Coal Co. v. Chandler* (1903) 71 Ark. 518, 77 S. W. 912.

Under these circumstances and under this evidence, it is clear that the court cannot say, as matter of law, that the plaintiff was guilty of carelessness in working under an unsupported roof, for that was a question for the jury to determine. *Carnego v. Crescent Coal Co.* (1913) 163 Iowa, 194, 143 N. W. 550.

⁶*Sugar Creek Min. Co. v. Peterson* (1898) 177 Ill. 324, 52 N. E. 475, reversing (1898) 75 Ill. App. 631; *Western Anthracite Coal & Coke Co. v. Beaver* (1901) 192 Ill. 333, 61 N. E. 335; *Donk Bros. Coal & Coke Co. v. Stroff* (1903) 200 Ill. 483, 66 N. E. 29; *Kellyville Coal Co. v. Strine* (1905) 217 Ill. 516, 75 N. E. 375; *Mertens v. Southern Coal & Min. Co.* (1908) 235 Ill. 540, 85 N. E. 743; *Peebles v. O'Gara Coal Co.* (1909) 239 Ill. 370, 88 N. E. 166; *Arkley v. Niblack* (1916) 272 Ill. 356, 112 N. E. 67; *Davis v. Missouri & I. Coal Co.* (1914) 186 Ill. App. 478.

⁷*Little v. Norton Coal Co.* (1910) 83 Kan. 232, 109 Pac. 768; *Majestic Collieries Co. v. Bradley* (1909) 182 Ky. 533, 116 S. W. 738.

¹The following rulings were made with reference to the Indiana enactment which requires operators to keep on hand a supply of timbers, and deliver them where required. See § 19, *supra*.

In *Antioch Coal Co. v. Rockey* (1907) 169 Ind. 247, 82 N. E. 76, where the operator of a cutting machine was injured by the fall of

"If for any legal reason plaintiff is not entitled to recover, notwithstanding

ing defendant's unlawful conduct, it should be brought forward by defend-

slate from the roof of the room in which he was working, a complaint was held sufficient which averred that the defendant's mine boss had failed to visit and examine plaintiff's working place at least once in every alternate day, as prescribed by the statute. Burns's Rev. Stat. 1901, § 7472.

In *Peabody-Alwert Coal Co. v. Yandell* (1913) 179 Ind. 222, 100 N. E. 758, the court approved a complaint which alleged, in substance, that decedent's death was caused by appellant's failure, in violation of the provisions of the Mining Act, to keep on hand sufficient timbers to make decedent's working place safe, and to deliver timbers for such purpose to such place, although the same were necessary therefor; that appellant's mine boss failed to visit and examine his working place, and failed to see that, as decedent advanced his excavation, loose coal and slate overhead were removed or secured from falling; that by reason thereof the roof over decedent's working place became loose and dangerous, and fell and caused his death; that appellant had knowledge of such condition for sufficient time before the injury to have remedied the same and thereby have avoided the accident.

In *Domestic Block Coal Co. v. De-Army* (1913) 179 Ind. 592, 100 N. E. 675, 102 N. E. 99, where the plaintiff was injured by the fall of loose stones from the roof of a traveling way, it was objected that there was no direct averment in the complaint that the roof was defective or dangerous prior to the accident, but it was alleged that the mine boss knew the roof was insecure and defective and in a condition to fall at any time, and had such knowledge for a period of from two to six days preceding the accident, and in time to have taken down the stone that caused the injury. The plaintiff insisted that the averment that the mine boss knew of the defective condition of the roof, coupled with other allegations, compelled the inference that such condition existed, and that, in any event, the court was not warranted, under the curative statutes of Indiana, in reversing the judgment because of the defects in the complaint. This contention was held to be correct, *McElwaine-Richards Co. v. Wall* (1902) 159 Ind. 557, 65 15 A.L.R.—94.

N. E. 753, being disapproved in so far as it held that courts are not warranted in resorting to inferences or deductions, where the question involves the sufficiency of a pleading.

In *Collins Coal Co. v. Hadley* (1906) 38 Ind. App. 637, 75 N. E. 832, 78 N. E. 353, it was held that a good cause of action was stated by a complaint which, in substance, alleged that the death of a miner, upon whom the roof of a room fell, resulted from a violation of the following duties imposed by statute: The duty of defendant to keep constantly on hand a sufficient supply of timbers, and to deliver at the working place, all props, caps, and timbers as requested; the duty of defendant's bank boss to visit and examine each and every working place in the mine at least every alternate day when the miners were at work, and to see that each and every working place was properly secured by props or timbers; the duty of the bank boss was to see that a sufficient supply of props, caps, and timbers was always on hand at decedent's working place; the duty of defendant to place a blackboard, sufficiently large, with the number thereon of every workman employed in the mine, at the most convenient place near the entries, to be used by the workmen in registering thereon such timber as might be required from day to day, to make secure their working places.

In *Princeton Coal Min. Co. v. Howell* (1910) 46 Ind. App. 572, 92 N. E. 122, a complaint was held sufficient which alleged that the plaintiff, a driver hauling coal, was injured by the fall of a large stone from the roof of the main entry in defendant's mine; that the timbers which held the roof at the place where the plaintiff was injured were insufficient to sustain its weight; that the defendant had knowledge of the dangerous conditions for more than ten days before the accident; and that the mine boss, having such knowledge, failed to cause the dangerous place to be put into the safe condition.

In *Collins Coal Co. v. DePugh* (1909) 43 Ind. App. 648, 88 N. E. 317, the court overruled a demurrer to a complaint averring "that had said defendant provided plaintiff with props and caps of proper length, as was its duty under the law, said plaintiff

ant's pleading."² In this point of view, a complaint, if otherwise correctly drawn, is not open to exception on the ground of its containing no allegation that the miner's request for the delivery of timbers was made in the manner prescribed by the legislature.³

It is not necessary that the com-

could and would have propped the roof and sides of said subentry, without in any way interfering with his work there, so that the same could not and would not have caved in, fallen upon, and injured plaintiff." The precedent cited was *Davis Coal Co. v. Poland* (1902) 158 Ind. 607, 92 Am. St. Rep. 319, 62 N. E. 492, where a similar complaint was assumed to be good, except in a single particular, not involved in the later case.

In *Harting v. Vandalia Coal Co.* (1912) 50 Ind. App. 98, 98 N. E. 132, where a "jerry man" was killed, it was held that a violation of a statutory duty was sufficiently charged by a complaint which, in substance, averred that it was the duty of the defendant, by and through its mine boss, to see that all loose coal, slate, and rock overhead in the entries in its mine were taken down or carefully secured, and to see that the various working places and traveling ways of its servants in its mine were reasonably free from danger of slate and rock falling; that the defendant wholly failed so to do, and negligently failed to place sufficient props, cross-bars, or other artificial support under such slate and rock in the entry into which the plaintiff was sent by the boss in charge of said mine; that, while he was passing through said entry, a large amount of rock and slate gave way and fell upon him; that his death was caused wholly by the negligence of appellee in failing to perform its duty and see that all loose coal, slate, and rock overhead in the entry were taken down or carefully secured, and while he was in the exercise of due care and caution.

See also *Coal Bluff Min. Co. v. McMahon* (1913) 54 Ind. App. 131, 102 N. E. 862, where the court sustained a very long complaint characterized as being "awkwardly drawn," which was couched in language following various sections of the Act of 1905, Burns's Rev. Stat. §§ 8569 et seq.

² *Adams v. Kansas & T. Coal Co.*

plaint should contain an averment that the defect in question could have been remedied.⁴

Where the statute on which the action is founded is, by its terms, applicable only to mines belonging to a certain category, the complaint is bad unless it contains an express averment that the mine in question is one

(1900) 85 Mo. App. 486 (not necessary to allege that the danger of plaintiff's situation was unknown to him).

³ In *Peabody-Alwert Coal Co. v. Yandell* (1913) 179 Ind. 222, 100 N. E. 758 (see note 1), one of the special contentions rejected was that the complaint should have alleged facts showing that the plaintiff's decedent had registered a request for timbers on the blackboard which the act required the employer to furnish for the purpose. The court quoted the following remarks: In *Muren Coal & Ice Co. v. Copeland* (1910) 46 Ind. App. 234, 90 N. E. 489, it was said: "The statute expressly imposes on the operator the duty of seeing to it that the miner's working place is supplied with the timbers which he may need from time to time, as the work progresses, to make his working place entirely secure. The provision with reference to the blackboard was designed, evidently, as one of the means of keeping the mining boss informed of the necessity for timbers. The law requires the mining boss to visit the mine every alternate day. This provision of the law is very evidently intended, in part, for the same purpose. But with the fact conceded that the mining boss, who for this purpose represents the operator, has knowledge of the fact that the necessary timbers are not supplied in the miner's working place, the duty to supply them imperatively follows."

⁴ *Princeton Coal Min. Co. v. Howell* (1910) 46 Ind. App. 572, 92 N. E. 122. The court said: "The averments show that the negligence complained of consisted of a failure to replace broken and insufficient timbers. It needs no averment to show that a structure once made can be repaired. The courts take notice of matters of common knowledge, and matters of which judicial notice is taken need not be averred. . . . This court knows, without being told, that a detached stone 7½ feet long, 3 feet wide,

of the description specified by the legislature.⁵

§ 37. Admissibility of evidence.

a. Admissible.

Evidence as to the condition of the place of work, immediately before and soon after the injury complained of was received, is admissible for the purpose of enabling a jury to determine what the condition of the place was at the time when the injury was received, and the number of props then in use.¹

It is proper to allow an expert miner to express an opinion as to the number of props that would be required to prevent the fall of the portion of the roof which collapsed,² or as to the practicability of sawing or cutting off portions of certain cross-bars lying in the plaintiff's room, so as to render them suitable to be used as props for a roof under which they could not be erected without being considerably shortened.³

b. Inadmissible.

Where the only negligence relied upon in the complaint is the failure

of the manager to comply with a demand for props, evidence that the plaintiff had borrowed and another miner loaned props, just before the time when the injury was received, or at any other time, is incompetent.⁴ Negligence on the employer's part, in respect of the propping of the place where the accident occurred, cannot be established by showing what was done or omitted at a different place, and under entirely different conditions.⁵

§ 38. Instructions.

The general rule is that an instruction given in the language of the statute which imposed the duty, or duties, alleged to have been violated, is not open to exception.¹ On the other hand, an instruction containing words which constitute a departure in any essential respect from the provisions of the statute is deemed to be erroneous.² An instruction which informs the jury as to the consequences of a breach of duty other than that which the complaint alleges to have been violated is erroneous;³ or which leaves the jury to determine whether the

and 18 inches thick, situated in the roof of an entry to a coal mine, can be 'carefully secured or taken down.' To hold otherwise would be to ignore the law of gravitation."

¹ *L. T. Dickason Coal Co. v. Unverferth* (1902) 30 Ind. App. 546, 66 N. E. 759 (no averment that more than ten men were employed); *Zeller, McC. & Co. v. Vinardi* (1908) 42 Ind. App. 232, 85 N. E. 378 (similar omission); *Timson v. Manufacturers Coal & Coke Co.* (1909) 220 Mo. 580, 119 S. W. 565 (no averment that the mine generated gas).

² *Pana Coal Co. v. Becker* (1906) 130 Ill. App. 43.

³ *Donk Bros. Coal & Coke Co. v. Stroff* (1903) 200 Ill. 483, 66 N. E. 29.

⁴ *Kellyville Coal Co. v. Strine* (1905) 217 Ill. 516, 75 N. E. 375. The contention rejected was that, after the timbers had been described as to length, size, and condition, it was a matter of common knowledge whether or not they could be cut and used.

⁵ *Pana Coal Co. v. Becker* (1906) 130 Ill. App. 40.

⁶ *Sugar Creek Min. Co. v. Peterson* (1898) 177 Ill. 324, 52 N. E. 475,

reversing (1898) 75 Ill. App. 631.

¹ *Mt. Olive & S. Coal Co. v. Herbeck* (1901) 190 Ill. 39, 60 N. E. 105, affirming (1900) 92 Ill. App. 441; *Arkley v. Niblack* (1916) 272 Ill. 356, 112 N. E. 67; *Donk Bros. Coal & Coke Co. v. Peton* (1901) 95 Ill. App. 193, affirmed in (1901) 192 Ill. 41, 61 N. E. 330.

² *Kedes v. Christian County Coal Co.* (1909) 149 Ill. App. 434.

³ In *Peacock Coal & Min. Co. v. Crawford* (1917) 65 Ind. App. 401, 117 N. E. 504, where the action was brought to recover for injuries caused by the fall of rock and slate from the roof of the room in which the plaintiff was working, one averment of the complaint was treated as being based on a breach of the statutory duty of the defendant to furnish props and timbers. In this point of view, an instruction by which the jury was directed that it was the defendant's duty, by its mine boss, to visit and examine the plaintiff's working place each alternate day, and also to exercise ordinary care to the end that all loose coal, slate, or rock overhead in that working place

negligence alleged amounted to a violation of the duty imposed by statute with respect to the conditions described, and omits to inform them what is the nature of the duty referred to.⁴

Whether an instruction concerning a particular point was warranted by the evidence relating to that point is a question to be determined with reference to the particular elements involved in each instance.⁵

The propriety of various instructions, in so far as the question was presented whether the statements which they contained with regard to matters of substantive law were correct, has been considered in the appropriate portions of the earlier subdivisions.

§ 89. *Special interrogatories.*

The doctrine that a trial judge "is not required to submit a special interrogatory to the jury, unless it relates to ultimate facts of such a char-

acter that it would control a general verdict," was applied in the case cited below.¹

VII. *Effect of statutes imposing duties on miners with regard to the protection of their working places.*

§ 40. *In general.*

Broadly speaking, the effect of the provisions considered in subds. II and III. *supra*, is to impose upon employers and miners "reciprocal duties and obligations which are equally imperative and binding."¹ The object of the present subdivision is to explain more definitely the nature and extent of the obligations with which the miners are chargeable in respect of the safeguarding of their working places. Those obligations are in part the result of the implied or inferential operation of the above-mentioned provisions, and in part the effect of various enactments of a mandatory or prohibitive tenor.

should be taken down or carefully secured, was held to be erroneous, the former branch because the complaint did not charge a violation of the statutory requirement regarding examination, and the latter branch because the requirement as to the removal is applicable to travel and air ways, and not to the miner's working place.

⁴ *Peacock Coal & Min. Co. v. Crawford* (1917) 65 Ind. 401, *supra*.

⁵ In *Russell v. O'Gara Coal Co.* (1914) 188 Ill. App. 328 (only abstract of case reported), it was held that an instruction which purported to set out what was necessary to be proved under a count in the declaration was not open to the objection that the declaration referred to caps and timbers, whereas the evidence had relation to props. The ruling was based upon the ground that there was undisputed evidence that props, caps, and timbers are inseparable.

¹ *Springfield Coal Min. Co. v. Gedutis* (1907) 227 Ill. 11, 81 N. E. 9, holding, in a case where the gravamen of the complaint was the mine foreman's failure to furnish cross timbers, that the following interrogatory had been properly withheld from the jury: "Were there any props and cap pieces, not in use in the room of Gedutis at the time of the injury, that were of

sufficient length and dimensions that they could have been used in propping the roof?" The court said: "If the jury had answered the interrogatory in the affirmative, it would not necessarily have controlled the general verdict. The jury may have found that there were props and cap pieces in the room, of sufficient length and dimensions, that could have been used in propping the roof, and at the same time agreed with appellee's contention that the conditions were such that the roof could not have been made reasonably safe without the use of timbers also, and there was evidence upon which a general verdict of this character might stand, regardless of whether there were props and cap pieces in the room."

¹ *Heald v. Wallace* (1902) 109 Tenn. 346, 71 S. W. 80. The statement in this case was made with reference to an enactment of the type discussed in subd. III., but it is equally applicable as a description of the general effect of the provisions tabulated in § 12.

The following remark is applicable, by its terms, only to the provisions discussed in subd. III.: The statute "requires the owners or operators of the mines to furnish props to support the roof, but it is the duty of the miners to call for the props needed, and

§ 41. Provisions as to notifying the employer that timbers are needed.

The enactments by which a previous notification by the miner that timbers are needed at his working place is made a condition precedent to the supervision of the employer's duty to furnish them are discussed in subd. III. *supra*.

§ 42. Provisions importing by implication the subsection of the miner to the duty to timber his working place.

The phraseology of all the provisions which define the duties of the employer with regard to furnishing timbers imports, more or less explicitly, an intention on the part of the legislatures to subject the miner to a correlative duty to secure his working place by means of the timbers

to put them in." *Central Coal & Coke Co. v. Graham* (1917) 129 Ark. 550, 196 S. W. 940.

¹For a specific authority on this obvious point, see *Majestic Collieries Co. v. Bradley* (1909) 132 Ky. 533, 116 S. W. 738.

²In *Old Diamond Coal Co. v. Denney* (1914) 160 Ky. 554, 169 S. W. 1016, where slate fell upon the operator of a cutting machine, the defendant company contended that the statute placed upon the miner the duty of securing the roof of the room in which he worked, and that it was consequently incompetent for the plaintiff to show that this duty lay upon the company. The trial judge having ruled that plaintiff might show that it was the custom of this mine for the mine owner to prop the roof, the defendant offered to rebut that testimony by showing that the custom of its mine imposed upon a machine operator the duty of inspecting the roof under which he was working, and of seeing that it was securely propped by the "loaders;" and that, if the "loaders" failed to discharge their duty, then it was the duty of the operator to notify the foreman or bank boss of that fact. The defendant further offered to prove that the United Mine Workers of America, a labor organization, had an agreement with it, under which it was the duty of the machine operator to direct his "loaders" to prop the slate roof, and that if they did not do so, and it became dangerous, the miner should then report it to the boss. The trial judge, however,

furnished. In an action based upon a provision of this type, the fact that the plaintiff had not propped his working place is manifestly no defense, if it appears that his failure to do so was a consequence of an antecedent refusal or neglect on the defendant's part to furnish the necessary timbers.¹

By the terms of the English and the earlier Kentucky enactments (see § 12, *supra*), the probative force of custom and contract, as an element admissible with respect to the question of the incidence of the duty, as between the employer and the miner is explicitly recognized.² The effect of such a provision is that a person employed in a mine in which the tim-

refused to admit any of this evidence offered by the defendant, upon the ground that the plaintiff was employed only for the purpose of operating the machine, and was not, under his contract, called upon to do anything more. Held, that the exclusion of this evidence was error, requiring a reversal of a judgment in favor of the plaintiff. The court said: "While subsec. 7 of § 2789b [of the statutes] imposes upon the operator of a coal mine the peremptory duty of furnishing to the miner such props and caps as are necessary to make safe the roof of the miner's working place, when request therefor is made, it does not, by virtue of its terms, impose the duty of propping the roof upon the miner or the mine operator. That duty may, by agreement or custom, be imposed upon either the miner or the mine owner. The issue being, therefore, as to whose duty it was to prop the mine, under the custom of the mine or the agreement between the miners and the operator, the court improperly rejected the evidence offered by the defendant upon that issue. The evidence of appellee upon that issue being competent, clearly, similar evidence by the defendant upon the same issue was likewise competent." Commenting upon the view of the trial judge that the question whose duty it was to prop the mine was concluded against the defendant by the statute and by the decision in *Williams Coal Co. v. Cooper* (1910) 138 Ky. 287, 127 S. W. 1000, the court said: "It is true the opinion in the *Cooper* Case says it

bering is ordinarily done by the miners themselves is liable for any negligence of which he may be guilty in performing such work,³ and that, if

was no part of the duty of Cooper to prop the rooms, and that § 2732 of the Kentucky Statutes makes it the duty of those whose business it is to prop a mine liable to a penalty for failure to do so, and applies only to those charged with that duty. That opinion, however, did not refer to subsection 7 of § 2739b, above quoted, which is admitted to be controlling in this case. It did not undertake to say whose duty it was, under subsec. 7 of § 2739b, supra, to prop the mine; it only held it was the duty of the company to do so, under the facts of that case." On the authority of the above case, the question whose duty it was to prop the place of work was again held, in *Borderland Coal Co. v. Small* (1914) 160 Ky. 738, 170 S. W. 8, to involve an issue of fact.

The ruling in the Denney Case was also approved in *Borderland Coal Co. v. Kirk* (1918) 180 Ky. 691, 203 S. W. 534.

In *Big Branch Coal Co. v. Wrenchie* (1914) 160 Ky. 668, 170 S. W. 14, the rejection of evidence concerning the incidence of the duty of propping as fixed by custom or agreement was held error.

In *Carter Coal Co. v. Hill* (1915) 166 Ky. 213, 179 S. W. 2, where slate fell from the roof of a "room neck" upon a "loader," soon after he had been set to work there, the contention of the defendant that the trial judge had erred in assuming, for the purpose of his instructions, that it was defendant's duty to prop the roof, was rejected with reference to evidence which, as a whole, was considered to show "that it was the duty of the company to do the propping, but that, under the contract between the company and Brooks [the contractor by whom the plaintiff was employed], this duty devolved upon Brooks. Manifestly, if, under the custom of the mine, it was the duty of the company not only to cross timber, but to set the props, the responsibility arising from this duty could not be evaded by a contract requiring the contractor to perform the work. If, upon another trial, it should be made to appear that the contractor's employees were themselves charged with the duty of propping, or taking down the draw slate,

he fails to use timbers furnished by the employer, he is precluded, on the ground both of contributory negligence and assumption of risks, from

then the question of whose duty it was to do such work under the particular circumstances of this case should be submitted to the jury. Of course, if it was the duty of the plaintiff and those working with him to do this work, and they failed to do so, and by reason thereof he was injured, there can be no recovery."

³In *Gibbon v. Phillips* (1894) 64 L. J. Mag. Cas. N. S. (Eng.) 42, the respondent was charged on information with a breach of § 49, rule 22, of the English act, in failing to set "props and sprags" in the manner prescribed. The two questions presented on the appeal from the decision of the magistrates were thus discussed by Wills, J.: "I think the meaning of this rule is perfectly clear, and it is only a matter of surprise to me that anyone should have misunderstood it. The words 'where they are required,' to my mind, clearly mean where they are 'necessary,' and not where the workmen think they are necessary. Very many workmen think nothing necessary which is merely required for safety. They are constantly willing to run frightful risks, and jeopardize their own lives and the lives of others, to avoid a little trouble, and a rule of this kind is intended to prevent, as far as possible, the fatal consequences to which such carelessness may give rise. The answer to the first part of the question seems to be perfectly clear—that is to say, that sprags or props are required where necessary; and, if they are necessary, the rule provides that the distance between them is not to exceed 6 feet, or such less distance as the person in authority may direct. Therefore, whether they are necessary or not is a question of fact to be decided by the justices in each case. Now, what they have decided here is that, as there were no general directions given to workmen to prop all overhanging coal,—directions which the rule clearly does not contemplate,—the respondent had a right to exercise his own discretion in the matter of sprags or props. In one sense, of course, a workman must exercise his discretion, but he must do so subject to this control—that if he does not exercise it rightly, and the justices think he has not exercised

maintaining an action to recover for an injury occasioned by that failure.⁴

§ 43. *Provisions expressly imposing that duty upon miners.*

Illinois.

Coal Mines Act, Laws 1911, No. 544, § 23, subsec. 6 (c) (Jones & A. Rev. Stat. ¶ 7494). It shall be the duty of the miner properly to prop and secure his place for his own safety, with materials provided therefor.

Iowa.

Acts of 20 Gen. Assem. chap. 21, § 15 (McClain's Code 1888, § 2463; Anno. Code 1897, § 2491). Any miner who neglects or refuses to securely prop or support the roof or entries under his control is declared guilty of a misdemeanor.

Acts 1911, chap. 106, § 44 (Code Supp. 1913, § 2489-16a). Each miner or other employee employed in a mine shall securely prop and timber the roof of his working place therein, and shall obey any order or orders given by the superintendent or mine foreman relating to the width of the working place, and to the security of the mine, in the part thereof where he is at work. When draw slate or other like material is over the coal, he shall see to it that proper timbers are placed thereunder for his safety before working under the same.

Kentucky.

Act of February 15, 1893; Ky. Stat. 1903, § 2732; Stat. 1894, § 2732; Stat. 1915, § 2738d (2). Fine of \$50 imposed upon any person employed in a mine who "intentionally or wilfully neglects or refuses to securely prop the roof or working place under his control."

Ohio.

Act of April 15, 1889 (Rev. Stat. 1892, § 6871; Gen. Code 1910, § 921). The miner shall "securely prop the

it rightly, then he is liable to be convicted. . . . The second part of the question is whether, the respondent having propped the coal directly the manager told him, the coal was propped when required. I have already intimated that that is a total misapprehension of the word 'required.' The justices have clearly applied the wrong test, and have never

roof of any working place under his control," under a penalty if he intentionally and wilfully neglects or refuses to perform such duty.

Pennsylvania.

Anthracite Coal Mines Act (Act of June 2, 1891) art. 12, rule 14. Any person having charge of a working place in any mine shall keep the roof and sides thereof properly secured by timber or otherwise, so as to prevent such roof and sides from falling, and he shall not do any work, or permit any work to be done, under loose or dangerous material, except for the purpose of securing the same. Brightly's Dig. p. 151.

Anthracite Act of June 2, 1891, art. 12, rule 55. No person or persons working in any coal mine or colliery shall cut any props or timber, while the same are in position to support the roof or sides. Brightly's Dig. p. 192.

Bituminous Coal Mines Act of May 15, 1893 (P. L. p. 52) art 20, rule 12. See § 46, infra.

Tennessee.

Acts of 1881, chap. 17, § 19. Any miner having charge of a working place in any coal mine or colliery, who shall neglect or refuse to keep the roof thereof properly propped and timbered, to prevent the falling of coal, slate, or rocks, shall be deemed guilty of a misdemeanor.

Laws 1915, No. 169, § 31. Penalty imposed upon any miner who neglects or refuses to take down all loose material, or securely prop the roof of the working place under his control, when ordered to do so by the foreman.

Virginia.

Laws 1912, chap. 178, §§ 4 and 13. It shall be the duty of each miner to securely prop and secure his working place in order to make the same

directed their attention to the proper question. The case must go back to them to consider whether the propping was or was not, in fact, required under the circumstances and at the time."

⁴Branson v. Clover Fork Coal Co. (1914) 157 Ky. 763, 164 S. W. 304; Carter Coal Co. v. Reynolds (1917) 175 Ky. 325, 194 S. W. 311.

secure for him to work therein, and no miner shall work in any working place unless he has props and timbers sufficient to make his place secure.

West Virginia.

Laws 1883, chap. 70, § 6; Laws 1907, chap. 78, § 15 (Code 1871, p. 994; Code Supp. 1907, chap. 78, § 410; Anno. Code 1913, § 483). Substantially the same as the Virginia provision.

§ 44. Effect of these provisions.

In cases involving the effect of provisions of the above type, it has been laid down that an action may be maintained by the employer against

the miner to recover for an injury occasioned to his person or property by the nonperformance of the duty prescribed;¹ that the miner cannot recover for an injury of which such nonperformance was the proximate cause;² that his failure to comply with the statute is not excused by the fact that compliance would, under the circumstances, have been inconvenient;³ and that he cannot relieve himself of his statutory responsibility by showing that his omission to secure his working place was in accord with a custom sanctioned by the employer himself.⁴

¹ *Pittsburgh & W. Coal Co. v. Estievenard* (1895) 53 Ohio St. 48, 40 N. E. 725.

² *Lammey v. Center Coal Min. Co.* (1909) 144 Iowa, 640, 123 N. W. 356 (where the precise point determined was that the defendant's failure to deliver props was not the proximate cause of the injury complained of); *Proctor Coal Co. v. Beaver* (1913) 151 Ky. 844, 152 S. W. 965 (holding, with regard to a claim based on the Tennessee provision, that on the evidence a verdict should have been directed for defendant); *Virginia Iron Coal & Coke Co. v. Asbury* (1915) 117 Va. 683, 86 S. E. 148 (holding that the statute was not intended to relieve the workman of exercising that degree of care required of him before its enactment); *Huettel Coal & Coke Co. v. Lawrence* (1915) 117 Va. 728, 86 S. E. 151.

³ *Morris Coal Co. v. Donley* (1906) 73 Ohio St. 298, 76 N. E. 945, where it was held that a demurrer had been properly sustained to a declaration averring that the unsafe and dangerous condition of the roof was so near to the face of the wall of the coal where plaintiff had to perform his duties that it could not be posted or propped by the plaintiff while performing his duties in cutting the coal with his machine; that said machine with which plaintiff had to work was 8 or 10 feet long, and had to be worked across the entire working place. The court said: "The statute contains no term suggesting the intention that there should be an exception to its operation because of the presence of such conditions as are alleged. To introduce such an exception by construction would be an obvious attempt to avert the consequences of a sup-

posed oversight on the part of the legislature; and the departure from safe rules of construction would not be excused by considerations leading to a clear conviction that the legislature did not deliberately intend to include the case presented, within the provisions of the statute. The facts alleged to show that compliance with the statute was impracticable do not show more than that compliance with its provisions would have been attended with some inconvenience. For aught that appears, it would have been quite practicable either to remove from the roof of the room the slate which constituted the source of the danger, or to prop the roof, and continue to mine with hand tools to such an extent as the presence of the props might have made necessary. To introduce the suggested exception would be the abrogation, rather than the construction, of the statute."

⁴ *Coal & Min. Co. v. Clay* (Consolidated Coal & Min. Co. v. Floyd) (1894) 51 Ohio St. 542, 25 L.R.A. 848, 38 N. E. 610. It was held error to refuse an instruction embodying this doctrine. There the evidence showed that at the time of the accident, and for a long time before, a custom existed at this mine whereby the work of posting and propping was given to the workmen called "fillers." By force of this custom one Dalton was required to post and prop. The court said: "The object of the statute is to encourage carefulness—regard not only for the life of the miner, but for the lives of all who may be subjected to like risks. It imposes an obligation to perform a duty to others. Anything, therefore, which tends to operate in opposition to that obligation would violate the

Whether a particular provision is applicable to a certain miner depends upon the language of the provision and the conditions under which the miner is working.⁵

As the necessary effect of a statute which imposes upon the miner the duty of propping his working place is to relieve the employer from all responsibility in that regard, it operates so as to preclude the miner, irrespective of whether he was himself guilty of negligence in respect of the performance of the duty, from maintaining a common-law action against the employer for injuries caused by insufficient propping.⁶

The cases in which the incidence of the duty was discussed, with reference to the connotation of the expression "working place," are reviewed in §§ 50 and 51, *infra*.

§ 45. Provisions imposing upon the miner the duty of discontinuing work until timbers are furnished.

Pennsylvania.

Act of June 2, 1891, P. L. 176, Act 11, § 2. A workman in want of props shall notify the mine foreman of the fact, and, "in case of danger from loose roof or sides, he shall not continue to cut or load coal until the said props and timbers have been properly furnished, and the place made secure."

Virginia.

See § 43, *supra*.

policy of this statute, and hence, whatever right the custom at this mine, imposing upon Dalton the work of propping and posting the roof of the room, may have given Clay to call upon Dalton to do the manual work of posting, and delay his own work until that had been properly done, such custom ought not to have the effect to exonerate Clay from the duty enjoined by the statute, nor shift the risk undertaken by himself over upon the company." This decision was approved in *Morris Coal Co. v. Donley* (1906) 73 Ohio St. 298, 76 N. E. 945. It was discussed, with apparent approval, in *Heald v. Wallace* (1902) 109 Tenn. 346, 71 S. W. 80. But the court made no explicit ruling as to the effect of custom.

West Virginia.

See § 43, *supra*.

§ 46. Effect of these provisions.

The theory that a provision of this tenor operates so as to render a miner chargeable with contributory negligence, as a matter of law, if he continues to cut and load coal before the timbers he has asked for are furnished, has been rejected in Pennsylvania.¹ The effect of the other enactments has not yet been discussed. But it is apparent that they are, to say the least, susceptible of the same construction.

§ 47. Provisions imposing upon the miner the duty to examine his working place.

Alabama.

Laws 1897, p. 1099, § 33, rule 3. Every workman shall examine the working place before commencing work.

Illinois.

Coal Mines Act, Laws 1911, No. 544, § 23, subsec. 6 (c) (Jones & A. Rev. Stat. chap. 93, ¶ 7497). Every miner shall sound and thoroughly examine the roof of his working place before commencing work, and, if he finds loose rock or other dangerous conditions, he shall not work in such dangerous place except to make such dangerous conditions safe.

Iowa.

Laws 1911, chap. 106, § 44; Code

Compare also the case cited in § 48, note 3, *infra*.

⁵In *Williams Coal Co. v. Cooper* (1910) 138 Ky. 287, 127 S. W. 1000, the operator of a coal-cutting machine was held not to be within the purview of the Kentucky enactment, for the reason that the duty of propping the roof, after coal had been cut, shot down, and removed, was discharged by "loaders."

⁶This was one of the grounds on which recovery was denied in *Morris v. Taylor Coal Co.* (1917) 206 Ill. App. 100.

¹*Collins v. Northern Anthracite Coal Co.* (1913) 241 Pa. 55, 38 Atl. 75 (case for jury, the evidence being that, after examination of the roof which fell, both the plaintiff and his

Supp. 1913, § 2489-162. It shall be the duty of each employee to examine his working place upon entering the same, and he shall not commence to mine or load coal or other mineral until it is made safe.

Montana.

Coal Mining Act, Laws 1911, chap. 120, § 83. Each miner shall examine his working place upon entering the same, and shall not commence to mine or load until it is made safe. He shall be very careful to keep his working place in safe condition at all times. Should he at any time find his place becoming dangerous from any cause or condition, to such an extent that he is unable to take care of the same personally, he shall at once cease work and notify the mine foreman.

Pennsylvania.

Bituminous Coal Mines Act May 15, 1893 (XIV.) art. 20, rule 12. A miner shall examine his working place before beginning work and take down all dangerous slate, or otherwise make it safe by properly timbering the same before beginning to dig or load coal . . . and he shall at all times be very careful to keep his working place in safe condition during working hours. Brightly's Dig. p. 320.

Rule 13. Should he at any time find his place becoming dangerous, either from gas or roof, . . . he shall at once cease working.

Rule 14. It shall be the duty of every miner to set stays under the coal, while undermining, to secure it from falling. Brightly's Dig. p. 322.

Rule 24. Any miner or other workman who shall discover anything wrong

with . . . the condition of the roof, side, timber, or roadway, or with any other part of the mine in general, such as would lead him to suspect danger to himself or his fellow workmen, or to the property of his employer, shall immediately report the same to the mine foreman, or other person for the time being in charge of that portion of the mine.

§ 43. Effect of these provisions.

Provisions of this type manifestly involve, so far as regards mines within the purview of the statutes of which they form a part, the abrogation of the common-law doctrine that, as a general rule, a servant is under no obligation to inspect those portions of the master's plant by which his safety may be affected.¹ The duties imposed are "continuing duties, and rest upon the miner, regardless of whether his employer has supplied him with suitable props or not."²

Evidence as to a rule, custom, or agreement in derogation of the statutory duty imposed by these provisions is not admissible.³ A similar rule has been laid down with reference to the duty of timbering the place of work. See § 44, *supra*.

The existence of the statutory duty may, under some circumstances, constitute an element favorable to the employer in this regard—that the inference of culpability on his part in respect of having failed to discover the unsafe conditions which caused the injury complained of is repelled, more or less strongly according to the extent of the miner's experience, by the fact that the latter was himself ignorant of those conditions.⁴

helper concluded that it was safe enough to work under).

¹ See Labatt, Mast. & S. § 1330.

² *Edgren v. Scandia Coal Co.* (1915). 171 Iowa, 459, 151 N. W. 519. The court held the case had been improperly submitted on a common-law footing, and said: "The burden was upon the plaintiff to show: (1) that he had requested the props; (2) that they had not been furnished within a reasonable time; (3) that this was the reason for his failure to prop the roof; (4) that upon entering the mine upon the morning of the accident he

made a diligent examination of the roof; (5) that with reasonable diligence in his examination he could not discover indications of a loosening roof, and that, as a reasonably prudent man, he believed the same to be safe at that time." The last of the prerequisites here specified is applicable only to the Iowa statute.

³ *Kallio v. Northwestern Improv. Co.* (1913) 47 Mont. 314, 132 Pac. 419. Ann. Cas. 1915A, 1228. As to this case see further in § 50, note 2, *infra*.

⁴ In *Morris v. Taylor Coal Co.* (1917) 206 Ill. App. 100, where a verdict for

The Mining Act of Kentucky contains a general provision, authorizing operators to frame rules which are to become effective when approved by a designated state official and posted in the manners prescribed. It has been held that a miner who fails to observe a rule which requires him to examine the roof of his place of work cannot recover for an injury caused by defects which a reasonably careful examination would have disclosed.⁵ But such a rule is, of course, not binding upon him unless it has been duly posted.⁶ Where the evidence shows that the miner did make an examination of the roof which fell on him, the question whether he ought to have discovered the defective place is primarily for the jury.⁷

Whether the injured miner is precluded from recovery, on the ground of his having infringed a prohibition against beginning work until the working place "is made safe," is a question of fact.⁸

As the expression, "working place," which is used in enactments of this

type, is not applicable to a completed entry, they afford no basis for a contention that an employer may, by a rule promulgated in accordance with a statute, subject a miner who uses such an entry merely as a traveling way to the duty of discovering dangerous conditions therein and avoiding them.⁹

VIII. Places to which the statutory duties of employers and miners are applicable.

§ 49. In general.

All the statutes by which duties in respect of the timbering of mines are imposed upon employers contain provisions which, either by their express terms or by implication, cover the "working places" of miners. In some jurisdictions enactments relative to portions of mines designed for purposes of travel and transportation have also been passed. It is manifest that, in states in which only provisions of the former type are in force, the right of miners to recover for injuries received outside the limits of

a miner, who had been injured by the fall of a piece of coal from the room in which he was working, was set aside, the court argued thus: "If it [the roof] was in a falling, unstable and unsafe condition, it seems to us that it was the duty of appellee to properly prop and secure this place with the timbers that were furnished him, and that it cannot be said, where the miner had failed to prop and secure his room, that that should be charged as an act of negligence upon the part of the appellant." "The charge in the declaration is that appellant knew the condition of this roof, or by the exercise of reasonable care could have known it, but the evidence of appellee is that the roof, so far as he could determine and ascertain by the usual tests, was solid, and not dangerous, and not liable to fall. It also appears from his statement that the mine examiner's marks were in the room, showing that it had been examined the night before. It further appears from the evidence that appellee was an experienced miner, and was well acquainted with the usual tests applied in determining whether or not a roof was safe. He applied these tests, and found the roof at the

point complained of to be in a safe condition. If he, as an experienced miner, was unable to find that the roof was in a loose and dangerous condition, we are unable to see how it can be said that the appellant was negligent in not finding it."

⁵ *Elk Horn Min. Corp. v. Vanhoose* (1918) 179 Ky. 529, ante, 1878, 200 S. W. 921.

⁶ *Stearns Coal & Lumber Co. v. Spradlin* (1917) 176 Ky. 405, 195 S. W. 781.

⁷ *Consolidation Coal Co. v. Bailey* (1917) 178 Ky. 114, 198 S. W. 561.

⁸ *Edgren v. Scandia Coal Co.* (1915) 171 Iowa 459, 151 N. W. 519. There the court upheld the plaintiff's contention that "if, in the manner of making such examination and the extent of it, and in the conclusion which he reached, he acted and judged as a reasonably prudent person of experience would have acted and judged, then he was justified in deeming the place as 'safe,' and he did not violate the statute by proceeding to load his coal in the manner in which he did."

⁹ See *Consolidated Coal Co. v. Lundak* (1902) 196 Ill. 594, 63 N. E. 1079, where such a rule was held to be void, because it virtually operated so as to

their working places is determinable with reference to common-law doctrines.¹ As the question whether the particular portion of the mine in which the claimant was injured is within the purview of a statute is determinable with reference to the same considerations, irrespective of whether the party subjected to the specified duty is the employer or the miner, no attempt has been made, in the following sections, to segregate the decisions relating to these two classes of duty.

§ 50. Scope of provisions applying specifically to "working places."

A "room" in a coal mine is con-

release the employer from liability for his own negligence. See *Labatt, Mast. & S.* § 1135.

¹See remarks of the court in *Wellston Coal Co. v. Smith* (1901) 65 Ohio St. 70, 55 L.R.A. 99, 87 Am. St. Rep. 547, 61 N. E. 143, 10 Am. Neg. Rep. 445. These remarks were indorsed in *Sloss-Sheffield Steel & I. Co. v. Green* (1909) 159 Ala. 178, 49 So. 301.

²This doctrine was taken for granted in the cases cited in notes 2 and 3, *infra*, and in many of those reviewed in §§ 14 and 21, *et seq.*, *supra*.

³In *Kallio v. Northwestern Improv. Co.* (1913) 47 Mont. 314, 132 Pac. 419, Ann. Cas. 1915A, 1228, the grounds upon which the plaintiff was held to have been properly nonsuited were: That evidence as to a rule, custom, or agreement in derogation of the statutory duty was not admissible; that the expression "working place" included every place in which he was "mining or loading;" and that its connotation was not coextensive with that of the same expression, as used in statements concerning the scope of an employer's common-law liability. The facts were thus summarized by the court: "It was either admitted or established that the accident occurred at a point 70 or 75 feet from the face of the entry, at a place where, and at a time when, appellant and his associate were loading the coal blasted out by the preceding shift; that they had just come on shift, and this work was part of their duty as miners; that they had inspected the entry for a distance of 50 feet from the face, but no further; that the appellant could not tell, without an inspection by sound-

ceded to be a "working place," so far as regards that portion of it in which the work of excavation is being carried on, and which is immediately affected by the operation incidental thereto.¹

In Montana, it has been laid down as a matter of law that the connotation of this expression extends also to the portion of a room which is remote from the coal face, and not immediately affected by the work of excavation.² On the other hand, in several cases decided with reference to the more recent of the Iowa enactments set out in § 43, *supra*, the question whether the expression is applicable to that portion has been treated

ing, that the piece of coal which fell upon him was loose and likely to fall, but its presence and character would have been revealed through an inspection by sounding, so that it could be picked down; no such sounding was done by either appellant or respondents; that blasting affects the roof and walls of the entry for not to exceed 10 feet from the face, but loosening of the walls and roof is accomplished by the action of air, to which this portion of the entry in question had been exposed for nearly a month." The agreement upon which the plaintiff relied was to the effect that the miners were to examine and keep safe the entry for a distance of 50 feet from the face, and that the company should perform these duties beyond that point. The court said: "It is . . . apparent that the 'working place' which the miner must, under the statute, examine and keep safe, is a varying area, and that the duty imposed is a positive one. The suggestion is made that this cannot be so, because the act, by its § 70, requires the master to see that 'all loose coal, slate, and rock overhead, in rib, in traveling ways where miners have to travel to or from their work,' are taken down or carefully secured, and by its § 73 requires the foreman or his assistant to visit and examine every working place at least each alternate day, and see to the security of the same. The conclusion does not follow; rather, the clear intent of the statute is that such places as are the seat of active operations shall be looked after by both master and servant, and the mere fact that at a given time one of such places may

as one of fact, to be determined from the evidence as a whole.³

For practical purposes, the court seems to have adopted the doctrine

not be the seat of active operations, and may therefore, at such time, be subject to the exclusive inspection of the master, does not absolve the employee from the duty of examination, when that place is, or is about to become, the scene of his labors. As to the place at which the appellant was injured, the respondents should have seen to its safety; but it was also the duty of the appellant to refrain from loading until he had examined it and had made it safe. Neither party having observed the statutory duty, and the accident being due to this nonobservance, the parties were in *pari delicto*."

³ In *Carnego v. Crescent Coal Co.* (1913) 163 Iowa, 194, 143 N. W. 550, the case was held to have been properly submitted to the jury, as the evidence concerning the incidence of the duty to see that the roof was supported was conflicting. Commenting on the earlier enactment in § 2491 of the Code, which imposes a penalty upon a miner who fails to prop the working place "under his control" (see § 43, *supra*), the court said: "This has reference to the place where the employee is 'to mine or load coal or other mineral,' and not to the entry through which he reaches such places, or brings his tools, or the car, to use or load. Whether the roof of the entry shall be inspected and repaired by the employer or the miner depends upon who is in control, and if the jury found that, according to custom and usage, the defendant's employees, Smith and Pevlik, were required to repair the entry where the switch was, and were then in charge of that work, it necessarily follows that the defendant, if these men failed to exercise ordinary care therein, and the injury resulted from such failure, was negligent." The following agreement between the operators (including defendant) and miners of the district in which defendant's mine was located was held to have been properly received in evidence: "In accordance with the state law the company shall furnish all necessary timbers, and the miner shall keep his room securely propped. If a miner, working in a room, fails to securely prop the same,

that a verdict based upon the theory that the space which is used only for travel and transportation is not the miner's "working place" should not be

or neglects to as directed by the pit foreman, or carelessly shoots down the props or timbers, and a fall of slate occurs through such failure, negligence, or carelessness, he shall immediately clear his roadway of such falls of slate, and do all necessary re-timbering, and in case of his neglect to do so the company may do such work and charge the expense thereof to said miner." The court was of opinion that this agreement "was admissible as bearing on what was required of the miners, and, in omitting reference to any duty of theirs with respect to the entries, tended to confirm the evidence that it was not the custom for them to care for the entries."

In *Mitchell v. Phillips Min. Co.* (1917) 181 Iowa, 600, 165 N. W. 108, it was held error to direct a verdict for the defendant upon evidence which tended to show that plaintiff's decedent was killed by a fall of slate while he was loading coal on a car, about 20 feet from the face of a room; that the mine foreman had notice that the roof in that part of the room was in a dangerous condition; and that there were props and timbers at hand. The court said: "The statute does not define or fix the limits of his working place. As the work progresses in a mine, under some circumstances, there comes a time when it is a question as to what is the working place of the miner, and whether it has passed out of his control, and the duty devolves upon the company to look after the roof; that is, where the employer's duty begins and the employee's duty ceases." Evidence tending to show that, under a custom prevailing in the mine, it was the duty of the defendant to place cross timbers over the place where the slate fell, or to take down the defective roof, was held to be competent.

In *Erickson v. Maple Block Coal Co.* (1918) 183 Iowa, 1292, 167 N. W. 105, it was held that the trial judge had properly refused to direct a verdict for the defendant, where the evidence was to the effect that the claimant had been injured at a place about 2 feet beyond the end of the car track in his room, while he was going to-

disturbed, unless the testimony points convincingly to a different conclusion. It will be observed that different doctrines are held in these two states with respect to the competency of evidence of custom, as an element bearing upon the responsibilities of the employer and the miner in regard to that space.

A "neck" which was being excavated by the claimant, for the purpose of affording access to a proposed "room," was assumed in one case to be a "working place."⁴

towards the coal face; that he had been warned by the pit boss of the dangerous condition of the roof over the roadway, and had asked to be assigned to some other work; and that, if there had been cross timbers or planking over the roadway, the roof would not have fallen.

In *Mitchell v. Swanwood Coal Co.* (1918) 182 Iowa, 1001, 166 N. W. 391, a verdict for a plaintiff whose decedent had been killed by slate which fell from the roof above, on a car track laid to a point about 20 feet from the coal face of a room, was held to be warranted by evidence the substance of which, and the conclusions to be drawn from it, were thus stated by the court: "It appears here that the foreman was notified of the condition of the roof of this room over the roadway, some time before the injury occurred. He failed to do anything to protect the roadway from falling slate. Intestate discovered cracks in this slate which suggested to his mind imminent danger. The defect was in a place over the roadway where it was the defendant company's duty to make repairs upon notice, and we think without notice, if discovered. This was at a point where the workmen must pass in gaining ingress to and egress from the working face of the mine. Upon discovering the cracks in the roof, deceased was about to put in temporary supports under the loosened portion of the roof. This he had a right to do, not only for his own protection against the negligence of the company, but for the protection of others who might come in over the roadway, as well as for the protection of the company's property."

The above cases, it should be observed, were decided with reference to the later of the two Iowa enactments, set out in § 43, *supra*, which does not

This expression does not embrace a completed entry,⁵ but is applicable as regards a new entry which the miner is engaged in enlarging,⁶ or a previously constructed entry which he is engaged in enlarging.⁷

The employer's duty to furnish props applies to all descriptions of "working places" in which the roof may fall, and is not restricted to places in which they are to be used for the support of a permanent roof.⁸

What is "the entrance to the working place," within the meaning of a

contain the descriptive phrase "under the control." Some rulings as to the earlier enactment which contains that phrase are reviewed in the following sections.

⁴In *Big Branch Coal Co. v. Wrenchie* (1914) 160 Ky. 668, 170 S. W. 14 (decided with reference to the earlier Kentucky statute; see § 19 *supra*).

⁵In *Consolidated Coal Co. v. Lundak* (1902) 196 Ill. 594, 63 N. E. 1079, where a driver was injured by a fall of slate, a certain instruction, criticized as one which ignored § 16 of the earlier Illinois act, was pronounced correct, on the ground that "the dangerous roof, in this instance, was not where miners were working, but was where they were in no danger from it. It was over the track, where the miners were not called upon to put up props."

⁶*Baldi v. Cedar Hill Coal & Coke Co.* (1909) 97 C. C. A. 505, 173 Fed. 781 (decided with reference to Colorado statute; see § 12, *supra*); *Mammoth Vein Coal Co. v. Bubliss* (1907) 83 Ark. 567, 104 S. W. 210 (for statute, see § 19, *supra*).

⁷In *Holmes v. Bloomfield Coal & Min. Co.* (1917) 182 Iowa, 137, 162 N. W. 820, the injury complained of was caused by the fall of a piece of slate on a man engaged in shooting down the roof of a new haulage way, which was being formed by lowering the grade of an existing one. Held, that a verdict for the defendant had been properly directed.

⁸This may be said to be the general principle underlying *Interstate Coal Co. v. Trivett* (1913) 155 Ky. 825, 160 S. W. 728, where the court rejected defendant's contention that the duty was not predicable with respect to "draw slate," which, as the evidence showed, it was neither practicable nor customary to prop.

statute, "is to be explained by testimony in every case; but, when explained, it may become a question to be decided as a matter of law. The statute does not fix a distance, but a place."⁹

Under a statute which specifically provides that the props, etc., are to be furnished for the purpose of "securing the roof" by the miners, an action cannot be maintained for an injury caused by what is technically known as "bottom coal."¹⁰

§ 51. —to places "under the control" of the miner.

It is not disputed that the portion of a room in which the work of excavation is being carried on is presumptively within the scope of this phrase.¹

⁹ In *Lindquist v. Pacific Coast Coal Co.* (1914) 81 Wash. 73, 142 Pac. 445, where it was laid down that defendant could not be held negligent on the ground that the timbers furnished were placed about 250 feet away from the place where the decedent was killed. The special contention advanced by plaintiff was that the collapse of the roof of a chute, by which his decedent was killed could have been obviated if cribs had been erected for the support of the roof, and that the timber supplied by the defendant company was placed at such a distance from the working place that the miners could not erect the cribs, and make any money at the rate agreed upon between the miners' union and the defendant owner. But the court was of opinion that the union must have fixed or agreed upon the schedule of compensation with due reference to the fact that the mine could not be worked safely without taking time to crib the roof as the work progressed.

¹⁰ *Yanloniz v. Spring Valley Coal Co.* (1914) 185 Ill. App. 563.

¹ This doctrine is obviously taken for granted in the cases cited in the following notes.

In *Wahlquist v. Maple Grove Coal & Min. Co.* (1902) 116 Iowa, 720, 89 N. W. 98 (decided with reference to the earlier of the Iowa provisions, set out in § 43, *supra*), where the direction of a verdict for the defendant, on the ground that it was the duty of the plaintiff to prop the roof which fell on him, was held error, the ratio decidendi was that the evidence tended to

Whether it applies in a particular instance to the portion in which such work has been discontinued is a question of fact, which is presumably to be determined with reference to considerations similar to those which are appropriate when merely the connotation of "working place" is involved. See preceding section. But none of the cases so far reported bear upon this point.

A completed entry is not "under the control" of the miners who use it merely as a passageway.² On the other hand, this phrase may or may not, according to circumstances, be applicable to an entry which was in course of construction at the time when the claimant was injured.³ In

show that he was a laborer working under another miner, who was charged with the duty of propping.

² In *Wellston Coal Co. v. Smith* (1901) 65 Ohio St. 70, 55 L.R.A. 99, 87 Am. St. Rep. 547, 61 N. E. 143, 10 Am. Neg. Rep. 445, it was held that the duty with regard to propping, which is imposed upon miners by Ohio Rev. Stat. § 6871 (see § 43, *supra*), is not applicable to an entry.

In *Corson v. Coal Hill Coal Co.* (1897) 101 Iowa, 224, 70 N. W. 185, 1 Am. Neg. Rep. 230, where the plaintiff, while in charge of coal cars, was thrown off, owing to the collision of the car in which he was riding with a piece of slate which had fallen from the roof of a completed entry, the negligence alleged was that of one Hayden, an employee in charge of the underground workings. An instruction to the effect that if the defendant kept on hand a sufficient supply of timbers for props, and sent them down when requested, it was not liable for the injury, was held to have been properly refused, for the reason that it had no application to the facts in the case, plaintiff not being in control of the entry.

In *Ashland Coal & I. R. Co. v. Wallace* (1897) 101 Ky. 626, 42 S. W. 744, 43 S. W. 207, where an action was held to be maintainable for the death of a tracklayer upon whom slate had fallen from the roof of an entry, the ratio decidendi was, in part, that the entry was not "under his control."

³ In *Thayer v. Smoky Hollow Coal Co.* (1903) 121 Iowa, 121, 96 N. W. 718, the evidence showed that a piece of

the cases cited evidence as to custom was expressly held to be competent for the purpose of showing whether such an entry was, in point of fact, "under the control" of the employer, or of the claimant, at the time when the accident occurred.

In one case, where the claimant was injured while loading a car in the neck of his room, the inference that this place was under his control was held to be negated by the terms of a specific contract.⁴

§ 52. — to "traveling ways."

The general principle underlying the decisions is that the expression "traveling ways" connotes only such

slate fell from the roof of a side entry, which was being driven from the main entry, and injured a digger who was then pushing a car, and that the defective roof was above the iron rails which had been laid by the defendant company after the bottom of the entry had been taken up. A new trial was ordered on account of certain errors not relevant to the present subject, but the court made the following remarks with regard to the merits of the case: "One of the close questions . . . was . . . the defendant's duty to look after the safety of the place where plaintiff received his injuries. . . . The exact time when a master's duty begins is not fixed by any arbitrary rules. . . . If the employee was in control, then he was under a statutory duty to prop the roof and to properly timber the entry; but if this was a duty devolving upon the defendant, by reason of custom or otherwise, then the obligation rested on it, and not on its employee, who was without authority or control."

In *Taylor v. Star Coal Co.* (1899) 110 Iowa, 40, 81 N. W. 249, the substance of the evidence was that, when injured, the plaintiff was engaged in work in a double header or entry, or was removing coal or other material for the purpose of making an entry. The question, whether or not the roof which fell was under the plaintiff's control, was held to be for the jury, as his evidence tended to show "not only that he had no control over the roof, but that he was instructed not to remove slate therefrom." The court approved an instruction to the effect that, notwithstanding the accident

sections of the underground workings as are used exclusively for purposes of travel and transportation. For injuries caused by the negligence of the employer in failing to secure a rock in the roof of such a section, he is liable, although the evidence shows that the rock extended over the room in which the plaintiff was working, and that it was loosened by reason of his work.¹

The expression does not apply to a "hauling crosscut" which, at the time when the injury complained of was received, had been closed for several months;² nor to a portion of a room in which tracks have been laid;³ nor to a tunnel which is in process of con-

may have occurred in an entry, the defendant was not liable, if by general usage or custom, or for any other reason, it was plaintiff's duty to look after the roof at the place where he was working.

¹In *Braddich v. Phillips Coal Co.* (1912) 159 Iowa, 402, 138 N. W. 406, an agreement between the coal operators and the mine workers, in the district in question, provided that "in case the room had been properly timbered, . . . and the roof from any cause becomes so heavy as to require double timbering, the company shall, when notified by the miner, do the necessary work to protect the roadway." As it was shown without dispute that the neck of the plaintiff's room constituted the roadway between the room proper and the entry, it followed that, so far as the matter of double timbering was concerned, the neck was under the control of the defendant.

²*Barrett v. Dessy* (1908) 78 Kan. 642, 97 Pac. 786.

³*Tanner v. Cherokee & P. Coal & Min. Co.* (1916) 97 Kan. 21, 154 Pac. 269 (air man injured by fall of rock while repairing the "stopping").

⁴In *Ricardo v. Central Coal & Coke Co.* (1917) 100 Kan. 95, 163 Pac. 641, the court argued thus: "Evidence was introduced tending to show that it was the custom in this and in other mines for the mine operator to put a room in safe condition when starting a miner to work in it, after it had been partially worked out by another miner. If any part of a miner's room were a traveling way, under the statute, proof of such a custom would be unnecessary and wholly immaterial. The ex-

struction for the purpose of being used, when completed, as an entry.⁴

It has been held that the phrase, "wherein miners have to travel to and from their work," as used in the Indiana statute, is applicable not only to a way which the employees generally use in passing to and fro between their working places and the hoisting shaft, but also to a roadway in the room of a mine, which is only for the

use of those employed to work in that room.⁵ "When a place in a mine is definitely described, and its relation to the other parts of the mine is fixed and certain, as being a place in a room, an entry, an air passage, or a traveling way, it is a question of law for the court to determine whether such place is or is not in a traveling way."⁶

istence of the custom argues that the whole of the room is the miner's working place, and that no part of it is a traveling way. The plaintiff's evidence tended to show that he received the cars on a switch at the entry to his room, pushed the cars in, loaded them, and pushed them out again to the switch. This showed that the plaintiff used the whole length of his room as his working place." The conclusion thus arrived at was deemed to be corroborated by a provision in the same enactment, by which the operator is required to supply "sufficient prop timber of suitable length and size for the places where it is to be used." The court observed that "these props are furnished by the mine operator, and are set by the miners to support the roofs of their rooms. It would hardly be necessary to furnish props to the miners for use in their rooms, if the mine operator were required to see that the loose coal, slate, and rock overhead were secured against falling in the rooms." The court expressed its disagreement with the contrary conclusion reached in *Antioch Coal Co. v. Rockey* (1907) 169 Ind. 247, 82 N. E. 76 (see note 5, *infra*), and in *Domestic Block Coal Co. v. De Armev* (1913) 179 Ind. 592, 100 N. E. 675, 102 N. E. 99.

⁴ In *Baldi v. Cedar Hill Coal & Coke Co.* (1909) 97 C. C. A. 505, 173 Fed. 781, where the action was founded on the Colorado statute, the evidence showed that, when the writ had proceeded to such an extent that the face of the room was about 38 feet from the entrance, a piece of rock fell from the roof, and seriously injured plaintiff's foot. The court said: "Under the facts in this case, we do not think the place where they [the claimant and his fellow workman] were working was a traveling way at the time of the injury. The fact that it was contemplated to be a traveling way, 15 A.L.R.—95.

and the excavation was being made for that purpose, did not constitute it a traveling way until its completion. It was the same as what has been designated as a 'room,' in which coal is mined." (Compare the cases cited in VII. of the monograph appended to *Elk Horn Min. Corp. v. Vanhoose*, ante, 1378.

⁵ *Domestic Block Coal Co. v. De Armev* (Ind.) supra (construing Acts 1905, p. 65, § 12; Burns's Rev. Stat. 1903, § 8580). The court said: "Inasmuch as props could not well be set in a travel way, the task of securing loose rock overhead by propping might present practical difficulties, and it is presumed that for that reason the statute was so amended in 1905 as to require the loose rock over travel ways to be taken down, unless they could, by practical means, be safely secured. The practical difficulty in the way of securing loose rock hanging over the travel way exists as well in the way through a room as in that connecting the room with the hoisting shaft. It was necessary for workmen to pass to and fro over the way in the room in controversy, both in moving the machines, and hauling the coal to the hoisting shaft. And, while not so many workmen would pass over the way through the rooms as over the other ways, we do not think that it was the intention of the legislature to limit the application of the statute, as suggested in the requested instruction. The object of the statute was the protection of miners from the dangers incident to their employment, and the statute should not be narrowly construed." The judgment of the court of appeals in (1912) — Ind. App. —, 97 N. E. 706, 98 N. E. 875, where the complaint was held demurrable, was reversed.

⁶ *Ricardo v. Central Coal & Coke Co.* (1917) 100 Kan. 95, 163 Pac. 641.

§ 53. Applicability of statutes to prospecting tunnels.

A prospecting tunnel which was being driven through rock with the hope of discovering a deposit of coal was pronounced, in the case cited below, to be outside the purview of the Coal Mines Act of Washington.¹

The only ground assigned for this decision was that the "legislature itself had purposely refrained" from extending the act to excavations of this character. But the hypothesis that the absence of an express declaration of the legislative intent was, of itself, sufficient to warrant the con-

clusion arrived at, seems to be of somewhat dubious soundness. It is submitted that the driving of the tunnel in question was a species of mining work, and consequently that was no valid reason for holding that the injured person was not entitled to sue under an act which applies in general terms to coal mines. The writer has not been able to find any other case in which it has even been intimated that the scope of a statute of this type is limited to operations directly connected with the actual digging and transportation of coal after it has been discovered.

¹ Hemmingson v. Carbon Hill Coal Co. (1911) 62 Wash. 28, 112 Pac. 1111

(rock fell on plaintiff while engaged in timbering tunnel). C. B. L.

**GEORGE S. MAWHINNEY, Respt.,
v.
MILLBROOK WOOLEN MILLS, Appt.**

New York Court of Appeals — May 31, 1931.

(231 N. Y. 290, 132 N. E. 93.)

War — government order as excuse for postponement of civilian order.

1. The receipt of an order by a mill for cloth for Army uniforms during war is, although it was sought by the owner of the mill, a valid excuse for postponing the filling of prior civilian orders, under the provisions of the National Defense Act, providing that government orders at such time shall take precedence over all other orders and contracts placed with any individual.

[See note on this question beginning on page 1512.]

Appeal — right to pass on weight of evidence.

2. The appellate division of the supreme court cannot pass upon the weight of evidence to sustain a defense which was stricken out by the trial court.

— refusal of request to find — question of law.

3. A question of law is raised, to be passed upon by the court of appeals, by refusal of requests to find, sustained by uncontradicted evidence and not inconsistent with findings already made.

War — precedence of government orders — necessity of order.

4. An executive order directing the preference of government orders during time of war is not necessary to effect such preference under the National Defense Act, providing that government orders at such time shall take precedence over all other orders and contracts placed with any individual.

[See notes in 3 A.L.R. 23; 9 A.L.R. 1510; 11 A.L.R. 1429.]

APPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, Second Department, affirming a judgment of a Trial Term for Richmond County in favor of plaintiff in an action brought to

recover damages for alleged breach of a contract to manufacture, sell, and deliver certain cloth. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Herbert C. Smyth and Rod-eric Wellman, with Messrs. Wellman, Smyth, & Scofield, for appellant:

The order as originally placed invoked the National Defense Act, required precedence, and excused delay in the performance of plaintiff's contract.

Stewart v. Stone, 127 N. Y. 500, 14 L.R.A. 215, 28 N. E. 595; *Dolan v. Rodgers*, 149 N. Y. 489, 44 N. E. 167; *Heine v. Meyer*, 61 N. Y. 171; *Baily v. De Crespigny*, L. R. 4 Q. B. 180, 38 L. J. Q. B. N. S. 98, 19 L. T. N. S. 681, 17 Week. Rep. 494, 15 Eng. Rul. Cas. 799; *Metropolitan Water Bd. v. Dick, K. & Co.* [1918] A. C. 119, 8 B. R. C. 483, 87 L. J. K. B. N. S. 370, 117 L. T. N. S. 766, 82 J. P. 61, 34 Times L. R. 113, 62 Sol. Jo. 102, 23 Com. Cas. 148, 16 L. G. R. 1, Ann. Cas. 1918C, 390; *Roxford Knitting Co. v. Moore & Tierney*, 11 A.L.R. 1415, — C. C. A. —, 265 Fed. 177.

Mr. Thomas G. Prioleau, for respondent:

In view of the unanimous affirmance of the judgment, there being presented here no exception to the admission or exclusion of evidence, the sole question for this court to determine is whether the legal conclusions that defendant, in failing to deliver the 90 pieces of woolen cloth, breached its contract, and that plaintiff was thereby damaged, were justified upon the facts as they were found.

McManus v. McManus, 179 N. Y. 338, 72 N. E. 235; *Krekeler v. Aulbach*, 169 N. Y. 372, 62 N. E. 416; *Peoole v. Steeplechase Park Co.* 218 N. Y. 480, 113 N. E. 521, Ann. Cas. 1918B, 1099; *Poel v. Brunswick-Balke-Collender Co.* 216 N. Y. 310, 110 N. E. 619; *Lancaster Beach Sea Beach Improv. Co. v. New York*, 214 N. Y. 4, 108 N. E. 90; *Ryan v. Franklin*, 199 N. Y. 347, 92 N. E. 673; *Re Lee*, 220 N. Y. 537, 116 N. E. 352; *Saxon v. Erie R. Co.* 221 N. Y. 179, 116 N. E. 983; *Kavanaugh v. Commonwealth Trust Co.* 223 N. Y. 103, 119 N. E. 237.

Crane, J., delivered the opinion of the court:

On the 9th day of February, 1917, the plaintiff and the defendant entered into a contract in writing wherein and whereby the defendant agreed to manufacture, sell, and deliver to the plaintiff 100 pieces of

woolens at the price of \$1.75 per yard. Deliveries were to be made during the months of May, June, and July in the year 1917. The only deliveries made were 10 pieces, for which the plaintiff duly paid. The balance of the order the defendant failed to manufacture and deliver. The time for the delivery of the remaining 90 pieces of woolens was extended until the latter part of October or the early part of November, 1917. The findings state that the extension was made until October or November, 1918, and so we find it in the request to find which was refused. This, I am quite certain, is a mistake, as in January, 1918, the plaintiff's lawyer wrote a letter demanding damages for breach of the contract.

On May 11, 1917, the defendant made a contract with the United States government through Colonel M. Gray Zaliniski, Quartermasters Corps, U. S. A., whereby it agreed to furnish 200,000 yards of melton, and made deliveries in June, July, August, September, October, November, and December. Deliveries were to be made at the depot of the Quartermasters Corps, Boston, Massachusetts. Another contract was made between the same parties on July 27, 1917, for 100,000 yards of the same woolen, deliveries to be made in the months of September, October, November, and December. On August 25, 1917, another contract was executed for 360,000 yards, deliveries to be made every month from December to June, 1918, and on November 5, 1917, a still further agreement was executed for 380,000 yards, deliveries to be made every month to December, 1918, with the exception of June. These government orders were for olive drab meltons to be made into uniforms for the soldiers.

The first order was the result of a visit by Emanuel Kaplan, treasurer of the defendant, to Colonel Horton in Washington, for the pur-

pose of showing how the government could use less virgin wool in overcoating by using a certain percentage of reworked wool. Colonel Horton sent him to Colonel Penrose at Philadelphia, at which interview the following conversation took place: "I showed Colonel Penrose this fabric, and spoke to him about this fabric, in view of the fact we have made goods previous to this time for the allied countries, where reworked wool could be used in army fabric, and Colonel Penrose said to me, after a long conversation about the qualities and benefits and so forth, that the reworked wool had been accepted by the government. He said, 'Won't you make cloth for the government?' I said that 'I couldn't go ahead, because we were all sewed up to the civilian trade, and that we are held in high esteem with the civilian trade; we had a good reputation, we made a big name, and we were well known in the country for our class of fabrics;' and he said, 'Don't you know that the government comes first?' I said, 'Yes, Colonel Penrose; but in a condition of this kind, where the mill has got to deliver to the civilian trade, I don't think at the present time we can take on that scale.' 'Well,' he said, 'you know the government comes first. You proceed, and you will have a letter that you will have to give the government precedence of the deliveries.' The following day we got notice the contract would come along."

On June 16, 1917, Lieutenant Colonel Williamson, depot quartermaster at Boston, wrote the defendant that there should be no delays in the deliveries of the melton, and said: "Orders from the government must take precedence; therefore, in order to carry out the above you are hereby requested to employ all available machinery and means at your command in order to expedite deliveries."

On June 27, 1917, Colonel Zaliniski, with whom the contracts had been made, wrote to the committee

on supplies, Council of National Defense, at Washington, District of Columbia, that the Millbrook Woolen Mills, Incorporated, were under contract to furnish 200,000 yards of 30-ounce melton and were having trouble with their civilian customers over deferred shipments. He requested that the customary communication be sent to the mills, authorizing them to defer commercial commitments so as not to interfere with the deliveries.

The Council of National Defense, established by an act of Congress passed August 26, 1916 (39 U. S. Stat. 619), consisted of the Secretary of War, Secretary of the Navy, Secretary of the Interior, Secretary of Agriculture, Secretary of Commerce, and the Secretary of Labor. This Council of National Defense on July 2d, through its committee on supplies, wrote the following letter to the Millbrook Woolen Mills, Incorporated: "Dear Sirs:—Please note that we desire prompt delivery on the 200,000 yards of 30 oz. melton which you are under contract to furnish the government, and that you defer, if necessary, all commercial commitments that may interfere with your deliveries on these goods."

Up to this time, while the defendant was proceeding with the government orders, it had not executed a written contract under the May 11th agreement with Colonel Zaliniski. There was some misunderstanding regarding its terms. Therefore, on July 23, 1917, Colonel Zaliniski wrote the mills that the Secretary of War had advised that, unless it signed the contract with the terms agreeable to the War Department, the government would take control of its plants under § 120 of the National Defense Act. Later, and on October 8, 1917, a letter from Captain Poole, of the Quartermaster's Department, to the defendant, stated:—"The needs of the troops are so great that you are asked to use your utmost endeavor to make deliveries."

And finally, on November 24,

1917, Newton D. Baker, Secretary of War, addressed to the Millbrook Woolen Mills, Incorporated, a notice stating that the President of the United States, pursuant to the authority vested in him, requisitioned for public use connected with the common defense: "(a) All cloth in your possession now ready for delivery to the United States government; and (b) all cloth now in process of manufacture by you for the United States government, the same to be completed to conform to the requirements of your contract."

The notice further directed the mills to utilize all machinery exclusively in the production of cloth contracted for.

Shortly after the first government contract, and on May 18, 1917, the Millbrook Woolen Mills notified the plaintiff that at the urgent request of the United States government it had taken on a large contract for uniform cloth to be delivered as soon as possible, and that it was necessary to devote 50 per cent of its looms solely to the manufacture of this cloth. It requested its customers to cancel 30 per cent of the orders undelivered. Again on June 29, 1917, it wrote to Mr. Mawhinney another note, stating as follows: "We note that you have not as yet complied with the request made by our mill in their letter of May 18th that you cancel 30 per cent of your order remaining undelivered on that date. As explained, owing to their obligations to the government, it is impossible to fill our civilian orders complete."

By letter of August 28, 1917, the defendant wrote the plaintiff that it would do its best to comply with the plaintiff's demand for woollens, but that, owing to the fact that the major part of the mill's production was devoted towards filling the government order, deliveries on civilian accounts had been delayed. The last communication to the plaintiff was December 1, 1917, and notified him that because of the commandeering of all materials and machinery the defendant deemed the plaintiff's orders to be canceled.

There is no question but that the government orders under the contracts beginning May 11, 1917, utilized the defendant's looms and delayed or prevented the execution of the plaintiff's contract.

On these facts, the plaintiff brought this action to recover damages for breach of contract, and has been awarded a judgment of \$10,393.45 by the court, a jury trial having been waived. The defenses set up in the answer were three. The first defense set up the government contracts and alleged that their execution necessarily curtailed the civilian output. The second defense pleaded the National Defense Act and that pursuant thereto the defendant desisted from making deliveries to the plaintiff. The third defense reiterated the first two, and set forth the various government commands above stated, and alleged that by reason of them the plaintiff's contract was delayed and terminated. The answer on the trial was also amended so as to extend the time of delivery under the plaintiff's contract to October or November, 1917.

The learned trial judge deemed that the facts did not justify the defenses, and that the defenses pleaded, in view of the facts, were insufficient, and in his very able opinion stated that he struck out these defenses and the evidence to sustain them, and gave judgment for the plaintiff as above stated. The appellate division unanimously affirmed the trial court, except that it reinstated the third defense and the evidence relating thereto, making new findings of fact in conformity with its conclusion.

The defendant has not had the benefit of a trial court passing on the weight of the evidence to sustain the third defense. It was all stricken out. The appellate division passed upon it.

This it could do on review, but not in the first instance. This might require a reversal and a new trial, but we pass the point, as there is, in our opinion, no such

Appeal—right to pass on weight of evidence.

conflict in the testimony as to present a disputed question of fact.

The case comes here, therefore, after a unanimous affirmance, by permission of this court. The narrow question presented is whether requests to find, made of the trial court, were refused, which, on uncontradicted evidence, should have been decided in the defendant's favor, and which requests were not inconsistent with the findings already made. If

-refusal of request to find— question of law. such be the case, then a question of law is presented for this court to review. *Le Gendre v. Scottish Union & Nat. Ins. Co.* 183 N. Y. 392, 76 N. E. 472; *Bedlow v. New York Floating Dry Dock Co.* 112 N. Y. 263, 2 L.R.A. 629, 19 N. E. 800.

Requests to find, Nos. 4, 5, and 6, presented such a question. In effect they were that the President, through the War Department, placed an order with the defendant for woolen cloth, and that, in conformity with such order and the three contracts made, defendant was obliged to give precedence to the government over the plaintiff's contract, which necessitated the delay.

There was no dispute about these facts, as appears from the above correspondence and agreements. The court refused to make these findings, because it believed that the facts constituted no defense. It was of the opinion that, conceding all the above facts, no such order was made prior to November 24, 1917, as required the defendant to give precedence to the government under the National Defense Act.

With this conclusion we cannot agree. Section 120 of the National Defense Act (39 Stat. at L. 213, chap. 134, Comp. Stat. § 3115, 9 Fed. Stat. Anno. 2d ed. p. 1343) provides: The President, in time of war or when war is imminent, is empowered, through the head of any department of the government, in addition to the present authorized methods of purchase or pro-

curement, to place an order with any individual firm, association, company, corporation, or organized manufacturing industry for such product or material as may be required. . . . Compliance with all such orders for products or material shall be obligatory, . . . and shall take precedence over all other orders and contracts heretofore placed with such individual, firm [etc.] . . . and any individual, firm [etc.] . . . who shall refuse to give to the United States such preference in the matter of the execution of orders. . . . The President, through the head of any department of the government . . . is hereby authorized to take immediate possession of any such plant or plants. . . . Any individual, firm [etc.], . . . failing to comply with the provisions of this section, shall be deemed guilty of a felony, and upon conviction shall be punished by imprisonment for not more than three years and by a fine not exceeding \$50,000."

We do not interpret this act of Congress to mean that the government through the President or head of the War Department was required

War—precedence of government orders—necessity of order.

in every case to issue an order directing a preference in government work. Upon placing an order for material, the act gave the preference; nothing had to be said about it. The country's unpreparedness when we entered the war in April, 1917, and the necessity for haste in the manufacture of clothing, ammunition, equipment of all kinds, together with ships for transportation, are well known. All these were as necessary as men. Every agency acted with the utmost expedition. Time was the essence of all movements. It was paramount. The Allies were continually pressing for speedy assistance. When, therefore, the government made contracts for clothing and requested through its proper Army officers that delivery be made as speedily

as possible, and that precedence be given over all civilian matters, these were orders which came within the spirit, purpose, and meaning of this act of Congress. Power was given to the President and the heads of departments to use force where necessary, and to take over plants for procuring necessary material, but this was not the first step; it was the last action to be taken, and then only with those who refused to comply with the orders and demands of the government. It was a reserve power, only to be used where necessary. When contracts were made or orders placed for goods, and expedition was required and demanded, the exigencies of the situation, coupled with these verbal or written directions of the government officials in charge of the work, made precedence obligatory under this act of Congress. It is unreasonable to suppose, when we consider the pressure under which the heads of all departments were working, that the innumerable orders given for shoes, clothes, ammunition, and all equipment for the Army should require a personal order from the Secretary of War before civilian contracts could be stayed for government work. The order or direction from the quartermaster whose duty it was to procure the goods as speedily as possible, or, as in this case, from the Council of National Defense, including the Secretary of War, directing such a preference, brings the case within the spirit and the letter of this act of Congress. In fact, having the reserve power to take over plants or to imprison, a request made by the proper officials for all haste possible in deliveries would amount to the same thing as a mandate compelling a preference. The willingness and desire of a manufacturer to serve the government under such circumstances and conditions in preference to civilian trade cannot be presumed to be a mere desire to profiteer. But, whether it be or not, it is the government we must think of and its necessity for pres-

ervation; it needed equipment at once, and this required that all else be laid aside irrespective of the motive of the manufacturer in complying. The one who gave his service with alacrity under such conditions should, at least, be considered with as much favor as he who held back until threatened or his property commandeered. The laggard who feared the financial results under his civilian contracts merits no encouragement. The fact that the defendant may have sought or welcomed the government work is immaterial. The fact is, the government gave it orders which had to be filled at once. The act of Congress, the necessity of the times, brooked no delay.

The correspondence in this case shows that all the insistence for haste and for preference came from the Army officials in charge of the work and the Council of National Defense. It cannot be imagined these these officials were acting in behalf of the defendant and that their demands were not genuine. It was not the defendant or its officials who created the situation. It was the government of the United States acting through its Army officers.

The undisputed facts in this case show that the government made contracts for woolens with the defendant which required the use of its looms and materials and preference in the execution of the work. This preference was necessitated within the meaning and purpose of the above act of Congress, and constituted a good defense for the delay or cancelation of the plaintiff's contracts.

Under a similar state of facts the same conclusion has been reached by the circuit court of appeals, second circuit, in *Roxford Knitting Co. v. Moore & Tierney*, 11 A.L.R. 1415, — C. C. A. —, 265 Fed. 177. It has also been held that, where the performance of a contract is suspended by government work for a material length of time, execution

of the contract is entirely excused. *Metropolitan Water Bd. v. Dick, K. & Co.* [1918] A. C. p. 119, 8 B. R. C. 483, 87 L. J. K. B. N. S. 370, 117 L. T. N. S. 766, 82 J. P. 61, 34 Times L. R. 113, 62 Sol. Jo. 102, 23 Com. Cas. 148, 16 L. G. R. 1, Ann. Cas. 1918C, 390 (House of Lords).

Where this act of Congress applies and government work has delayed the execution of other contracts, such delay is excused at law; it is a defense to an action for a breach of contract. *Dolan v. Rodgers*, 149 N. Y. 489, 493, 44 N. E. 167; *Metropolitan Water Bd. v. Dick, K. & Co. supra*; *Re Ship-*

—government order as excuse for postponement of civilian order.

ton, A. & Co. [1915] 3 K. B. 676, [1915] W. N. 304, 84 L. J. K. B. N. S. 2137, 31 Times L. R. 598; *Oakman v. Boyce*, 100 Mass. 477.

The requests to find above mentioned should have been granted by the trial court, having been established by uncontradicted evidence. They constitute, for the reasons stated, a full and complete defense to the alleged breach of contract set up by the plaintiff. We therefore reverse the judgments below, and grant a new trial, costs to abide the event.

Hiscock, Ch. J., and Hogan, Cardozo, McLaughlin, and Andrews, JJ., concur.

Chase, J., concurs in result.

ANNOTATION.

Rights of parties to contracts the performance of which is interfered with or prevented by war conditions or acts of government in prosecution of war.

I. Introduction, 1512.

II. In general:

- a. Where subject-matter of contract or means of performance has been requisitioned, or put under governmental control, 1512.
- b. Effect of requisition of chartered vessel, 1514.
- c. Where performance involves doing of illegal act, 1516.
- d. Change in conditions due to war as destroying basis of contract, 1516.
- e. Right to resume performance after cessation of governmental interference, 1519.

I. Introduction.

The earlier cases involving the question above stated are collected in the annotation in 3 A.L.R. 21, and supplemental annotations in 9 A.L.R. 1509, and 11 A.L.R. 1429.

II. In general.

- a. Where subject-matter of contract or means of performance has been requisitioned, or put under governmental control.

(Supplementing annotations in 3 A.L.R. 22, 9 A.L.R. 1510, and 11 A.L.R. 1429.)

III. Effect of provision in contract suspending or excusing performance in certain contingencies:

- a. As excluding doctrine of commercial frustration, 1520.
- b. As covering situation occasioned by war:
 1. In charter parties or bills of lading, 1520.
(No decisions herein on this point.)
 2. In contracts of sale, 1520.
 3. In other contracts, 1521.
(No decisions herein on this point.)

A requisition of the subject-matter of a contract of sale by the government in time of war constitutes an excuse for nonperformance by the party who obeyed the requisition. *Tipler-Grossman Lumber Co. v. Forrest City Box Co.* (1921) — Ark. —, 229 S. W. 17.

In the reported case (*MAWHINNEY v. MILLBROOK WOOLEN MILLS*, ante, 1506), it is held that the effect of the National Defense Act, § 120 (39 Stat. at L. 213, 214, chap. 134, Comp. Stat. §§ 3115f-3115h, 9 Fed. Stat. Anno. 2d ed. p. 1343), which provides that

when an order is placed by the government, "compliance with all such orders for products or materials to be obligatory" and "shall take precedence over all other orders and contracts theretofore placed with such individual, firm, or corporation," is to exonerate a manufacturer whose capacity is engrossed with government orders from liability for nonperformance of its pre-existing contracts, although no formal order was issued directing a preference in government work. This decision reverses (1919) 188 App. Div. 971, 76 N. Y. Supp. 910, which modifies and affirms (1918) 105 Misc. 99, 172 N. Y. Supp. 461, to which reference is made in the annotation in 3 A.L.R. pp. 23, 24.

The fact that a manufacturer of lumber has been engaged in furnishing lumber to a third party, used in packing food products for transportation for the government, will not exonerate him from liability for nonperformance of a contract, where he fails to show that he was acting under a requisition, either directly or indirectly. *Tipler-Grossman Lumber Co. v. Forrest City Box Co.* (Ark.) *supra*.

In *Claddagh S. S. Co. v. Steven & Co.* [1919] S. C. (Scot.) 132, digested in *Mews*, Dig. 1920, cols. 290, 291, a company which owned two ships, one of which was free and the other under requisition by the government, on receiving an offer to purchase the free ship, refused to sell one without the other, and eventually concluded a verbal agreement for the sale of both ships for a lump sum. With the acquiescence of both parties this agreement was embodied by the ship brokers in two contracts, and the lump sum was apportioned between the two ships. Delivery of each ship was to be made by bill of sale, and the price paid when the ship passed a dry dock inspection. Before the free ship had passed her inspection, she was requisitioned by the government. The purchasers thereupon refused to accept delivery or pay the price of either ship. It was held with regard to the ship that had been free that, as the sellers were unable to deliver what they had contracted to deliver—name-

ly, a free ship—the purchasers were not in breach of contract in refusing to carry through the transaction; and, with regard to the other ship, that as the evidence showed that the object of the two contracts was to give effect to, and not to supersede, the original agreement for the sale of the two ships together, the purchasers were entitled to refuse to accept delivery of and to pay for one ship without the other.

In *Rader v. Northrup-Williams Co.* (1920) — C. C. A. —, 269 Fed. 592, it was held that the seller of goods was not entitled to damages for the buyer's rescission on account of delay in performance, on the ground that such delay was due to the fact that shipment could not be made without a government permit, which it was the buyer's duty to obtain, where it appeared that permits, when necessary, were furnished only to those who were actually ready to ship, and that the seller was never in that position.

In *Pierson & Co. v. American Steel Export Co.* (1920) 194 App. Div. 555, 185 N. Y. Supp. 527, it was held that where the time for delivery of goods ordered had been extended from time to time by consent of both parties, on account of inability of the seller to fill the order and subsequent difficulties encountered by the buyer in procuring an export license, the buyer could not thereafter rescind upon the ground of the seller's inability to make shipments during the delivery period.

A manufacturer of lumber prohibited by the government from filling orders without permission is not thereby exonerated from liability for failure to fill an order previously accepted by him, where he fails to establish that he has exercised diligence and good faith in endeavoring to obtain such permission. *Washington Mfg. Co. v. Midland Lumber Co.* (1921) — Wash. —, 194 Pac. 777.

Difficulty experienced by the seller of goods in procuring material, arising out of the fact that the United States government was requiring, and in fact commandeering, a large amount of the

same material for use in making aéroplanes, is not due to the acts of the public enemy within the meaning of a statutory provision that the want of performance of an obligation is excused when prevented by the act of public enemies. *Dwight v. Callaghan* (1921) — Cal. App. —, 199 Pac. 838.

A statute enacting that no person shall "sell or enter into any contract for the sale of" any imported timber except to the holder of a permit from the controller invalidates a contract for the sale of such timber to one who is not the holder of a permit, although it contains the condition that the buyer shall obtain a permit. *Eisen v. McCabe* [1920] S. C. (Scot.) 111, digested in *Mews*, Dig. 1920, col. 366.

In *Mahmoud v. Ispahani* (1921) 37 Times L. R. (Eng.) 489, it was held that the effect of an order issued by the Food Controller under the Defense of the Realm Regulations and having the force of an act of Parliament, which provided: "Until further notice a person shall not either on his own behalf or on behalf of any other person buy or sell or otherwise deal in any of the articles specified in the schedule hereto, whether situated within or without the United Kingdom, except under and in accordance with the terms of a license issued by or under the authority of the Food Controller,"—was to make a contract between a person having a license and one who falsely represented that he had one when in fact he had not void ab initio, although the order further provided that "all parties to the purchase or sale of any of the articles specified in the schedule shall require or disclose (as the case may be) all such information as may be necessary . . . for the purpose of satisfying them or him that the provisions of this order have not been contravened," and such inquiry had been made by the party seeking damages for the breach of the contract.

Where, if a building contractor had proceeded with due diligence, he might have completed the work before the

taking effect of a governmental regulation prohibiting further building operations except by special permission, the measure of damages for which he is liable to the owner is not what it would have cost, over and above the contract price, to do the work at the time it should have been done, but what it cost over and above the contract price to complete it at the time when it became lawful to resume operations. *Mertens v. Home Freeholds Co.* (1921) 90 L. J. K. B. N. S. (Eng.) 707.

A case which, though not strictly within the scope of this annotation, inasmuch as, under the construction put upon the contract, performance was not interfered with by war conditions, is *Andersen, M. & Co. v. Northwest Trading Co.* (1921) — Wash. —, 196 Pac. 630, in which it was held that a c. i. f. contract calling for shipment within a certain period was duly performed on the part of the seller by delivery within such period to a carrier by rail for transportation to the coast under a combination rail and water bill of lading, which, with the insurance policy, was duly tendered to the buyer, although, on account of the conditions in trans-Pacific commerce due to the war, the commandeering of vessels by the government, the issue of priorities, and the congestion due to insufficient facilities, the shipment did not go forward by water for several months.

b. Effect of requisition of chartered vessel.

(Supplementing annotations in 3 A.L.R. 24, 9 A.L.R. 1510, and 11 A.L.R. 1430.)

In *Texas Co. v. Hogarth Shipping Corp.* (U. S. Adv. Ops. 1920-21, p. 724) — U. S. —, 65 L. ed. —, 41 Sup. Ct. Rep. 612, affirming — C. C. A. —, 267 Fed. 1023, which affirms without opinion (1919) 265 Fed. 375, set out in the annotation in 9 A.L.R., at page 1512, it was held that the requisition by the British government of a British ship in British waters for war use, for a period likely to extend beyond the time for the intended voyage, dis-

solved a charter party entered into in the United States by which the shipowner agreed to furnish such ship for such voyage, and excused him from performing it, the court saying: "It long has been settled in the English courts and in those of this country, Federal and state, that where parties enter into a contract on the assumption that some particular thing essential to its performance will continue to exist and be available for the purpose, and neither agrees to be responsible for its continued existence and availability, the contract must be regarded as subject to an implied condition that if, before the time for performance and without the default of either party, the particular thing ceases to exist or be available for the purpose, the contract shall be dissolved and the parties excused from performing it. . . . Here the ship, although still in existence and entirely seaworthy, was rendered unavailable for the performance of the charter party by the requisition. By that supervening act she was impressed into the war service of the British government for a period likely to extend—and which, as it turned out, did extend—long beyond the time for the charter voyage. In other words, compliance with the charter party was made impossible by an act of state, the charterer was prevented from having the service of the ship and the owner from earning the stipulated freight. The event apparently was not anticipated, and there was no provision casting the risk on either party. Both assumed that the ship would remain available and that was the basis of their mutual engagements. These, we think, must be regarded as entered into on an implied condition that, if, before the time for the voyage, the ship was rendered unavailable by such a supervening act as the requisition, the contract should be at an end and the parties absolved from liability under it. That the charter party was entered into in this country is not material. The important consideration is that it became impossible of performance through a supervening act of state, which operated directly

on the ship and the parties could not avoid."

In *Texas Co. v. Hogarth Shipping Corp.* (U. S.) *supra*, it was held that the requisition of a British ship in British waters by the British government for war use could not be said to have been invalid for lack of a formal warrant, where, following the usual practice, never disapproved, the requisition order was communicated to the shipowner by a telegram, and the government treated the telegraphic order as effective by using the ship as a war transport for more than six months, and compensated the owner accordingly.

A charter of a vessel for one month, with an option to the charterer of continuing the hire from month to month for an indefinite period, is not terminated by the requisition of the vessel by the government. *Elliott Steam Tug Co. v. John Payne & Co.* [1920] 2 K. B. (Eng.) 693, [1920] W. N. 152, 90 L. J. K. B. N. S. 89, 25 Com. Cas. 208, 36 Times L. R. 401, 123 L. T. N. S. 619.

Where the owner of a vessel has, in breach of the charter party, withdrawn the ship from the service of the charterers, and the vessel was subsequently requisitioned by the government, by which the owners were prevented from restoring her to the service of the charterers had they wished to, the period during which the vessel was under requisition must be excepted in determining the damages to which the charterers are entitled. *Elliott Steam Tug Co. v. John Payne & Co.* (Eng.) *supra*. In discussing the point the court said: "When the owner is prevented by the law of the land from using his vessel in the service of the charterer, the result must be (independently of any exception) that the same law cannot make him liable in damages. It surely cannot call upon him to do two inconsistent things at the same time. Reference was made, however, to the judgment of Tindal, Ch. J., in *Davis v. Garrett* (1830) 6 Bing. 724, 130 Eng. Reprint, 1459, 5 Eng. Rul. Cas. 273. The passage relied upon, which I think may be called a *locus classicus*, being

extremely carefully and accurately expressed, as the decisions of that learned judge so commonly were, is as follows: 'But we think the real answer to the objection is that no wrongdoer can be allowed to apportion or qualify his own wrong; and that as a loss has actually happened whilst his wrongful act was in operation and force, and which is attributable to his wrongful act, he cannot set up as an answer to the action the bare possibility of a loss, if his wrongful act had never been done.' It is to be observed that the learned judge is there dealing with damage that did arise from, and in his words was attributable to the breach, and the decision was that it was none the less recoverable because it was not shown that it would not have happened if there had been no breach. I do not read the principle laid down to be that all damage occurring during the period of a breach is to be treated as connected with it unless the contrary is shown, but that damages flowing from the act constituting the breach—in that case navigating the vessel where and when she met with disaster—could not be excluded merely because they might have flowed from navigating her on the course contracted for. If the larger rule indicated above is to be applied, it would seem to follow—indeed I think it follows from the plaintiffs' argument here—that if a tenant of a house wrongfully held over for a day after the expiry of his term, and on that day the house was requisitioned, he would be responsible in damages for the requisitioning. This is, I think, out of the question. In my view the requisitioning, whether in the case of the vessel in question in this action, or in the case of a house such as I have instanced, is not to be regarded, unless it is proved to be so in fact, as arising out of the use of the vessel or house at the time, but as due to a liability incident to its mere existence, and that the rule in *Davis v. Garrett* (Eng.) *supra*, has no application."

Apportionment of hire paid by government.

When, during the continuance of a

charter party the vessel has been requisitioned by the Admiralty, both the charter party hire and the Admiralty hire are brought into account and adjustment is to be made between the owners and the charterers. *Elliott Steam Tug Co. v. John Payne & Co.* (Eng.) *supra*.

c. Where performance involves doing of illegal act.

(Supplementing annotations in 3 A.L.R. 26, 9 A.L.R. 1513, and 11 A.L.R. 1430.)

A contract between British contracting parties for the sale of goods to be imported from Germany becomes illegal and is abrogated upon the outbreak of war between Great Britain and Germany, inasmuch as performance would involve intercourse with the enemy, or tend to assist the enemy. *Re Badische Co.* [1921] 2 Ch. (Eng.) 331.

A foreign embargo is no excuse for nonperformance. *Krulewitch v. National Importing & Trading Co.* (1921) 195 App. Div. 544, 186 N. Y. Supp. 838.

A prohibition of the War Trade Board is no defense to an action for nonperformance of a contract of sale, where such prohibition did not become effective until after the contract period had expired, and expressly excepted shipments made from some foreign port before a date after the expiration of the contract period. *Ibid*.

d. Change in conditions due to war as destroying basis of contract.

(Supplementing annotations in 3 A.L.R. 32, 9 A.L.R. 1515, and 11 A.L.R. 1431.)

In *Edward Maurer Co. v. Tubeless Tire Co.* (1921) 272 Fed. 990, the court, though finding it unnecessary to decide the question, expressed the opinion that the regulations imposed by the War Industry Board fixing the maximum price of and restricting dealings in rubber were the creation, by the law, of a condition which did not merely make more difficult performance of a contract for the sale of rubber to be delivered at stated periods, but rendered it impossible

while they were in force, and therefore excused performance during that period.

It is no defense to an action for breach of a contract for the sale of goods to be shipped from Java to New York that there was an absence of direct transportation, where it does not appear that indirect transportation was likewise impossible. *Krulewitch v. National Importing & Trading Co.* (1921) 195 App. Div. 544, 186 N. Y. Supp. 838.

The seller of goods to be delivered at New York by shipment within a certain period is not entitled to relief on the ground of mistake, by reason of the fact that at the time of making the contract an embargo had been imposed which continued during the time for performance, since the availability of transportation facilities was a matter extrinsic to the contract. *Ibid.*

In *Eminence Distillery Co. v. Fremd* (1921) 191 Ky. 191, 229 S. W. 369, it was held that the liability of a distillery company under a contract for the disposal of its offal was not terminated by the enactment of the Food Control Law, by which it was made unlawful to use foods, fruits, food materials, or fuel in the production of distilled spirits for beverage purposes, where it did not appear that the distillery could not have been operated to produce distilled spirits for other purposes, or that its operation merely for the making of beverages was contemplated by the parties in making the contract.

A contractor cannot claim the benefit of the doctrine of frustration by reason of a refusal, by the government authorities, of a license to proceed with the construction of a building, where he might have completed the work before the period when such license was required, had he proceeded with proper despatch. *Mertens v. Home Freeholds Co.* (1921) 90 L. J. K. B. (Eng.) 707.

In *Home Builders v. Busk* (1921) — Neb. —, 182 N. W. 589, it was held that, in an action in equity for an accounting and for damages brought by an owner against a building contrac-

tor, neither party could recover from the other for damages arising from delays that were caused by strikes and by World War conditions, where it appeared that both parties were to some extent chargeable with negligence and so contributed to the delay complained of.

The refusal of the crew of a chartered vessel to proceed as directed by the charterer because of the risk of attack by German submarines constitutes a breach of contract, in respect of which the owner is liable for damages, it being the owner's duty to procure a crew who will carry out the instructions of the charterer. *Elliott Steam Tug Co. v. John Payne & Co.* [1920] 2 K. B. (Eng.) 693, [1920] W. N. 152, 90 L. J. K. B. N. S. 89, 25 Com. Cas. 208, 36 Times L. R. 401, 123 L. T. N. S. 619.

The basis of a contract between British contracting parties for the sale of goods of which the source of supply was intended by all parties to be Germany, made at a time when, under the commercial conditions which prevailed, there was unrestricted trade with Germany, and freedom in the sellers to obtain the supplies from Germany,—and providing for continuous performance within fixed times, comparatively short, subject to minor postponements from specified causes—ceases to exist where commerce with Germany has for a long time been interrupted by war. *Re Badische Co.* [1921] 2 Ch. (Eng.) 331. The court in this case, in discussing the doctrine of commercial frustration, said: "The doctrine of dissolution of a contract by the frustration of its commercial object rests on an implication arising from the presumed common intention of the parties. If the supervening events or circumstances are such that it is impossible to hold that reasonable men could have contemplated that event, or those circumstances, and yet have entered into the bargain expressed in the document, a term should be implied dissolving the contract upon the happening of the event or circumstances. The dissolution lies not in the choice of one or other of the

parties, but results automatically from a term of the contract. The term to be implied must not be inconsistent with any express term of the contract. These general statements are, I conceive, justified by the language used, and the views expressed, by Lord Sumner in *Bank Line v. Capel & Co.* [1919] A. C. 435, and by the lords before whom was argued the *Tamplin Case* [1916] 2 A. C. 397. The event which has happened here is the war between this country and Germany, of long duration, bringing in its train complete stoppage of supplies of dyestuffs from Germany, upheavals in prices, freights, and values, dislocation of shipping and commerce, government restrictions and embargoes, and culminating after the conclusion of hostilities in the passing by the legislature of this country of an act (the dyestuffs (Import Regulation) Act 1920), prohibiting until the year 1931 the importation into the United Kingdom of all synthetic dyestuffs and intermediate products. I put to myself the following question which was put by Lord Loreburn in the *Tamplin Case*, *supra*: Supposing that during the negotiation of these contracts the parties had contemplated the possibility of this war, and the change in conditions which it involved, would they, as reasonable men, have intended that the contract should bind under or notwithstanding the new conditions? Would they have taken their chance of them, or would they have said: "If that happens, it is all over between us? To my mind, there is only one possible answer. No reasonable man would enter into these contracts on that footing. To agree that contracts such as these for delivery of goods over short periods should be interrupted by a war between the country of the contracting parties and the country of supply, and should on the termination of the war be resumed at a date which no man could foresee, and under commercial and political conditions which no man could foretell, would be to make a contract absolutely in the dark and one of a most unbusinesslike nature. In my

opinion, the parties contracted on the footing that peace would continue to exist between the country of the contracting parties and the country of the source of supply, and that the source of supply would remain open; and (subject to two other points) a term should be implied providing for the dissolution of the contract in the event of war breaking out between those two countries, whereby the source of supply became blocked for an indefinite period of time. That is a term which should be implied so as to give to the contracts the effect which the contracting parties must, as business men, be deemed to have intended."

The doctrine of commercial frustration is applicable to contracts for the supply of unascertained goods. *Re Badische Co.* (Eng.) *supra*. Upon this point the court said: "There is not much authority upon the point. In *Blackburn Bobbin Co. v. Allen & Sons* [1918] 1 K. B. (Eng.) 540, *McCardie, J.*, discussed the question at length, and stated *id.* 550, his conclusion in the following words: 'My conclusion upon the matter is, that in the absence of any question as to trading with the enemy, and in the absence also of any administrative intervention by the British government authorities, a bare and unqualified contract for the sale of unascertained goods will not (unless most special facts compel an opposite implication) be dissolved by the operation of the principle of *Krell v. Henry* [1903] 2 K. B. (Eng.) 740, 72 L. J. K. B. N. S. 794, 89 L. T. N. S. 328, 19 Times L. R. 711, 52 Week. Rep. 246, even though there has been so grave and unforeseen a change of circumstances as to render it impossible for the vendor to fulfil his bargain. If I were to hold otherwise, I should create a rule the result of which no man can foresee, and to the operation of which no judge can satisfactorily fix the limits.' It will be observed that the learned judge does not definitely exclude the application of the doctrine to such a contract. He keeps the door open in cases where trading with the enemy or administrative intervention

is involved, and where special facts exist. There is also a statement by Lord Reading, Ch. J., in a case of *Thornett & Fehr v. Yuills* [1920] W. N. (Eng.) 337, 37 Times L. R. 31, 26 Com. Cas. 59, 150 L. T. Jo. 266, that no question of frustration can arise on a contract which is for the sale of unascertained goods. No authority is given for this proposition. The case was not a case in which failure to deliver the goods arose from the war. The manufacturers (whose agents had contracted to sell) had simply not manufactured, and it was sought to imply a term, in a contract to sell certain quantities of particular tallow 'of 1919 make,' that goods of that kind should be made in 1919. However correct the decision in that case may have been, it affords me little or no assistance in the present case. Speaking for myself, I can see no reason why, given the necessary circumstances to exist, the doctrine should not apply equally to the case of unascertained goods. It is, of course, obvious from the nature of the contract that the necessary circumstances can only very rarely arise in the case of unascertained goods. That they may arise appears to me undoubted, and is indicated by the remarks of McCardie, J., which I have just cited. [1918] 1 K. B. (Eng.) 550. *Veithardt & Hall v. Rylands Bros.* (1917) 116 L. T. N. S. (Eng.) 706, 86 L. J. Ch. N. S. 604, and *E. Hulton & Co. v. Chadwick & Taylor* (1918) 34 Times L. R. (Eng.) 230, 62 Sol. Jo. 329, 53 L. Jo. 70, 144 L. T. Jo. 272, were cases of contracts in respect of unascertained goods; and in the latter case the parties were held freed from liability owing to alteration of circumstances. The foundation of the doctrine being the happening of such events that no reasonable man would have entered into the contract with those events in contemplation, I can see no reason for refusing to apply the doctrine on the happening of such events. Even if I take as my guide the carefully worded conclusion of McCardie, J., I find these five contracts to lie well within its ambit. There exist in regard to them questions as to trading with the

enemy, administrative intervention, and other most special facts, including one which gives to the unascertained goods almost a specific touch; that is to say, that the goods were, in the contemplation of the parties, to come from Germany."

c. Right to resume performance after cessation of governmental interference.

(Supplementing annotation in 9 A.L.R. 1521.)

Performance on the part of the seller of a contract for the sale of flour, to be delivered before a date fixed, is not merely postponed, but is dispensed with altogether, where it was made subject to the condition that the purchaser would take such steps as might be necessary to lift a railway embargo against shipments for export for which ocean freight space was not provided and the purchaser failed to do so within the contract period. *Tanner v. Ballard & B. Co.* (1921) — C. C. A. —, 273 Fed. 671.

In *Edward Maurer Co. v. Tubeless Tire Co.* (1921) 272 Fed. 990, it was held that the effect of provisions in contracts for the sale of rubber to be delivered during stated months, one of which contracts provided: "This contract is subject to all the rules and regulations imposed by the United States government. . . . This contract is subject to force majeure, strikes, and other causes and delays beyond seller's control," and the other of which contained the same provision, with these added words: "Buyers agree to furnish seller with manufacturer's import license. Subject to granting of import license by the United States government,"—was not merely to suspend the seller's obligation to deliver during the period that performance was prevented by governmental interference, so that when the restrictions were removed the contract would remain in full force and effect, but operated to discharge both parties from further obligations thereunder upon the imposition of governmental regulations preventing its performance." The court said: "The contract in its entirety is

made subject to the rules and regulations imposed by the United States government. The contract in its entirety is made subject to force majeure. It is not deliveries only, but the contract obligation itself, which is thus made to depend upon these conditions. Furthermore, in contracts to deliver and to accept and pay for an article of commerce, the market value of which is fluctuating, time is of the essence. The failure or refusal of the vendor to deliver or tender the monthly quantities at the time agreed is a breach which would discharge the buyer from further obligation to accept and pay. The buyer of an article thus fluctuating in value cannot be held to an obligation to accept and pay at other times, and under different conditions, when its market value may have greatly changed. If plaintiff's contention is sound, it was excused from any obligation to perform during the entire period the governmental regulations were in force, the duration of which neither party could foresee, yet during the same period the defendant would remain obliged to accept and pay, if, after the end of the war and the lifting of the restrictions, the plaintiff might get in position to make deliveries. During that period the contract obligations would remain dormant. They would be revived when the restrictions were removed and the ability of the plaintiff to make deliveries restored. No doubt the parties might have so phrased their contract as to be susceptible of this interpretation, but, in the absence of apt language to express that intention, the law will not infer it."

III. Effect of provision in contract suspending or excusing performance in certain contingencies.

a. As excluding doctrine of commercial frustration.

Supplementing annotations in 3 A.L.R. 41, and 9 A.L.R. 1521.

A suspensory clause in a contract between British contracting parties, for the sale of goods to be imported from Germany, that deliveries may be suspended if any contingencies should arise beyond the control of the par-

ties, such as fire, accidents, war, strikes, or the like, if applicable to a war between England and Germany, is void as against public policy, and therefore cannot operate to keep the contract in force. *Re Badische Co.* [1921] 2 Ch. (Eng.) 331.

b. As covering situation occasioned by war.

1. In charter parties or bills of lading.

No decisions herein on this point. For earlier decisions see annotations in 3 A.L.R. 43, 9 A.L.R. 1521, and 11 A.L.R. 1432.

2. In contracts of sale.

(Supplementing annotations in 3 A.L.R. 48, 9 A.L.R. 1522, and 11 A.L.R. 1432.)

As to the effect of such provisions as giving the right to resume performance upon cessation of governmental interference, see *Tanner v. Ballard & B. Co.* (1921) — C. C. A. — 273 Fed. 671, and *Edward Maurer Co. v. Tubeless Tire Co.* (1921) 272 Fed. 930, in subd. II. e, supra.

A clause in a contract for the sale of goods which provides the deliveries by the seller, or orders off the contract by the buyer, may be suspended if any contingency should arise beyond the control of the parties, such as fire, accidents, war strikes, or the like, is not to be construed as referring to a war between the country of the contracting parties and the country of the contemplated source of supply. *Re Badische Co.* [1921] 2 Ch. (Eng.) 331.

A clause in a contract of sale entered into after the war had been raging for nearly four years, and when interference with the commerce of the world and the ordinary facilities of obtaining and transporting merchandise was well known, that "sellers are not to be responsible for strikes, fires, accidents, or anything beyond their control," does not exonerate them from failure to perform occasioned by a lack of transportation facilities caused by a government embargo. *Krulewitch v. National Importing & Trading Co.* (1921) 195 App. Div. 544, 186 N. Y. Supp. 838.

A provision in a contract to furnish a supply of ice during a prescribed period released the seller from delivery in the event "that an embargo or shortage of coal occur, or any conditions brought on by war, impairing or disarranging the working schedule of the plant," exonerates the manufacturer from liability for the increased expense to which the buyer was put in obtaining ice during a period while performance of the contract was suspended by action of the government authorities. *Losquadro v. Hudson Consumers' Ice Co.* (1921) — C. C. A. —, 271 Fed. 276.

In *Losquadro v. Hudson Consumers' Ice Co.* (Fed.) *supra*, where a contract to furnish ice in given quantities at named prices for a prescribed period contained a provision relieving the seller from delivery in the event "that an embargo or shortage of coal occur, or any conditions brought on by war, impairing or disarranging the working schedule of the plant," it was held to be a question of fact for the jury whether a governmental restriction of the supply of ammonia and a shortage of coal—conditions admittedly brought on by the war—were such as to disarrange throughout the term of the contract the working schedule of the plant in a manner and to such extent as to relieve the seller from liability for failure to make delivery.

In *Pottash v. Herman Reach & Co.* (1921) — C. C. A. —, 272 Fed. 658, it was held that under a contract of sale

calling for a shipment of commodities from a remote part of the world under known scarcity of ships and dangers of navigation due to war, which imposed no further obligation on the seller with respect to their transit than that of shipment at a named place and within a named period, and containing the stipulations, "No arrival, no sale," and "if goods lost not to be replaced," the buyer was not entitled to reject a shipment on account of shortage or on the ground of unreasonable delay in arrival.

In *Roy Realty Co. v. B. Altman & Co.* (1920) 194 App. Div. 43, 184 N. Y. Supp. 458, it was held, sustaining a demurrer to the complaint in an action by the purchaser for breach of a contract to sell and deliver certain linens, made on June 1, 1915, that as the contract was made at a time when, owing to the war, trade conditions were in an extremely unsettled state, importation practically impossible, and the manufacture of many articles in this country either stopped or seriously limited by these unsettled conditions, it must be taken as conditioned upon the possibility of the defendant's securing the merchandise which it agreed to sell, and therefore that it was necessary to allege that the contract was possible of fulfilment before suit was brought.

3. In other contracts.

No decisions herein on this point. For earlier decisions see annotation in 3 A.L.R. 53. E. S. O.

STATE OF SOUTH DAKOTA, Respt., v.

WILLIAM CASEY et al., Appts.

South Dakota Supreme Court—July 16, 1921.

(— S. D. —, 183 N. W. 971.)

Bail — surrender of principal — exoneration of sureties.

Under a statute providing that sureties on a bail bond may surrender their principal to a police officer, who shall take him before a proper magistrate, who shall recommit him and indorse an exoneration on the
15 A.L.R.—96.

recognizance, a mere surrender of the principal to the officer without taking him before a magistrate will not exonerate the sureties.

[See note on this question beginning on page 1527.]

APPEAL by defendants from an order of the Circuit Court for Lyman County (Williamson, J.) sustaining a demurrer to the answer in an action brought to recover the penalty of an appearance bond given by them as sureties. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Spangler & Wire and J. E. House, for appellants:

The surrender by defendants of their principal was a sufficient compliance with the law to release them as sureties on the appearance bond.

State v. Breen, 6 S. D. 537, 62 N. W. 135; 3 Am. & Eng. Enc. Law, 2d ed. 708; State v. Funk, 20 N. D. 145, 30 L.R.A.(N.S.) 211, 127 N. W. 722, Ann. Cas. 1912C, 743; State v. Banks, 24 N. D. 21, 138 N. W. 973; Com. v. Skaggs, 44 L.R.A.(N.S.) 1064, note; Smith v. State, 12 Neb. 309, 11 N. W. 317; State v. Anderson, 119 Iowa, 711, 94 N. W. 208; McNeal v. Van Duser, 142 Mich. 593, 105 N. W. 1109; Schwarzhild & S. Co. v. Cryan, 167 Mich. 377, 132 N. W. 1065; Koch v. Coots, 43 Mich. 30, 4 N. W. 534.

Messrs. Byron S. Payne, Attorney General, Vernon R. Sickel, Assistant Attorney General, and J. W. Jackson, for the State:

The surrender of Dillon, the principal, to the custody of the deputy sheriff, was not a sufficient compliance with the law to release the defendants from liability as sureties upon the appearance bond.

State v. Breen, 6 S. D. 537, 62 N. W. 135; United States v. Stevens, 16 Fed. 101; State v. Tieman, 39 Iowa, 474; Cameron v. Burger, 60 Or. 458, 120 Pac. 10.

Smith, J., delivered the opinion of the court:

Appeal from an order sustaining plaintiff's demurrer to defendants' answer. One John Dillon was arrested upon a criminal charge. Defendants became sureties upon his appearance bond. The accused failed to appear for trial, as required by the conditions of said bond or undertaking, whereupon, by proper proceedings in the trial court, said bond was duly declared forfeited, and the defendants, as

sureties, required and directed to pay the penalty of such bond. Defendants neglected and refused to make such payment, whereupon this action was brought. Defendants' answer alleges that prior to the term of court at which the accused was required to appear for trial the defendants arrested the principal, John Dillon, took him into their actual custody, and turned him over and surrendered him to one Egan, a deputy sheriff of the county, and then and there informed said Egan that they had arrested and surrendered the accused for the purpose of releasing themselves from further liability upon said undertaking or bail; that said deputy sheriff accepted the custody and took charge of said Dillon, with full knowledge that the accused was surrendered for the purpose of releasing defendants from further liability as sureties; that defendants then and there informed said deputy sheriff that they were ready and willing to go with him, and requested him to take said Dillon before the proper magistrate, as provided by statute, for such further proceedings as might be required to terminate their liability; that they were informed by said deputy sheriff that the magistrate was out of town and could not then be found, whereupon defendants left said Dillon in custody of said deputy sheriff; that said deputy sheriff kept the accused in his custody while endeavoring to furnish a new bond until late at night, when said deputy took said Dillon to a hotel and told him to stay there until morning, when he would either have to give a new bond or be committed to jail; and that said Dillon absconded from said hotel by reason

of the carelessness and negligence of said deputy sheriff.

Plaintiff demurred to the answer on the ground that it did not state facts sufficient to constitute a defense, which demurrer was sustained. Defendants appeal.

The sole question presented is whether the facts alleged in the answer constitute a defense and are sufficient to defeat a recovery upon the bond or undertaking.

Section 4601, Rev. Code 1919, provides that "any person charged with a criminal offense and admitted to bail may be arrested by his bail at any time before they are finally discharged, and at any place within the state; or by a written authority indorsed on a certified copy of the recognizance, bond or undertaking, the bail may empower any officer or person of suitable age and discretion to do so, whereupon such person shall be surrendered and delivered to the proper sheriff or other peace officer, who forthwith shall take such person before any court, judge or magistrate having the proper jurisdiction in the case; and at the request of such bail, the court, judge or magistrate shall recommit such person to the custody of the sheriff or other officer, and indorse on the recognizance, bond or undertaking, "or certified copy thereof, after notice to the state's attorney, if no cause to the contrary appear, the discharge and exoneration of such bail; and the person so committed shall therefrom be held in custody until discharged by due course of law."

This statute prescribes the mode in which sureties upon such an undertaking may be released from liability. Plainly their liability continues until they have caused themselves to be released and exonerated by taking the steps required by the statute.

We are of the view that under this statute the sheriff acts as agent of the sureties, and not as an officer of the state or court, even though his statutory duty requires him to accept custody of the accused when

required by the sureties on the bail bond. "An accused person who is admitted to bail is considered as being transferred to the friendly custody of his sureties." 6 C. J. 1042, § 311.

He remains in such custody until he is discharged or recommitted. Id. 952, § 166. The accused when taken into custody by his bail, is not held by authority of the warrant or process under which he was originally taken, but under the authority conferred upon such bail by the statute, and the sheriff into whose custody the accused is committed by his bail holds him under like authority, until a new commitment by the magistrate as provided in § 4601, supra, and until an order of discharge and exoneration of the bail is indorsed on the recognizance, bond, or undertaking, or certified copy thereof. And in such case the sureties are chargeable with the duty of seeing to it that every step be taken that is essential to a valid discharge, and that an order of exoneration and discharge be made and entered as required by the statute.

Bail—
surrender
of principal
—exoneraton
of sureties.

In *Edwards v. State*, 39 Okla. 605, 136 Pac. 577, the supreme court of that state, construing a statute identical with our own, said: "The manner of the surrender of the principal is regulated by this statute. The general rule is that the provisions of the statute must be strictly followed by the surety seeking to be released from the bond,"—quoting with approval from *Cameron v. Burger*, 60 Or. 458, 120 Pac. 10, wherein that court said: "The statute itself provides the manner in which a defendant may be surrendered and bail exonerated, and that is the rule to be observed. It excludes all other methods of reaching that result."

In discussing the proper construction to be placed upon statutes of this kind, the supreme court of Texas said: "These are the modes, and the only ones known to our law.

The procedure is fully and explicitly stated in the articles 2741 to 2750, inclusive, and, according to our construction, must be pursued strictly." (Roberts v. State, 4 Tex. App. 129.)

In *United States v. Stevens* (C. C.) 16 Fed. 101, it was held that, where the statute required an indorsement of exoneration of bail to be made by certain officers, the sureties were chargeable with the duty of seeing that such indorsement was made, and that such indorsement was the essential and exclusive evidence of a valid discharge.

In *Berkstresser v. Com.* 127 Pa. 15, 17 Atl. 680, it was held that, where the form and manner of surrender were prescribed by statute, a surrender in any other manner than that prescribed did not relieve the sureties from liability. The Texas statute differs from our own, which requires a new commitment in that bail may surrender their principal to the sheriff, who then holds him under the original commitment. *Woodring v. State*, 53 Tex. Crim. Rep. 17, 108 S. W. 371; *State v. Tieman*, 39 Iowa, 474.

In *State v. Breen*, 6 S. D. 537, 62 N. W. 135, the decisive question was whether the language of the undertaking was sufficiently comprehensive to require the accused to remain in attendance upon court at a subsequent term to which the case was continued. The bond was held

sufficient to require his attendance at the subsequent term, and the sureties were held bound to produce him when his presence for trial was lawfully required. Incidentally the court remarked that "under § 7610 of the Compiled Laws, they [the sureties] were, at any time after becoming his sureties, authorized to arrest him at any place within the state, or to empower any officer or person of suitable age and discretion to do so, and to surrender him to the proper authority, and thus require the court to discharge and exonerate them from further liability. As this was not done, defendants cannot escape liability."

The arrest of the accused by his bail and his surrender to and acceptance by the sheriff, even though with full knowledge of the purpose of such arrest and surrender, do not operate as a release of the sureties. The class of cases (see *Com. v. Skaggs* [152 Ky. 268, 153 S. W. 422], 44 L.R.A.(N.S.) 1065, and note) which holds that sureties on a criminal undertaking are not liable where the courts, under some process or order, take the accused into custody, and by so doing deprive the sureties of the right to arrest and surrender the principal and be thus released from liability, have no application in this case.

The order of the trial court is therefore affirmed.

ANNOTATION.

Surrender of principal by sureties on bail bond.

This annotation is supplemental to that in 3 A.L.R. beginning at page 180, and collates the recent cases as to the surrender of the principal by the sureties on a bail bond.

It is held in the reported case (*STATE v. CASEY*, ante, 1521) that where a statute prescribes the manner in which a surrender, by bail, of their principal shall be made, the statutory procedure must be substantially followed in order to exonerate the bail. That case arose under a statute providing that sureties desiring to surrender their principal shall deliver

him to a peace officer, and that the officer shall take him before a magistrate, who shall make an order of recommitment and indorse an exoneration on the bond. The sureties delivered the principal to a deputy sheriff, but the principal escaped before being recommitted. It is held that the deputy sheriff was the agent of the bail, and that there was no sufficient surrender.

But in *Hester v. State*, 145 Ark. 347, 224 S. W. 618, a surrender not made in strict accordance with the statute was sustained, the court stat-

ing the facts and its conclusion as follows: "It is also suggested by appellee that the surrender of Tom Gibson was not effected in the manner provided by statute, in that no receipt was taken from the sheriff for his body, and the surrender was made without a certified copy of the bond. It is provided in § 2178 of Kirby's Digest that 'the bail may arrest the defendant without such certified copy' and substantial compliance with the statutes on surrender is all that is required."

While the point is not strictly within the scope of this note, it may be observed that it has been held recently that a surrender of the principal, though made after the entry of a judgment of forfeiture, warrants a remission of the forfeiture if a good excuse for the failure of the principal to appear is offered. *State v. Williford* (1919) 104 Kan. 221, 178 Pac. 612; *Reed v. State* (1919) 76 Okla. 298, 185 Pac. 326. See also *Paris v. State* (1920) — Ga. App. —, 104 S. E. 510. W. A. S.

MRS. HARRIET MABEL BRIDGES, Appt.,

v.

KINDER & NORTHWESTERN RAILROAD et al.

Louisiana Supreme Court — June 15, 1921.

(— La. —, 89 So. 309.)

Railroad — absence of headlight — liability for killing person on track.

Absence of a proper headlight when running a train of cars at night does not render a railroad company liable for killing a person lying in a drunken stupor on the track, where the light carried was sufficient to warn anyone in possession of his senses of the approach of the train.

[See note on this question beginning on page 1527.]

APPEAL by plaintiff from a judgment of the District Court for the Parish of Allen (Overton, J.) in favor of defendants in an action brought to recover damages for alleged wrongful death of plaintiff's decedent. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. R. Lee Garland, Daniel L. Guilbeau, Mark C. Pickel, and John W. Lewis for appellant.

Messrs. Pujo, Liskow, & Martin, for appellees:

It makes no difference whether the decedent was a trespasser, a licensee, or an invitee. His negligence was of such a character as to preclude his widow and heirs from recovery under either classification.

Settoon v. Texas & P. R. Co. 48 La. Ann. 807, 19 S. W. 759; *Elliott, Railroads*, § 1250; *Gilliam v. Texas & P. R. Co.* 114 La. 272, 38 So. 166; *Courtney v. Louisiana R. & Nav. Co.* 133 La. 360, 63 So. 48; *Gordon v. Business Men's Racing Asso.* 141 La. 819, L.R.A. 1917F, 700, 75 So. 785; *Schexnaydre v. Texas & P. R. Co.* 46 La. Ann. 250, 49 Am. St. Rep. 321, 14 So. 513; *Smith v.*

Crescent City R. Co. 47 La. Ann. 835, 17 So. 302; *Provost v. Yazoo & M. Valley R. Co.* 52 La. Ann. 1900, 28 So. 305; *Jones v. Sibley, L. B. & S. R. Co.* 121 La. 39, 46 So. 61; *Castile v. O'Keefe*, 138 La. 479, 70 So. 481; *Rogers v. Louisiana R. & Nav. Co.* 143 La. 58, 78 So. 237; *Tyer v. Gulf, C. & S. F. R. Co.* 143 La. 177, 78 So. 438; *Fils v. Iberia, St. M. & E. R. Co.* 145 La. 544, 82 So. 697.

Provosty, J., delivered the opinion of the court:

Defendant is a railroad corporation, but all its stock is owned by the Peavy-Byrnes Lumber Company, a sawmill concern, to which in reality it is a mere adjunct. It owns no cars, as we understand, but only a locomotive and a motor car. It carries freight, but no express

matter, and carries passengers only in the motor car. Its road runs from the sawmill to the town of Kinder, a distance of $1\frac{1}{4}$ miles. The track is paralleled by a public road and a path, but is extensively used by pedestrians—to a greater extent, as we gather, than the path and road. Plaintiff's husband was run over by a train and killed, and this suit is in damages for his death. The defense is absence of negligence on the part of the defendant; also contributory negligence on the part of the decedent. But the latter defense may be left out of consideration, since the evidence as a whole leaves little or no doubt that he was run over while lying in a drunken stupor on the track. When last seen at about 2 o'clock in the day he had been drinking, and had in his possession a carton containing 2 quart bottles of whisky; and when his body was found one of the bottles lay near him, half emptied, and the other was gone. This was between 8:30 and 9 o'clock at night. The train which ran over him was going to Kinder. The locomotive was pushing some ten box cars, loaded with lumber. On the top of the front box car was a brakeman with an ordinary railroad lantern, and there was no other headlight. The light of this lantern did not extend more than about 10 feet ahead. The train was going 7 or 8 miles an hour. The brakeman saw an object on the track, but too late even to signal to the engineer, and knew that they had run over this object, but thought it was a hog. The mode of operating was always for the locomotive to push the cars in going to Kinder, and to back in returning to the mill. On the night in question it returned to the mill in that way, and without any cars attached. It passed a second time over the decedent, living or already dead, and this time, in the glare of the headlight, the engineer saw the body on the track. The two legs had been cut off, one near the trunk, the other below the knee, and lay outside of the track, about 20 feet from the rest of the body, which was between

the rails. The body was dust-covered and much bruised. Decedent lived at the mill, and was returning home, after an absence of some days in search of employment. He was not a drunkard, but would drink too much occasionally, and had been discharged both by the Peavy-Byrnes Lumber Company and by a lumber company in Texas on account of his drinking, which did not comport with his line of work of saw filing,—a kind of work requiring a clear eye and a steady and precise hand.

The negligence attributed to the defendant is in having operated this train without a sufficient headlight, although the constant use of the track by pedestrians was known.

The evidence shows that the train had been run in that same way for eight years without any accident. The road can hardly be said to have been anything more than a sawmill facility. The headlight of the locomotive flared out on both sides of the box car against which it struck, and it and the lantern of the brakeman and the noise of the moving train gave full notice of the approach of the train to anyone on the track (considering the speed was only 7 or 8 miles an hour), unless to someone bereft of the faculties of sight and hearing, as the unfortunate decedent happened to be on that occasion. The place was out in the woods, not near any populous center. Under these circumstances the responsibility for what happened must remain with the unfortunate decedent alone. What was said by this

**Railroad—
absence of
headlight—
liability for
killing person
on track.**

court in the case of *Gilliam v. Texas & P. R. Co.* 114 La. 272, 38 So. 166, applies even more clearly to the present case. The learned trial judge, founding himself upon that case, and upon that of *Fils v. Iberia, St. M. & E. R. Co.* 145 La. 544, 82 So. 697, dismissed the suit.

Judgment affirmed.

Sommerville, J., takes no part.

Petition for rehearing denied June 30, 1921.

ANNOTATION.

Duty to have forward light on car or train preceding engine or on engine running backwards.

- I. At crossing, 1527.
- II. At place other than crossing, 1529.
- III. Sufficiency of light, 1532.
- IV. Proximate cause of injury, 1534.
- V. Contributory negligence, 1535.

I. At crossing.

Ordinarily it is the duty of a railroad company to have after dark a conspicuous light on a forward car pushed by a locomotive, on a moving car disconnected from the locomotive, or on the tender of a locomotive backing without cars, when the car or locomotive is passing over a street or highway crossing; and the failure of the company to have a light so placed when the car or locomotive is passing over the crossing is negligence sufficient to hold the company liable for a consequent injury to or death of a person struck at the crossing while exercising reasonable care for his own safety.

United States.—*Texas & P. R. Co. v. Nolan* (1894) 11 C. C. A. 202, 23 U. S. App. 443, 62 Fed. 552; *Chicago, R. I. & P. R. Co. v. Sharp* (1894) 11 C. C. A. 337, 27 U. S. App. 334, 63 Fed. 532.

Arkansas.—*St. Louis, I. M. & S. R. Co. v. Johnson* (1905) 74 Ark. 372, 86 S. W. 282; *Chicago, R. I. & P. R. Co. v. Moon* (1908) 88 Ark. 231, 114 S. W. 228.

Illinois.—*Chicago & A. R. Co. v. Garvey* (1871) 58 Ill. 83; *Lake Erie & W. R. Co. v. Zoffinger* (1883) 107 Ill. 199; *Chicago, M. & St. P. R. Co. v. Walsh* (1895) 157 Ill. 672, 41 N. E. 900; *Coulter v. Illinois C. R. Co.* (1914) 264 Ill. 414, 106 N. E. 258; *Opp v. Pryor* (1920) 294 Ill. 538, 128 N. E. 580; *Chicago & N. W. R. Co. v. Traves* (1889) 83 Ill. App. 307.

Indiana.—*Pittsburgh, C. C. & St. L. R. Co. v. Terrell* (1911) 177 Ind. 447, 42 L.R.A.(N.S.) 367, 95 N. E. 1109.

Louisiana.—See *Curley v. Illinois C. R. Co.* (1888) 40 La. Ann. 810, 6 So. 108; *Bryant v. Illinois C. R. Co.*

(1897) — *La.* —, 22 So. 799, 8 Am. Neg. Rep. 406.

Maryland.—See *State use of Steever v. Union R. Co.* (1889) 70 Md. 69, 18 Atl. 1032.

Michigan.—*Schremms v. Pere Marquette R. Co.* (1906) 145 Mich. 190, 116 Am. St. Rep. 291, 108 N. W. 698; *Gorton v. Harmon* (1908) 152 Mich. 473, 116 N. W. 443, 15 Ann. Cas. 461; *Amanta v. Michigan C. R. Co.* (1918) 177 Mich. 280, 143 N. W. 76.

Missouri.—*McWhirt v. Chicago & A. R. Co.* (1916) — *Mo.* —, 187 S. W. 830, affirmed in (1917) 243 U. S. 422, 61 L. ed. 826, 37 Sup. Ct. Rep. 392; *Kerr v. Bush* (1919) — *Mo. App.* —, 215 S. W. 393.

Nebraska.—*Union P. R. Co. v. Connolly* (1906) 77 Neb. 254, 109 N. W. 368.

New York.—*Cheney v. New York C. & H. R. R. Co.* (1878) 16 Hun, 415. See also *Maginnis v. New York C. & H. R. R. Co.* (1873) 52 N. Y. 215.

North Carolina.—*Reid v. Atlanta & C. Air Line R. Co.* (1905) 140 N. C. 146, 52 S. E. 307.

Pennsylvania.—*Doud v. Delaware, S. & S. R. Co.* (1902) 203 Pa. 227, 52 Atl. 249. See also *Di Grazio v. Pennsylvania R. Co.* (1918) 261 Pa. 364, 104 Atl. 596.

Tennessee.—*St. Louis & S. F. R. Co. v. Rutland* (1918) 125 C. C. A. 31, 207 Fed. 287, 4 N. C. C. A. 951, construing Tennessee law.

West Virginia.—*Bowles v. Chesapeake & O. R. Co.* (1907) 61 W. Va. 272, 57 S. E. 131.

Wisconsin.—*Bohan v. Milwaukee, L. S. & W. R. Co.* (1883) 58 Wis. 80, 15 N. W. 801.

In *Amanta v. Michigan C. R. Co.* (1918) 177 Mich. 280, 143 N. W. 76, an action for an injury at a crossing, the following instruction was held to be proper: "I may say to you, . . . that if you find that this locomotive was running backwards on the main track of the defendant, without lights

on the rear of the tender, the south end going south, after it was dark enough to obscure the approaching locomotive, the defendant as a matter of law was negligent; and if you also find that the plaintiff stopped, looked, and listened, and used ordinary care and caution to detect danger and avoid injury, as he claims he did, then and in that case he is entitled to recover such damages as he has fairly shown you he has suffered."

In *McWhirt v. Chicago & A. R. Co.* (1916) — Mo. —, 187 S. W. 830, affirmed in (1917) 243 U. S. 422, 61 L. ed. 826, 37 Sup. Ct. Rep. 392, it was held to be negligent to back a string of cars over a crossing on a dark night without giving a signal and without having a lookout or light on the forward car.

Where the headlight of an engine, although burning, does not disclose to persons at a crossing, using proper care and watchfulness, that the locomotive is preceded by gravel cars, the railroad company is negligent in not furnishing some other and more effectual signal or notice of the fact. *Bohan v. Milwaukee, L. S. & W. R. Co.* (Wis.) *supra*.

Independently of a statute requiring railroad companies to ring a bell or sound a whistle at all public crossings, a railroad company, in backing a train of flat cars over a public crossing after dark, without a brakeman or light or other signal on them to warn the public of their coming, is guilty of negligence. *Chicago, R. I. & P. R. Co. v. Sharp* (Fed.) *supra*.

See to the same effect, *Opp v. Pryor* (1920) 294 Ill. 538, 128 N. E. 580, wherein, however, there was a conflict of evidence as to the presence of a brakeman with a lantern on the forward car, so that the question of negligence by the defendant company was held not to be a question for the court.

In *Pittsburgh, C. C. & St. L. R. Co. v. Terrell* (Ind.) *supra*, it was held to be negligence at common law for a railroad company to fail to give any signals by whistle or bell, or by having a light on the forward car, while its train was backing in the

dark toward and over a crossing at the rate of 30 miles per hour.

So, where, in an action to recover for personal injuries, the evidence showed that the plaintiff was struck by cars moved by the defendant at or on a crossing, that the train was being run at an unusual rate of speed, that no bell was rung or whistle sounded, that there was no light on the forward car that struck the plaintiff, and that the plaintiff was observing due care for his safety, it was held that a recovery by the plaintiff was fully justified. *Lake Erie & W. R. Co. v. Zoffinger* (1883) 107 Ill. 199.

Where an engine is backing over a crossing in the nighttime, it is the duty of the engineer to sound adequate warning and to keep a man with a light at the rear of the engine as it is moving, so as to keep a lookout adequate for safety; and if there is a failure in this respect, and an injury results, there is a negligent breach of duty. *Reid v. Atlanta & C. Air Line R. Co.* (1905) 140 N. C. 146, 52 S. E. 807.

Where a city ordinance requires every locomotive, railroad car, or train of cars running in the nighttime to have a brilliant and conspicuous light on the front end, and, while backing, to have such a light on the rear end of the locomotive, car, or train of cars, it is negligence for a railroad company to push a string of cars over a city crossing in the nighttime without any light on the forward car. *Coulter v. Illinois C. R. Co.* (1914) 264 Ill. 414, 106 N. E. 258.

Though a statutory requirement as to precautions to be taken by railroad trains at crossings is not for the protection of a person who has been walking on a railroad track for a long distance, and is struck by a train at a highway crossing, the failure of a railroad company to have a light on its locomotive or on a coal car pushed by it over a crossing is negligence at common law toward such a person, and may be made a ground of the railroad company's liability for his death. *Kerr v. Bush* (1919) — Mo. App. —, 215 S. W. 393.

In Di Grazio v. Pennsylvania R. Co. (1918) 261 Pa. 364, 104 Atl. 596, an action for the wrongful death of the plaintiff's husband, it was held that there was a case for the jury; it appearing that he was struck at a street crossing in the nighttime by a car pushed by a locomotive moving at the rate of 15 miles per hour, and that there was no light on the car, and no bell rung or other warning given of the approach of the train.

II. At place other than crossing.

With respect to an accident in the nighttime at a place other than a crossing, where no conspicuous forward light is carried on a car pushed by a locomotive, on a moving disconnected car, or on the tender of a backing locomotive, the liability of the railroad company for an injury by such a car or locomotive ordinarily depends on whether the person or property injured by the car or locomotive is rightfully on the track or at a place where the presence of a person or an animal on the track might reasonably be expected.

United States.—**Baltimore & P. R. Co. v. Cumberland** (1900) 176 U. S. 282, 44 L. ed. 447, 20 Sup. Ct. Rep. 380; **Rich v. Chicago, M. & St. P. R. Co.** (1906) 78 C. C. A. 663, 149 Fed. 79.

California.—**Puckhaber v. Southern P. Co.** (1901) 132 Cal. 363, 64 Pac. 480.

Florida.—**Wade v. Louisville & N. R. Co.** (1907) 54 Fla. 277, 45 So. 472.

Georgia.—**Western & A. R. Co. v. Bloomingdale** (1885) 74 Ga. 604.

Illinois.—**Pennsylvania Co. v. Conlan** (1881) 101 Ill. 93; **East St. Louis Connecting R. Co. v. O'Hara** (1894) 150 Ill. 585, 37 N. E. 917, 11 Am. Neg. Cas. 416; **Illinois C. R. Co. v. Klein** (1901) 95 Ill. App. 220. See also **Illinois C. R. Co. v. Schmitt** (1902) 100 Ill. App. 490. Compare **Chicago & A. R. Co. v. O'Neil** (1898) 172 Ill. 527, 50 N. E. 216, affirming (1896) 64 Ill. App. 623 (negligence held to be gross, creating liability to a trespasser).

Kentucky.—**Conley v. Cincinnati, N. O. & T. P. R. Co.** (1889) 89 Ky. 402, 12 S. W. 764; **Louisville & N. R. Co. v.**

Bays (1911) 142 Ky. 400, 34 L.R.A. (N.S.) 678, 134 S. W. 450; **Southern R. Co. v. Sanders** (1911) 145 Ky. 679, 141 S. W. 77; **Southern R. Co. v. Caplinger** (1913) 151 Ky. 749, 49 L.R.A. (N.S.) 660, 152 S. W. 947; **Oliver v. Roach** (1907) 31 Ky. L. Rep. 284, 102 S. W. 274.

Louisiana.—**Gilliam v. Texas & P. R. Co.** (1905) 114 La. 272, 38 So. 166; **Strickland v. Louisiana R. & Nav. Co.** (1913) 134 La. 238, 63 So. 888; **Kraemer v. Louisville & N. R. Co.** (1918) 144 La. 57, 80 So. 198. See also the reported case (**BRIDGES v. KINDER & N. W. R. Co.** ante, 1525).

Nevada.—**Crosman v. Southern P. Co.** (1918) 42 Nev. 92, 173 Pac. 223.

New York.—**Caffi v. New York C. & H. R. R. Co.** (1906) 49 Misc. 620, 96 N. Y. Supp. 835; **McCarty v. New York C. & H. R. R. Co.** (1902) 73 App. Div. 34, 76 N. Y. Supp. 321.

North Carolina.—**Stanley v. Durham & N. R. Co.** (1897) 120 N. C. 514, 27 S. E. 27, 2 Am. Neg. Rep. 634; **Purnell v. Raleigh & G. R. Co.** (1898) 122 N. C. 832, 29 S. E. 953; **Allen v. North Carolina R. Co.** (1908) 149 N. C. 258, 62 S. E. 1079; **Norris v. Atlantic Coast Line R. Co.** (1910) 152 N. C. 505, 27 L.R.A. (N.S.) 1069, 67 S. E. 1017; **Hammett v. Southern R. Co.** (1911) 157 N. C. 322, 72 S. E. 1077.

Ohio.—See **Cincinnati etc. R. Co. v. Shurts** (1918) 10 Ohio App. 226.

Pennsylvania.—**Fisher v. Monongahela C. R. Co.** (1889) 131 Pa. 292, 18 Atl. 1016.

South Carolina.—**Carter v. Seaboard Air Line R. Co.** (1920) 114 S. C. 517, 104 S. E. 186.

Tennessee.—**East Tennessee, V. & G. R. Co. v. Fain** (1883) 12 Lea, 35. Compare **Little Rock & M. R. Co. v. Wilson** (1891) 90 Tenn. 271, 13 L.R.A. 364, 25 Am. St. Rep. 693, 16 S. W. 613 (recovery for death of trespasser allowed).

Vermont.—**Ingram v. Rutland R. Co.** (1915) 89 Vt. 278, 95 Atl. 544, Ann. Cas. 1918A, 1191.

Virginia.—See **Baltimore & D. R. Co. v. Lee** (1909) 110 Va. 305, 66 S. E. 51.

Canada.—**La Compagnie du Chemin de fer Canadien du Pacifique v. Bra-**

zeau (1909) Rap. Jud. Quebec 19 B. R. 293; Canadian P. R. Co. v. Bois-seau (1902) 82 Can. S. C. 424.

The duty of a railroad company to maintain a proper headlight on a backing locomotive, or car pushed by a locomotive extends to a member of the public walking on the track at a point where the public is accustomed to use the same as a pathway. Stanley v. Durham & N. R. Co. (1897) 120 N. C. 514, 27 S. E. 27, 2 Am. Neg. Rep. 634; Allen v. North Carolina R. Co. (1908) 149 N. C. 258, 62 S. E. 1079; Norris v. Atlantic Coast Line R. Co. (1910) 152 N. C. 505, 27 L.R.A. (N.S.) 1069, 67 S. E. 1017; Carter v. Seaboard Air Line R. Co. (S. C.) *supra*.

Likewise, where a railroad ran through a small town, it was held that the company was bound to anticipate that the inhabitants would, to some extent, use the tracks for their own purposes, and the shifting of a train of cars at night without a light or other warning was held to constitute negligence even as to one who was technically a trespasser on the tracks. Conley v. Cincinnati, N. O. & T. P. R. Co. (1889) 89 Ky. 402, 12 S. W. 764.

It has been held, however, that where a railroad company allows the public to use its tracks and right of way habitually, while the railroad must see that a reasonable lookout is kept, this duty covers only the period when the tracks are largely used by the public, and does not apply at night so as to make the furnishing of a headlight necessary. See Southern R. Co. v. Sanders (1911) 145 Ky. 679, 141 S. W. 77, wherein the court said: "We have written in a number of cases that it is the duty of a railroad company when moving engines and cars upon tracks where the presence of persons using the tracks as a matter of right or as licensees must be anticipated, to give warning of the approach of the train, to operate it at a reasonable rate of speed, and to keep a lookout. This care is not only exacted at places where the public have a right to use the right of way and tracks, as at street crossings and the like, but is also exacted at points

on its road in cities, towns, and populous communities where the public generally have been in the habit of using, with the knowledge and consent of the company, its tracks and right of way. . . . But, in places where the right of way and tracks of the company are used substantially as the evidence shows they were at Lawrenceburg, the duty of the company is not at all times of the day and night the same. For example, the company might consent to and be charged with notice of the use of its tracks and premises by licensees during certain hours of the day, or during the entire day. But in the night, the tracks and premises at these places might be used seldom or not at all by travelers, and consequently the company would not be under the same high duty to anticipate their presence on the track during these hours as it would be during the daytime. It does not follow that because persons who in large numbers habitually use its tracks and right of way during certain hours of the day, or during the entire day, are to be treated as licensees, that it will be used in the same manner during the night, or that the company owes in the day and night the same degree of care. There is and ought to be a distinction between the duty owing by a railroad company at all times of the day and night and under all circumstances and conditions at places where travelers have the right to be, as on public crossings and streets that are occupied by railroad companies, and the duty it owes on its private premises and yards set apart by it for its own use and business. . . . The general rule is that when persons who have no business with the company come on its private grounds and on places where the general public have no right to go or be, they are trespassers. . . . But when the use by the public of the tracks and private premises of a railroad company becomes frequent and common, the law in its regard for human life and limb puts upon the company the duty of exercising care to prevent injuring the persons thus using its grounds. So that

a person may at one time and place be a licensee, and at another time but at the same place be a trespasser,—the changed conditions growing out of the different use by the public of the place.”

Where an employee of a railroad company in the course of his duties is rightfully on the railroad track after dark, the company ordinarily owes him the duty of providing a conspicuous light on the forward car of a train pushed by a locomotive or on the forward end of a backing locomotive. *Ingram v. Rutland R. Co.* (1915) 89 Vt. 278, 95 Atl. 544, Ann. Cas. 1918A, 1191. In that case it was held that a railroad company was liable for the death of a fireman killed in the nighttime by a switching train while he was on his way to his locomotive, it appearing that there was no light on the forward car of the switching train.

However, where an employee is using a railroad track in the nighttime for some purpose not directly within the scope of his duties, and in a manner prohibited by a rule of the company, his employer does not owe him a duty to have a light on the forward end of a backing locomotive. See *Crosman v. Southern P. Co.* (1918) 42 Nev. 92, 173 Pac. 223, where it was held that an employee of a railroad company who was injured by a switch engine running backward, while he was riding on a velocipede after dark in violation of a rule of the company, and on a track which he should not have used for that purpose, was not justified in relying on the company's having a light on the engine.

In *Kraemer v. Louisville & N. R. Co.* (1918) 144 La. 57, 80 So. 198, it appeared that the plaintiff, while in the performance of his duties as a police officer, was struck by a backing train either at a street crossing or on adjacent property owned by the city. It also appeared that the time of the accident there was a dim red light on the end of the forward car, a brakeman with a bright white light at the middle of the car, and another brakeman with a light on the car following. In holding that the railroad company

was liable for the injury to the plaintiff, the court said: “Although the backing of a railroad train through a city and over street crossings at night is not of itself such negligence as should render the railroad company liable for any accident that might result, it is an operation of sufficient danger to the public to require the railroad company to maintain all reasonable safeguards, such as having a bright light on the forward end of the train, and a lookout there, in a position to warn a person in danger. The defendant in this case did not fulfil that duty to the public.” The court also held that, in view of the duties which were being discharged by the plaintiff at the time of the accident, it was immaterial whether the accident occurred at the crossing or on the property of the city adjoining the crossing.

The duty to display a headlight on a backing locomotive, or car pushed by a locomotive, is due to one lawfully in a railroad yard, as a person in the course of his employment by an independent contractor. *Caffi v. New York C. & H. R. R. Co.* (1906) 49 Misc. 620, 96 N. Y. Supp. 835.

Similarly it has been held to be error to direct a nonsuit where it appeared that a railroad intersected a manufacturing plant, and that the plaintiff, an employee of the plant, while crossing at day break one of the tracks of the railroad on his way to his work, was struck by a backing train, and, from his statement of the occurrence, it was evident that if there had been a light on the rear end of the train it would have afforded him timely warning of its approach. *Fisher v. Monongahela C. R. Co.* (1889) 131 Pa. 292, 18 Atl. 1016.

Where a railroad occupied state land on the banks of a canal, and canal boat men necessarily crossed the track on leaving or returning to their boats, the company was held liable where a boatman, crossing the track at night and near a freight car which had been standing there all day, was injured by the sudden starting of the car by a locomotive without light or warning. *McCarty v. New York*

C. & H. R. R. Co. (1902) 73 App. Div. 34, 70 N. Y. Supp. 321.

Where a train is run at night without a headlight or a bell ringing, and at a high and dangerous rate of speed, at a place where many persons are likely to be passing on their way to a ferry or otherwise, such acts are liable to the construction of being in wanton and wilful disregard of the rights and safety of the public generally, so as to amount in law to wanton and wilful negligence. In such a case, it is not necessary, in order to raise an inference of gross negligence, to prove that the company's employees were actuated by ill-will directed specifically towards the plaintiff, or to show that they must have known that he was in a position in which he was likely to be injured. *East St. Louis Connecting R. Co. v. O'Hara* (1894) 150 Ill. 580, 37 N. E. 917, 11 Am. Neg. Cas. 416.

On the other hand, in *Gilliam v. Texas & P. R. Co.* (1905) 114 La. 272, 38 So. 166, it was held that where an engine was pushing some freight cars at night, the failure to equip the front car with a headlight was not negligence as to one lying asleep on the track in a state of intoxication. Similarly in the reported case (*BRIDGES v. KINDER & N. W. R. Co.* ante, 1525) it is held that a railroad company is not liable for the death of a person in a drunken stupor on its track at a place other than a crossing, where it appears that the person killed was struck by a train of cars pushed by a locomotive, and that a brakeman was on the forward car with an ordinary railroad lantern at the time of the accident. In *Little Rock & M. R. Co. v. Wilson* (1891) 90 Tenn. 271, 13 L.R.A. 364, 25 Am. St. Rep. 693, 16 S. W. 613, however, a recovery was sustained for the killing of a drunken man asleep on the track, an absolute statutory duty to have a light on a backing train having been violated.

Under a statute requiring a locomotive to be equipped with a headlight, it has been held that where a headlight was obstructed by a caboose in advance of the locomotive, so that the crew of the train did not see two

mules trespassing on the railroad track until the animals were struck and killed by the caboose, the railroad company was liable for the loss to their owner. *Cincinnati etc. R. Co. v. Shurts* (1918) 10 Ohio App. 226.

III. Sufficiency of light.

In *Cheney v. New York C. & H. R. R. Co.* (1879) 16 Hun (N. Y.) 415, it was insisted that the court erred in charging that it was the duty of the railroad company to have so much light upon the tender of an engine running backward as to enable an ordinary person, in the exercise of reasonable diligence, to see it. Before giving the above charge, the court had told the jury that it was for them to say whether it was necessary, in order to perform the duty of the company to foot-passengers, that there should be a light upon the engine, and whether, when the engine was backing, there should be a light upon the rear of it, and what kind of a light was required. It was held that, as a whole, the charge on the subject of a light seemed unexceptionable, the court saying: "The precaution pointed out by the judge was not one exclusively designed to give warning to travelers, like the posting of a flagman at a street crossing, but it had respect to the moving of the trains and the use of the road. . . . Besides, the evidence warranted the jury in finding that, owing to the darkness of the night, the engine could not be seen at the crossing unless it had a light upon it, and as it was the duty of the intestate to use his eyes, it would seem to follow that it was the correlative duty of the defendant to take reasonable precaution that the engine could be seen."

An ordinary lantern in the hand of a brakeman on the top of a car does not meet the requirement of an ordinance providing that a backing engine or train shall have a "conspicuous" light on the engine or rear car, so as to show in what direction the cars are moving. *Chicago, M. & St. P. R. Co. v. Walsh* (1895) 157 Ill. 672, 41 N. E. 900.

Irrespective of a statute requiring

railroads to equip, maintain, and use on each and every locomotive being operated in road service in the nighttime a headlight of power and brilliancy of 1,500 candle power, careful train service necessarily requires locomotives to be equipped with headlights when traversing highways in the nighttime. *Chicago, R. I. & P. R. Co. v. Moon* (1908) 88 Ark. 231, 114 S. W. 228, wherein it appeared that an engine, running backward for a distance of 19 miles and traversing in that distance eight crossings of the track by public roads, had no lights on the rear end, which was the approaching end, except two lanterns, one hung on each side of the tender, but it also appeared that the backing of the engine was due to an emergency. In reference to the latter fact, the court said: "Whatever emergencies may render the running of an engine in this way a proper discharge of the employees' duties to the company, they do not excuse them to travelers on public highways crossing the tracks."

In *Southern R. Co. v. Caplinger* (1913) 151 Ky. 749, 49 L.R.A.(N.S.) 660, 152 S. W. 947, it was said: "It is equally plain that the lantern setting on the top of the car was not in a position to and did not furnish sufficient light to aid the brakeman in keeping a lookout, or to warn persons about the track of the presence of the car, or give notice of its movements. The engine bell was ringing and the engine lights were burning, but these circumstances do not of course help the case for the company."

Whether an ordinary railroad lantern on the back of a train, or on the tender of a locomotive going backward, constitutes a sufficient compliance with a regulation requiring a "headlight, or other equivalent reflecting lantern, to give due warning to persons near or crossing" the tracks, or with an ordinance requiring each engine or train to display "a brilliant and conspicuous light," is a question for the jury. *Baltimore & P. R. Co. v. Cumberland* (1900) 176 U. S. 232, 44 L. ed. 447, 20 Sup. Ct. Rep. 380; *Pennsylvania Co. v. Conlan* (1881) 101 Ill. 93.

A red light on the tender of a locomotive running backward over a highway crossing has been held to be an insufficient warning of danger. *Gorton v. Harmon* (1908) 152 Mich. 473, 116 N. W. 443, 15 Ann. Cas. 461. In that case the court said: "To run a train across the country and public highways without any headlight is a most unusual thing. It is a matter of common knowledge that trains almost universally have headlights which throw a powerful light ahead of the train, and that this light can be seen, where there are no obstructions, for a great distance. Travelers, in the absence of any other warning, have a right to assume that the engines of trains are provided with such lights. The red light on the end of the tender was no notice of the approaching train. If the travelers saw the red light it does not follow that they could see it move towards them, for it would seem nearly stationary as they looked at it. Red lights on the rear of trains are indication of danger to those in the rear. They have not been used upon the front of trains as a warning to travelers."

So, in *Schremms v. Pere Marquette R. Co.* (1906) 145 Mich. 190, 116 Am. St. Rep. 291, 108 N. W. 698, wherein it appeared that an engine was running backward on a dark night, with a red light hanging on the tender, the court said, obiter: "The manner of running this train upon a dark night, without proper equipment to indicate its proximity to one traveling upon the highway, indicates such a reckless disregard of the rights of the traveler upon the highway as to merit the severest censure."

The fact that the plaintiff testifies that he saw the light "a good ways off" does not preclude him from claiming that the light was insufficient, where he also testifies that he saw the light far enough off to have saved himself and his companion, but did not know that it was a train, and that he heard no bell or whistle. *Norris v. Atlantic Coast Line R. Co.* (1910) 152 N. C. 505, 27 L.R.A.(N.S.) 1069, 67 S. E. 1017.

In *St. Louis & S. F. R. Co. v. Rutland* (1913) 125 C. C. A. 31, 207 Fed.

287, 4 N. C. C. A. 951, writ of certiorari denied in (1913) 231 U. S. 755, 58 L. ed. 468, 34 Sup. Ct. Rep. 323, the court, after observing that under the Tennessee decision certain statutory precautions in running a train or locomotive over a crossing were required only when they were practicable, stated the facts and the conclusion of the court thereon as follows: "The defendant's evidence tended to show that the cars approached the crossing slowly, under control, with the bell of the engine ringing, with two lookouts with lanterns upon the car in advance, and taking every precaution which the circumstances permitted, and that Rutland must have walked or run in front of the car just the instant before it hit him. If this testimony, and all the inferences which might reasonably be drawn from it, can be accepted at their full value, the defendant would not be liable. There is no inconsistency between this conclusion and that reached in the preceding paragraph on the subject of contributory negligence, since the two conclusions are necessarily drawn from opposite points of view,—one gives to the plaintiff the benefit of all reasonable inferences from the testimony in the case and the other gives the same benefit to the defendant."

IV. *Proximate cause of injury.*

The absence of a headlight has been held not to have contributed to the fatality, where one killed by a train was warned of its approach in time to avoid it. *Wade v. Louisville & N. R. Co.* (1907) 54 Fla. 277, 45 So. 472. See to the same effect *Baltimore & O. R. Co. v. Lee* (1909) 110 Va. 305, 66 S. E. 51.

In *Bryant v. Illinois C. R. Co.* (1897) — La. —, 22 So. 799, 3 Am. Neg. Rep. 406, it was held that the failure to have a light on the forward car of a long train could not have been the proximate cause of the death of a boy whose body was found between the tender of the locomotive and the driving wheel.

In *Puckhaber v. Southern P. Co.* (1901) 132 Cal. 363, 64 Pac. 480, it

appeared that the body of the plaintiff's intestate was found near the dead body of another man on a side track. It was claimed that the intestate was killed by a backing engine without a light on the forward end of the tender. On the question of the proximate cause of the death the court said: "It is a basic element in every right of recovery that a defendant's negligence must contribute to the injury,—must be the proximate cause of the injury. By proving defendant's negligence, without in some way fastening that negligence to the injury, a case is not made out. This is true, even though it be assumed that the law of this state is to the effect that, in the absence of evidence upon the subject, it will not be presumed that deceased was guilty of negligence. For, conceding negligence of defendant in the abstract was shown, and no negligence upon the part of deceased was shown, still a case may have arisen of *damnum absque injuria*. If the negligence of defendant in omitting to carry a light be simply abstract negligence,—that is, negligence having no relation whatever to the injury done,—then such negligence is a matter foreign to any issue in the case. And unless the negligence is connected with the injury, the case stands exactly as if no negligence had been proven. Plaintiffs insist that the jury had a legal right to infer as a fact that the absence of the light upon the tender was the cause of the death. While, as before suggested, it may not be presumed against deceased that he became drunken and slept upon the track, or deliberately stood upon the track in front of the backing engine, the laws of self-preservation denying any inference of such conduct upon his part, still, as is said in some of the cases, the deceased may have fallen insensible upon the track in a fit, and thus have been killed without fault upon his part, and, under such circumstances, that the absence of the light in no way tended to his death. Tested by this illustration, a dozen lights upon the tender would not have saved his life. Neither do we consider the fact that another man was killed

at the same time sufficient evidence to create a presumption that the want of the light upon the tender was the proximate cause of death. To this point it may be said, there is not a scintilla of evidence that the other man was possessed of a single one of the five senses. It follows, therefore, that there is an absolute dearth of evidence to the point that the absence of the light upon the tender added the weight of a hair to the cause which occasioned the young man's death."

However, in *Pittsburgh, C. C. & St. L. R. Co. v. Terrell* (1911) 177 Ind. 447, 42 L.R.A.(N.S.) 367, 95 N. E. 1109, the court said with regard to a contention that a complaint did not show that the negligence alleged was the proximate cause of the injury to the plaintiff: "It is finally argued by appellant's counsel that the complaint does not show that appellant's negligence was the proximate cause of appellee's injury, because it does not directly allege that she would have heard a signal if given, or seen a light if displayed, on the backing car. Such allegations were not required; the general averments sufficiently show that appellant's negligence as alleged was the proximate cause of the injury to appellee."

V. Contributory negligence.

The breach of a railroad company's duty to provide a sufficient light does not relieve an individual of all obligation to look and listen for engines and trains when he attempts to walk on or across the tracks of the company, nor does it absolve him from the consequences of negligence in that regard. *Allen v. North Carolina R. Co.* (1908) 149 N. C. 258, 62 S. E. 1079.

So, although a railroad company permits the public to use its yards as a common passageway, and it is guilty of negligence in not maintaining a light on the rear of the tender of a backing locomotive, a person on the tracks at a place other than a crossing is nevertheless under an obligation to take ordinary precaution for his own safety, and if it appears that at the time of an accident, the engine and tender were backing at

about the rate of 6 miles per hour and necessarily making much noise, and that the bell was being constantly rung, there can be no recovery. *Rich. v. Chicago, M. & St. P. R. Co.* (1906) 78 C. C. A. 663, 149 Fed. 79.

Where no occasion, necessity, or excuse is shown for the plaintiff's presence in a railroad yard at night, and it appears that the plaintiff might well have made his way home by means of one of two well-lighted streets on either side of the railroad, he cannot recover for injuries sustained in the yard, notwithstanding the absence of a headlight on the engine which injured him. *Western & A. R. Co. v. Bloomington* (1885) 74 Ga. 604.

On the other hand, the failure of a railroad company to provide a headlight is not only negligence, but a continuing neglect of the performance of a duty on the part of the company, the performance of which would enable it to have the last clear chance to prevent injury to a person walking on the track. The failure of the person walking on the track to observe the train in time to prevent the accident does not constitute contributory negligence, where no headlight is displayed. *Stanley v. Durham & N. R. Co.* (1897) 120 N. C. 514, 27 S. E. 27, 2 Am. Neg. Rep. 634. In that case the court said: "The plaintiff was not required to be on the lookout for his safety, if there was no light on the box car or other proper signal given to warn him of his danger. It was not incumbent on him to be on the lookout for a danger which he had no reasonable ground to apprehend to exist. He had a right to suppose that the company would take care to provide against injuring pedestrians on the track, by providing proper lights and signals; and to feel secure in acting upon that supposition. And if this light was not furnished (and there was testimony going to show that it was not), the company was not only negligent, but its negligence was a continuing one."

In *Hammett v. Southern R. Co.* (1911) 157 N. C. 322, 72 S. E. 1077, wherein it appeared that a person walking on a dark night along a path

about 2 feet from the end of the cross-ties was injured by a passing locomotive running without a headlight, the court said: "It is possible that the plaintiff's injury may have resulted from his own negligence in walking too near the track or attempting to cross it without looking or listening, but this is not so apparent from the evidence that it must be inferred as matter of law."

In *Pittsburgh, C. C. & St. L. R. Co. v. Terrell* (1911) 177 Ind. 447, 95 N. E. 1109, it was held that it was not contributory negligence as a matter of law for one about to cross a railroad track in a wagon, to fail to stop and go on the track to look for an approaching train, where it appeared that she was struck by a train backing over a crossing without a signal or a light on the forward car. The decision was based on the ground that, in the absence of a signal or a light, such precautions by the plaintiff might not have been sufficient to prevent her injury.

Similarly in *St. Louis & S. F. R. Co. v. Rutland* (1913) 125 C. C. A. 31, 207 Fed. 287, 4 N. C. C. A. 951, the court, in construing the law of Tennessee, held that it was for the jury to deter-

mine whether a person was guilty of contributory negligence who stepped on a track when an approaching train of cars pushed by a locomotive was almost on him. It appeared that there were several lanterns on the forward car, but that some, at least, of them might not have been visible to the person who was struck by the car.

Likewise, whether one employed on a railroad, and therefore rightfully upon the tracks, was in the exercise of ordinary care at the time when he was struck by a train backing without a light, has been held to be a question for the jury. *Oliver v. Roach* (1907) 31 Ky. L. Rep. 284, 102 S. W. 274.

As to the right to recover for the death of a person who, while drunk and asleep on a railroad track, was killed by cars pushed along the track without a forward light, see the following cases set out supra in the subdivision "At place other than crossing:" *Gilliam v. Texas & P. R. Co.* (1905) 114 La. 272, 38 So. 166; *Little Rock & M. R. Co. v. Wilson* (1891) 90 Tenn. 271, 13 L.R.A. 364, 25 Am. St. Rep. 693, 16 S. W. 613. And see the reported case (*BRIDGES v. KINDER* N. W. R. Co. ante, 1525). W. S. R.

EMMA R. MAINE, Appt.,

v.

MARYLAND CASUALTY COMPANY et al., Respts.

Wisconsin Supreme Court—June 23, 1920.

(172 Wis. 350, 178 N. W. 749.)

Witness — waiver by beneficiary under insurance policy.

1. The statute making physicians incompetent to testify to facts learned in treating patients cannot be waived by the beneficiary under a patient's insurance policy, in a suit upon the policy, so as to permit testimony as to the cause of death.

[See note on this question beginning on page 1544.]

— competency — physician — waiver of privilege.

2. The statutory prohibition of testimony of physicians as to facts ascer-

tained in treating patients may be waived by the patient for whose benefit it was enacted.

[See 28 R. C. L. 542.]

— waiver by application for insurance.

3. An applicant for accident insurance does not impliedly waive the statutory exclusion of testimony of attending physicians as to facts learned in treating a patient, so as to make their testimony admissible in proof of a claim against the insurance company.

[See 28 R. C. L. 545.]

(Owen and Siebecker, JJ., dissent.)

Evidence — declarations as to injury — hearsay.

4. Declarations by the holder of an accident insurance policy that he had injured himself some days before in attempting to move an ice box are not, even though made to physicians to receive treatment, part of the *res gestæ*, and are not admissible in proof of the fact of such injuries.

APPEAL by plaintiff from a judgment of the Circuit Court for LaCrosse County (Higbee, J.) in favor of defendants in an action brought to recover the amount alleged to be due on an accident insurance policy. *Affirmed.*

Statement by Eschweiler, J.:

This action is to recover on a policy of accident insurance. The plaintiff is the widow and beneficiary under said policy of C. D. Maine, the insured, who it is claimed was injured on November 14, 1918, resulting in his death, thirteen days later.

The insured on the day in question moved a heavy ice box on a neighbor's premises. On the following day he gave an indication of pain in his side by frequently placing his hand there when standing up. Two days after the accident he lay down on a couch during the daytime, complaining of pain in the same place, which appeared to be over the gall duct on the right side of the abdomen. Shortly thereafter he was attended by physicians, and on November 21st was taken to the hospital and there operated upon.

The medical testimony shows that prior to being sent to the hospital the diagnosis of some of the physicians was that there was an infection of the gall bladder. The operation disclosed, however, that a part of the omentum, which is a part of the peritoneum, or membrane lining of the abdominal cavity, had become gangrenous to an extent about the size of the palm of a hand. This portion was removed, but subsequently there developed a paralysis of the muscles in the walls of the intestines, and a secondary operation was performed. The distention of the bowels caused by such paralysis increased, and he died on November 27th as a result thereof.

15 A.L.R.—97.

The testimony indicated that such condition of the membrane was probably produced by a twisting as the result of some violent physical strain on or of the patient's body.

Under the testimony received by the court under its first ruling, there was evidence that the deceased had at several times, but of more than two days after the accident, stated to the attending physicians, who were then treating him professionally, that he had twisted himself at the time he was moving the ice box on November 14th, and that he attributed the subsequent pain to such twisting. The physicians further testified that, considering what was disclosed at the operations and the autopsy, taken in connection with the statements that the deceased made to them as to the moving of the ice box, they ascribed the cause of his death as being traceable to such injury. A motion was made by the defendant to strike out the testimony of such physicians, which was granted, and thereupon the defendant moved for a directed verdict in its favor, which the court granted, "solely upon the ground that the only evidence of the accident, which is claimed was the proximate cause of the deceased's death, is the statements of the physicians and surgeons who were called to treat him and to operate upon him, and, the court being of the opinion that such testimony was incompetent because of the privilege, under § 4075 of our statutes, there is no evidence to sustain the claim of the plaintiff to the effect that there was

an accident within the meaning of the terms of the policy."

The policy in suit contained the following: "Affirmative proof of death, or loss of limb or sight or duration of disability must be furnished to the company within two months from the time of death, or loss of limb or sight, or termination of disability for which the company is liable. No suit for recovery hereunder may be brought until after three months from the date of filing final proofs at the company's home office. . . . 14. The company

shall have the right and opportunity to examine the person of the assured or beneficiary when and so often as it requires in case of injury, and also the right and opportunity to make an autopsy in case of death."

From a judgment of dismissal of the complaint upon the merits, plaintiff has appealed.

Messrs. Winter, Morris, Esch, & Holmes, for appellant:

It was error to strike out the testimony of physicians which was properly in the case and admitted without objection.

Cornell v. Barnes, 26 Wis. 473; McCormick v. Herndon, 67 Wis. 648, 31 N. W. 303; Union Nat. Bank v. Hicks, 67 Wis. 189, 30 N. W. 234; Sucke v. Hutchinson, 97 Wis. 373, 72 N. W. 880; Glasheen v. Wisconsin Traction, Light Heat & P. Co. 165 Wis. 24, 160 N. W. 1055; Norris v. Stewart, 105 N. C. 455, 18 Am. St. Rep. 917, 10 S. E. 912; Parrish v. McNeal, 36 Neb. 727, 55 N. W. 222; McKinney v. Grand Street, P. & F. R. Co. 104 N. Y. 352, 10 N. E. 544; Green v. Crapo, 181 Mass. 55, 62 N. E. 956; Morris v. New York, O. & W. R. Co. 148 N. Y. 88, 51 Am. St. Rep. 675, 42 N. E. 410; McKnelly v. Brotherhood of American Yeomen, 160 Wis. 514, 152 N. W. 169.

Defendant, by cross-examination, acknowledged the competency of the witness, and thereby waived any objection he might have had.

Morrison v. Wisconsin Odd Fellows Mut. L. Ins. Co. 59 Wis. 170, 18 N. W. 13; Cronkhite v. Travelers' Ins. Co. 75 Wis. 116, 17 Am. St. Rep. 184, 43 N. W. 731; Bachmeyer v. Mutual Reserve Fund Life Asso. 87 Wis. 325, 58 N. W. 499; Hall v. American Masonic Acci. so. 86 Wis. 518, 57 N. W. 366; Cary v. Preferred Acci. Ins. Co. 127 Wis.

67, 5 L.R.A.(N.S.) 926, 115 Am. St. Rep. 997, 106 N. W. 1055, 7 Ann. Cas. 484; French v. Fidelity & C. Co. 135 Wis. 259, 17 L.R.A.(N.S.) 1011, 115 N. W. 869; Budde v. National Travelers Ben. Asso. 184 Iowa, 1219, 169 N. W. 766; Standard Life & Acci. Ins. Co. v. Schmalz, 66 Ark. 588, 74 Am. St. Rep. 112, 53 S. W. 49; United States Mut. Acci. Asso. v. Barry, 131 U. S. 100, 33 L. ed. 60, 9 Sup. Ct. Rep. 755; Olson v. Court of Honor, 100 Minn. 117, 8 L.R.A.(N.S.) 521, 117 Am. St. Rep. 676, 110 N. W. 374, 10 Ann. Cas. 622; Ludwig v. Preferred Acci. Ins. Co. 118 Minn. 510, 130 N. W. 5.

There can be an implied waiver of the privilege of the statute by the patient himself during his lifetime.

Re Hunt, 122 Wis. 468, 100 N. W. 874; Re Coleman, 111 N. Y. 220, 19 N. E. 71; McMaster v. Scriven, 85 Wis. 162, 39 Am. St. Rep. 828, 55 N. W. 149; McGinty v. Brotherhood of Railway Trainmen, 166 Wis. 85, 164 N. W. 249; Wigmore, Ev. ed. 1905, § 2384.

Messrs. George H. Gordon, Law & Gordon, and James E. Coleman, for respondents:

If upon a general objection the court rejects the evidence, the ruling will not be reversed upon appeal if it appears that the evidence was objectionable upon any specific grounds.

Pettit v. May, 34 Wis. 666; Rosenberg v. Sheahan, 148 Wis. 92, 133 N. W. 645; Jones, Ev. § 894; Wigmore, Ev. § 18.

There is no language in the contract of insurance which can be construed as a waiver by the insured of the privilege defined by § 4075.

Western Travelers' Acci. Asso. v. Munson, 73 Neb. 858, 1 L.R.A.(N.S.) 1068, 103 N. W. 688; Foley v. Royal Arcanum, 151 N. Y. 196, 56 Am. St. Rep. 621, 45 N. E. 456; Adreveno v. Mutual Reserve Fund Life Asso. 34 Fed. 870; Masonic Mut. Ben. Asso. v. Beck, 77 Ind. 203, 40 Am. Rep. 295; Jarvis v. Northwestern Mut. Relief Asso. 102 Wis. 546, 72 Am. St. Rep. 895, 78 N. W. 1089; Charter Oak L. Ins. Co. v. Rodel, 95 U. S. 232, 24 L. ed. 433; Buffalo Loan Trust & S. D. Co. v. Knights Templar & M. Mutual Aid Asso. 126 N. Y. 450, 22 Am. St. Rep. 839, 27 N. E. 942; Boyle v. Northwestern Relief Asso. 95 Wis. 312, 70 N. W. 351; Re Hunt, 122 Wis. 460, 100 N. W. 874; Casson v. Schoenfeld, 166 Wis. 401, L.R.A.1918C, 162, 166 N. W. 23.

The statements made by C. D.

Maine, the deceased, to the doctors, were not admissible in any event, regardless of whether or not they were privileged.

1 C. J. § 303; Jones, Ev. § 345; Hall v. American Masonic Acci. Asso. 86 Wis. 518, 57 N. W. 366; Globe Acci. Ins. Co. v. Gerisch, 163 Ill. 625, 54 Am. St. Rep. 486, 45 N. E. 563; Andrews v. United States Casualty Co. 154 Wis. 82, 142 N. W. 487; Priedeaux v. Mineral Point, 43 Wis. 513, 28 Am. Rep. 558; Travelers' Protective Asso. v. West, 42 C. C. A. 284, 102 Fed. 226; Brahmsteadt v. Mystic Workers, 152 Wis. 580, 140 N. W. 354; Andrzejewski v. Northwestern Fuel Co. 158 Wis. 170, 148 N. W. 37; Ætna L. Ins. Co. v. Ryan, 166 C. C. A. 559, 255 Fed. 483.

Eschweiler, J., delivered the opinion of the court:

It is conceded in this case that there is no evidence in the record sufficient to support a verdict for the plaintiff upon the accident insurance policy in suit, except and unless the testimony of physicians, who attended the deceased subsequent to November 14th, as to what was disclosed by the surgical operations performed by them, and including statements made by him to them concerning the alleged twisting or injury sustained in the moving of the ice box, was erroneously stricken out. The trial court excluded it under the following portion of § 4075, Stat.: "No person duly authorized to practice physic or surgery shall be permitted to disclose any information which he may have acquired in attending any patient in a professional character and which information was necessary to enable him to prescribe for such patient as a physician or to do any act for him as a surgeon."

Appellant contends that the defendant should be prevented from asserting any right under such statutory provision: First, because for want of proper objection either to the competency of such physicians to testify as witnesses, or to their testimony as it was being received; and, secondly, because it must be considered that the exclusion of such testimony under said § 4075, being a privilege accorded

the patient, was one that might be waived, and under the situation in this case was so waived.

We do not deem it necessary to recite in detail the manner and form in which the offered testimony on the points here in issue was objected to by the defendant from time to time as the same was being offered and was at first received. Objections were interposed as to the competency of the evidence on the ground of privilege, and also in a form indicating that some of such objections were based upon the ground that the statements by the deceased as to the alleged accident on November 14th, made some considerable time thereafter, were not parts of the *res gestæ*. That the objections were intended to be to the incompetency of the witnesses to testify, rather than to the incompetency of their testimony, was perhaps not so precisely or concretely stated during the earlier stages of the trial as might have been advisable, but it is rendered immaterial in the disposition of this case, for the reason that court and counsel were apprised that reliance was being expressly placed by defendants upon the section of the statute above quoted.

Upon subsequent motions made by defendant and the action of the trial court it is clear that the questions now considered were squarely presented to the trial court, so that the first objection raised by appellant on this appeal as to the form of defendant's objections to this testimony must be overruled.

Although § 4075, Stat., *supra*, makes no exception in terms as to the application of the peremptory language of the statute, excluding the testimony of physicians or surgeons as to information received by them professionally from a patient, yet it is also well established that such statutory provision, being intended as a protection to the patient rather than a mere inhibition to the physician, is a pro-

Witness—
competency—
physician—
waiver of
privilege.

tection or privilege that may be waived by him for whose benefit it is deemed to have been enacted, and therefore such testimony may, notwithstanding the statute, be admitted; it satisfactorily appearing that the patient's privilege has been waived. *McGinty v. Brotherhood of Railway Trainmen*, 166 Wis. 83, 89, 164 N. W. 249; *Re Hunt*, 122 Wis. 460, 469, 100 N. W. 874.

There was no express waiver by the patient in this instance, and it cannot be waived by the administrators, executors, or personal representatives of the deceased, nor by

any person standing in the position towards deceased such as does the plaintiff beneficiary under the policy in suit. *Casson v. Schoenfeld*, 136 Wis. 401, 413, L.R.A.1918C, 162, 166 N. W. 23.

It is urged, however, and largely from the standpoint of the probable injustice that will otherwise result in this instance, as well as in similar situations, under the facts in this case there was intended by the insured that there should be a waiver of such privilege from his taking out such an accident policy, in that the very nature of the contract necessarily implies that it was anticipated that in case of accident the testimony of attending physicians or surgeons would be required in order to establish a right to recover, either for the insured himself in case of an injury not resulting in his death, or for the designated beneficiary in case such injury resulted in death.

It is further urged that the contract of insurance, providing as it does on its face for the furnishing by the insured or his beneficiary respectively of satisfactory proofs of injury or death, also indicates an intention on the part of the insured that the statutory exclusion of such material testimony as was being offered in this case was to be lifted and waived by the insured. Plaintiff also insists that, in view of the

conditions inserted for defendant's benefit in this contract, namely, the ones requiring statutory proofs of death, necessarily requiring the statement or evidence of physicians, and the further privilege providing for the examination of the body of the insured under the clauses set forth in the statement of facts above, should prevent it from now asserting any benefits from a privilege belonging to the insured, and not to the defendant or the witnesses themselves.

That such a statute, as well as others, that the public policy of the state has adopted for the exclusion of testimony involving information acquired in such confidential relationships as that between physician and patient, lawyer and client, minister and penitent, may and undoubtedly does in particular instances result in the defeat of meritorious and just claims, may and does make us well hesitate, but not pause, in upholding the law as it has been written. It must not be overlooked that such a privilege is somewhat of a double-edged sword, in that such patient could not waive his privilege so as to have admitted testimony elicited from a physician that was favorable to the patient's side of any controversy, and at the same time insist upon the statute for the exclusion of further testimony on cross-examination or otherwise which might prove harmful to his cause. If the bars are lowered for and by him, they must be kept lowered for the opposite party.

Were such statute only for the benefit of parties situated towards the patient as is the defendant in this case, then there would be much force to the argument that such contract provisions should be held to be a waiver by it of such privilege. The possibility, however, of need of such testimony on any action on such an insurance policy does not justify, in our judgment, a conclusion that the patient himself, in the making of such a contract, thereby impliedly writes into it a waiver on

his part of such statutory privilege, which privilege, if
—waiver by application for thus waived by him,
insurance. would necessarily
be waived as against him if alive or
against his memory or reputation if
dead.

The trial court was therefore right in ruling as he did that the information obtained by the medical witnesses while attending, prescribing for, and operating upon the patient, were excluded and not permitted to be received in evidence by force of § 4075, Stat. supra.

Much of the apparent hardship resulting in this case from a dismissal of plaintiff's cause of action, however, necessarily results from the application of another well-established rule of evidence not dependent upon the statute.

The testimony of the physicians so excluded in this case on all the other points on which it was offered would have been of no avail and weight, unless there could have been connected with such testimony the declarations of the deceased, made some days subsequent to the accident to these same physicians, that he did injure himself by the moving

Evidence—
declarations as
to injury—
hearsay. of the ice box.
Such declarations
were clearly no part
of the res gestæ,

were hearsay, and inadmissible. Hall v. American Masonic Acci. Asso. 86 Wis. 518, 525, 57 N. W. 366; Brahmsteadt v. Mystic Workers, 152 Wis. 580, 582, 140 N. W. 354; Andrews v. United States Casualty Co. 154 Wis. 82, 87, 142 N. W. 487; Ætna L. Ins. Co. v. Ryan, 166 C. C. A. 559, 255 Fed. 483; Globe Acci. Ins. Co. v. Gerisch, 163 Ill. 625, 627, 54 Am. St. Rep. 486, 45 N. E. 563; Budde v. National Travelers Ben. Asso. 184 Iowa, 1219, 169 N. W. 766; Jones, Ev. § 345; 1 C. J. 500.

Recitals of past events made by an interested person are no more admissible because made to physicians or surgeons, even when necessarily so made for the purpose of

proper treatment by such, any more than if made to other persons. Keller v. Gilman, 93 Wis. 9, 11, 66 N. W. 800; Kath v. Wisconsin C. R. Co. 121 Wis. 503, 511, 99 N. W. 217; Peoria Cordage Co. v. Industrial Bd. 284 Ill. 90, 93, L.R.A. 1918E, 822, 119 N. E. 996, 17 N. C. C. A. 245; Maryland Casualty Co. v. McCallum, 200 Ala. 154, 75 So. 902; 1 C. J. 500.

Judgment affirmed.

Winslow, Ch. J., and Kerwin, J., took no part.

Owen, J., dissenting (July 15, 1920):

The result of this litigation should cause the legislative mind most serious reflection. A husband, with most commendable prudence and foresight, purchased an accident insurance policy, which provided for the payment of \$5,000 to his widow in case of death resulting from bodily injuries. Death occurred by reason of bodily injuries, and she seeks to recover on the insurance policy. In order to establish the causal relation between the bodily injuries and the death, the testimony of his attending physician is essential. That testimony is declared incompetent, and is not received, by reason of the provisions of § 4075, Stat., which provides: "No person duly authorized to practise physic or surgery shall be permitted to disclose any information which he may have acquired in attending any patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician or to do any act for him as a surgeon."

It is suggested that the legislature can, with much profit, in a consideration of the wisdom of this enactment, balance equivalents with a view of determining whether this statute is promotive or destructive of justice. The rule did not obtain at common law. It had its origin in the state of New York, and has been adopted by approximately one

half of the states of this country. It is said that it was enacted for the purpose of encouraging patients to disclose fully their ailments to their attending physicians without apprehension that their statements so made could be disclosed upon the witness stand to their humiliation and disgrace. As compared with the innumerable ailments to which the human flesh is heir, those which bring shame or disgrace to the sufferer are inconsiderable. Of those so afflicted who consult physicians but an inconsequential proportion are restrained from complete disclosure by apprehension of enforced publicity of shameful secrets. When we realize that but an insignificant segment of society requires protection of this nature, well may we wonder whether the shield designed for their benefit should be made so broad and ample as to constitute an insuperable barrier to the attainment of justice by the heirs and representatives of those who do not need such protection.

Ordinarily bodily affliction and disease are attended with neither shame nor disgrace. The character of one's ailment is not usually a secret. It is generally known to one's neighbors, friends, and acquaintances. In all the range of human affliction one can think of but one class of diseases that he would hide from his friends and neighbors, and that is venereal diseases. No other diseases, nor class of diseases, bring humiliation or shame or disgrace to the sufferer. He who has acquired venereal disease by clandestine liaison has scant claim upon legislative consideration for protection from the shame which he has deliberately invited. In the last analysis, therefore, this statute must be said to have been enacted to save from shame and disgrace those who by their own acts have forfeited their honor. If this could be done without at the same time working injustice to the innocent and the pure, the purpose might be generous and praiseworthy. But where the innocent are made to suf-

fer to shield the wicked and the guilty from the publicity of their own misconduct, the cost of generous consideration becomes too great. Taking society as a whole, this statute cheats rather than promotes justice. It suppresses rather than reveals truth. This case furnishes a splendid illustration of its consequences. Here a poor widow is turned out of court, unable to recover on a contract made by her deceased husband for her benefit because this statute closes the mouth of his attending physician. The same result must follow in any case for the recovery of damages for death caused by wrongful act, where the testimony of the attending physician is necessary to establish the causal relation between the injury and the death. The innocent should not be thus deprived of justice and made to pay the cost of the protection which this statute would afford to those who have forfeited all right to protection.

The centuries of experience during which the common law was developed did not give rise to this rule. As already stated, it had its origin in a statutory enactment of the state of New York, and not more than half of the jurisdictions of this country have been impressed with the wisdom or justice of the rule thus created. Well may this statute receive legislative reconsideration, and if it be still thought desirable to afford protection to those who have but scant claim upon the consideration of society, then let it be so framed that such protection can be extended without working hardship and injustice to the innocent and the pure. While a statute so sweeping and unambiguous in its terms is difficult of administration by the courts so that injustice will not result, or of confinement to the accomplishment of the purposes for which all know it was designed, yet, nevertheless, courts have somewhat ameliorated its harsh results by the application of well-founded legal principles. It has been held that the statute confers a privilege upon

the patient, and that he may release the seal placed upon the mouth of the physician by waiving the privilege. In order that harsh results might not follow, it has been held in many jurisdictions that the privilege could be waived by an heir or personal representative of the patient after he is dead. Wigmore, Ev. § 2391, and cases cited, to which may be added *Olson v. Court of Honor*, 100 Minn. 117, 8 L.R.A. (N.S.) 521, 117 Am. St. Rep. 676, 110 N. W. 375, 10 Ann. Cas. 622. This court, however, is firmly committed to the proposition that the privilege may be waived by no one except the patient himself, and that the power does not pass to his heirs or personal representatives. *Re Hunt*, 122 Wis. 460, 100 N. W. 874; *Re Bruendl*, 102 Wis. 45, 78 N. W. 169; *Casson v. Schoenfeld*, 166 Wis. 401, L.R.A. 1918C, 162, 166 N. W. 23. But it is also firmly established that the privilege may be waived by acts other than those amounting to an express waiver in open court. *McGinty v. Brotherhood of Railway Trainmen*, 166 Wis. 83, 164 N. W. 249. It is also well established that where a testator calls upon his attorney to witness his will he thereby releases the seal placed upon the lips of his attorney by force of the similar rule making confidential communications made by the client to his attorney, and the attorney becomes a competent witness to the execution of the will and to the competency of the testator to make a will. *McMaster v. Scriven*, 85 Wis. 162, 39 Am. St. Rep. 828, 55 N. W. 149; *Re Coleman*, 111 N. Y. 220, 19 N. E. 71; *Alberti v. New York, L. E. & W. R. Co.* 118 N. Y. 85, 6 L.R.A. 765, 23 N. E. 35. These cases recognize the principle that, although dead, the deceased may leave behind him evidence which indicates an express intention on his part to waive the privilege.

In *Re Coleman*, 111 N. Y. 220, 19 N. E. 71, it is said: "It would be contrary to settled rules of law to ascribe to the testator an intention, while making his will and going

through the forms required to make it a valid instrument, to leave in operation the provisions of a statute which he had power to waive, but which, if not waived, might frustrate and defeat the whole object of his action."

Just as these considerations have prompted courts to hold that where a testator requested his attorney to witness his will, he thereby waived the privilege of secrecy attaching to his communications, so here, it should be held, in my opinion, that the deceased, in applying for, taking out, and paying premiums upon, this insurance policy, waived the privilege of secrecy which the statute imposes upon his attending physician.

It is matter of common knowledge that in order to recover upon a policy of this kind it must be proved that death was the result of an injury, and that in the vast majority of cases this causal relation can be proved only by the attending physician. It is to be presumed that when the insured made application for the insurance policy, and paid the premiums thereon as they became due, he did it with the intention that his beneficiary would be able to secure the benefits provided by the terms of the policy. With that plain proposition everyone will agree. Now to ascribe to him an intention to leave the provisions of this statute in force, thereby destroying the only evidence upon which his beneficiary may rely to establish liability under the policy which he has bought and paid for, is to make his transaction a most silly and foolish one. To my mind the waiver of the statute follows as logically in this case as it does when a testator calls upon his attorney to witness his will, and just as logically as it did in the *McGinty Case*, supra. People pay for death benefit provisions in insurance policies for but one purpose, i. e., so that their beneficiaries may recover thereon in case of death; and it is not their intention that such provisions shall be

rendered nugatory, and their premium payments donations to the insurance companies, by withholding from the beneficiaries the only evidence upon which they may rely to collect upon the insurance policy when the insured has it within his power to release it.

I maintain, therefore, that by the very act of applying and paying for an insurance policy of this nature the insured thereby waives the privilege of the statute just as effectually as does the testator who calls upon his attorney to witness his will.

I agree that the statements made by the deceased to his physician con-

cerning the nature of the bodily injuries cannot be received for the purpose of proving the fact of the accident. But in this case there was ample evidence from which the bodily injuries might be inferred without reliance upon statements made to the physician by the deceased.

For these reasons, therefore, I think the judgment should be reversed and the cause remanded for a new trial.

I am authorized to state that Mr. Justice Siebecke concurs in the foregoing dissenting opinion.

Petition for rehearing denied.

ANNOTATION.

Waiver by beneficiary or personal representative, in actions on insurance policy, of privilege of communications to physician.

- I. General statement, 1544.
- II. Beneficiaries, 1544.
- III. Personal representatives, 1546.

I. General statement.

It is to be observed that the note is not concerned with the validity or effect of a stipulation by the insured purporting to waive the privilege either for himself, or for his personal representatives or beneficiaries.

Since at common law there was no privilege as to communications between a physician and patient, the question under consideration is one of statutory construction, upon which the courts have reached somewhat different conclusions, depending on the wording of the particular statute and difference in interpretation of the purpose and intended effect of the statutes.

II. Beneficiaries.

The conclusion reached in the reported case (*MAINE v. MARYLAND CASUALTY Co.* ante, 1536) that the beneficiary in an insurance policy cannot waive the privilege, in an action on the policy, is not the view taken apparently by the majority of the courts which have considered the question; the view being taken generally that the privilege as to com-

munications between a physician and the insured may be waived by the beneficiary in an action on the policy or certificate of insurance. *National Annuity Asso. v. McCall* (1912) 103 Ark. 201, 48 L.R.A.(N.S.) 418, 146 S. W. 125; *Penn Mut. L. Ins. Co. v. Wiler* (1884) 100 Ind. 92, 50 Am. Rep. 769; *Johnson v. Fidelity & C. Co.* (1915) 184 Mich. 406, L.R.A.1916A, 475, 151 N. W. 593; *Olson v. Court of Honor* (1907) 100 Minn. 117, 8 L.R.A.(N.S.) 521, 117 Am. St. Rep. 676, 110 N. W. 374, 10 Ann. Cas. 622; *Sovereign Camp, W. W. v. Grandon* (1902) 64 Neb. 39, 89 N. W. 448.

In an action by the beneficiary on a life insurance policy, the court in *Penn Mut. L. Ins. Co. v. Wiler* (1884) 100 Ind. 92, 50 Am. Rep. 769, referring to the Indiana statute, providing that "the following persons shall not be competent witnesses: . . . physicians, as to matter communicated to them, as such, by patients, in the course of their professional business, or advice given in such cases," said: "Notwithstanding the absolutely prohibitory form of our present statute, we think it confers a privilege which the patient, for whose benefit the provision is made, may claim or waive. . . . As in the case of attorney and

client, the inviolability of the confidence, the right of objecting to the disclosure of matter communicated to a physician as such by his patient, does not cease with the death of the latter. This view is reasonable, and it is supported by the decided cases.

. . . Not without the careful consideration asked by counsel, we are constrained to interpret the statute as giving to a person, having such a relation to the deceased patient and a contract made by him as that sustained by the appellee, the right in a suit by her on the contract, either to waive the statute or to object on the ground thereof. It may be said that in such case she represents the patient for such purpose. The statute is remedial, and should be liberally construed with a constant view to its purpose."

The Indiana court in *Penn Mut. L. Ins. Co. v. Wiler* (Ind.) *supra*, cited, in support of its ruling, *Masonic Mut. Ben. Asso. v. Beck* (1881) 77 Ind. 209, 40 Am. Rep. 295, in which it is said (obiter so far as the present question is concerned) that the relation of physician and patient should be protected as strictly confidential, subject only to the rights of the patient to waive the restriction, or, if the patient shall have died, then subject to the choice of the party who may be said to stand in the place of the deceased and whose interest may be affected by the proposed disclosure.

The Minnesota statute involved in *Olson v. Court of Honor* (1907) 100 Minn. 117, 8 L.R.A.(N.S.) 521, 117 Am. St. Rep. 676, 110 N. W. 374, 10 Ann. Cas. 622, provided that "a regular physician or surgeon cannot, without the consent of his patient, be examined in a civil action, as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient." The court, in holding that the beneficiary in an insurance policy could waive the privilege, said: "Does this privilege become absolute on the death of the patient, or may those who represent him or claim an interest under him after death waive the privilege for the protection of such interest?

This is an important question; for if they cannot waive the privilege given by the statute, and their adversary may invoke it to suppress the truth and defeat the enforcement of rights the deceased provided for them in his lifetime, then the statute may be made an instrument for cheating justice. If such be the proper construction of the statute, then, if an executor or legatee presents a will for probate, which is contested on the ground that the testator was of unsound mind when the will was made, the executor or legatee may not, if the contestant objects, call the physician who was attending the testator at the time to testify as to his knowledge of the patient's mental condition, acquired in attending him. Nor could the personal representatives of a party, in an action to recover damages on account of the death of his intestate by the alleged negligence of the defendant, call the physician who attended the intestate after his injury to testify as to the nature of the injuries and the cause of death, if such information was acquired in attending him. . . . Upon principle and what seems to be the weight of judicial authority, we hold that the statute in question is for the protection of the patient, and he may waive the privilege if he sees fit, and that, as a general rule, those who represent him after his death may also waive the privilege, for the protection of interests which they claim under him."

The Nebraska statute involved in *Sovereign Camp, W. W. v. Grandon* (Neb.) *supra*, provided that no physician should be allowed, in giving testimony, to disclose any confidential communication properly intrusted to him in his official capacity, and necessary and proper to enable him to discharge the functions of his office, but that the prohibitions in the statute should not apply to cases where "the party in whose favor the respective provisions are enacted waives the right thereby conferred."

And that the beneficiary in an insurance policy may waive the privilege seems also assumed in such cases as *Fidelity & C. Co. v. Meyer* (1912) 106

Ark. 91, 44 L.R.A.(N.S.) 493, 152 S. W. 995; Maryland Casualty Co. v. Maloney (1915) 119 Ark. 434, L.R.A. 1916A, 519, 178 S. W. 387; Frasier v. Metropolitan L. Ins. Co. (1911) 161 Mo. App. 709, 141 S. W. 936; and Hicks v. Metropolitan L. Ins. Co. (1916) 196 Mo. App. 162, 190 S. W. 661, in considering whether there was in fact a waiver by the beneficiary.

But a beneficiary, it was held in *Beil v. Supreme Lodge, K. H.* (1903) 80 App. Div. 609, 80 N. Y. Supp. 751, is not a "personal representative" within the meaning of the New York statute authorizing the admission of certain testimony of physicians when the statutory prohibition has been expressly waived on the trial or examination by the personal representatives of the deceased. And it was accordingly held that the beneficiary, in view of this statutory provision for a waiver by the personal representatives, did not have the power to waive the statutory prohibition against the disclosure, by a physician, of any information acquired in attending a patient in a professional capacity, and necessary to enable him to act in that capacity. The court said that the words "personal representatives" as used in the statute applied only to executors and administrators.

And under the Iowa statute declaring that the prohibition against the admission of confidential communications to a physician "shall not apply to cases where the party in whose favor the same is made waives the right conferred," the original beneficiaries in a certificate of insurance, it was held in *Shuman v. Supreme Lodge, K. H.* (1900) 110 Iowa, 480, 81 N. W. 717, could not waive the privilege for the purpose of proving that the insured was mentally incompetent at the time he made a change of beneficiary. The court said that the patient might waive the privilege, and that in cases of will contests, where the parties were claiming rights to the estate through devise, inheritance, or in a representative capacity, those representing the estate might also waive it; but that neither of the claimants in this instance were asserting rights in

such a capacity, that each claimed to be in effect the appointee of the decedent, and there was no warrant for making such a case as this an exception to the rule of the statute. The ground of the decision, as indicated, is broad enough to include any case of a beneficiary, and the case is cited in *Long v. Garey Invest. Co.* (1906) — Iowa, —, 110 N. W. 26, as holding that "the privilege cannot be waived by the appointee as beneficiary under an insurance policy."

III. *Personal representatives.*

See also *Beil v. Supreme Lodge, K. H.* (N. Y.) under II. *supra*.

An executor, it was held in *Westover v. Aetna L. Ins. Co.* (1885) 99 N. Y. 56, 52 Am. Rep. 1, 1 N. E. 104, could not waive the privilege under the New York statute which then provided that a physician should not be allowed to disclose any information acquired in attending a patient in a professional capacity, and that the statute should apply to every examination of a person as a witness, unless the "provisions thereof are expressly waived by . . . the patient." The court said: "Whenever the evidence comes within the purview of the statutes, it is absolutely prohibited, and may be objected to by anyone, unless it be waived by the person for whose benefit and protection the statutes were enacted. After one has gone to his grave, the living are not permitted to impair his fame and disgrace his memory by dragging to the light communications and disclosures made under the seal of the statutes. An executor or administrator does not represent the deceased for the purpose of making such a waiver. He represents him simply in reference to rights of property, and not in reference to those rights which pertain to the person and character of the testator. If one representing the property of a patient can waive the seal of the statute because he represents the property, then the right to make the waiver would exist as well before death as after, and a general assignee of a patient, for the purpose of protecting the assigned estate, could

make the waiver; and yet it has been held that an assignee in bankruptcy is not empowered to consent that the professional communications of his assignor shall be disclosed."

In several cases, although the actual holding was only on the question whether the beneficiary could waive the privilege, the court in the course of the opinion uses language bearing on the question whether the personal representatives might waive the same.

Thus, in a case of this kind, the court in *National Annuity Asso. v. McCall* (1912) 103 Ark. 201, 48 L.R.A. (N.S.) 418, 146 S. W. 125, stated that the statutory privilege to a patient of objecting to disclosures of matters communicated to, or information obtained by, a physician as such, may be waived by the patient himself and after his death by his representative.

So, in *Olson v. Court of Honor*

(1907) 100 Minn. 117, 8 L.R.A. (N.S.) 521, 117 Am. St. Rep. 676, 110 S. W. 374, 10 Ann. Cas. 622, a case involving the right of a beneficiary in an insurance policy to waive the statutory privilege, it was said: "Upon principle and what seems to be the weight of judicial authority, we hold that the statute in question is for the protection of the patient, and he may waive the privilege if he sees fit, and that, as a general rule, those who represent him after his death may also waive the privilege, for the protection of interests which they claim under him."

And although the case was one involving the right of a beneficiary to waive the privilege, attention is called to the statement in the reported case (*MAINE v. MARYLAND CASUALTY Co.* ante, 1536) that the privilege cannot be waived by the administrators or executors.

R. E. H.

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